A/CN.4/SER.A/2013/Add.1 (Part 1)

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

# 2013

*Volume II*
*Part One*

*Documents of the sixty-fifth session*

UNITED NATIONS

A/CN.4/SER.A/2013/Add.1 (Part 1)

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United Nations
New York and Geneva, 2019

**NOTE**

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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The reports of the special rapporteurs and other documents considered by the Commission during its sixty-fifth session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

A/CN.4/SER.A/2013/Add.1 (Part 1)

UNITED NATIONS PUBLICATION

*Sales No.*: E.18.V.4
ISBN: 978-92-1-133871-3
eISBN: 978-92-1-047206-7

ISSN: 0082-8289
eISSN: 2412-1525

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## ABBREVIATIONS

| | |
|---|---|
| APEC | Asia-Pacific Economic Cooperation |
| ASEAN | Association of Southeast Asian Nations |
| CIL | customary international law |
| EC | European Community |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICSID | International Centre for Settlement of Investment Disputes |
| IFRC | International Federation of Red Cross and Red Crescent Societies |
| IGAD | Intergovernmental Authority on Development |
| ILO | International Labour Organization |
| ITLOS | International Tribunal for the Law of the Sea |
| NAFTA | North American Free Trade Agreement |
| OAS | Organization of American States |
| OCHA | Office for the Coordination of Humanitarian Affairs |
| OECD | Organization for Economic Cooperation and Development |
| PCIJ | Permanent Court of International Justice |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNDP | United Nations Development Programme |
| UNDRO | Office of the United Nations Disaster Relief Office |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNHCR | Office of the United Nations High Commissioner for Refugees |
| UNISDR | United Nations Office for Disaster Risk Reduction |
| WCO | World Customs Organization |
| WTO | World Trade Organization |

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|---|---|
| *I.C.J. Reports* | ICJ, *Reports of Judgments, Advisory Opinions and Orders* |
| *P.C.I.J., Series A* | PCIJ, *Collection of Judgments* (Nos. 1–24: up to and including 1930) |
| AFDI | *Annuaire français de droit international* (Paris) |
| AJIL | *American Journal of International Law* (Washington, D.C.) |
| BYBIL | *The British Year Book of International Law* (London) |
| ECHR | European Court of Human Rights, *Reports of Judgments and Decisions*. All judgments and decisions of the Court, including those not published in the official series, can be consulted in the database of the Court (HUDOC), available from the Court's website (www.echr.coe.int). |
| ILM | *International Legal Materials* (Washington, D.C.) |
| ILR | *International Law Reports* (Cambridge) |
| LGDJ | Librairie générale de droit et de jurisprudence (Paris) |
| RGDIP | *Revue générale de droit international public* (Paris) |
| UNRIAA | United Nations, *Reports of International Arbitral Awards* |

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In the present volume, the "International Tribunal for Rwanda" refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994; and the "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

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## NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is **http://legal.un.org/ilc/**.

# PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

[Agenda item 4]

**DOCUMENT A/CN.4/662**

## Sixth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur

[*Original: English*]
[*3 May 2013*]

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| Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948) | United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277. |
| Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950) | *Ibid.*, vol. 213, No. 2889, p. 221. |
| Treaty establishing the European Economic Community (Rome, 25 March 1957) | United Nations, *Treaty Series*, vol. 298, No. 4300, p. 3. See also the consolidated versions of the Treaty establishing the European Community, *Official Journal of the European Communities*, No. C 340, 10 November 1997, p. 173, and the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, No. C 306 (17 December 2007), p. 1. |
| International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) | United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3. |
| International Covenant on Civil and Political Rights (New York, 16 December 1966) | *Ibid.*, vol. 999, No. 14668, p. 171. |
| Convention on the prevention of marine pollution by dumping of wastes and other matter (London, Mexico City, Moscow and Washington, D.C., 29 December 1972) | *Ibid.*, vol. 1046, No. 15749, p. 120. |
| United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) | *Ibid.*, vol. 1833, No. 31363, p. 3. |
| Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984) | *Ibid.*, vol. 1465, No. 24841, p. 85. |
| Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) | *Ibid.*, vol. 1513, No. 26164, p. 293. |
| Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987) | *Ibid.*, vol. 1522, No. 26369, p. 3. |
| Convention on Early Notification of a Nuclear Accident (Vienna, 26 September 1986) | *Ibid.*, vol. 1439, No. 24404, p. 275. |
| Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 26 September 1986) | *Ibid.*, vol. 1457, No. 24643, p. 133. |
| Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988) | ILM, vol. XXVII, No. 4 (July 1988), p. 868. |
| Convention on the Rights of the Child (New York, 20 November 1989) | United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3. |
| Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991) | *Ibid.*, vol. 2101, No. 36508, p. 177. |
| Convention on environmental impact assessment in a transboundary context (Espoo, 25 February 1991) | *Ibid.*, vol. 1989, No. 34028, p. 309. |
| Agreement establishing the Caribbean Disaster Emergency Response Agency (Port of Spain, 26 February 1991) | *Ibid.*, vol. 2256, No. 40212, p. 53. |
| Inter-American Convention to Facilitate Disaster Assistance (Santiago, 7 June 1991) | OAS, *Official Records*, OEA/Ser.A/49 (SEPF), p. 15. |
| Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992) | United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269. See also ILM, vol. 31, No. 6 (November 1992), p. 1312. |
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# Introduction*

1. At the sixty-fourth session of the International Law Commission, in 2012, the Special Rapporteur submitted his fifth report on the protection of persons in the event of disasters.[1] He provided therein an overview of the views of States and organizations on the work undertaken by the Commission to date, in addition to an explanation of his position on the Commission's question in its report on the work of its sixty-third session, in 2011: "Does this duty to cooperate include a duty on States to provide assistance when requested by the affected State?"[2] The report contained a further elaboration of the duty to cooperate and a discussion of the conditions for the provision of assistance and of the question of the termination of assistance. Proposals for the following three further draft articles were made in the report: A (Elaboration of the duty to cooperate),[3] 13 (Conditions on the provision of assistance)[4] and 14 (Termination of assistance).[5]

2. The Commission considered the fifth report from 2 to 6 July 2012,[6] and referred all three draft articles to the Drafting Committee. The Drafting Committee also had

* The Special Rapporteur expresses his deep appreciation to the Special Representative of the Secretary-General for Disaster Risk Reduction, Margareta Wahlstrom, and her adviser, Marco Toscano-Rivalta, for their encouragement and support. His appreciation for assistance in the preparation of the present report extends to the following: Matthias A. Braeunlich, PhD candidate, The Graduate Institute, Geneva; Melissa Stewart, JD candidate and Global Law Scholar, Georgetown University Law Center, Washington, D.C., and LLM candidate, Institut d'études politiques de Paris; Trent Buatte, JD candidate, and Josh Doherty, JD/MA candidate, George Washington University Law School, Washington, D.C.; Emika Tokunaga, PhD candidate, Osaka School of International Public Policy, Osaka University; Amogh Basavaraj, MA in law and diplomacy 2013, Amanda Mortwedt, LLM 2013, Katherine Conway, MA in law and diplomacy 2013, Yang Fu, MA in law and diplomacy 2014, and Suparva Narasimhaiah, LLM 2012, The Fletcher School of Law and Diplomacy, Tufts University, Medford (Massachusetts), United States; and Paul R. Walegur, The Hague, Netherlands. The Special Rapporteur also expresses his gratitude to Andrea de Guttry, Sant'Anna School of Advanced Studies of Pisa, Italy, co-editor of *International Disaster Response Law* (The Hague, T.M.C. Asser Press, 2012), for making available to him well in advance of publication the text of the valuable contributions included therein.

[1] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/652.

[2] *Yearbook … 2011*, vol. II (Part Two), para. 44.

[3] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/652, para. 116.

[4] *Ibid.*, para. 181.

[5] *Ibid.*, para. 187.

[6] *Ibid.*, vol. I, 3138th to 3142nd meetings.

before it draft article 12 (Right to offer assistance), proposed by the Special Rapporteur in his fourth report,[7] the consideration of which it had been unable to conclude at the sixty-third session, in 2011, owing to a lack of time.

3. The Drafting Committee, in the light of the discussion held by the Commission in plenary meeting, provisionally adopted the following five additional draft articles: 5 *bis* (Forms of cooperation), 12 (Offers of assistance), 13 (Conditions on the provision of external assistance), 14 (Facilitation of external assistance) and 15 (Termination of external assistance).

4. The five draft articles were submitted to the Commission in plenary meeting in a comprehensive report presented by the Chair of the Drafting Committee on 30 July 2012.[8] Owing to a lack of time for the subsequent preparation and adoption of the corresponding commentaries, the Commission at that meeting took note of draft articles 5 *bis* and 12 to 15 as provisionally adopted by the Drafting Committee. The five draft articles were reproduced in a Commission document[9] and in the Commission's report on the work of its sixty-fourth session.[10]

5. In November 2012, at the sixty-seventh session of the General Assembly, the Sixth Committee considered the chapter of the Commission's annual report devoted to the Special Rapporteur's fifth report and the Commission's debate thereon, particular attention being given to draft articles 5 *bis* and 12 to 15, as adopted by the Drafting Committee. Some delegations, for their part, concentrated on draft articles A, 12, 13 and 14 as originally proposed by the Special Rapporteur. A summary of the debate of the Sixth Committee, has been prepared by the Secretariat at the request of the Assembly (resolution 67/92 of 14 December 2012, para. 32).[11]

6. According to the syllabus supporting the recommendation for inclusion of the present topic in the Commission's long-term programme of work,[12] the focus of the topic would be "the undertaking of activities aimed at the prevention, and mitigation of the effects, of … disasters as well as … the provision of humanitarian relief in the immediate wake of … disasters".[13] The syllabus considered "largely relevant today" the classification made in General Assembly resolution 46/182 of 19 December 1991, of key activities undertaken in this area, which extended to disaster prevention, mitigation and preparedness, including through enhanced early warning capacities.[14] The syllabus also made reference to the findings of the High-level Panel on Threats, Challenges and Change in 2004, which identified the responsibility to prevent as one of the three specific responsibilities of the international community, considering it "the most pertinent to the topic at hand".[15] Thus, the scope of the topic *ratione temporis* would comprise "not only the 'response' phases of the disaster, but also the pre- and the post-disaster phases".[16] Moreover, the syllabus listed the principles of prevention and mitigation among the core principles underpinning contemporary activities in the realm of protection of persons in the event of disasters. With regard to the former, "States are to review existing legislation and policies to integrate disaster risk reduction strategies into all relevant legal, policy and planning instruments, both at the national and international levels, in order to address vulnerability to disasters". With regard to the latter, "States are to undertake operational measures to reduce disaster risks at the local and national levels with a view to minimizing the effects of a disaster both within and beyond their borders".[17]

7. In 2008, in his preliminary report,[18] the Special Rapporteur considered that, on the question of the scope of the topic *ratione temporis*, "a broad approach appears indicated as concerns the phases which should be included, in order to provide fully fledged legal space". He referred to "the wide range of specific issues to which providing disaster assistance gives rise through successive phases, not only of disaster response but also of pre-disaster and post-disaster: prevention and mitigation on the one hand, and rehabilitation on the other".[19] He concluded, "To achieve complete coverage, work on the topic should extend to all three phases of a disaster situation, but it would appear justified to give particular attention to aspects relating to prevention and mitigation of a disaster as well as to provision of assistance in its immediate wake".[20]

8. In 2009, in his second report,[21] the Special Rapporteur suggested concentrating, at the initial stage of work, on response at the disaster proper and immediate post-disaster phase, while emphasizing that this was "without prejudice to the Commission addressing, at a later stage, preparedness at the pre-disaster phase".[22]

9. In 2012, in his fifth report,[23] the Special Rapporteur, summarizing the general comments made by the Sixth Committee in its debate on the Commission's 2011 annual report, recorded that it had been suggested that the proposed scope of the draft articles was too narrow with respect to the events to be covered and, therefore, it should be extended to a wider range of pre-disaster activities relating to risk reduction, prevention preparedness and mitigation.[24] Also in that report, the Special Rapporteur touched upon the

[7] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/643, p. 222, para. 109.

[8] *Yearbook … 2012*, vol. I, 3152nd meeting.

[9] Document A/CN.4/L.812, mimeographed.

[10] *Yearbook … 2012*, vol. II (Part Two), para. 56, footnote.

[11] See the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session (A/CN.4/657), paras. 16–25.

[12] *Yearbook … 2006*, vol. II (Part Two), pp. 206–216, annex III.

[13] *Ibid.*, p. 206, para. 1.

[14] *Ibid.*, p. 207, para. 6.

[15] *Ibid.*, para. 10; see also A/59/565 and Corr.1.

[16] *Yearbook … 2006*, vol. II (Part Two), annex III, p. 211, para. 27.

[17] *Ibid.*, p. 212, para. 34.

[18] *Yearbook … 2008*, vol. II (Part One), document A/CN.4/598.

[19] *Ibid.*, p. 154, para. 57.

[20] *Ibid.*, p. 155, para. 66.

[21] *Yearbook … 2009*, vol. II (Part One), document A/CN.4/615.

[22] *Ibid.*, para. 29.

[23] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/652.

[24] *Ibid.*, para. 15, citing a statement by Poland (*Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 21st meeting (A/C.6/66/SR.21), para. 84).

question of cooperation in disaster preparedness, prevention and mitigation, noting that "more recent conventions have shifted the focus from a primarily response-centric model to one focused largely on prevention and preparedness".[25]

10. In his concluding remarks at the end of the Commission's 2012 debate on his fifth report, the Special Rapporteur expressed his intention to devote his next report to prevention, mitigation and preparedness in respect of disasters.[26]

[25] *Ibid.*, para. 114.

[26] *Ibid.*, vol. I, 3142nd meeting.

## Prevention

### A. Historical development of the concept of disaster risk reduction

11. The Office of the United Nations Disaster Relief Coordinator (UNDRO) was founded in 1971. It was the predecessor of the present Office for the Coordination of Humanitarian Affairs (OCHA). As early as 1973, it initiated a research project that culminated in an expert group meeting, held from 9 to 12 July 1979, bringing together scientists and planners specializing in the major natural hazards of meteorological, geological and geophysical origin. In its report studying in detail natural disaster and vulnerability analysis,[27] the expert group concluded, "it is now also realized that the actual and potential consequences of natural hazards are becoming so serious and so increasingly global in scale, that much greater emphasis will henceforth have to be given to pre-disaster planning and prevention".[28]

12. Nearly a decade later, in 1987, the General Assembly focused on disaster reduction, citing increasing and grave damages and loss of life. In its resolution 42/169 of 11 December 1987, it recognized "the responsibility of the United Nations system for promoting international cooperation in the study of natural disasters of geophysical origin and in the development of techniques to mitigate risks arising therefrom, as well as for coordinating disaster relief, preparedness and prevention, including prediction and early warning", and decided to designate the 1990s as the International Decade for Natural Disaster Reduction. It also decided on five specific goals, including "to disseminate existing and new information related to measures for the assessment, prediction, prevention and mitigation of natural disasters" and "develop measures for the assessment, prediction, prevention and mitigation of natural disasters through programmes of technical assistance and technology transfer, demonstration projects, and education and training, tailored to specific hazards and locations, and to evaluate the effectiveness of those programmes."

13. In its resolution 44/236 of 22 December 1989, the General Assembly adopted the International Framework of Action for the International Decade for Natural Disaster Reduction, devoting one section to actions to be taken by the United Nations system. It declared, "The organs, organizations and bodies of the United Nations system are urged to accord priority, as appropriate and in a concerted manner, to natural disaster preparedness, prevention, relief and short-term recovery." It also recognized "the important responsibility of the United Nations system as a whole for promoting international cooperation in order to mitigate natural disasters, provide assistance and coordinate disaster relief, preparedness and prevention".

14. On 19 December 1991, a year into the International Decade, the General Assembly adopted its landmark resolution 46/182, containing in its annex guiding principles for humanitarian relief, preparedness, prevention and on the continuum from relief to rehabilitation and development. It recommended that "special attention should be given to disaster prevention and preparedness by the Governments concerned, as well as by the international community" (para. 8). Sections II and III of the annex focused on prevention and preparedness, proposing specific measures to be taken by the international community and States.

15. In the same year, the General Assembly noted that approximately 100 States were already following the 1989 call to establish national strategies to achieve the objectives of the Decade, and endorsed a proposal to convene a world conference on natural disaster reduction to help to implement the International Framework of Action (see General Assembly resolution 46/149 of 18 December 1991, para. 3). The General Assembly agreed that the objectives of that conference were to review the accomplishments of the Decade, to increase actions and exchange, and to "increase awareness of the importance of disaster reduction policies" (see General Assembly resolution 48/188, para. 6), recognizing the role that disaster reduction could play for the improvement of emergency management in general and capacity-building for disaster preparedness and mitigation at the national level.

16. In 1994, the World Conference on Natural Disaster Reduction took place in Yokohama, Japan. Building on the midterm review of the Decade, it led to the adoption of the Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation containing the Principles, the Strategy and Plan of Action.[29] In the Yokohama Message, the 148 participating States affirmed that "disaster prevention, mitigation, preparedness and relief are four elements which contribute to and gain from the implementation of sustainable development policies", recommending that "nations should incorporate them in their development plans and ensure efficient follow-up measures at the community, national, subregional, regional and international levels"[30] and calling for further improvements in early warning.[31] They

[27] UNDRO/EXPGRP/1.

[28] *Ibid.*, foreword.

[29] Report of the World Conference on Natural Disaster Reduction, A/CONF.172/9, chap. I, resolution 1, annex I.

[30] *Ibid.*, annex II, para. 2.

[31] *Ibid.*, annex I, para. 5.

affirmed that "disaster prevention, mitigation and preparedness are better than disaster response in achieving the goals and objectives of the Decade" and that "disaster response alone is not sufficient".[32] For the rest of the Decade and beyond, States were urged to "develop and strengthen national capacities and capabilities and, where appropriate, national legislation for natural and other disaster prevention, mitigation and preparedness".[33]

17. In 1999, the International Strategy for Disaster Reduction was launched as a follow-up to the International Decade for Natural Disaster Reduction and to develop the Yokohama Strategy and its Plan of Action (see General Assembly resolution 54/219 of 22 December 1999). According to the secretariat mandated to oversee and guide the Strategy, the Strategy "reflects a major shift from the traditional emphasis on disaster response to disaster reduction, and in effect seeks to promote a 'culture of prevention' ".[34] This statement is a reflection of the contents of the major General Assembly resolutions relating to the Strategy, emphasizing the need for international cooperation across the board with a focus on prevention (see General Assembly resolutions 54/219 of 22 December 1999 and 56/195 of 21 December 2001, respectively).

18. In 2002, the Plan of Implementation of the World Summit on Sustainable Development declared that "an integrated, multi-hazard, inclusive approach to address vulnerability, risk assessment and disaster management, including prevention, mitigation, preparedness, response and recovery, is an essential element of a safer world in the twenty-first century".[35]

19. A year later, in 2003, the twenty-eighth International Conference of the Red Cross and Red Crescent adopted the resolution "Adoption of the Declaration and Agenda for Humanitarian Action", which focused on four main areas, one of which was reducing the risk and impact of disasters and the improvement of preparedness and response mechanisms. Final goal 3.1 of the Agenda was to "acknowledge the importance of disaster risk reduction and undertake measures to minimize the impact of disasters on vulnerable populations".

20. That same year, in its resolution 58/214 of 23 December 2003, the General Assembly took note of the report of the Secretary-General on the Implementation of the International Strategy for Disaster Reduction, in which it was indicated that "the International Strategy for Disaster Reduction should continue to become a more visible, recognized and flexible instrument for reducing the risk of and vulnerability to natural hazards and related environmental and technological disasters".[36] To this end, the Secretary-General envisaged the development of a "framework for guidance and monitoring of disaster risk reduction".[37] The goal of this new framework would be "to increase the understanding and effectiveness of disaster risk reduction practices through a participatory process and building on existing praxis".[38] The Secretary-General concluded that "disaster risk reduction is a potent no-regrets solution for adapting nationally to climate change", and encouraged disaster risk assessment to support the new strategy.[39]

21. Moreover, the General Assembly recognized "the urgent need to further develop and make use of the existing scientific and technical knowledge to reduce vulnerability to natural disasters".[40] It therefore decided to "convene a World Conference on Disaster Reduction in 2005 … designed to foster specialized discussion and produce concrete changes and results".[41] By building on the Yokohama Strategy and its Plan of Action and the Johannesburg Plan of Implementation,[42] the objectives of the Conference were to "share the best practices and lessons learned to further disaster reduction within the context of attaining sustainable development and identify gaps and challenges"; "increase awareness of the importance of disaster reduction policies"; and "increase the reliability and availability of appropriate disaster-related information to the public and disaster management agencies in all regions".[43] The General Assembly stressed "the importance of identifying, assessing and managing risks prior to the occurrence of disasters".[44]

22. In 2005, the participants in the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, held in Mauritius, adopted the Mauritius Declaration,[45] in which they emphasized the need for increased preventive protection of small island developing States[46] and pointed to disaster risk reduction and early warning systems[47] and the building of resilience[48] as appropriate measures.

23. The World Conference for Disaster Reduction took place in Kobe, Hyogo, Japan, from 18 to 22 January 2005. It adopted the Hyogo Declaration[49] and the Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters.[50] The Hyogo Framework was intended as "the first plan to explain,

[32] *Ibid.*, annex II, para. 3.

[33] *Ibid.*, para. 7 (*c*).

[34] UNISDR, "What is the International Strategy?" , available from www.unisdr.org/who-we-are/international-strategy-for-disaster-reduction.

[35] *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002* (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap. I, resolution 2, annex, para. 37.

[36] A/58/277, para. 1.

[37] *Ibid.*, para. 17.

[38] *Ibid.*, para. 20.

[39] *Ibid.*, paras. 59 and 60.

[40] General Assembly resolution 58/214 of 23 December 2003, preamble.

[41] *Ibid.*, para. 7.

[42] *Report of the World Summit on Sustainable Development...* (see footnote 35 above), chap. I, resolution 2, annex.

[43] General Assembly resolution 58/214 of 23 December 2003, para. 7 (*c*)–(*e*).

[44] General Assembly resolution 59/231 of 22 December 2004, para. 11.

[45] A/CONF.207/11 (United Nations publication, Sales No. E.05.II.A.4), chap. I, resolution 1, annex I.

[46] *Ibid.*, paras. 3, 4, 6 and 10.

[47] *Ibid.*, para. 6.

[48] *Ibid.*, para. 13.

[49] A/CONF.206/6, available from www.unisdr.org/we/inform/publications/1037, chap. I, resolution 1.

[50] *Ibid.*, resolution 2.

describe and detail the work that is required from all different sectors and actors to reduce disaster losses",[51] and the Conference provided "a unique opportunity to promote a strategic and systematic approach to reducing vulnerabilities and risks to hazards".[52] The Hyogo Declaration stated:

> We recognize as well that a culture of disaster prevention and resilience, and associated pre-disaster strategies, which are sound investments, must be fostered at all levels, ranging from the individual to the international levels. Human societies have to live with the risk of hazards posed by nature. However, we are far from powerless to prepare for and mitigate the impact of disasters. We can and must alleviate the suffering from hazards by reducing the vulnerability of societies. We can and must further build the resilience of nations and communities to disasters through people-cent[red] early warning systems, risks assessments, education and other proactive, integrated, multi-hazard, and multi-sectoral approaches and activities in the context of the disaster reduction cycle, which consists of prevention, preparedness, and emergency response, as well as recovery and rehabilitation. Disaster risks, hazards, and their impacts pose a threat, but appropriate response to these can and should lead to actions to reduce risks and vulnerabilities in the future.[53]

24. The Hyogo Framework for Action re-emphasized the responsibility of each State to take effective measures to reduce disaster risk, "including for the protection of people on its territory",[54] and took up the call made in the Johannesburg Plan of Implementation that "an integrated, multi-hazard approach to disaster risk reduction should be factored into policies, planning and programming related to sustainable development, relief, rehabilitation, and recovery activities in post-disaster and post-conflict situations in disaster-prone countries".[55]

25. The review of progress made in implementing the Yokohama Strategy identified specific gaps and challenges as key areas for developing a relevant framework for action for the decade 2005–2015: (*a*) governance: organizational, legal and policy frameworks; (*b*) risk identification, assessment, monitoring and early warning; (*c*) knowledge management and education; (*d*) reducing underlying risk factors; and (*e*) preparedness for effective response and recovery.[56] In the light of the objectives of the World Conference, the expected outcome for the subsequent 10 years was formulated as "the substantial reduction of disaster losses, in lives and in the social, economic and environmental assets of communities and countries".[57]

26. In its resolution 60/195 of 22 December 2005, the General Assembly recognized that "the Hyogo Framework for Action complements the Yokohama Strategy … and its Plan of Action" (preamble), and called for "a more effective integration of disaster risk reduction into sustainable development polices, planning and programming; for the development and strengthening of institutions, mechanisms and capacities to build resilience to hazards and for a systematic incorporation of risk reduction approaches into the implementation of emergency preparedness, response and recovery programmes" (para. 3).

27. In its resolution 61/200 of 20 December 2006, paragraph 4, the General Assembly stressed:

> The importance of the Hyogo Declaration and the Hyogo Framework for Action and the priorities for action that States, regional and international organizations and international financial institutions as well as other concerned actors should take into consideration in their approach to disaster risk reduction and implement, as appropriate, according to their own circumstances and capacities, bearing in mind the vital importance of promoting a culture of prevention in the area of natural disasters, including through the mobilization of adequate resources for disaster risk reduction, and of addressing disaster risk reduction, including disaster preparedness at the community level, and the adverse effects of natural disasters on efforts to implement national development plans and poverty reduction strategies with a view to achieving the internationally agreed development goals, including the Millennium Development Goals.

28. The General Assembly adopted resolution 61/198 of 20 December 2006, in which it "notes the proposed establishment of a Global Platform for Disaster Risk Reduction as the successor mechanism of the Inter-Agency Task Force for Disaster Reduction, and, taking into account the implementation of the Hyogo Framework for Action, decides that the Global Platform shall have the same mandate as the Inter-Agency Task Force for Disaster Reduction" (para. 15). Three sessions of the Global Platform have been held since—in 2007, 2009 and 2011—with the fourth scheduled for May 2013. Preparatory and follow-up work on the sessions of the Global Platform is led by the United Nations Office for Disaster Risk Reduction (UNISDR), which was created in 1999 as the secretariat of the International Strategy for Disaster Reduction (General Assembly resolution 54/219 of 22 December 1999).

29. At the second session of the Global Platform, in 2009, Heads of State and Government highlighted "in stark, unequivocal terms that reducing disaster risk is critical to managing the impacts of climate change", while risk-prone countries stressed that they were giving "high priority to disaster risk reduction and wish to move ahead quickly in the design and adoption of policies and strategies to address their risks".[58]

30. In the report on the midterm review of the Hyogo Framework for Action, it was observed that "a growing political momentum for disaster risk reduction has been generated over the past five years", as exemplified by the thematic debate on disaster risk reduction convened in 2011 by the President of the General Assembly, at which Member States called for "more awareness-raising activities, better use of shared experiences, advance planning and prevention".[59] In the report, a growing commitment at the national level to disaster risk reduction and the achievement of the Hyogo Framework for Action objectives was observed, and it was noted that preparedness was the priority for action where Governments had achieved the most "success".[60] It was stressed that, at the

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[51] See www.unisdr.org/we/coordinate/hfa.

[52] A/CONF.206/6, chap. I, resolution 2, para. 1.

[53] *Ibid.*, resolution 1, para. 3.

[54] *Ibid.*, resolution 1, para. 4; and *ibid.*, resolution 2, para. 13 (*b*).

[55] *Ibid.*, resolution 2, para. 13 (*c*).

[56] *Ibid.*, resolution 2, para. 9.

[57] *Ibid.*, resolution 2, para. 11.

[58] Chair's summary of the second session of the Global Platform for Disaster Risk Reduction (Geneva, 3–16 May 2011), paras. 1 and 6, available from www.preventionweb.net/files/10750_GP09ChairsSummary.pdf.

[59] Inter-Agency Secretariat of the International Strategy for Disaster Reduction, *Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters: Mid-term Review 2010–2011* (2011), sect. 3.3, available from www.unisdr.org/files/18197_midterm.pdf.

[60] *Ibid.*, sect. 3.1, Priority for Action 5.

regional level, the Hyogo Framework for Action "has brought about a significant momentum for change".[61]

31. In May 2011, the third session of the Global Platform for Disaster Risk Reduction was held, grounded on the findings of the second session, in 2009, the results of the midterm review and the 2011 *Global Assessment Report on Disaster Risk Reduction* of UNISDR.[62] The Platform identified that it was critical to create incentives for investing in prevention, and noted that few countries incorporated disaster prevention into reconstruction and recovery planning.[63] In addition, "the discussions at the third session demonstrated that we now possess the knowledge, the means and the commitment to make disaster risk reduction a national, local and international priority".[64]

32. In its resolution 66/199 of 22 December 2011, the General Assembly took note with appreciation of the results of the midterm review of the Hyogo Framework for Action and recognized that the Global Platform had been confirmed as "being the main forum at the global level for strategic advice coordination and partnership development for disaster risk reduction" (para. 4). It also requested UNISDR to "facilitate the development of a post-2015 framework for disaster risk reduction" (para. 5).

33. The Hyogo Framework for Action and the International Strategy for Disaster Reduction gave further impetus for binding and non-binding regional initiatives[65] focused on disaster risk reduction:[66] the ASEAN Agreement on Disaster Management and Emergency Response;[67] the Beijing Action for Disaster Risk Reduction in Asia (2005); the Delhi Declaration on Disaster Risk Reduction in Asia (2007); the Kuala Lumpur Declaration on Disaster Risk Reduction in Asia (2008); the Fourth Asian Ministerial Conference on Disaster Risk Reduction (2010), leading to the Incheon Declaration on Disaster Risk Reduction in Asia and the Pacific (2010), and the Incheon Regional Roadmap and Action Plan on Disaster Risk Reduction through Climate Change Adaptation in Asia and the Pacific, reaffirming the Framework for Action and proposing Asian initiatives for climate change adaptation and disaster risk reduction considering vulnerabilities in the region;[68] the African Union Africa Regional Strategy for Disaster Risk Reduction of 2004, which was followed by a programme of action for its implementation (originally for the period 2005–2010, but later extended to 2015);[69] four sessions of the Africa Regional Platform for Disaster Risk Reduction, the most recent in 2013;[70] the Arab Strategy for Disaster Risk Reduction 2020, adopted by the Council of Arab Ministers Responsible for the Environment at its twenty-second session, in December 2010;[71] and, lastly, the Nayarit Communiqué on Lines of Action to Strengthen Disaster Risk Reduction in the Americas (2011).[72]

34. Developments in the field of climate change have reinforced disaster risk reduction, most prominently in the Cancun Adaptation Framework, to enhance action on adaptation, seeking to reduce vulnerabilities and build resilience in developing countries, explicitly taking into consideration the Hyogo Framework for Action (FCCC/CP/2010/7/Add.1, para. 14 (*e*)). In addition, in the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want", adopted in 2012, Heads of State and Government and high-level representatives reaffirmed their commitment to the Hyogo Framework for Action.[73] They called "for disaster risk reduction and the building of resilience to disasters to be addressed with a renewed sense of urgency … and … to be integrated into policies, plans, programmes and budgets at all levels and considered within relevant future frameworks".[74]

35. States have implemented the Hyogo Framework for Action by incorporating disaster risk reduction into national policy and legal frameworks. In a 2011 review of international implementation of national policy and legal frameworks for disaster risk reduction, based on a self-reporting mechanism that is non-exclusive, numerous States reported having integrated disaster risk reduction into development plans.[75]

### B. Prevention as a principle of international law

36. At this point, the Special Rapporteur deems it appropriate to recall the centrality of his dual-axis approach throughout the study of the present topic. Just as the disaster phase proper, the pre-disaster phase implies rights and obligations both horizontally (the rights and obligations of States in relation to one another and the international community) and vertically (the rights and obligations of States in relation to persons within a State's territory and

[61] *Ibid.*, sect. 3.2.

[62] *Global Assessment Report on Disaster Risk Reduction* (Geneva, 2011, UNISDR).

[63] Chair's summary of the third session of the Global Platform for Disaster Risk Reduction and World Reconstruction Conference (Geneva, 8–13 May 2011), paras. 8.5 and 9.1, available from www.preventionweb.net/files/20102_gp2011chairssummary.pdf.

[64] *Ibid.*, para. 4.

[65] The establishment of national platforms for disaster reduction, already called for in 1991, was requested by the Economic and Social Council in paragraph 9 of its resolution 1999/63, as well as in paragraph 10 of General Assembly resolution 56/195 of 21 December 2001 and paragraph 3 of General Assembly resolution 58/215 of 23 December 2003.

[66] For an overview, see also General Assembly resolution 59/231 of 22 December 2004.

[67] The Agreement is the first international treaty concerning disaster risk reduction to have been developed after the adoption of the Hyogo Framework for Action.

[68] For the text of the Incheon Declaration, see www.unisdr.org/we/inform/publications/16327.

[69] *Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006–2015) and Declaration of the Second African Ministerial Conference on Disaster Risk Reduction 2010*, introduction, available from www.unisdr.org/files/19613_bookletpoaenglish.pdf.

[70] "Africa seeks united position on disaster risk reduction", 13 February 2013, available from www.unisdr.org/archive/31224.

[71] For the text of the Strategy, see www.unisdr.org/files/18903_17934asdrrfinalenglishjanuary20111.pdf.

[72] For the text of the Communiqué, see www.unisdr.org/files/18603_communiquenayarit.pdf.

[73] General Assembly resolution 66/288 of 27 July 2012, annex, para. 186.

[74] *Ibid.*

[75] See the Compilation of national progress reports on the implementation of the Hyogo Framework for Action (2009–2011), Hyogo Framework for Action priority 1, core indicator 1.1. Available from www.preventionweb.net/english/hyogo/progress/documents/hfa-report-priority1-1%282009-2011%29.pdf.

control). The obligation of States in relation to one another and the international community in the pre-disaster phase have been alluded to by the Special Rapporteur in his fifth report with reference to the duty to cooperate in disaster preparedness, prevention and mitigation.[76] Also relevant in the pre-disaster phase as regards rights and obligations of States in relation to one another is the obligation to prevent transboundary harm.[77] Nevertheless, as noted in the memorandum by the Secretariat, "prevention is more closely associated with a primary obligation to prevent harm to one's own population, property and the environment generally".[78]

37. As can be seen from the historical account given in the preceding section, prevention, mitigation and preparedness have long been part of the discussion relating to natural disaster reduction and more recently to that on disaster risk reduction. Generally, they cover measures that can be taken in the pre-disaster phase.[79] As has been aptly put in the memorandum by the Secretariat, "prevention, mitigation and preparedness lie on different points of the continuum of actions undertaken in advance of the onset of a disaster".[80]

38. Preparedness, which is an integral part of disaster or emergency management, has been characterized as "the organization and management of resources and responsibilities for addressing all aspects of emergencies, in particular preparedness, response and initial recovery steps".[81] It was proposed as an appropriate measure to confront earthquakes as early as 1983.[82] After inclusion as a specific focus of the International Decade for Natural Disaster Reduction, UNDP organized a disaster management training programme on disaster preparedness and elaborated further upon the notion in 1994. Preparedness came to be understood as crucial to international relief assistance. Accordingly, the objective of preparedness measures is closely related to the occurrence of a disaster.[83] As the Secretariat concluded, "preparedness refers to those measures put into place in advance to ensure an effective response, including the issuance of timely and effective early warning and the temporary evacuation of people and property".[84] In temporal terms, preparedness straddles two areas of disaster risk reduction and disaster management: the pre-disaster phase and the post-disaster phase. The simple goal of disaster preparedness is to respond effectively and recover more swiftly when disasters strike. Preparedness efforts also aim at ensuring that those having to respond know how to use the necessary resources. The activities that are commonly associated with disaster preparedness include developing planning processes to ensure readiness; formulating disaster plans; stockpiling resources necessary for effective response; and developing skills and competencies to ensure effective performance of disaster-related tasks.[85] The Federal Emergency Management Agency of the United States has defined disaster preparedness as "a continuous cycle of planning, organizing, training, equipping, exercising, evaluating, and taking corrective action in an effort to ensure effective coordination during incident response".[86]

39. "Mitigation" is frequently referred to in most instruments relating to disaster risk reduction together with preparedness.[87] The General Assembly set as a goal of the International Decade for Natural Disaster Reduction, "to improve the capacity of each country to mitigate the effects of natural disasters expeditiously and effectively".[88] In terms of specific measures, mitigation came to be understood as aiming at structural or non-structural measures to limit the adverse effects of disaster.[89]

40. Since, by definition, mitigation and preparedness imply the taking of measures prior to the onset of a disaster, they can be properly regarded as specific manifestations of the overarching principle of prevention, which lies at the heart of international law. The Charter of the United Nations has so enshrined it in declaring that the first purpose of the United Nations is "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace".[90] The Commission, in its 2001 draft articles on the prevention of transboundary harm from hazardous activities, considered the "well-established principle of prevention" in relation to that international aspect of man-made disasters.[91] The Commission explicitly referred to the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[92] the Rio Declaration on Environment and Development[93] and General Assembly resolution 2995 (XXVII) of 15 December 1972,[94] and concluded that

> [the] prevention of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution.[95]

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[76] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/652, paras. 114–115.

[77] See the draft articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 148, para. 98.

[78] A/CN.4/590 and Add.1–3 (available from the Commission's website, documents of the sixtieth session; the final text will be published as an addendum to *Yearbook … 2008*, vol. II (Part One)), para. 24.

[79] General Assembly resolution 42/169 of 11 December 1987, para. 4 (*a*).

[80] A/CN.4/590 and Add.1–3 (footnote 78 above), para. 27.

[81] UNISDR, *2009 UNISDR Terminology on Disaster Risk Reduction* (Geneva, 2009), p. 18.

[82] Drakopoulos and Tassos, "Earthquakes and their social, economic and legal implications", p. 183.

[83] General Assembly resolution 46/182 of 19 December 1991, annex, para. 18.

[84] See footnote 80 above.

[85] Sutton and Tierney, "Disaster preparedness: concepts, guidance and research".

[86] See https://training.fema.gov/programs/emischool/el361toolkit/preventionresources.htm.

[87] General Assembly resolution 46/182 of 19 December 1991, annex, sect. III.

[88] General Assembly resolution 44/236 of 22 December 1989, annex, para. 2 (*a*).

[89] See International Strategy for Disaster Reduction, *Living with Risk: A Global Review of Disaster Reduction Initiatives, 2004 version*, vol. I (United Nations publication, Sales No. GV.E.03.0.2), p. 17.

[90] Article 1, paragraph 1.

[91] *Yearbook … 2001*, vol. II (Part Two), p. 148, para. (4) of the general commentary.

[92] *Ibid.*

[93] *Ibid.*, para. (3) of the general commentary.

[94] *Ibid.*, para. (4) of the general commentary.

[95] *Ibid.*, p. 149, para. (5) of the general commentary.

41. The existence of an international legal obligation to prevent harm, both in its horizontal and vertical dimensions (see para. 36 above), finds support in human rights law and environmental law.

### 1. Human rights law

42. In his preliminary report, the Special Rapporteur emphasized that "States are under a permanent and universal obligation to provide protection to those on their territory under the various international human rights instruments and customary international human rights law".[96] He further recalled that "each human right is deemed to entail three levels of obligation on the State":[97] the duty to respect (i.e. refraining itself from violating), protect (i.e. protecting rights holders from violations by third parties) and fulfil (i.e. taking affirmative actions to strengthen access to the right).[98] Protection, however, not only relates to actual violations of human rights, but also entails an obligation for States to prevent their occurrence.[99]

43. This positive obligation to prevent human rights violations is explicitly enshrined in article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide and article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

44. Furthermore, the International Covenant on Civil and Political Rights establishes a positive obligation for States to respect and ensure human rights for all individuals subject to its jurisdiction, without distinction of any kind.[100] Article 2, paragraphs 2 and 3 (*a*)–(*b*), of the Covenant point to an obligation to prepare for and mitigate the consequences of human rights violations. Article 2, paragraph 2, has been described as entailing "preventive measures to ensure the necessary conditions for unimpeded enjoyment of the rights enshrined in the Covenant".[101] The prevention of human rights violations has been described as "basically the identification and the eradication of the underlying causes leading to violations of human rights".[102] With reference to torture, it has been observed that the violation of the right not to be tortured is the "final link in a long chain which starts where respect for the human dignity is taken lightly, its prevention means having to identify the links of the chain which precede torture and to break the chain before it reaches its final link".[103]

45. More explicitly, the Inter-American Court of Human Rights has formulated the legal obligation of States to take reasonable steps to prevent human rights violations in the following manner:

> This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.[104]

46. Also in his preliminary report, the Special Rapporteur gave as examples of the human rights relevant in the event of disasters the rights to life, food, health and medical services, to the supply of water, to adequate housing, clothing and sanitation and the right not to be discriminated against.[105] The protection of those rights in the event of disasters extends to the taking of measures aimed at preventing and mitigating their effects. Each of those rights must also be read in the light of a State's duty "to respect and to ensure".[106] The obligation to respect requires States not to take any measures that would result in individuals being prevented from exercising or experiencing their rights. The obligation to ensure requires States to take positive measures to ensure that State authorities and third parties cannot violate a person's rights. Thus, an international obligation to prevent and mitigate disasters arises from States' universal obligation to ensure rights such as the rights to life and food, clothing and shelter. Such an international duty to prevent and mitigate disasters based on human rights law was identified as early as 1978.[107]

47. Article 6 of the International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life, which includes obligations on States to affirmatively protect the right to life. The Human Rights Committee has already indicated that article 6 requires States to prevent certain life-threatening and foreseeable disasters. In its general comment interpreting article 6, the Committee stated that it would be desirable for States to take positive measures to reduce mortality, including measures to "eliminate malnutrition and epidemics".[108] Here, the Committee clearly had such disasters in mind, including, for example, extreme cases of malnutrition (e.g. famine) as would fall within the definition of disaster adopted by

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[96] *Yearbook … 2008*, vol. II (Part One), document A/CN.4/598, p. 149, para. 25.

[97] *Ibid.*, para. 26.

[98] Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study*, p. 34.

[99] Van Boven, "Prevention of human rights violations", p. 191.

[100] Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, p. 37, art. 2, para. 18.

[101] Kriebaum, "Prevention of human rights violations", p. 156.

[102] Nowak and Suntinger, "International mechanisms for the prevention of torture", p. 146.

[103] *Ibid.*

[104] *Velasquez Rodriguez v. Honduras*, judgment of 29 July 1988, Inter-American Court of Human Rights, Series C, No. 4, para. 175; see also para. 174.

[105] *Yearbook … 2008*, vol. II (Part One), document A/CN.4/598, p. 149, para. 26.

[106] See, for example, art. 2, para. 1 of the International Covenant on Civil and Political Rights.

[107] See Samuels, "The relevance of international law in the prevention and mitigation of natural disasters", pp. 245 and 248. ("As a minimum, the recognized right to an adequate standard of living, including adequate food, clothing, and housing, must involve a State's legal obligation to assist another in time of natural disaster, a State's legal obligation to prepare for disaster relief within its own territory and to take preventive measures in order to minimize the suffering resulting from natural disasters.") See also Hand, "Disaster prevention presentation, from SCJIL symposium 2003", pp. 147 and 159–161.

[108] Report of the Human Rights Committee, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V, General comment No. 6 (article 6) on the right to life, p. 93, para. 5. ("Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.")

the Commission in draft article 3.[109] The rights secured by the Covenant also go hand in hand with those enshrined in the Universal Declaration of Human Rights. According to article 3 of the Declaration, "Everyone has the right to life, liberty and security of person".[110] As provided in article 25, paragraph (1),

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[111]

Disasters are certainly situations under which an individual may face "circumstances beyond his control".[112]

48. In addition, article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights recognizes the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". In the event of a disaster, a State has the obligation to guarantee the standard of living of everyone by mitigating its effects.[113] Such a legal obligation in respect of disaster relief was already affirmed in 1977, also in consideration of "the economic, social, and political interest of all nations in the speedy mitigation of the human effects of a disaster anywhere".[114] Of course, the Covenant regime is subject to progressive realization,[115] meaning that a State's obligation to fulfil article 11 depends in part on its level of economic development.[116]

49. The Convention on the Rights of the Child also recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".[117] The States parties to the Convention have the duty to "take appropriate measures" to assist parents in fulfilling their primary responsibility to implement that right, "particularly with regard to nutrition".[118]

50. The existence of an obligation to mitigate has been recently addressed in relation to climate change, in particular when establishing a core set of minimum thresholds or basic human rights standards, which have to be taken into account when dealing with climate change.[119] In addition, as regards preparedness, it has been suggested that public health law "recommends laws that encourage or require natural disaster preparedness".[120]

51. International jurisprudence has recently adopted the approach outlined in the present section, with the European Court of Human Rights expressly recognizing that the right to life requires States to take all appropriate measures to prevent both natural and man-made disasters.[121] In two groundbreaking cases, the Court held that failing to take feasible measures that would have prevented or mitigated the consequences of foreseeable disasters amounted to a violation of the right to life and therefore incurred the responsibility of the State under international law.[122] In *Öneryildiz*, a methane explosion in a public refuse dump, situated on a slope overlooking a valley in Istanbul, engulfed 10 slum dwellings in the immediate vicinity of the dump and killed 39 people. Experts had warned the Turkish authorities of the risk of such an explosion two years earlier, but no steps were taken. In *Budayeva*, a mudslide swept through a mountainous town in the Russian Federation, killing several people and destroying many buildings. While the town had been protected by retention dams, they were badly damaged by particularly heavy mudslides in 1999 and never repaired, warnings by the State meteorological institute notwithstanding. Two weeks before the mudslide, the agency informed the local Ministry for Disaster Relief about the imminent danger of a new disaster and requested that observation points should be set up in the upper sections of the river and that an emergency warning should be issued if necessary. None of the proposed measures were taken.

52. Interpreting article 2 of the European Convention on Human Rights, which ensures the right to life in almost identical terms as article 6 of the International Covenant on Civil and Political Rights, the Court affirmed in its judgment in *Öneryildiz* that the right to life "does not solely concern deaths resulting from the use of force by agents of the State but also… lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction" and stressed that "this positive obligation entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life".[123] In its 2008 judgment in *Budayeva*, the Court concluded:

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[109] For a discussion of famine and malnutrition as a disaster, see Garcia, "Famine as a catastrophe: the role of international law", p. 229.

[110] General Assembly resolution 217 (III) of 10 December 1948.

[111] *Ibid*.

[112] Kent, "The human right to disaster mitigation and relief", p. 137.

[113] In support of the view that this human right presupposes an obligation to mitigate, see Nicoletti, "The prevention of natural and man-made disasters: what duties for States", p. 194. See also Hand, "Disaster prevention presentation", pp. 147 and 159.

[114] Green, *International Disaster Relief: Towards a Responsive System*, p. 66.

[115] See art. 2.

[116] Progressive realization itself is not foreign to the concept of prevention in international law. In the commentary to the Commission's draft articles on prevention of transboundary harm, it was noted that "the economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence" and that "a State's economic level cannot be used to dispense the State from its obligation under the present articles". See *Yearbook … 2001*, vol. II (Part Two), p. 155, para. (13) of the commentary to article 3.

[117] Art. 27, para. 1.

[118] Art. 27, para. 3.

[119] McInerney-Lankford, Darrow and Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions*, p. 30.

[120] Feinberg, "Hurricane Katrina and the public health-based argument for greater federal involvement in disaster preparedness and response", p. 598.

[121] See Kälin and Dale, "Disaster risk mitigation—why human rights matter", p. 38.

[122] See ECHR, *Öneryildiz v. Turkey* [GC], application No. 48939/99, judgment of 30 November 2004, *Reports of Judgments and Decisions* 2004-XII, and *Budayeva and Others v. Russia*, application Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008 (extracts).

[123] *Öneryildiz*, para. 71, and *Budayeva*, para. 129 (see previous footnote).

> In the sphere of emergency relief, where the State is directly involved in the protection of human lives through the mitigation of natural hazards, these considerations should apply in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use… The scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.[124]

53. A State therefore incurs liability when it neglects its duty to take preventive measures when a natural hazard is clearly identifiable and effective means to mitigate the risk are available to it.[125] These two decisions concerning a duty to prevent and mitigate disasters are relevant for a number of reasons. First, the Court articulated the same duty regarding natural and man-made disasters. Second, the Court faulted Turkey and the Russian Federation for failing to "take appropriate steps" to prevent the harm, which mirrors the obligation in various international instruments for States to take "appropriate" or "necessary" measures to reduce the risk of disaster. Third, the cases suggest that a State's duty is triggered when a disaster becomes foreseeable, which mirrors the foreseeability requirement within the principle of due diligence.[126]

### 2. Environmental law

54. States have an obligation not to cause environmental harm *in genere* and to ensure that activities within their jurisdiction do not harm the environment or areas under the jurisdiction of another State. The duty to prevent in international environmental law encompasses both obligations.[127] Prevention in the environmental context is based on the common law principle of *sic utere tuo ut alienum non laedas*. As declared by ICJ in the *Corfu Channel* case, this principle is well established in international law[128] and was applied as early as 1941 in the *Trail Smelter* arbitration.[129] The first clear pronouncement of the principle of prevention in international environmental law can be found in principle 21 of the Declaration of the United Nations Conference on the Human Environment, which reads:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[130]

55. Principle 2 of the Rio Declaration on Environment and Development adopted principle 21 wholesale, with the added recognition that States have a sovereign right to exploit their own resources according to their developmental policies.[131] Principle 11 of the Rio Declaration builds on this obligation by adding that States must adopt legislative and administrative policies intended to prevent or mitigate transboundary harm.[132]

56. The principle was affirmed in the 1996 advisory opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons* in the following terms: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment".[133]

57. Over time, the key enunciations of the principle of prevention have been used to hold States responsible for failing to take steps necessary to stop transboundary harm. For example, in the *Gabčíkovo-Nagymaros Project* case, ICJ called upon both parties to "look afresh at the effects on the environment of the operation of the Gabčíkovo power plant" on the Danube River.[134] In the light of "new norms and standards", the Court found that, at least in the field of environmental protection, "vigilance and prevention are required" on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation to this type of damage.[135] Similarly, in the *Pulp Mills on the River Uruguay* case, the Court found that the principle of prevention was part of customary international law and that a State was thus obliged to use all the means at its disposal in order to avoid activities that took place in its territory or in any area under its jurisdiction causing significant damage to the environment of another State.[136]

58. The World Charter for Nature was adopted by the General Assembly in its resolution 37/7 of 28 October 1982, embodying prevention as its underpinning principle. The Assembly recalled its conviction that "the benefits which could be obtained from nature depended on the maintenance of natural processes and on the diversity of life forms and that those benefits were jeopardized by the excessive exploitation and the destruction of natural habitats".

59. As already mentioned, in 2001, the Commission identified a "well-established principle of prevention" in the context of transboundary environmental harm.[137] Article 3 of the draft articles on prevention of transboundary harm from hazardous activities requires States to "take all appropriate measures to prevent significant transboundary

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[124] *Budayeva* (footnote 122 above), para. 137.

[125] Kälin and Dale, "Disaster risk mitigation—why human rights matter", p. 39.

[126] See para. 61 below.

[127] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, separate opinion by Judge Cançado Trindade, at p. 159, para. 59.

[128] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 4, at p. 22.

[129] *Trail Smelter case (United States of America v. Canada)*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

[130] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972*, A/CONF.48/14/Rev.1 (United Nations publication, Sales No. E.73.II.A.14), p. 5, principle 21.

[131] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8a), resolution 1, annex I, principle 2.

[132] *Ibid.*, principle 11.

[133] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 241, para. 29.

[134] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 78, para. 140.

[135] *Ibid.*

[136] *Pulp Mills on the River Uruguay* (footnote 127 above), para. 101 (citing p. 22 of the judgment in the *Corfu Channel* case (footnote 128 above) and the advisory opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons* (footnote 133 above)).

[137] Draft articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 148, paragraph (4) of the general commentary.

harm or at any event to minimize the risk thereof".[138] In establishing such a duty, the Commission drew upon the principle of *sic utere tuo ut alienum non laedas*, while adding more specificity to the "limitations on the freedom of States reflected in principle 21" of the Declaration of the United Nations Conference on the Human Environment. Article 3 imposes an obligation on States to "adopt and implement national legislation incorporating accepted international standards"[139] and to enforce legislation and administrative regulations to ensure compliance.[140] The principle of prevention also animates article 7 on the assessment of risk, article 8 on the duty to notify, article 9 on the duty to consult with affected States on preventive measures and article 16 on emergency preparedness. The commentary to article 16 even recognizes a "duty to prevent environmental disasters".[141]

60. Both ICJ and the Commission agree that the principle of prevention stems from two distinct but interrelated State obligations: due diligence and the precautionary principle.[142]

### (a) *Due diligence*

61. The principle of due diligence is an established principle of international law and has been referred to as one of its "basic principles".[143] It has been associated with the principle of responsibility, referring to underlying rules within a "regime of responsibility for breach of due diligence obligations".[144] In relation to acts or omissions of non-State actors, it has been stated as early as the beginning of the twentieth century that "the State may incur responsibility if it fails to exercise due diligence in preventing or reacting to such acts or omissions".[145] Due diligence, as it relates to prevention in the environmental context, has been defined as using, among others, the "best practicable means"[146] or "all appropriate and effective measures".[147] As described by ICJ in the *Pulp Mills on the River Uruguay* case, the obligation to "prevent pollution" in the treaty between Uruguay and Argentina was "an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party".[148]

62. The obligation of due diligence is the standard basis for prevention.[149] The obligation is one of conduct rather than result; the duty of due diligence cannot guarantee the total prevention of significant harm, but a State must exert its best possible efforts to minimize the risk.[150] In this sense, the duty of due diligence is the core obligation of the prevention principle,[151] and the formula obliging States to take all "necessary or appropriate measures" (e.g. art. 3 of the draft articles on transboundary harm) is often used to express this due diligence obligation.[152] Due diligence is manifested by a State's efforts to implement and enforce legislation and administrative regulations on prevention.[153] Due diligence has been accepted by States as "in accordance with current realities of State practice and international law".[154] To arrive at this finding, the Commission relied on a number of international environmental conventions that contain obligations to take appropriate measures or, more specifically, to implement treaty obligations through legislation and administrative regulations.[155] Thus, although the term "due diligence" is not used by international environmental conventions, it is accepted that numerous treaties on the law of the sea, maritime pollution, protection of the ozone layer, environmental impact assessments and the use of transboundary watercourses and international lakes contain such an obligation.[156]

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[138] *Ibid*. Prevention is also the preferred method of asserting State responsibility and liability for transboundary harm. In his first report on prevention of transboundary damage from hazardous activities, the Special Rapporteur, Pemmaraju Sreenivasa Rao, states that "prevention as a policy in any way is better than cure" and that "it is a time-honoured policy and one that is widely used by many developed and industrialized societies to manage and even reduce or eliminate the ill effects of their economic growth" (*Yearbook … 1998*, vol. II (Part One), document A/CN.4/487 and Add.1, p. 186, para. 32).

[139] *Yearbook … 2001*, vol. II (Part Two), p. 153, paras. (2) and (4) of the commentary to article 3.

[140] *Ibid.*, p. 154, para. (6).

[141] *Ibid.*, p. 168, para. (1) of the commentary to article 16.

[142] *Ibid.*, pp. 154–155, paras. (7)–(18) of the commentary to article 3.

[143] Condorelli, "The imputability to States of acts of international terrorism", pp. 240–242. See also Pisillo-Mazzeschi, "The due diligence rule and the nature of the international responsibility of States", pp. 9–51.

[144] Pisillo-Mazzeschi, "Forms of international responsibility for environmental harm", pp. 15–16.

[145] Hessbruegge, "The historical development of the doctrines of attribution and due diligence in international law", p. 268, referring to Amos Shartle Hershey, *The Essentials of International Public Law*, New York, Macmillan Company, 1918, p. 162. See also Barnidge, "The due diligence principle under international law", pp. 81–121.

[146] United Nations Convention on the Law of the Sea, art. 194, para. 1.

[147] Convention on environmental impact assessment in a transboundary context, art. 2, para. 1.

[148] *Pulp Mills on the River Uruguay* (footnote 127 above), p. 79, para. 197.

[149] Prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 154, paragraph (8) of the commentary to article 3.

[150] *Ibid.*, paragraph (7).

[151] In his second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), the Special Rapporteur, Pemmaraju Sreenivasa Rao, notes that "the duty of prevention, which is an obligation of conduct, is essentially regarded as a duty of due diligence" and that "any question concerning implementation or enforcement of the duty of prevention would necessarily have to deal with the content of the obligation and hence the degree of diligence which should be observed by States" (*Yearbook … 1999*, vol. II (Part One), document A/CN.4/501, p. 116, para. 18).

[152] Convention on the prevention of marine pollution by dumping of wastes and other matter, art. 1; United Nations Convention on the Law of the Sea, art. 194; and Convention on the Transboundary Effects of Industrial Accidents, art. 3. See also Romano, "L'obligation de prévention des catastrophes industrielles et naturelles", p. 389. See in particular Nicoletti, "The prevention of natural and man-made disasters: what duties for States".

[153] Draft articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 154, paragraph (10) of the commentary to article 3.

[154] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/510, p. 117, para. 10.

[155] *Yearbook … 2001*, vol. II (Part Two), p. 154, paragraph (8) of the commentary to article 3, footnote 880 (citing the United Nations Convention on the Law of the Sea, art. 194, para. 1; the Convention on the prevention of marine pollution by dumping of wastes and other matter, arts. I, II and VII, para. 2; the Vienna Convention for the Protection of the Ozone Layer, art. 2; the Convention on the Regulation of Antarctic Mineral Resource Activities, art. 7, para. 5; the Convention on environmental impact assessment in a transboundary context, art. 2, para. 1; and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 2, para. 1).

[156] *Yearbook … 2001*, vol. II (Part Two), p. 154, paragraph (8) of the commentary to article 3.

63. The obligation of due diligence has two main characteristics: the degree of care in question is that expected of a "good Government" and the required degree of care is also proportional to the degree of hazardousness of the activity involved.[157] Regarding the "good Government" standard, for the Commission:

> The main elements of the obligation of due diligence involved in the duty of prevention could be thus stated: the degree of care in question is that expected of a good Government. It should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor the activities. It is, however, understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed.[158]

64. According to the Commission, under the "good Government" criterion, the economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligations of due diligence.[159] It is understood, however, that a State's economic level cannot discharge it from its obligation in this regard and, in fact, "vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected".[160] As far as the proportionality standard is concerned, the degree of care required of a State is proportional to the degree of harm that the hazard involves. The harm itself should be foreseeable and the State must have known or should have known that the degree of risk was significant.[161]

65. The European Court of Human Rights has also framed the duty of prevention as one of due diligence. In *Öneryildiz*, the Court held that Turkish authorities had a positive obligation to prevent when they "knew or ought to have known that there was a real and immediate risk to a number of persons"[162] and, in *Budayeva*, that a failure "to take measures that were necessary and sufficient to avert the risks inherent in dangerous activity"[163] amounted to a violation of the right to life under article 2 of the European Convention on Human Rights. Similarly, in *Budayeva*, the Court found that, in the face of increasing risks of mudslides, "the authorities could reasonably be expected to acknowledge the increased risk of accidents in the event of a mudslide that year and to show all possible diligence in informing the civilians and making advance arrangements for the emergency evacuation".[164] Nevertheless, in *Öneryildiz*, the Court recognized that "an impossible or disproportional burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources".[165] In *Budayeva*, the Court noted that "this consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature".[166] Allowing for various actions to be taken on the basis of the specific capacities and priorities of the State does not, however, absolve States of their obligation to avert risk and to "do everything within their power to protect [people] from the immediate and known risks to which they were exposed".[167]

### (b) *Precautionary principle*

66. Under international environmental law, the "precautionary principle" relates to the more general prevention of environmental harm (including within national boundaries) and essentially creates a rebuttable presumption that an action or policy has a suspected risk of causing harm to the public or to the environment absent evidence that it does not pose a risk.[168] The Rio Declaration first formulated it as follows:

> In order to protect the environment, the precautionary approach shall be widely applied by States, according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[169]

The precautionary principle entails two main elements: the awareness of the existence or persistence of risks and the awareness of scientific uncertainties surrounding the issue at stake.[170]

67. The commentary to article 3 of the draft articles on prevention of transboundary harm recognizes that the duty to prevent involves taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent serious or irreversible damage.[171] The commentary to draft articles 7 and 10 expressly finds that the precautionary principle has become a general principle of environmental law.[172]

68. The principle has been implicitly included in a number of international conventions, such as the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (art. 4, para. 3), the United Nations Framework Convention on Climate Change (art. 3, para. 3), the Treaty establishing the European Community as amended by the Treaty of Amsterdam (art. 174 (former art. 130 (*r*)) and the Vienna Convention for the Protection of the Ozone Layer (art. 2).[173]

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[157] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/510, p. 119, para. 20.

[158] *Yearbook … 2001*, vol. II (Part Two), p. 155, paragraph (17) of the commentary to article 3.

[159] *Ibid*. See also *Yearbook … 2000*, vol. II (Part One), document A/CN.4/510, p. 120, para. 23.

[160] *Yearbook … 2001*, vol. II (Part Two), p. 155, paragraph (17) of the commentary to article 3.

[161] *Ibid.*, paragraph (18).

[162] *Öneryildiz* (footnote 122 above), para. 101.

[163] *Budayeva* (footnote 122 above), para. 140.

[164] *Ibid.*, para. 152.

[165] *Öneryildiz* (footnote 122 above), para. 107.

[166] *Budayeva* (footnote 122 above), para. 135.

[167] *Öneryildiz* (footnote 122 above), para. 109.

[168] See, for example, principle 15 of the Rio Declaration (footnote 131 above).

[169] *Ibid.*

[170] See *Pulp Mills on the River Uruguay* (footnote 127 above), separate opinion by Judge Cançado Trindade, at p. 159, para. 62. See also Trouwborst, *Precautionary Rights and Duties of States*.

[171] *Yearbook … 2001*, vol. II (Part Two), p. 155, paragraph (14) of the commentary to article 3.

[172] *Ibid.*, pp. 162–163, paragraphs (6)–(7) of the commentary to article 10.

[173] *Ibid.*, paragraph (7).

69. Since the 1990s, it has been argued that the precautionary principle has become a principle of "customary international environmental law" or even general international customary law.[174] In his dissenting opinion in the ICJ judgment in the *Pulp Mills on the River Uruguay* case, Judge *ad hoc* Vinuesa concluded that the precautionary principle "indisputably is at the core of environmental law", saying "in my opinion, the precautionary principle is not an abstraction or an academic component of desirable soft law, but a rule of law within general international law as it stands today".[175] The Court has not, however, yet acknowledged the principle as such.[176]

### C. International cooperation on prevention

70. The Commission has reaffirmed the duty to cooperate in article 5 of its draft articles on the present topic and, in article 5 *bis*, adopted in 2012, has given a non-exhaustive enumeration of the forms that cooperation may take in the context of relief. Cooperation is also at the centre of the horizontal (international) dimension of prevention. In his fifth report, the Special Rapporteur briefly touched upon cooperation as it relates to disaster preparedness prevention and mitigation. As noted therein, cooperation relates to nearly all aspects of disaster prevention, including cooperation on search and rescue arrangements, standby capacity requirements, early warning systems, exchange of information pertaining to risk assessment and identification, contingency planning and capacity-building.[177]

71. The duty to cooperate is a well-established principle of international law. As the Special Rapporteur noted in his second report,[178] it is enshrined in numerous international instruments, including the Charter of the United Nations. As formulated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the purpose of cooperation is, in part, "to promote international economic stability and progress" and "the general welfare of nations".[179]

72. The duty to cooperate is also well established in connection with prevention. It has been reiterated by the General Assembly in numerous resolutions that address disaster prevention and disaster risk reduction. In establishing the International Decade for Natural Disaster Reduction, the Assembly recognized the responsibility of the United Nations to cooperate to mitigate risk, including through prevention and early warning, while calling upon States to cooperate to reduce natural hazards.[180] In more recent resolutions, the Assembly has urged the international community "to reduce the adverse effects of natural disasters" through cooperation.[181] International cooperation is to be undertaken in order to support national efforts for prevention,[182] especially "to increase the capacity of countries to respond to the negative impacts of all natural hazards … particularly in developing countries".[183] The Hyogo Framework for Action was adopted in large part to encourage cooperation in prevention, both among States and between States and non-State actors.[184] As has been explained, the Hyogo Framework for Action "is the guiding document in strengthening and building international cooperation to ensure that disaster risk reduction be used as a foundation for sound national and international development agendas".[185] This is confirmed by the language of the Framework, which stresses the importance of cooperation with regard to disaster prevention: "We are determined to reduce disaster losses of lives and other social, economic and environmental assets worldwide, mindful of the importance of international cooperation, solidarity and partnership, as well as good governance at all levels."[186]

73. Non-binding declarations have referred to cooperation when underscoring the duty to prevent. For example, the Yogyakarta Declaration on Disaster Risk Reduction in Asia and the Pacific 2012 called upon stakeholders to "enhance and support regional cooperation mechanisms and cent[res] on disaster information management" relating to local risk assessment and financing.[187] Likewise, the Declaration of Panama placed cooperation as central to the "prevention and mitigation of risks and natural disasters". Heads of State and/or Government pledged "to foster international co-operation and capacity-building in the area of natural disasters, in enhancing the provision of humanitarian assistance at all stages of a disaster and in promoting a culture of prevention and early warning systems".[188]

74. Cooperation is embedded in the regional organs and platforms concerned with prevention, including the Regional Platform for Disaster Risk Reduction in the Americas, the Arab Strategy for Disaster Risk Reduction 2020, the Asian Ministerial Conference on Disaster Risk Reduction, the European Forum for Disaster Risk Reduction, the Pacific Platform for Disaster Risk Management and the Africa Regional Strategy for Disaster Risk Reduction. For

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[174] See in more detail Harding and Fisher, eds., *Perspectives on the Precautionary Principle*, p. 5; Trouwborst, "The precautionary principle in general international law: combating the Babylonian confusion", p. 189; Romano, "L'obligation de prévention des catastrophes industrielles et naturelles", p. 396.

[175] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures*, Order of 13 July 2006, *I.C.J. Reports 2006*, p. 113, dissenting opinion of Judge ad hoc Vinuesa, at p. 152.

[176] Sunstein, *Laws of Fear: Beyond the Precautionary Principle*; Cameron, "Environmental risk management in New Zealand—is there scope to apply a more generic framework?"

[177] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/652, paras. 114–115.

[178] *Yearbook … 2009*, vol. II (Part One), document A/CN.4/615.

[179] General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

[180] General Assembly resolution 42/169 of 11 December 1987, paras. 7–8.

[181] General Assembly resolution 58/215 of 23 December 2003, para. 2.

[182] See, for example, General Assembly resolution 60/196 of 22 December 2005, para. 2.

[183] General Assembly resolution 59/233 of 22 December 2004. See also resolution 60/196 of 22 December 2005.

[184] A/CONF.206/6, chap. I, resolution 2.

[185] See www.unisdr.org/we/coordinate.

[186] A/CONF.206/6, resolution 1, fifth preambular paragraph.

[187] Adopted by the Fifth Asian Ministerial Conference on Disaster Risk Reduction, held in Yogyakarta, Indonesia, in 2012.

[188] Declaration of Panama, adopted at the Fourth Summit of Heads of State and/or Government of the Association of Caribbean States, held in Panama City in July 2005, available from www.acs-aec.org/sites/default/files/Declaracion_de_Panama_en_0.pdf.

example, the European Forum has noted that it "will serve as a venue for … information sharing, exchange of knowledge and ideas and facilitation of cooperation".[189] To this end, the European Forum has "identified specific opportunities for cross-fertilization between countries and subregions for exchanging knowledge and information, as well as inter-government and inter-sector cooperation".[190] In addition, the Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006–2015) identified cooperation as a major area of activity relating to risk assessment. It stressed cooperation "regionally and internationally to assess and monitor regional and transboundary hazards".[191] Regional cooperation is said to be important as it allows for the efficient use of resources and reduces duplicative efforts.[192]

75. As a legal duty, international cooperation for disaster prevention finds its source in bilateral and multilateral treaties concluded between States or between States and international organizations. As an example of the latter, a 2000 framework agreement between the Caribbean Community and Japan specifically addressed cooperation for disaster prevention. The framework resolved "to promote cooperation for … preventive action and rehabilitation", as well as stressing that "international cooperation should be promoted to strengthen the institutional capacity of the regional and national agencies concerned with disaster prevention emergency response and management".[193]

### 1. Bilateral instruments

76. Many States have concluded bilateral agreements specially addressing cooperation in disaster prevention.[194] Examples are the agreements between Argentina and Spain,[195] Guatemala and Mexico,[196] Germany and Hungary,[197] France and Italy,[198] the Republic of Korea and Poland,[199] Poland and Hungary,[200] Poland and Ukraine,[201] Poland and the Russian Federation,[202] the Russian Federation and Greece,[203] Switzerland and Italy,[204] the United States and the Russian Federation,[205] the United States and Poland,[206] the United States and Bulgaria,[207] the United States and Ukraine,[208] the United States and the Philippines,[209] Uruguay and Spain,[210] Spain and Mexico,[211] the Russian Federation and Spain,[212] and France and Malaysia.[213] The last-mentioned

[189] See www.preventionweb.net/files/19800_efdrrwebfinal.pdf, p. 16.

[190] *Ibid.*

[191] Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006–2015) and declaration of the second African Ministerial Conference on Disaster Risk Reduction 2010, p. 47, available from www.unisdr.org/files/19613_bookletpoaenglish.pdf.

[192] "Implementing the Hyogo Framework for Action in Europe: Advances and Challenges, Report for the period 2009–2011", pp. 39–41, available from www.unisdr.org/.

[193] A New Framework for CARICOM–Japan Cooperation for the Twenty-first Century, sect. 1-1, available from www.mofa.go.jp/region/latin/latin_e/caricom0011.html.

[194] A/CN.4/590 and Add.1–3 (footnote 78 above), para. 43.

[195] Spain and Argentina: Agreement on cooperation on disaster preparedness and prevention, and mutual assistance in the event of disasters (Madrid, 3 June 1988), United Nations, *Treaty Series*, vol. 1689, No. 29123, p. 23.

[196] Mexico and Guatemala: Agreement on cooperation for the prevention of and assistance in cases of natural disasters (Guatemala City, 10 April 1987), *ibid.*, vol. 1509, No. 26055, p. 3.

[197] Federal Republic of Germany and Hungary: Agreement on matters of common interest relating to nuclear safety and radiation protection (Budapest, 26 September 1990), *ibid.*, vol. 1706, No. 29504, p. 263.

[198] France and Italy: Convention on the prediction and prevention of major hazards and on mutual assistance in the event of natural or man-made disasters (Paris, 16 September 1992), *ibid.*, vol. 1962, No. 33532, p. 369.

[199] Republic of Korea and Poland: Agreement on scientific and technological cooperation (Seoul, 29 June 1993), *ibid.*, vol. 1847, No. 31455, p. 289.

[200] Agreement between the Governments of the Republic of Poland and the Republic of Hungary on Cooperation and Mutual Aid in Preventing Catastrophes, Natural Disasters and other Serious Events and in Eliminating their Effects (6 April 2000).

[201] Agreement between the Government of the Republic of Poland and the Cabinet of Ministers of Ukraine on Cooperation and Mutual Aid in Preventing Catastrophes, Natural Disasters and other Serious Events and in Eliminating their Effects (19 July 2002).

[202] Agreement between the Government of the Republic of Poland and the Government of the Russian Federation on Cooperation Preventing the Technological and Natural Disasters and Elimination of their Effects (Warsaw, 25 August 1993).

[203] Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on co-operation in the field of prevention and response to natural and man-made disasters (Athens, 21 February 2000).

[204] Agreement between the Swiss Confederation and the Italian Republic on Cooperation in the Area of Risk Management and Prevention and on Mutual Assistance in the Event of Natural and Man-made Disasters (Rome, 2 May 1995).

[205] Memorandum of Understanding between the Government of the United States of America and the Government of the Russian Federation on cooperation in natural and man-made technological emergency prevention and response (Moscow, 16 July 1996), United Nations, *Treaty Series*, No. 50116, p. 1.

[206] Protocol of Intentions between the Federal Emergency Management Agency (United States of America) and the Ministry of Defence of the Republic of Poland on cooperation in natural and man-made technological emergency prevention and response (Warsaw, 9 May 2000).

[207] Protocol of Intentions between the Federal Emergency Management Agency (United States of America) and the Ministry of Defence of the Republic of Bulgaria on Cooperation in natural and man-made technological emergency prevention and response (Washington, D.C., 24 January 2000).

[208] Memorandum of Understanding between the Government of the United States of America and the Government of Ukraine on Cooperation in Natural and Man-made Technological Emergency Prevention and Response (Kiev, 5 June 2000).

[209] Protocol of Intentions between the Government of the United States of America and the Republic of the Philippines Concerning Cooperation and Disaster Prevention and Management (Washington, D.C., 20 November 2001).

[210] Agreement between the Ministry of National Defence of the Eastern Republic of Uruguay and the Ministry of the Interior of the Kingdom of Spain on Scientific and Technological Cooperation and Mutual Assistance in Civil Defence and Disaster Prevention (Madrid, 25 September 1997).

[211] Agreement between the Ministry of the Interior of the Kingdom of Spain and the Ministry of the Interior of the United Mexican States on Scientific and Technological Cooperation and Mutual Assistance in Civil Defence and Disaster Prevention, 1997.

[212] Agreement between the Government of the Kingdom of Spain and the Government of the Russian Federation on cooperation in the field of prevention of natural disasters and mutual assistance in the mitigation of their outcome (Madrid, 14 June 2000), United Nations, *Treaty Series*, vol. 2153, No. 37586, p. 57.

[213] Agreement between the Government of the French Republic and the Government of Malaysia on Cooperation in the Field of Disaster Prevention and Management and Civil Security (Paris, 25 May 1998), *Journal officiel de la République française*, 9 December 1998, p. 18519.

agreement provides an illustrative example of the type of language in these agreements that speaks to the importance of cooperation: "Convinced of the need to develop cooperation between the competent organs of both Parties in the field of the prevention of grave risks and the protection of populations, property and the environment."[214]

77. By way of illustration, one of the earliest examples of a bilateral agreement addressing disaster risk reduction is that concluded between the United Kingdom and the United States in 1958, which includes elements to improve technology in forecasting, information sharing and early warning for hurricanes. The agreement was for a cooperative meteorological programme for the purpose of achieving "greater accuracy and timeliness in forecasts of hurricanes and in warnings of accompanying destructive winds, tides, and floods".[215]

78. The United States has also concluded several bilateral agreements with other countries that address both disaster prevention and management. An agreement concluded with Poland indicated that "the Parties intend to cooperate in natural and man-made technological disaster mitigation, preparedness, response, and recovery in the areas of training, expert assistance and exchange of experiences".[216] The activities primarily concerned were training and the exchange of information.[217] A similar agreement, signed with the Philippines, expressed the desire of both countries to "further cooperative activities in disaster prevention and management through a framework of collaboration that facilitates the exchange of expertise, knowledge, and information, and the transfer of new technology in emergency management".[218]

79. More than two decades ago, France signed bilateral agreements with Italy and Greece to address major risks that could lead to natural disasters. The agreement with Greece, signed in 1989, concerned cooperation on major natural risks and outlined activities to predict and prevent risks and to mitigate their effects.[219] A similar agreement with Italy, signed in 1992, covered prediction and prevention of risks, including through information exchange, as part of a broader agreement addressing both pre-disaster prevention and disaster response.[220]

80. In 2000, Greece and the Russian Federation signed a bilateral agreement for the purpose of cooperation in "prevention and response to natural and man-made disasters".[221] The agreement defined "emergency prevention" as "a set of measures taken in advance and aimed at a maximum possible reduction of emergency risk, protection of health of population, diminishing damage for natural environment and material losses in case of emergency".[222] This agreement mentioned a range of activities specifically geared towards disaster prevention, including through environmental monitoring, assessment of risk and exchange of information.[223]

81. Other bilateral agreements concluded by States for a purpose other than risk reduction included provisions on disaster prevention. A bilateral agreement concluded in 2002 between South Africa and Nigeria referred to capacity-building and exchange of information for public health issues, including "emergency preparedness and response".[224] An agreement concluded between Germany and Austria in 1988 primarily concerning cooperation in disaster response also included provisions on disaster prevention.[225] Under this agreement, the two States were to cooperate "in preventing and countering disasters or serious accidents, by exchanging all relevant scientific and technical information … In exchanging information of risks and damage which may affect the territory of the other Contracting State this exchange of information shall include precautionary data measurements".[226] A similar bilateral agreement signed between Belgium and France in 1981 included an article specifically on disaster prevention relating to forecasting and prevention.[227] This agreement included pledges to exchange information relating to forecasting and prevention.[228]

### 2. Multilateral instruments

82. The Special Rapporteur turns now to the examination of the text of multilateral instruments, both global and regional, concerned with the prevention of any disaster, regardless of its transboundary effects. In assessing each instrument, the discussion focuses on States' obligations to adopt or implement appropriate legislative and regulatory measures to fulfil their preventive obligations. Such "necessary measures" are the hallmark of due diligence and may serve to tie these instruments to a more general duty to prevent and mitigate disasters.

83. There is no comprehensive international instrument obliging States to prevent natural or man-made disasters. Instead, the international system has to date

[214] *Ibid.*, fourth preambular paragraph (original: French).

[215] United Kingdom of Great Britain and Northern Ireland and United States of America: Exchange of notes constituting an agreement for the continued operation of hurricane research stations in the Cayman Islands established under the Agreement of 30 December 1958 as amended by the Agreement of 15 February 1960 (Washington, 23 November and 12 December 1966), United Nations, *Treaty Series*, vol. 603, No. 8735, p. 235.

[216] Protocol of Intentions… (footnote 206 above).

[217] *Ibid.*

[218] See footnote 209 above.

[219] Agreement on the modalities of Franco–Hellenic cooperation with regard to major natural hazards (Paris, 11 May 1989), United Nations, *Treaty Series*, vol. 1549, No. 26941, p. 299. Under art. 1, the Governments "shall cooperate with regard to major natural hazards. Their cooperation shall be aimed at: Hazards prediction, when possible; Hazards prevention, either by keeping hazards from degenerating into disasters or by attenuating their effects."

[220] See footnote 198 above.

[221] See footnote 203 above.

[222] *Ibid.*, art. 1.

[223] *Ibid.*, art. 3.

[224] Agreement between the Government of the Republic of South Africa and the Government of the Federal Republic of Nigeria on Cooperation in the Field of Health and Medical Sciences (Pretoria, 28 March 2002).

[225] Austria and Federal Republic of Germany: Agreement concerning mutual assistance in the event of disasters or serious accidents (Salzburg, 23 December 1988), United Nations, *Treaty Series*, vol. 1696, No. 29224, p. 61.

[226] *Ibid.*, art. 13.

[227] France and Belgium: Convention on mutual assistance in the event of disasters or serious accidents (Paris, 21 April 1981), United Nations, *Treaty Series*, vol. 1437, No. 24347, p. 33.

[228] *Ibid.*, art. 11.

followed a piecemeal approach when including disaster risk reduction in treaty obligations, either focusing on the kind of disaster (e.g. industrial or nuclear accidents) or the kind of State response activity (e.g. telecommunications assistance). Taken together, these instruments contain common language revolving around States' due diligence obligations regarding the prevention and mitigation of certain disasters.

84. In 1980, the Office of the United Nations Disaster Relief Coordinator published a compendium of legal arrangements for disaster prevention and mitigation,[229] it being a "comprehensive review of existing knowledge of the causes and characteristics of national phenomena and the preventive measures which may be taken to reduce or eliminate their impact on disaster-prone developing countries".

### (a) *Global instruments*

85. The first global international treaty that may be said to have addressed, albeit indirectly, the question of prevention is the United Nations Convention on the Law of the Sea, article 145 of which, on the protection of the marine environment, provides that "necessary measures shall be taken in accordance with this Convention … to ensure effective protection for the marine environment from harmful effects which may arise from such activities". Mention should also be made in this connection of the Convention on the Law of the Non-navigational Uses of International Watercourses, which requires watercourse States to prevent and mitigate harm to other watercourse States. It should be observed, however, that these prevention provisions were very much environmental law-oriented, as were most of the similar pronouncements referring to prevention made in the last two decades of the twentieth century.[230]

86. As observed by the Secretariat, "the closest contemporary global international convention dealing with the prevention and mitigation of disasters" is the Framework Convention on civil defence assistance.[231] Currently with 14 States parties and 12 signatories, it entered into force in 2001 and aims to promote cooperation among State civil defence authorities "in terms of prevention, forecasting, preparedness, intervention and post-crisis management" (preamble). Although most of the Convention covers inter-State assistance after a disaster has occurred, it also envisages prevention as a key element of "assistance".[232] It provides for a general requirement for States parties to "undertake to explore all possibilities for co-operation in the areas of prevention, forecasting, preparation, intervention and post-crisis management".[233]

87. Aside from the Framework Convention on civil defence assistance, the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations is often cited as one of the global instruments to address disaster risk reduction.[234] It expressly makes prediction and mitigation of disasters a priority in the area of telecommunication assistance.[235] The Convention obliges States to cooperate with other States, "non-State entities" and intergovernmental organizations to facilitate the use of telecommunication resources for disaster mitigation,[236] which the Convention defined as "measures designed to prevent, predict, prepare for, respond to, monitor and/or mitigate the impact of, disasters".[237] To achieve this duty of cooperation, States may deploy equipment to "predict, monitor and provide information" about disasters,[238] share information among themselves about potential disasters[239] and provide "prompt telecommunication assistance to mitigate the impact of a disaster".[240] Thus, just as the Framework Convention on civil defence assistance, the Tampere Convention requires States only to "cooperate" with other States in disaster risk reduction. An obligation to prevent disasters within State borders can, however, be inferred from this duty to cooperate and from the other articles of the Convention. The Convention creates an internal obligation of States to "reduce or remove regulatory barriers to the use of telecommunication resource for disaster mitigation and relief".[241] Thus, a State party's duty to use telecommunications to mitigate disasters includes an obligation to take appropriate legislative and regulatory measures to promote disaster mitigation, which mirrors the traditional "due diligence" obligation identified in international environmental law instruments.

88. A duty of due diligence can also be read into global instruments covering specific types of potential disasters. Unlike the Framework Convention on civil defence assistance and the Tampere Convention, conventions covering industrial accidents, nuclear safety and environmental harm do not directly mention disaster situations. Given the definition by the Commission of "disaster" in draft article 3 of its draft articles on the present topic, each instrument addresses conditions that can rise to the level of a disaster if they cause "widespread loss of life, great human suffering and distress, or large-scale material or

[229] *Disaster Prevention and Mitigation: A Compendium of Current Knowledge*, vol. 9, *Legal Aspects* (United Nations publication, Sales No. 80.III.M.1, 1980).

[230] Such as the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer, in addition to the Convention on biological diversity, eighth and ninth preambular paragraphs.

[231] A/CN.4/590 and Add.1–3 (footnote 78 above), para. 36. It should also be noted that the Convention and Statute establishing an International Relief Union made one of its objectives the prevention of disasters (art. 2, para. 2). The Union was, however, formally replaced by UNESCO in 1968, which did not include disaster prevention among its objectives. See Nicoletti, "The prevention of natural and man-made disasters: what duties for States", p. 183, footnote 24.

[232] Art. 1 (*d*) defines "assistance" as "any action undertaken by the Civil Defence Service of a State for the benefit of another State, with the objective of preventing, or mitigating the consequences of disasters".

[233] Art. 4.

[234] See, for example, Nicoletti, "The prevention of natural and man-made disasters: what duties for States", p. 184 (discussing only the Framework Convention on civil defence assistance and the Tampere Convention as creating international disaster risk reduction obligations).

[235] Art. 3, paras. 1–2. In art. 1, para. 15, the Convention also defines "telecommunications" as "any transmission, emission, or reception of signs, signals, writing, images, sounds or intelligence of any nature, by wire, radio, optical fibre or other electromagnetic system".

[236] Art. 3, para. 1.

[237] Art. 1, para. 7.

[238] Art. 3, para. 2 (*a*).

[239] Art. 3, para. 2 (*b*).

[240] Art. 3, para. 2 (*c*).

[241] Art. 9, para. 1.

environmental damage, thereby seriously disrupting the functioning of society". For example, the Convention on the Transboundary Effects of Industrial Accidents applies to the prevention of, preparedness for and response to industrial accidents "capable of causing transboundary effects", including those caused by natural disasters.[242] The preamble of ILO Convention (No. 174) concerning the Prevention of Major Industrial Accidents, adopted in 1993, recognizes "the need to ensure that all appropriate measures are taken to: (*a*) prevent major accidents; (*b*) minimize the risks of major accidents; and (*c*) minimize the effects of major accidents".

89. The Convention on the Transboundary Effects of Industrial Accidents obliges States parties to "take appropriate measures" to prevent industrial accidents through "preventive, preparedness and response measures".[243] States parties must take "appropriate legislative, administrative and financial measures" to implement their prevention obligations[244] and establish emergency preparedness mechanisms to respond to industrial accidents.[245] For example, the Convention states that "the Parties shall take appropriate measures for the prevention of industrial accidents, including measures to induce action by operators to reduce the risk of industrial accidents".[246] Thus, although States are required under the Convention only to take steps to prevent transboundary accidents, the accidents themselves, especially in the case of natural disasters, occur within the State, and the State's due diligence obligation revolves around domestic prevention of internal industrial accidents.

90. A specific type of man-made disaster can arise as a result of nuclear activity. Several instruments refer to prevention in this context. Under the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, the general provisions require States to cooperate to minimize the consequences of a nuclear disaster by entering into agreements "for preventing or minimizing injury and damage which may result in the event of a nuclear accident or radiological emergency".[247] Similarly, the Convention on Nuclear Safety seeks to "prevent accidents with radiological consequences and to mitigate such consequences should they occur".[248] This convention, unlike the Convention on the Transboundary Effects of Industrial Accidents, does not apply only to activities that may cause harm to other States. Instead, it applies to any civilian nuclear installation regardless of its potential transboundary harm. Although the Convention on Nuclear Safety never expressly articulates a duty of States to prevent nuclear accidents, it is clear that the entire object and purpose of the Convention is to create international obligations to promote nuclear safety in order to prevent nuclear disasters.[249] Moreover, the Convention requires States parties to take "legislative, regulatory and administrative measures and other steps necessary" for implementing it.[250] The Convention works in conjunction with the Convention on Early Notification of a Nuclear Accident. That Convention, with 115 States parties, establishes a notification system through the International Atomic Energy Agency for any nuclear accident that has the potential for transboundary harm to another State.[251] It mandates States to notify those States that could be affected by significant nuclear accidents listed in article 1 not only about the existence of the harm but also about information relevant for mitigation damage.[252]

91. Core international environmental law instruments also require States to take preventive steps regarding potential environmental disasters. The United Nations Framework Convention on Climate Change, for example, recognizes that "Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects".[253] The Convention specifically requires developed countries listed under its annex I to adopt national policies to mitigate climate change through the reduction of greenhouse gas emissions[254] and commits all parties to formulate and implement domestic measures to mitigate climate change.[255] It is important to note that, under the Convention, States' duties to mitigate climate change and its resulting effects do not depend on transboundary harm to other States. Instead, the Convention applies to all anthropogenic emissions of greenhouse gas emissions, regardless of their potential effect on other countries. Moreover, in 2007, the States parties to the Convention recognized the link between climate change and disaster risk reduction by adopting the Bali Action Plan, in which States were called upon to adapt their national climate change plans to reflect "disaster reduction strategies".[256]

92. Other environmental conventions on specific areas such as biological diversity, desertification and environmental impact assessments also incorporate a duty to prevent in circumstances that could become disasters. For example, although the Convention on biological diversity focuses on responsibility for transboundary environmental damage,[257] it also requires each State party to develop national strategies on environmental conservation[258] and implement procedures for environmental impact assessments for projects likely to have significant adverse effects on biological diversity.[259] Similarly, the United Nations Convention to Combat Desertification calls upon States to implement programmes to "combat desertification and/or mitigate the effects of drought"[260] through appropriate and necessary legislation and regulatory measures[261] and national action programmes encompassing early warning

[242] Art. 2, para. 1.
[243] Art. 3, para. 1.
[244] Art. 3, para. 4.
[245] Art. 8, para. 1.
[246] Art. 6, para. 1.
[247] Art. 1, paras. 1 and 2.
[248] Art. 1, para. (iii).
[249] *Ibid.*
[250] Art. 4. See also art. 7.
[251] Art. 1, para. 1.
[252] Art. 2.
[253] Art. 3, para. 3.
[254] Art. 4, para. 2 (*a*).
[255] Art. 4, para. 1 (*b*).
[256] FCCC/CP/2007/6/Add.1, decision 1/CP.13, para. 1 (*c*) (iii).
[257] Art. 3.
[258] Arts. 6–7.
[259] Art. 14.
[260] Art. 3 (*a*).
[261] Arts. 4–5.

systems.[262] Lastly, the Convention on environmental impact assessment in a transboundary context sets out the obligations of States parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult one another on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries. In particular, it requires States parties to "take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities".[263] In this way, the Convention, just as the other environmental treaties, closely tracks article 3 of the draft articles on prevention of transboundary harm, laying down the general duty of States to prevent significant transboundary harm.

93. Moreover, although many environmental conventions focus on the duty to prevent deleterious transboundary effects, there is significant overlap between the topics covered by these conventions and disaster situations. These international instruments are also constructive because they each contain a duty of due diligence.

### (b) *Regional instruments*

#### (i) *Asia*

94. In Asia and the Pacific, the ASEAN Agreement on Disaster Management and Emergency Response is the most specific and comprehensive international instrument binding States to prevent and mitigate disasters through the adoption of disaster risk reduction mechanisms. The treaty, signed in 2005, entered into force in 2009 and has been ratified by all 10 States members of ASEAN. It aims to "provide effective mechanisms to achieve substantial reduction of disaster losses in lives and in the social, economic and environmental assets of the Parties, and to jointly respond to disaster emergencies".[264] It states that States parties "shall give priority to prevention and mitigation, and thus shall take precautionary measures to prevent, monitor and mitigate disasters".[265] In terms of mitigation, it expressly requires that States parties "immediately respond to a disaster occurring within their territory",[266] and each of these obligations must be met by taking necessary legislative and administrative measures.[267]

95. The Agreement contains three primary categories of disaster risk reduction obligations: risk identification and monitoring; prevention and mitigation; and disaster preparedness. First, States parties must identify all disaster risks within their territory and assign disaster risk levels to each potential hazard.[268] Second, article 6 requires States parties, jointly or individually, to "identify, prevent and reduce risks arising from hazards".[269] The Agreement then places the onus on "each Party" to adopt and implement legislative and regulatory measures on disaster mitigation and to strengthen local and national disaster management plans.[270] Lastly, States parties have a duty to prepare for disasters by establishing and maintaining "national disaster early warning arrangements"[271] and by developing strategies and response plans to reduce losses from disasters.[272] Together, these provisions create a comprehensive duty on all States members of ASEAN to take measures necessary to prevent, prepare for and mitigate disasters.

96. Other (non-binding) agreements in Asia also encourage States to work individually and together to reduce the risk of disasters. For example, the Asia-Pacific Economic Cooperation (APEC) forum adopted the APEC Framework for Capacity Building Initiatives on Emergency Preparedness, urging States to cooperate in a number of initiatives, including with regard to the legislative frameworks of member States. The APEC Principles on Disaster Response and Cooperation, adopted in 2008, also call upon individual member States to formulate and implement disaster risk mitigation and preparedness policies and early warning systems.[273] In addition, in the wake of the 2004 tsunami in Asia, the South Asian Association for Regional Cooperation endorsed a new comprehensive framework on early warning and disaster management, in which States committed themselves to developing and implementing risk reduction programmes within their own territories and to providing support to regional early warning systems.[274] In addition, the Delhi Declaration on Disaster Risk Reduction in Asia 2007 includes extensive provisions urging States to implement the Hyogo Framework for Action and to pass and strengthen legislative frameworks for disaster risk reduction.[275] The Dhaka Declaration on South Asia's Environmental Challenges and Natural Disasters calls for regional measures of prevention.[276] The Incheon Declaration on Disaster Risk Reduction in Asia and the Pacific 2010 reaffirms the commitment to the Hyogo Framework for Action and urges Governments and international actors to implement its five priorities for action.[277]

#### (ii) *Africa*

97. Various African organizations have established regional and subregional agencies that facilitate information-sharing and capacity-building tools relating to disaster risk reduction. Article 13, paragraph 1 (*e*) of the Constitutive Act of the African Union provides that its Executive Council may "take decisions on policies in areas of common interest to the Member States, including … environmental protection, humanitarian action and disaster response and relief". Pursuant to this mandate, the African Union and

[262] Art. 10, para. 3 (*a*).

[263] Art. 2, para. 1.

[264] Art. 2.

[265] Art. 3, para. 4.

[266] Art. 4 (*b*).

[267] Art. 4 (*d*).

[268] Art. 5.

[269] Art. 6, para. 1.

[270] Art. 6, para. 2.

[271] Art. 7.

[272] Art. 8.

[273] Available from http://aimp.apec.org/Documents/2008/SOM/CSOM/08_csom_020.pdf.

[274] Available from www.saarc-sec.org.

[275] Available from http://siteresources.worldbank.org/CMUDLP/Resources/Delhi_Declaration_on_DRR_2007.pdf.

[276] Available from http://saarc-sec.org/uploads/digital_library_document/13_-_Dhaka_-_13th_Summit_12-13_Nov_2005.pdf, para. 33.

[277] Available from www.unisdr.org/files/16327_incheondeclaration4amcdrrrev3.pdf.

the New Partnership for Africa's Development adopted the Africa Regional Strategy for Disaster Risk Reduction in 2004.[278] The Strategy is intended to facilitate initiatives at the subregional and national levels.[279]

98. In addition, the Economic Community of West African States approved its policy for disaster risk reduction in 2006 and recently established an implementation mechanism on disaster risk reduction, consisting of a ministerial coordination committee and a disaster management task force in the secretariat.[280] That mechanism has a mandate to coordinate State requests for international assistance and the mobilization of emergency response teams for member States. In 2002, the Intergovernmental Authority on Development (IGAD) developed a regional disaster risk management programme addressing issues relating to disaster risk reduction and management, including support for building national legislation on disaster management and identifying opportunities "for agreements on mutual assistance and development in disaster management at regional level and for cross-border agreements on harmonizing disaster management arrangements".[281]

99. Currently, the East African Community is enacting a disaster risk reduction and management bill as an attempt to operationalize article 112 (1) (*d*) of the Treaty for the Establishment of the East African Community, in which the partner States agreed to take necessary disaster preparedness, management, protection and mitigation measures especially for the control of natural and man-made disasters.

(iii) *Arab region*

100. In the Arab region, the League of Arab States developed the Arab Strategy for Disaster Risk Reduction 2020, which was adopted by the Council of Arab Ministers Responsible for the Environment at its twenty-second session, on 19 December 2010.[282] The strategy has two purposes: "to outline a vision, strategic priorities and core areas of implementation for disaster risk reduction in the Arab region" and "to enhance institutional and coordination mechanisms, and monitoring arrangements to support the implementation of the Strategy at the regional, national and local level through preparation of a Programme of Action".[283] Deriving from the Hyogo Framework for Action and based on the purpose of the Arab Strategy, five corresponding key priorities were developed: strengthen commitment for comprehensive disaster risk reduction across sectors; develop capacity to identify, assess and monitor disaster risks; build resilience through knowledge, advocacy, research and training; improve accountability for disaster risk management at the subnational and local levels; and integrate disaster risk reduction into emergency response, preparedness and recovery.[284] The implementation of the programme was envisaged in two phases, with a review in 2015, and the expected outcome in 2020 to substantially reduce "disaster losses, in lives and in the social, economic and environmental assets of communities and countries across the Arab region".[285]

(iv) *Europe*

101. Developments in Europe centre on the involvement of the European Union in prevention, preparedness and mitigation strategies originally referred to as civil protection. Since 1985, when a ministerial-level meeting in Rome addressed the issue, several resolutions on civil protection have been adopted, building the foundation on which disaster risk reduction today stands.[286] Civil protection in the European Union was lifted to another level with the adoption of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, which entered into force on 1 December 2009. The resulting consolidated version of the Treaty on the Functioning of the European Union regulated the competences of European Union organs, including as regards article 196 of the Treaty, on civil protection, and established a legal basis for European Union actions thereon.

102. The competence granted in article 196 is only a complementary competence "to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas" (art. 2, para. 5). Pursuant to the Treaty of Lisbon:

> 1. The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters. Union action shall aim to:
>
> (*a*) support and complement Member States' action at national, regional and local level in risk prevention, in preparing their civil-protection personnel and in responding to natural or man-made disasters within the Union;
>
> (*b*) promote swift, effective operational cooperation within the Union between national civil-protection services;

[278] Available from www.unisdr.org/files/13093_AFRICAREGIONALDRRSTRATEGYfullPDF.pdf.

[279] One of the express objectives of the Strategy is to "increase political commitment to disaster risk reduction" (para. 3.2).

[280] The policy is available from www.preventionweb.net/files/4037_ECOWASpolicyDRR.pdf. Under the policy, "national authorities recognize the need to develop and strengthen institutions required to build resilience to hazards", meaning that "political commitment to disaster risk reduction is increasing in the sub-region" (para. 2.2.1).

[281] IGAD, "Disaster risk management programme for the IGAD region", p. 18.

[282] Available from www.preventionweb.net/publications/view/18903.

[283] Available from www.preventionweb.net/files/18903_17934asdrrfinalenglishjanuary20111.pdf.

[284] *Ibid.*, p. 4.

[285] *Ibid.*

[286] Resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council of 25 June 1987 on the introduction of Community Cooperation on Civil Protection (25 June 1987), *Official Journal of the European Communities*, No. C 176, 4 July 1987, p. 1; resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council on the new developments in Community cooperation on civil protection (13 February 1989), *ibid.*, No. C 44, 23 February 1989, p. 3; resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council on Community cooperation on civil protection (23 November 1990), *ibid.*, No. C 315, 14 December 1990, p. 1; resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council on improving mutual aid between Member States in the event of natural or technological disaster (8 July 1991), *ibid.*, No. C 198, 27 July 1991, p. 1; resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council on strengthening Community cooperation on civil protection (31 October 1994), *ibid.*, No. C 313, 10 November 1994, p. 1; and resolution of the Council and of the representatives of the Governments of the Member States, meeting within the Council on strengthening the capabilities of the European Union in the field of civil protection (26 February 2001), *ibid.*, No. C 82, 13 March 2001, p. 1.

(*c*) promote consistency in international civil-protection work.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to help achieve the objectives referred to in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.[287]

103. Lastly, article 222 of the consolidated version of the Treaty on the Functioning of the European Union, known as the "solidarity clause", enshrines an obligation for member States to "act jointly in a spirit of solidarity if a Member State is… the victim of a natural or man-made disaster". This "hard-law" provision sets the European Union apart from other regional coordination schemes: any action taken by it under this provision will need to be enacted within the ordinary legislative procedure (art. 294 of the Treaty) and thereby established as European Union law, in the form of regulations, directives and decisions.[288]

104. In 2001, the European Union established the Community Mechanism for Civil Protection "to ensure even better protection in the event of natural, technological, radiological and environmental emergencies".[289] The mechanism, which was reformed and updated in 2007,[290] successfully enhanced European Union protection strategies in emergencies for the subsequent years, also in third States.[291] Recently, the European Union proposed a decision on a new reformed European Union civil protection mechanism.[292] While the emphasis of the Mechanism in force since 2007 is mainly on preparedness and response, the 2007 reform envisaged some rules on prevention and early warning.[293] The proposal, in comparison, aims to develop an "integrated approach" to disaster management, including prevention, preparedness and response. This would include the establishment of an emergency response centre; the development of reference scenarios for the main types of disaster; the development of contingency plans in member States; and pre-committed civil protection assets (pooling).[294] One specific objective would thus be "to achieve a high level of protection against disasters by preventing or reducing their effects and by fostering a culture of prevention" and "to enhance the Union's state of preparedness to respond to disasters".[295]

105. The involvement of the European Union in the implementation of disaster risk reduction can be better appreciated in a number of normative activities carried out at the European Union level. In 2008, the European Commission approved a communication on reinforcing the disaster response capacity of the Union, which was a preliminary effort to pave the way towards a European Union approach to disaster risk reduction. In 2009, the Commission adopted two communications relating to disaster risk reduction: a community approach on the prevention of natural and man-made disasters[296] and a strategy for supporting disaster risk reduction in developing countries.[297] The former plays a fundamental role in the European Union effort towards a common enabling environment for disaster risk reduction.[298] In particular, it identifies specific areas in which action at the European Union level could provide added value: establishing a European Union-level inventory of existing information and best practices; developing guidelines on hazards and risk mapping; linking actors and policies throughout the disaster management cycle; improved access to early warning systems; and more efficient targeting of community funds.

106. On 20 March 1987, the Council of Europe Committee of Ministers adopted resolution 87 (2), creating a cooperation group for the prevention of, protection against and organization of relief in major natural and technological disasters. This intergovernmental forum, now known as the European and Mediterranean Major Hazards Agreement, fosters research, public information and policy dialogue on disaster-related matters among its 27 member States.

107. The Council of Europe has stressed the imperative nature of the duty to prevent and mitigate the risks of nuclear disasters. In resolution 1087 (1996), on the consequences of the Chernobyl disaster, the Council of Europe Parliamentary Assembly recognized that "urgent action is imperative and must be viewed as an overriding priority for the international community" to take "practical steps to avert or at the very least reduce such risks" of a nuclear disaster (paras. 10–11).

108. European subregional groups have been also active in signing binding agreements containing disaster risk reduction elements. For example, in 1998, the Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters set out procedures to request assistance, required requesting States to "ensure unobstructed receipt and distribution of goods of assistance exclusively among the afflicted population" without discrimination, and called upon them to simplify and expedite customs procedures and waive customs fees and charges. In 1992, the States members of the Central

[287] Art. 176 C.

[288] Gestri, "EU Disaster response law: principles and instruments", pp. 116–117.

[289] Council Decision of 23 October 2001 establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions (2001/792/EC), *Official Journal of the European Communities*, No. L 297, 15 November 2001, p. 7.

[290] Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism (recast)(2007/779/EC), *Official Journal of the European Union*, No. L 314, (1 December 2007), p. 9.

[291] See the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions—Improving the Community Civil Protection Mechanism (COM/2005/137 final), p. 2.

[292] See the Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism (COM/2011/934 final).

[293] Communication from the Commission to the Council and the European Parliament—EU strategy for supporting disaster risk reduction in developing countries (COM/2009/84 final).

[294] See the Proposal for a Decision on a Union Civil Protection Mechanism (footnote 292 above).

[295] *Ibid*., art. 3, para. 1 (*a*)–(*b*).

[296] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—A Community approach on the prevention of natural and man-made disasters (COM/2009/82 final).

[297] See footnote 293 above.

[298] See La Vaccara, "An enabling environment for disaster risk reduction", pp. 199 and 208.

European Initiative adopted the Cooperation Agreement on the Forecast, Prevention and Mitigation of Natural and Technological Disasters, requiring member States to cooperate with one another to adopt prevention and mitigation measures (arts. 1–2). The agreement also sets up a joint committee responsible for developing "procedures for tighter solidarity" for cooperation in response to a disaster (arts. 4–5).

(v) *Latin America and the Caribbean*

109. The Inter-American Convention to Facilitate Disaster Assistance, adopted in 1991, is the only regional convention for the entire Americas directly relating to disasters. The Convention, which entered into force in 1996, exclusively focuses on disaster response and is thus of limited value in determining pre-disaster responsibilities of States.

110. At the subregional level, however, agreements place increasing importance on disaster prevention and mitigation. In 1999, the Association of Caribbean States adopted its own treaty on disaster response: the Agreement between Member States and Associate Members of the Association of Caribbean States for Regional Cooperation on Natural Disasters.[299] The Agreement expressly aims to create "a network of legally binding mechanisms that promote co-operation for prevention, mitigation and management of natural disasters" (art. 2). Pursuant to the Agreement, the Contracting Parties agree to promote "the formulation and implementation of standards and laws, policies and programmes for the management and prevention of natural disasters, in a gradual and progressive manner", including through the identification of "common guidelines and criteria" in a number of areas, such as the classification of humanitarian supplies and donations (arts. 4 and 7). The Declaration of Panama[300] adopted at the Fourth Summit of Heads of State and/or Government of the Association of Caribbean States, affirmed the importance of prevention in reducing vulnerability to disasters in the following terms:

> We acknowledge the vulnerability of our countries and territories to natural disasters and their negative impact on our efforts to ensure sustainable development; we also share the idea that the best way to combat vulnerability to natural disasters is to integrate disaster management and risk reduction into development policies and plans at all levels of our governments. We further reaffirm the importance of international cooperation, particularly at the regional level, in order to strengthen the national and regional bodies dedicated to the prevention and mitigation of risks and natural disasters.[301]

111. Other subregional instruments have established agencies to coordinate disaster risk reduction efforts. For example, in 1991, States members of the Caribbean Community adopted the Agreement Establishing the Caribbean Disaster Emergency Response Agency. The Agreement tasks the Agency with building national capacities for disaster response. States parties commit themselves to taking a number of steps to ensure that their national disaster response systems are adequately prepared (art. 4). They also commit themselves to reducing legal barriers to the entry of personnel and goods, providing protection and immunity from liability and taxation to assisting States and their relief personnel, and facilitating transit (arts. 21–23).

112. In addition, in 1993, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama created the Coordination Centre for the Prevention of Natural Disasters in Central America under the Central American Integration System as a specialized agency charged with coordinating implementation of the Regional Disaster Reduction Plan. The Coordination Centre revised its founding agreement in 2003 to reflect principles such as international cooperation, promotion of human rights (including the right to be protected for disasters) and the participation of the public in disaster management planning. The Coordination Centre itself is tasked with facilitating technical assistance and cooperation among member States in disaster prevention and mitigation.

## D. National policy and legislation

113. As previously noted,[302] following the International Decade for Natural Disaster Reduction, States engaged in various actions to unify efforts to better prepare for and reduce the harmful impact of disasters. The resulting two main agreements—the Yokohama Strategy and the Hyogo Framework for Action—both call upon States to implement national legislation that includes disaster prevention, mitigation and preparedness.

114. As stated above,[303] States have implemented the Hyogo Framework for Action by incorporating disaster risk reduction into national policy and legal frameworks. In the 2011 review, 64 States or areas reported having established specific policies on disaster risk reduction, evenly spread throughout all continents and regions, including the major hazard-prone locations. They are: Algeria, Anguilla, Argentina, Armenia, Bangladesh, Bolivia (Plurinational State of), Brazil, British Virgin Islands, Canada, Cape Verde, Chile, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Cuba, Dominican Republic, Fiji, Finland, Georgia, Germany, Ghana, Guatemala, Honduras, India, Indonesia, Italy, Japan, Kenya, Lao People's Democratic Republic, Lebanon, Madagascar, Malawi, Malaysia, Maldives, Marshall Islands, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Nepal, New Zealand, Nicaragua, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Saint Kitts and Nevis, Saint Lucia, Samoa, Senegal, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, the former Yugoslav Republic of Macedonia, United Republic of Tanzania, United States, Vanuatu and Venezuela (Bolivarian Republic of).

115. More recently, UNISDR has identified 76 States that have adopted national platforms, defined as a "coordinating mechanism for mainstreaming disaster risk reduction into development policies, planning and programmes", to implement disaster risk reduction strategies.[304]

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[299] The text of this Agreement, not yet in force, is available from www.acs-aec.org.

[300] See footnote 188 above.

[301] Para. 20.

[302] See para. 35 above.

[303] *Ibid.*

[304] For a continuously updated list of States that have adopted national platforms, see www.unisdr.org/partners/countries.

116. The Secretariat has pointed out that legal and policy frameworks relating more directly to prevention have typically been implemented at the national level versus the regional or international level.[305] Several countries have adopted legislation specifically addressing disaster risk reduction either as stand-alone legislation or as part of a broader legal framework concerning both disaster risk management and disaster response. States and territories that have enacted national and territorial laws envisaging disaster risk reduction include Algeria,[306] Cameroon,[307] the Dominican Republic,[308] El Salvador,[309] Estonia,[310] France,[311] Guatemala,[312] Haiti,[313] Hungary,[314] India,[315] Indonesia,[316] Italy,[317] Madagascar,[318] Namibia,[319] New Zealand,[320] Pakistan,[321] Peru,[322] the Philippines,[323] the Republic of Korea,[324] Slovenia,[325] South Africa,[326] Taiwan Province of China,[327] Thailand[328] and the United States.[329]

117. By way of illustration, a few examples of the integration of prevention into legislative or policy frameworks may be given. After South Africa passed the Disaster Management Act in 2002, it followed with a detailed policy document on its national disaster management framework. In addition, South Africa has a number of laws relating to disasters, such as fires, and associated with disaster prevention, such as those relating to environmental impact assessments. Namibia has incorporated prevention into its Disaster Risk Management Act of 2012, intended "to provide for an integrated and coordinated disaster management approach that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery".[330] The Philippines has included prevention in governance structures, defining it as

> the outright avoidance of adverse impacts of hazards and related disasters. It expresses the concept and intention to completely avoid potential adverse impacts through action taken in advance such as construction of dams or embankments that eliminate flood risks, land-use regulations that do not permit any settlement in high-risk zones, and seismic engineering designs that ensure the survival and function of a critical building in any likely earthquake.[331]

118. Colombia has recently strengthened its national policy framework relating to disaster management to include prevention under a single comprehensive framework. The National Disaster Risk Management System Act, adopted in April 2012, established a national system for disaster risk management and includes provisions on both disaster prevention and response. It creates a framework with various government bodies such as the Disaster Risk Management Unit and the National Disaster Prevention and Response System.[332]

119. Several States have also implemented policies focused on disaster risk reduction as a supplement to legislation or as stand-alone efforts. For example, Ghana has developed a national disaster risk reduction policy to integrate disaster risk reduction into planning and operation of public institutions. Ghana stated at the third session of the Global Platform for Disaster Risk Reduction, in 2011, that disaster risk reduction was among the key factors in considering good governance and sustainable development.[333] Bangladesh provides another example of robust policies in the absence of a formal law, including the coordination of 12 ministries under a comprehensive disaster management programme and the formulation of a national disaster management plan for the period 2010–2015, a climate change strategy and action plan (2009) and standing orders on disaster.[334]

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[305] A/CN.4/590 and Add.1–3 (footnote 78 above), para. 33.

[306] Algeria, Act on the prevention of major risks and the management of disasters within the framework of sustainable development, of 25 December 2004, available from www.mtp.gov.dz/GUIDE%20JURIDIQUE/textes-de-portee-generale/5-Loi-n2004-20.pdf.

[307] Cameroon, *Arrêté No. 037/PM du 19 mars 2003 portant création, organisation et fonctionnement d'un Observatoire National des Risques*.

[308] Dominican Republic, Decree No. 874-09 approving the Regulation for the application of Law No. 147-02 on Risk Management and repealing chapters 1, 2, 3, 4 and 5 of Decree No. 932-03 (2009).

[309] El Salvador, Law on Civil Protection, Disaster Prevention and Disaster Mitigation (2005).

[310] Estonia, Emergency Preparedness Act (2000).

[311] France, Law No. 2003-699 regarding the prevention of technological and natural risks and reparation of damages (2003).

[312] Guatemala, Decree No. 109-96, Law on the National Coordinator for the Reduction of Natural or Man-made Disasters (1996).

[313] Haiti, National Risk and Disaster Management Plan (2001).

[314] Hungary, Act LXXIV on the direction and organization of disaster prevention and the prevention against serious accidents related to hazardous materials (1999).

[315] India, Disaster Management Act, No. 53 (2005), available from http://indiacode.nic.in.

[316] Indonesia, Law No. 24 of 2007 Concerning Disaster Management.

[317] Italy, Decree of the Prime Minister to establish a national platform for disaster risk reduction (2008).

[318] Madagascar, Decree No. 2005-866 setting out the manner of application of Law No. 2003-010 of 5 September 2003 on the national risk and disaster management policy (2005).

[319] Namibia, Disaster Risk Management Act (2012).

[320] New Zealand, National Civil Defence Emergency Management Plan Order 2005 (SR 2005/295), part 3.

[321] Pakistan, National Disaster Management Act (2010). See also the official statement of the Government of Pakistan at the third session of the Global Platform for Disaster Risk Reduction, in 2011, available from www.preventionweb.net/files/globalplatform/pakistanofficialstatement.pdf.

[322] Peru, Law No. 29664 creating the National System for Disaster Risk Management (2011).

[323] The Philippines, Philippine Disaster Risk Management Act (2006).

[324] Republic of Korea, National Disaster Countermeasures Act (1995); National Disaster Management Act (2010).

[325] Slovenia, Act on the Protection against Natural and Other Disasters (2006).

[326] South Africa, Disaster Management Act No. 57 of 2002.

[327] Taiwan Province of China, Disaster Prevention and Response Act (2002).

[328] Thailand, Disaster Prevention and Mitigation Act (2007).

[329] United States, Disaster Mitigation Act of 2000.

[330] Namibia, Disaster Risk Management Act (2012), preambular paragraph.

[331] The Philippines, Implementing Rules and Regulations of Republic Act No. 10121, rule 2, sect. 1 (l).

[332] World Bank, "For the first time, Colombia has a natural disaster awareness and prevention policy—Colombia's President Juan Manuel Santos", 24 April 2012.

[333] See www.preventionweb.net/files/globalplatform/globalplatform2011ghana.docx.

[334] At the third session of the Global Platform, in 2011, the Government of Bangladesh noted that the issue of framing a national disaster management act remained under its active consideration. See http://preventionweb.net/files/globalplatform/bangladeshrevisedstatement.pdf.

120. The present section does not purport to deal with an exhaustive list of national disaster risk reduction legislation, but merely attempts to provide an overview of a variety of approaches. Although the analysis below addresses mainly legislation specifically targeted towards disaster management, other types of legislation are also relevant, including weather forecasting, insurance, land use restriction and right-to-know legislation. The last-mentioned legislation will be discussed briefly below. The present section will summarize key elements of disaster management laws from 14 geographically and economically diverse States, some of which were identified in the memorandum by the Secretariat,[335] while others have been chosen to diversify the sampling on the basis of geography and economic development. The present section will explore features of disaster legislation adopted by Algeria,[336] Bolivia (Plurinational State of),[337] Colombia,[338] Costa Rica,[339] Cuba,[340] India,[341] Japan,[342] Nicaragua,[343] the Philippines,[344] South Africa,[345] Sri Lanka,[346] the United Kingdom,[347] United States[348] and Viet Nam.[349]

121. Before describing in some detail the key elements of the legislation studied, the present section will explore two common aspects of that legislation that demonstrate States' recognition of an obligation to take steps to address disasters. First, the States do not vary widely in determining the scope of the problem that they seek to address. Principally, the legislation aims to protect against both natural and man-made disasters. The major distinction lies in the specificity of examples provided within the text of the legislation. For instance, Sri Lanka includes in its definition of natural or man-made catastrophes a long list of potential qualifying incidents, including landslides, cyclones, fires, chemical accidents, civil or internal strife, nuclear disaster and oil spills.[350] In Nicaragua, the law addresses both natural and man-made disasters, but presents a long list of natural disasters that could qualify without providing a parallel list for man-made disasters.[351] Other States provide a broad definition of disaster without giving more specific examples. For example, the legislation in the Philippines defines "disaster" as "a serious disruption of the functioning of a community".[352] A few laws are specific to floods or storms: although these limitations tend to be reflected in the title, they could potentially apply to both natural and man-made floods.[353] Several States also incorporate a requirement that an event must cause harm to people, property or the economy in order to be truly considered a disaster.[354] Read together, however, these laws demonstrate a recognized obligation to craft legislation addressing natural and man-made disasters.

122. A second element of disaster legislation that signals States' obligations is the two distinct methods by which States indicate the object, purpose and goals of the legislation. The more common approach simply declares that the legislation is intended to set forth a framework to manage disaster risks with an aim of preventing disasters, mitigating harm and increasing a State's disaster preparedness.[355] A handful of other States also supplement

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[335] A/CN.4/590 and Add.1–3 (footnote 78 above).

[336] See footnote 306 above.

[337] Plurinational State of Bolivia, Risk Reduction and Disaster Attention Act (2000), Law No. 2140, available from www.preventionweb.net/files/30230_bol2140.pdf.

[338] Colombia, Law No. 1523 of 24 April 2012 adopting the National Policy on Disaster Risk Management and establishing the National System of Disaster Risk Management and containing other provisions. Shortly before the adoption of the law, the World Bank had released a comprehensive study of the disaster risk management policies in Colombia, in which it criticized the country's framework, which may have influenced the shape of the new legislation. See World Bank, *Analysis of Disaster Risk Management in Colombia: A Contribution to the Creation of Public Policies*.

[339] Costa Rica, National Emergency and Risk Prevention Act (2011), Law No. 8488 of 11 January 2006.

[340] Farber and Chen, *Disasters and the Law: Katrina and Beyond*, pp. 211–212.

[341] See footnote 315 above.

[342] Japan, Disaster Countermeasures Basic Act, Act No. 223 (1961, revised 1997).

[343] Nicaragua, Law No. 337 (2000), Law Establishing a National System for the Prevention of, Mitigation of and Attention to Disasters.

[344] The Philippines, Philippine Disaster Risk Reduction and Management Act of 2010, Rep. Act No. 10121.

[345] See footnote 326 above.

[346] Sri Lanka, Disaster Management Act, No. 13 of 2005, 13 May 2005.

[347] United Kingdom, Flood and Water Management Act (2010).

[348] United States, Homeland Security Act of 2002, 6 U.S.C., paras. 311–321 (setting forth the mission, obligations and powers of the Federal Emergency Management Agency).

[349] Viet Nam, Ordinance of Prevention and Control of Floods and Storms and Implementation Provisions, No. 09-L/CTN (1993).

[350] Sri Lanka, Disaster Management Act, art. 25. See also Algeria, Risk Prevention and Disaster Management Act (footnote 306 above), arts. 2 and 10 (including earthquakes, floods, fires, industrial and nuclear accidents and health epidemics); and Japan, Disaster Countermeasures Basic Act (footnote 342 above), art. 2, which indicates that "disaster" refers to a storm, flood, earthquake, tsunami or other unusual natural event, a conflagration or explosion or any other damage of similar extent.

[351] Nicaragua, Law Establishing a National System for the Prevention of, Mitigation of and Attention to Disasters (footnote 343 above), art. 3.

[352] The Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), para. 3. See also Plurinational State of Bolivia, Risk Reduction and Disaster Attention Act (footnote 337 above), art. 1 (protecting against natural, technological and man-made threats); United States, Homeland Security Act (footnote 348 above), para. 313 (*b*) (2) (A) (protecting "against the risk of natural disasters, acts of terrorism, and other man-made disasters, including catastrophic incidents"); India, Disaster Management Act (footnote 315 above), art. 2 ("disaster" refers to natural or man-made catastrophes or accidents or negligence).

[353] See Viet Nam, Ordinance of Prevention and Control of Floods and Storms and Implementation Provisions (footnote 349 above), art. 2; United Kingdom, Flood and Water Management Act (footnote 347 above), art. 1 (covering floods and coastal erosion, including dam breaches, but not flooding where high rainfall has caused the sewage system to overflow).

[354] South Africa, Disaster Management Act No. 57 of 2002 (footnote 326 above), para. 1 (Disaster means "a progressive or sudden, widespread or localized, natural or human-caused occurrence which causes or threatens to cause, death, injury or disease, damage to property, infrastructure or the environment, or disruption of the life of a community, and which is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources".); and Colombia, Law establishing the National System of Disaster Risk Management (footnote 338 above), art. 4, para. 8 (declaring that disasters are the result of natural or unintentional man-made occurrences that cause harm or loss to persons, property, the economy or the environment).

[355] See South Africa, Disaster Management Act (footnote 326 above), preamble (providing for "a disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery"); Viet Nam, Ordinance of Prevention and Control of Floods and Storms and Implementation

such statements of purpose with more general goals, such as protecting life,[356] or motivations for the act, such as prior experience with disasters.[357] Still, for example, the Indian National Disaster Management Act specifically requires measures for the prevention of disasters, the integration of mitigation measures and disaster preparedness capacity-building.[358] The United States adopts a slightly more precise approach, suggesting that the Federal Emergency Management Agency "develop guidance" on "identifying potential hazards and assessing risk and impacts; mitigating the impact of a wide variety of hazards … managing necessary emergency preparedness and response recourses".[359] These statements of purpose identify prevention, mitigation and preparedness as specific goals of the States. For the sake of coherence, the present section will refer to those three recognized components of the disaster reduction framework in describing the particular features of the States' laws that are of relevance.

Provisions (footnote 349 above), preamble (setting out provisions for activities conducted for the prevention, control and mitigation of the consequences of floods and storms); United Kingdom, Flood and Water Management Act (footnote 347 above), preamble (stating that the act is for the management of risks in connection with flooding and coastal erosion); United States, Homeland Security Act (footnote 348 above), para. 313 (*b*) (2) (A) (leading "the nation's efforts to prepare for, protect against, respond to, recover from [disasters]"); India, Disaster Management Act (footnote 315 above), preamble (providing the effective management of disasters); Nicaragua, Law Establishing a National System for the Prevention of, Mitigation of and Attention to Disasters (footnote 343 above), art. 1 (stating that the law's purpose is to establish principles, norms and instruments necessary to create a system for the disaster prevention risk reduction, mitigation and preparedness); Plurinational State of Bolivia, Risk Reduction and Disaster Attention Act (footnote 337 above), art. 1 (regulating all activities in the field of the reduction of risks and warnings of disasters and emergencies, establishing an institutional framework that reduces risks from disasters and emergencies); Colombia, Law establishing the National System of Disaster Risk Management (footnote 338 above), art. 1 (disaster management, accomplished through a process of policies, strategies, plans and regulations, is necessary for reduction of risk, management of risk, and maintenance of the security, well-being and quality of life for persons); and Algeria, Risk Prevention and Disaster Management Act (footnote 306 above), art. 1 (enacting rules for the prevention of major risks and management of disasters).

[356] See, for example, United States, Homeland Security Act (footnote 348 above), para. 313 (*b*) (2) (mission is to reduce the loss of life and property and protect the nation from all hazards). See also Japan, Disaster Countermeasures Basic Act (footnote 342 above), art. 1 ("For the purpose of protecting the national territory, the life and limb of the citizens and their property, this act shall have for its aim the establishment of a machinery … the formulation of disaster prevention plans … ensuring an effective and organized administration of comprehensive and systematic disaster prevention."); the Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), para. 2 (identifying the State policy to uphold the right to life and strengthen the country's institutional capacity for disaster risk reduction); and Sri Lanka, Disaster Management Act (footnote 346 above), preamble (citing the necessity to protect human life and property of the people and environment of Sri Lanka from disasters).

[357] See, for example, Nicaragua, Law Establishing a National System for the Prevention of, Mitigation of and Attention to Disasters (footnote 343 above), preamble (referencing a handful of motivating factors for adopting the law, among them the United Nations International Decade for Natural Disaster Reduction, the climate phenomena El Niño and La Niña, and the country's history of earthquakes, volcanic eruptions, floods, hurricanes and forest fires). See also Viet Nam, Ordinance on Prevention and Control of Floods and Storms and Implementation Provisions (footnote 349 above), preamble (citing the life and property losses caused by floods and storms).

[358] India, Disaster Management Act (footnote 315 above), art. 11.

[359] United States, Homeland Security Act (footnote 348 above), para. 321 *l*.

### 1. Risk prevention

123. Risk prevention concerns the actions that States take to minimize the likelihood that a disaster will occur. To that end, the legislation discussed shows three main approaches to realizing this goal: risk assessment, information-sharing and land use controls.

#### (a) *Risk assessment*

124. According to the Hyogo Framework for Action,

> [t]he starting point for reducing disaster risk and for promoting a culture of disaster resilience lies in the knowledge of the hazards and the physical, social, economic and environmental vulnerabilities to disasters that most societies face, and of the ways in which hazards and vulnerabilities are changing in the short and long term, followed by action taken on the basis of that knowledge.[360]

125. The Framework has as its second priority for action to "identify, assess and monitor disaster risks and enhance early warning" (para. 14 (2)). Key activities presented within the framework are to:

> (*a*) Develop, update periodically and widely disseminate risk maps and related information to decision makers, the general public and communities at risk in an appropriate format.
>
> (*b*) Develop systems of indicators of disaster risk and vulnerability at national and subnational scales that will enable decision makers to assess the impact of disasters on social, economic and environmental conditions and disseminate the results to decision makers, the public and populations at risk.
>
> (*c*) Record, analyse, summarize and disseminate statistical information on disaster occurrence, impacts and losses, on a regular basis through international, regional, national and local mechanisms.[361]

126. The Yokohama Strategy emphasizes as its first principle that "risk assessment is a required step for the adoption of adequate and successful disaster reduction policies and measures",[362] while the General Assembly has stressed the importance of risk assessment at both the national and local levels in order to reduce vulnerability to hazards and to address the adverse impacts of disasters.[363]

127. Risk assessment at the national level is varied owing to financial and scientific constraints, regional and local needs and each State's individual approach. In 2011, 12 of 15 respondents to a survey of States members of the Group of 20 reported conducting national risk assessments, while the remaining three reported that risk assessments were in development and were to be implemented as early as 2013.[364] A review of national and local risk assessments on the basis of hazard data and vulnerability information reveals that this is the activity most widely

[360] A/CONF.206/6, para. 17.

[361] *Ibid.*

[362] A/CONF.172/9, chap. I, resolution 1, annex I.

[363] General Assembly resolutions 59/233 of 22 December 2004, para. 3; 61/200 of 20 December 2006, para. 7; and 63/217 of 19 December 2008, para. 10.

[364] See the G20/OECD methodological framework on disaster risk assessment and risk financing. Available from www.oecd.org/gov/risk/G20disasterriskmanagement.pdf.

practised as regards any prevention strategy in the Hyogo Framework for Action.[365]

128. There is evidence that States seek assistance for their national assessment of risk. At least 40 countries have sought assistance from the Global Risk Identification Programme of the United Nations Development Programme to improve their knowledge of disaster risk through national risk assessments and national risk information systems.[366] Twelve countries in Latin America and South Asia have sought assistance from the Central American Probabilistic Risk Assessment for technical assistance in risk assessment.[367]

129. Of the 14 States selected for study, a number focus on disaster risk identification, assessment and monitoring. India, for example, requires State-level and district-level plans to identify specific vulnerabilities and develop measures to mitigate harm caused by that vulnerability.[368] In furtherance of these goals, the legislation suggests ensuring that guidelines for prevention and mitigation are followed, and examining the construction of buildings to confirm that they are built to appropriate standards for the prevention of disasters.[369] Risk monitoring can take different forms, but generally involves risk assessments and weather forecasting. For example, the Japanese legislation includes a provision that local governments should engage in weather forecasting to help to prevent disasters caused by storms.[370] In the Philippines, the legislation includes risk assessments and risk knowledge-building.[371] In Viet Nam, the ordinance calls for weather forecasting and tracking and envisages public-private partnership to realize these goals.[372] Similarly, in the Philippines, the legislation requires identifying, assessing and prioritizing hazards and risks,[373] with the aim of consolidating local disaster risk information, including natural hazards, vulnerabilities and climate change risks, to maintain a local risk map.[374]

130. Some States have adopted routine weather monitoring as a means of identifying potential risks. In the United States, for example, the National Weather Service initially began as a means of helping farmers, but its utility for disaster prevention has expanded.[375] Weather forecasting is undertaken by a number of entities in the United States, including the National Weather Service, the Federal Aviation Administration (which provides forecasting to airlines and flights), the National Oceanic and Atmospheric Administration (which uses its systems to implement the country's emergency alert system) and a number of state-level authorities, such as the Utah Department of Transportation (which provides avalanche risk forecasts).[376] In addition, States are cooperating in the development of international weather warning systems under WMO.[377]

(b) *Collection and dissemination of risk information*

131. The collection and dissemination of risk information can contribute to prevention in that it reduces vulnerabilities and builds resilience to hazards. The Hyogo Framework for Action explains this purpose:

> Disasters can be substantially reduced if people are well informed and motivated towards a culture of disaster prevention and resilience, which in turn requires the collection, compilation and dissemination of relevant knowledge in information of hazards, vulnerabilities and capacities.[378]

As further explained in a report on the implementation of the Framework:

> Data collection and dissemination processes allow decision makers and the public to understand a country's exposure to various hazards and its social, economic, environmental and physical vulnerabilities. Such information, disseminated in an appropriate and timely manner, allows communities to take effective action to reduce risk.[379]

132. Under the third priority of action in the Hyogo Framework for Action, States are to undertake a variety of activities towards this end. They include providing for information, management and exchange through activities such as disseminating "easily understandable information on disaster risks and protection options".[380] The Yokohama Strategy called for the collection and dissemination of information "to improve public awareness of natural disasters and the potential to reduce their impact".[381]

133. Data collection and dissemination are part of policies adopted at the national level. For example, China has reported a robust strategy for making risk information available, including through a countrywide public awareness strategy.[382] Other countries have established disaster losses databases so that decision makers are aware of local risks and vulnerabilities.[383]

134. Of the 14 States selected, the legislation adopted in the United Kingdom requires the maintenance of a register of vulnerable structures and suggests dissemination of

[365] See the compilation of national progress reports on the implementation of the Hyogo Framework for Action (2009–2011), Hyogo Framework for Action priority 1, core indicator 1.1, available from www.preventionweb.net/english/hyogo/progress/documents/hfa-report-priority1-1%282009-2011%29.pdf.

[366] Achievements cited include the completion of a national risk assessment and national hazard profile in the Lao People's Democratic Republic; the completion of urban risk assessments in Mexico, Mozambique and Nepal; the establishment of a national disaster observatory in Armenia; and the launch of a comprehensive risk assessment in Mozambique.

[367] Bangladesh, Bhutan, Chile, Colombia, Costa Rica, El Salvador, India, Nepal, Pakistan, Panama, Peru and Sri Lanka.

[368] India, Disaster Management Act (footnote 315 above), art. 21.

[369] *Ibid.*, art. 30.

[370] Japan, Disaster Countermeasures Basic Act (footnote 342 above), art. 35.

[371] The Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), paras. 3–4 and 12.

[372] Viet Nam, Ordinance of Prevention and Control of Floods and Storms and Implementation Provisions (footnote 349 above), arts. 10–11.

[373] The Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), para. 9.

[374] *Ibid.*, para. 12.

[375] Baum, *When Nature Strikes: Weather Disasters and the Law*, p. 3.

[376] *Ibid.*, pp. 9 and 14.

[377] *Ibid.*, p. 15.

[378] A/CONF.206/6, para. 18.

[379] UNISDR, "Implementing the Hyogo Framework for Action in Europe: Advances and Challenges", p. 36, available from www.unisdr.org/files/19690_hfa11web.pdf.

[380] A/CONF.206/6, para. 18 (*i*) (a).

[381] A/CONF.172/9, chap. I, resolution 1, annex I, para. 12 (*a*) (i).

[382] A/66/301, annex, para. 8.

[383] *Ibid.*, para. 24.

flood and erosion risk maps and information.[384] In Algeria, the law establishes that citizens have a right to information on any vulnerabilities or risks that they face with regard to disasters, the services that are available to them for risk prevention and the identity of the actors in charge of disaster management.[385] Colombia has established a national information system for disaster risk management, which is specifically tasked with collecting and making available information relating to standards, protocols, technological solutions and processes that can reduce risk. Essentially, this entity acts as the nation's knowledge bank for issues regarding disaster risk reduction.[386]

135. In some cases, industrial accidents have prompted States to adopt stronger regulations that have, as a side effect, reduced risks of man-made disasters through risk identification and information sharing. In 1984, a chemical gas leak in Bhopal, India, killed and injured thousands of people who lived near a chemical plant.[387] In the aftermath of the incident, India passed laws regulating industrial conduct. The Environment (Protection) Act of 1986 prohibits industry, operations or processing from emitting environmental pollutants in excess of prescribed standards.[388] The Manufacture, Storage and Import of Hazardous Chemicals Rules of 1989 establish a duty on pollution control authorities to routinely inspect industrial establishments[389] and require industrial establishments to submit audit reports and emergency disaster management plans.[390]

136. The Bhopal disaster also spurred the requirement for environmental impact assessment statements, mandatory statements that contain information on any potentially adverse impacts on the environment, and proposed disaster management plans to address such adverse impacts, which are another means for risk identification and information-sharing.[391] Industrial regulations can also involve right-to-know provisions, such as the Emergency Planning and Community Right-to-Know Act, adopted by the United States in 1986, which established a toxic release inventory.[392] This law requires public reporting of the release of toxic chemicals.[393] Other groups then use this information to better understand risks, risk distribution and risk reduction.[394]

### (c) *Land use controls*

137. Land use controls are methods by which States seek to prevent either particular activities in specific vulnerable areas or all types of access to a particular area. The extent of the control would probably depend on the probability and severity of the risk posed in a particular area. Algeria, for example, identifies its major objectives as improving risk awareness and risk monitoring, taking into account risks in construction, and putting in place plans to manage all types of disasters.[395] Before indicating a number of specific actions that the State is permitted to adopt within its disaster management plans, the legislation cites five underlying principles that inform the State's policies: the precautionary principle, the principle of co-existence, the principle of preventive action and swift correction, the principle of participation, and the principle of the integration of new and innovative techniques.[396] It proposes a prohibition on construction and habitation within zones at risk of earthquakes or floods.[397] Similarly, Costa Rica can declare restrictions on land uses in order to avoid disasters.[398] The United Kingdom also grants itself broad powers to restrict or mandate certain uses of land.[399]

138. India adopted the Coastal Regulation Zone Notification in 1991, which controlled developmental activities within 500 metres of the high tide line as a means of mitigating potential harm caused by tsunamis.[400] Land use controls have also been effective in Cuba, where the Institute of Physical Planning establishes regulations to require that certain construction projects meet minimum safety requirements.[401] These regulations can also prohibit construction entirely in certain locations.[402] The Government of Cuba also promotes urbanization by ensuring that rural populations have access to essential government services; by reducing the size of the urban population, disaster risks that are accentuated by overpopulation can be prevented.[403] By implementing these land use controls, States are attempting to reduce the population's exposure to potential hazards and limit any harm that may result from a disaster in that area. In some cases, however, land use controls are less effective. For example, in the United States, certain government restrictions on land usage can be prohibited.[404]

139. Environmental regulations have also been used in the United States and are another type of land use restriction. The destruction of wetlands in Louisiana by industrial development drastically reduced the region's natural ability to withstand hurricanes; however, the

[384] United Kingdom, Flood and Water Management Act (footnote 347 above), art. 21.

[385] Algeria, Risk Prevention and Disaster Management Act (footnote 306 above), art. 11.

[386] Colombia, National System for the Management of Risks and Disasters Act (footnote 354 above), art. 45.

[387] Francis, "Legal aspects of disaster management and rehabilitation: the recent Indian experience of the tsunami disaster".

[388] *Ibid.*

[389] *Ibid.*, pp. 246–247.

[390] *Ibid.*

[391] *Ibid.*, p. 247.

[392] Fortun, "Environmental right-to-know and the transmutations of law".

[393] *Ibid.*

[394] *Ibid.*

[395] Algeria, Risk Prevention and Disaster Management Act (footnote 306 above), art. 7.

[396] *Ibid.*, art. 8.

[397] *Ibid.*, art. 19.

[398] Costa Rica, National Emergency and Risk Prevention Act (footnote 339 above), art. 34.

[399] United Kingdom, Flood and Water Management Act (footnote 347 above), art. 3.

[400] Francis, "Legal aspects of disaster management and rehabilitation ..." (footnote 387 above), pp. 247–248.

[401] Farber and Chen, *Disasters and the Law: Katrina and Beyond*, p. 218.

[402] *Ibid.*

[403] *Ibid.*

[404] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that a South Carolina statute that prohibited a landowner from building permanent habitable structures on islands off the coast of South Carolina constituted a taking that required just compensation).

Government is able to take steps to control the development of wetland areas under the Clean Water Act.[405] By protecting and regenerating wetlands, the State hopes, among other goals, to reduce harm caused by storms by taking advantage of the natural buffer that these wetlands provide.[406]

140. Although a number of approaches can constitute risk prevention, several disaster risk reduction acts include at least some specific policy suggestions in this area.

### 2. Mitigation of harm

141. Mitigation of harm involves the steps that States follow to reduce the amount of harm caused by a disaster. This approach can take various forms, including requiring buildings in at-risk areas to conform to certain safety standards or the building of dykes or levees.

#### (a) *Construction standards*

142. The Algerian law proposes the mandating of construction standards in various disaster scenarios.[407] In Viet Nam, the ordinance authorizes both the enforcement of construction standards and the building of facilities such as dykes.[408] United Kingdom law identifies a number of examples of State actions that could be taken in the course of flood or coastal erosion risk management, namely removing or altering buildings and using the State's law-making power to permit, require, restrict or prevent certain activities.[409] In addition, the State has a duty to maintain a register of structures, along with information regarding the owners and the state of repair of the structures, which are likely to have a significant effect on a flood risk area.[410] This law amends the Building Act of 1984 in order to include a requirement that people working on erecting, fitting or equipping a building take measures to increase the structure's flood resistance or resilience.[411]

#### (b) *Insurance*

143. Insurance systems are another way in which States seek to mitigate harm from disaster. In 1991, India adopted the Public Liability Insurance Act, which required industries to take out insurance policies to discharge any liabilities that might arise from their activities, such as any potential environmental harm.[412] The United States has adopted a national flood insurance programme, which is designed to reduce the likelihood that people will live in flood zones, thereby reducing the risk of disaster.[413] The programme encourages individuals to move away from flood zones by requiring property owners to obtain flood insurance and increasing the cost of insurance premiums each time the owner makes flood insurance claims.[414] California has also implemented a state-specific earthquake insurance regime that operates in a similar manner.[415]

144. Although fairly few disaster risk reduction acts specify particular measures that States should or must take with regard to the mitigation of harm, all the plans include some mention of harm as a goal of the legislation, leaving the specific methods used up to the relevant authorities charged with promulgating further regulations or legislation.

### 3. Preparedness

145. Disaster preparedness concerns the steps that States have taken in advance of a disaster, as a matter of course, that facilitate the provision of aid once a disaster has occurred. The South African Disaster Management Act of 2002 contains a detailed definition: "emergency preparedness means a state of readiness which enables organs of State and other institutions involved in disaster management, the private sector, communities and individuals to mobilize, organize, and provide relief measures to deal with an impending or current disaster or the effects of a disaster".[416] One of the most common ways in which States have approached disaster preparedness is by establishing an institutional hierarchy of agencies or actors and defining the roles and responsibilities of those actors.

#### (a) *Institutional framework*

146. Many States' laws either include a thorough description of a new institution established specifically for the purpose of promoting disaster risk reduction policies, including disaster preparedness,[417] or entrust already existing political or non-governmental actors with additional responsibilities.[418] Often, these new hierarchies are diverse, including members from a wide variety of government ministries and, in some cases, non-governmental actors such as businesses and labour organizations. Given the emphasis on disaster management in the selected legislation, it is unsurprising that a significant portion of almost every State's law is devoted to establishing, staffing and defining the roles of new government institutions devoted specifically to addressing disasters. Of the States surveyed, Algeria is alone in not defining which

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[405] Farber and Chen (footnote 401 above), pp. 211–212.

[406] *Ibid.*

[407] Algeria, Risk Prevention and Disaster Management Act (footnote 306 above), art. 23.

[408] Viet Nam, Ordinance of Prevention and Control of Floods and Storms and Implementation Provisions (footnote 349 above), arts. 34–35.

[409] United Kingdom, Flood and Water Management Act (footnote 347 above), art. 3.

[410] *Ibid.*, art. 21.

[411] *Ibid.*, art. 40.

[412] Francis, "Legal aspects of disaster management and rehabilitation ..." (footnote 387 above), p. 248.

[413] Farber and Chen, *Disasters and the Law: Katrina and Beyond*, p. 228.

[414] *Ibid.*

[415] Moréteau, "Catastrophic harm in United States law: liability and insurance", pp. 69 and 80.

[416] South Africa, Disaster Management Act (footnote 326 above), art. 1.

[417] See, for example, the National Disaster Management Authority of India, created by art. 3 of the Disaster Management Act (footnote 315 above); and the National Council for Disaster Reduction and Response of the Plurinational State of Bolivia, by art. 8 of the Risk Reduction and Disaster Attention Act (footnote 337 above).

[418] See, for example, Viet Nam, Ordinance of Prevention and Control of Floods and Storms and Implementation Provisions (footnote 349 above), art. 6.

portion of the Government is responsible for crafting and carrying out disaster risk reduction or disaster management policies.[419] Most States not only establish a national institution and national disaster management plan, but also create decentralized parallel structures at other levels of government.[420] The Indian Disaster Management Act, for example, creates a national disaster management authority,[421] which is tasked with preparing a national plan for disaster management.[422] It also establishes State[423] and district[424] institutions tasked with implementing the national plan at the local level.

147. These institutions, in particular at the national level, tend to comprise a wide variety of government ministers and thus incorporate a broad range of subject-matter expertise.[425] In the Philippines, the National Disaster Risk Reduction and Management Council, which is headed by the Secretary of the Department of National Defence, also includes the secretaries of the Department of the Interior and Local Government, the Department of Social Welfare and Development, the Department of Science and Technology, the National Economic and Development Authority, the Department of Health, the Department of Environment and Natural Resources, the Department of Agriculture and 36 other members, including additional government bodies, regional and local representatives and private sector and civil society representatives.[426]

148. Several States decided that the Head of Government should be the principal agent of disaster management institutions, signalling the importance that they place on disaster management.[427] Sri Lanka extends this principle and includes not only the President, but also the Prime Minister and the Leader of the Opposition as the leaders of the National Council for Disaster Management.[428]

149. Lastly, disaster management legislation also typically includes obligations that the institutions and disaster management plans are to undertake.[429] Colombia, for example, requires that the national plan develop a system for identifying and prioritizing risks, monitoring risks, communicating the existence of risks to affected populations and taking proactive steps to prevent or reduce the harm caused by disasters.[430]

### (b) *Funding*

150. Legislation requires funding in order to allow the Government to fulfil the obligations that it has created. Within disaster management laws, States, for the most part, include some provisions relating to funding. Most States, however, do not include specific appropriations in the acts. The Algerian act contains no provisions relating to funding. Several laws establish a fund to be used for disaster management, including risk reduction.[431] In some States, such funds are authorized, but not mandated.[432] Lastly, the United States,[433] the Philippines[434] and Sri Lanka[435] each have acts that appropriate specific levels of funding to be used for disaster management. These funding provisions enable States to engage in the disaster

[419] See Algeria, Risk Prevention and Disaster Management Act (footnote 306 above), arts. 50 and 52 (calling for national, regional and municipal plans for the management of disasters, but not specifying the plan's structure, composition or key components).

[420] See, for example, Plurinational State of Bolivia, Risk Reduction and Disaster Attention Act (footnote 337 above), arts. 11–12; Viet Nam, Decree No. 32-CP (20 May 1996), arts. 3 and 7; the Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), paras. 10–11; South Africa, Disaster Management Act (footnote 326 above), paras. 22–25 and 43–50; Japan, Disaster Countermeasures Basic Act (footnote 342 above), arts. 3–5; and United States, Homeland Security Act (footnote 348 above), para. 317.

[421] India, Disaster Management Act (see footnote 315 above), art. 3.

[422] *Ibid*., art. 10.

[423] *Ibid*., art. 14.

[424] *Ibid*., art. 25.

[425] See, for example, Plurinational State of Bolivia, Risk Reduction and Disaster Attention Act (footnote 337 above), art. 8; Viet Nam, Decree No. 32-CP (footnote 420 above), art. 11; South Africa, Disaster Management Act (footnote 326 above), para. 5; and Nicaragua, Law Establishing a National System for the Prevention of, Mitigation of and Attention to Disasters (footnote 343 above), art. 10.

[426] The Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), para. 5.

[427] See, for example, Japan, Disaster Countermeasures Basic Act (footnote 342 above), art. 11; Nicaragua, Law Establishing a National System for the Prevention of, Mitigation of and Attention to Disasters (footnote 343 above), art. 10; Colombia, National System for the Management of Risks and Disasters Act (footnote 354 above), art. 9; and Plurinational State of Bolivia, Risk Reduction and Disaster Attention Act (footnote 337 above), art. 8.

[428] Sri Lanka, Disaster Management Act (footnote 346 above), art. 3.

[429] See, for example, Plurinational State of Bolivia, Risk Reduction and Disaster Attention Act (footnote 337 above), art. 5; United States, Homeland Security Act (footnote 348 above), para. 318; India, Disaster Management Act (footnote 315 above), art. 10; Japan, Disaster Countermeasures Basic Act (footnote 342 above), arts. 3–5; the Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), para. 6; Sri Lanka, Disaster Management Act (footnote 346 above), art. 4; South Africa, Disaster Management Act (footnote 326 above), para. 4; Nicaragua, Law Establishing a National System for the Prevention of, Mitigation of and Attention to Disasters (footnote 343 above), art. 7; and United Kingdom, Flood and Water Management Act (footnote 347 above), art. 7.

[430] Colombia, National System for the Management of Risks and Disasters Act (footnote 354 above), art. 6.

[431] Plurinational State of Bolivia, Risk Reduction and Disaster Attention Act (footnote 337 above), art. 21 (establishing a fund for the reduction of risks and economic recovery); Nicaragua, Law Establishing a National System for the Prevention of, Mitigation of and Attention to Disasters (footnote 343 above), arts. 12–13 (establishing a national fund for disasters, which is to comprise funds received from the national budget and domestic and international donations); and Colombia, National System for the Management of Risks and Disasters Act (footnote 354 above), arts. 46–54 (renaming the National Fund for Calamities the National Fund for the Management of Disaster Risks and elaborating on the procedures that relate to the management of the Fund).

[432] Viet Nam, Ordinance of Prevention and Control of Floods and Storms and Implementation Provisions (footnote 349 above), art. 27; India, Disaster Management Act (footnote 315 above), arts. 46–49; Japan, Disaster Countermeasures Basic Act (footnote 342 above), arts. 94 and 101; South Africa, Disaster Management Act (footnote 326 above), paras. 56–57; United Kingdom, Flood and Water Management Act (footnote 347 above), art. 16.

[433] United States, Homeland Security Act (footnote 348 above), para. 321 *j* (authorizing the appropriation of more than $5.5 billion for the period 2004–2013).

[434] The Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), para. 21 (the local disaster risk reduction and management fund is funded by no less than 5 per cent of the estimated revenue from regular sources (i.e. tax revenues), to support disaster risk management activities, with 30 per cent of this Fund allocated as a quick response fund). See also *ibid*., para. 23 (allocating 1 billion pesos to the Office of Civil Defence to carry out disaster risk reduction activities).

[435] Sri Lanka, Disaster Management Act (footnote 346 above), art. 16 (granting the National Council for Disaster Management starting capital of 10 million rupees).

risk reduction policies envisaged without requiring a second set of processes for budgeting.

### (c) *Community preparedness and education*

151. Disaster preparedness involves community-level preparedness. Most States accomplish this goal through education and awareness-raising campaigns mandated by their disaster risk reduction acts. Japan, for example, specifically identifies the Japanese Red Cross Society as an organization with a special role regarding community preparedness.[436] The Philippines, by contrast, calls for disaster risk management to be introduced during secondary and tertiary education and mandates disaster risk management training and education for all public employees.[437]

152. The Indian act further recommends identifying buildings that can be used as relief centres in the event of a disaster, stockpiling food, providing information to State authorities, encouraging non-governmental organization and civil society involvement and ensuring that communications systems are in order (such as by performing drills periodically), among other tasks.[438] Japan mandates that local disaster plans provide for emergency provision, stockpiling and distribution and outline the operations relating to disaster prevention.[439] Meanwhile, Viet Nam focuses on education, establishing education programmes to promote common knowledge about storms and floods.[440] The United Kingdom suggests making arrangements for financial support of individuals and providing education and guidance on risk management.[441] These States typically include only a couple of specific recommendations or requirements relating to the structure or content of such education, however.

### (d) *Early warning*

153. Early warning was recognized by the General Assembly as an important aspect of disaster prevention as early as 1971.[442] It has been included in nearly all subsequent General Assembly resolutions dealing with the subject.[443] The Economic and Social Council emphasized that early warning should be a "key element" within regional, national and local prevention efforts.[444]

154. As noted in the Yokohama Strategy, "early warning of impending disasters and their effective dissemination … are key factors to successful disaster prevention".[445] Early warning has been seen as an essential modality of prevention at the national, regional and international levels.[446]

155. The Hyogo Framework for Action is most explicit when it comes to early warning, naming it within its second priority for action, and suggesting the following key activities on which States might draw:

> (*d*) Develop early warning systems that are people centred, in particular systems whose warnings are timely and understandable to those at risk, which take into account the demographic, gender, cultural and livelihood characteristics of the target audiences, including guidance on how to act upon warnings, and that support effective operation by disaster managers and other decision makers.
>
> (*e*) Establish, periodically review, and maintain information systems as part of early warning systems with a view to ensuring that rapid and coordinated action is taken in cases of alert/emergency.
>
> …
>
> (*g*) Implement the outcome of the Second International Conference on Early Warning held in Bonn, Germany, in 2003, including through the strengthening of coordination and cooperation among all relevant sectors and actors in the early warning chain in order to achieve fully effective early warning systems.
>
> (*h*) Implement the outcome of the Mauritius Strategy for the further implementation of the Barbados Programme of Action for the sustainable development of small island developing States, including by establishing and strengthening effective early warning systems as well as other mitigation and response measures.[447]

156. A review of existing national early warning systems in place with outreach to communities includes the following States or areas: Anguilla, Antigua and Barbuda, Armenia, Australia, Bangladesh, Bolivia (Plurinational State of), Botswana, British Virgin Islands, Canada, Cape Verde, Cayman Islands, Chile, Colombia, Cook Islands, Costa Rica, Cuba, Czech Republic, Dominican Republic, Ecuador, El Salvador, Fiji, Finland, Georgia, Germany, Ghana, Guatemala, Honduras, India, Indonesia, Italy, Jamaica, Japan, Kenya, Lao People's Democratic Republic, Lesotho, Madagascar, Malaysia, Maldives, Marshall Islands, Mauritius, Mexico, Mongolia, Morocco, Mozambique, New Zealand, Nicaragua, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Saint Kitts and Nevis, Saint Lucia, Senegal, Solomon Islands, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, the former Yugoslav Republic of Macedonia, Turks and Caicos Islands, United States, Vanuatu, Venezuela (Bolivarian Republic of) and Zambia.[448]

157. Of the 14 States selected, Algeria,[449] the Philippines[450] and India[451] each specifically provide for early

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[436] Japan, Disaster Countermeasures Basic Act (footnote 342 above), art. 2.

[437] The Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), para. 4.

[438] India, Disaster Management Act (footnote 315 above), art. 30.

[439] Japan, Disaster Countermeasures Basic Act (footnote 342 above), art. 42.

[440] Viet Nam, Decree No. 32-CP (footnote 420 above), art. 11.

[441] United Kingdom, Flood and Water Management Act (footnote 347 above), art. 3.

[442] In paragraph 8 of its resolution 2816 (XXVI) of 14 December 1971, the General Assembly invited potential recipient Governments to improve national disaster warning systems.

[443] See, for example, General Assembly resolutions 46/182 of 19 December 1991; 59/233 of 22 December 2004, para. 7; 60/196 of 22 December 2005, para. 8; 61/200 of 20 December 2006, para. 9; and 63/217 of 19 December 2008, para. 12.

[444] Economic and Social Council resolution 1999/63.

[445] A/CONF.172/9, chap. I, resolution 1, annex I.

[446] See, for example, General Assembly resolution 36/225 of 17 December 1981.

[447] A/CONF.206/6, para. 17 (ii).

[448] See the compilation of national progress reports on the implementation of the Hyogo Framework for Action (2009–2011), Hyogo Framework for Action priority 2, core indicator 2.3, available from www.preventionweb.net/english/hyogo/progress/documents/hfa-report-priority2-3%282009-2011%29.pdf .

[449] Algeria, Risk Prevention and Disaster Management Act (footnote 306 above), art. 17.

[450] The Philippines, Philippine Disaster Risk Reduction and Management Act (footnote 344 above), para. 4.

[451] India, Disaster Management Act (footnote 315 above), art. 30.

warning systems, while a number of others allude to them by mentioning information sharing or prompt communication of threats. In South Africa, the State must collect and disseminate information on phenomena that cause or aggravate disasters, risk factors, early warning systems and emergency response resources.[452] Nicaragua specifies the details of the State's three-tiered risk-level system as part of its early warning system.[453]

158. Early warning is, of course, not the sole province of national policy or legislation. References to that measure are found in multilateral and bilateral agreements and in decisions of judicial organs. Given its practical importance, it is deemed useful to give some examples of the manner in which early warning is dealt with by those three other sources.

159. According to the ASEAN Agreement on Disaster Management and Emergency Response, States should not only establish early warning systems, but also maintain and review them.[454] Part of the review could be a determination of the appropriateness of the warning system based on regular risk assessment.[455] An early warning system should have a mechanism to deliver information to people in a timely way.[456] An effort should be made to notify and educate persons within a State's territory or control on how to respond to the established early warning system.[457] The General Assembly has referred to such early warning systems as "people-centred".[458] As appropriate, States should also develop a mechanism of early warning to notify other States of the transboundary effects of hazards.[459]

160. Bilateral agreements have also provided for early warning systems. For example, an agreement between the United Kingdom and the United States concluded in 1958 provided for elements to improve early warning for the purpose of achieving "greater accuracy and timeliness in forecasts of hurricanes and in warning of accompanying destructive winds, tides, and floods".[460] Domestic practice as regards early warning is widely developed and mostly adapted to individual requirements and risk factors.[461]

161. The European Court of Human Rights has upheld the obligation to establish early warning systems. In *Budayeva*, the Court held that "the authorities' omission in ensuring the functioning of the early warning system was not justified".[462] Furthermore, the Court found there was a "causal link between the serious administrative flaws", including the lack of early warning, and the death of and injuries to the petitioners.[463] In addition, although not specifically using the term "early warning", the Court also found that, under article 2 of the European Convention on Human Rights (right to life), States had "a positive obligation to … adequately inform the public about any life-threatening emergency".[464]

## E. Proposals for draft articles

162. In the light of the foregoing, the Special Rapporteur proposes the following two draft articles:

"*Draft article 16. Duty to prevent*

"1. States shall undertake to reduce the risk of disasters by adopting appropriate measures to ensure that responsibilities and accountability mechanisms be defined and institutional arrangements be established, in order to prevent, mitigate and prepare for such disasters.

"2. Appropriate measures shall include, in particular, the conduct of multi-hazard risk assessments, the collection and dissemination of loss and risk information and the installation and operation of early warning systems."

"*Draft article 5* ter. *Cooperation for disaster risk reduction*

"Cooperation shall extend to the taking of measures intended to reduce the risk of disasters."

[452] South Africa, Disaster Management Act (footnote 326 above), para. 17.

[453] Nicaragua, Law Establishing a National System for the Prevention of, Mitigation of and Attention to Disasters (footnote 343 above), arts. 26–31.

[454] Art. 7, para. 1.

[455] *Ibid.*

[456] *Ibid.*

[457] *Ibid.*

[458] General Assembly resolutions 60/196 of 22 December 2005, para. 8; 61/200 of 20 December 2006, para. 9; and 63/217 of 19 December 2008, para. 12.

[459] ASEAN Agreement on Disaster Management and Emergency Response, art. 7, para. 2.

[460] See footnote 215 above.

[461] UNISDR, *Early Warning Practices Can Save Lives: Selected Examples: Good Practices and Lessons Learned.*

[462] *Budayeva* (footnote 122 above), para. 155.

[463] *Ibid.*, para. 158.

[464] *Ibid.*, para. 131.

# IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

[Agenda item 5]

**DOCUMENT A/CN.4/661**

## Second report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur

[*Original: Spanish*]
[*4 April 2013*]

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## Multilateral instruments cited in the present report

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## Introduction

1. The topic "Immunity of State officials from foreign criminal jurisdiction" was included in the long-term programme of work of the International Law Commission at its fifty-eighth session, in 2006, on the basis of a proposal contained in annex I to the report of the Commission on the work of that session.[1] At its fifty-ninth session, in 2007, the Commission decided to include this topic in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[2] At the same session, the Secretariat was requested to prepare a background study on the topic.[3]

2. The former Special Rapporteur submitted three reports, in which he established the boundaries within which the topic should be considered, analysed a number of substantive issues in connection with the immunity of State officials from foreign criminal jurisdiction, and examined the procedural issues related to this type of immunity.[4] The Commission considered the reports of the Special Rapporteur at its sixtieth and sixty-third sessions, held in 2008 and 2011, respectively. The Sixth Committee of the General Assembly dealt with the topic during its consideration of the report of the Commission, particularly in 2008 and 2011.

3. At its 3132nd meeting, held on 22 May 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[5] Following her appointment, the Special Rapporteur held a first set of informal consultations with the members of the Commission on 30 May 2012 on the basis of a list of questions which she had submitted in an informal working paper and which were included in the preliminary report.[6]

4. The Special Rapporteur submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction, which the Commission considered during the second part of its sixty-fourth session, held in 2012.[7]

5. The preliminary report was a "transitional report", in which the Special Rapporteur sought "to help clarify the terms of the debate up to this point and to identify the principal points of contention that remain and on which the Commission may wish to continue to work in the future".[8] To that end, the preliminary report reviewed the consideration of the topic of the immunity of State officials from foreign criminal jurisdiction during the quinquennium 2007–2011 on three levels: (*a*) the work carried out by the former Special Rapporteur; (*b*) the debate in the Commission; and (*c*) the debate in the Sixth Committee.

6. On the basis of these elements, the preliminary report identified a number of issues for consideration, on which no consensus had been reached during the previous quinquennium and which affected almost all of the issues covered in the former Special Rapporteur's three reports. As a result of this review, the Special Rapporteur divided these issues into four groups, to be considered over the current quinquennium:

1. General issues of a methodological and conceptual nature:
   - 1.1 The distinction between immunity *ratione materiae* and immunity *ratione personae* and the implications of that distinction
   - 1.2 Immunity in the system of values and principles of contemporary international law
   - 1.3 The relationship between immunity, on the one hand, and the responsibility of States and the criminal responsibility of individuals, on the other
2. Immunity *ratione personae*:
   - 2.1 The persons who enjoy immunity
   - 2.2 The material scope of immunity: private acts and official acts
   - 2.3 The absolute or restricted nature of immunity and, in particular, the role that international crimes play or should play
3. Immunity *ratione materiae*:
   - 3.1 The persons who enjoy immunity: the remaining terminological controversy and the definition of an "official"
   - 3.2 The definition of an "official act" and its relationship to the responsibility of the State
   - 3.3 The absolute or restricted nature of immunity: exceptions and international crimes
4. Procedural aspects of immunity.[9]

[1] *Yearbook … 2006*, vol. II (Part Two), p. 185, para. 257 and annex I.

[2] *Yearbook … 2007*, vol. II (Part Two), p. 98, para. 376.

[3] *Ibid.*, p. 101, para. 386. For the memorandum by the Secretariat, see A/CN.4/596 and Corr.1 (available from the Commission's website, documents of the sixtieth session; the final text will be published as an addendum to *Yearbook … 2008*, vol. II (Part One)).

[4] The preliminary report appeared in *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 157; the second report appeared in *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631; and the third report appeared in *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646.

[5] *Yearbook … 2012*, vol. I, 3132nd meeting; and *ibid.*, vol. II (Part Two), para. 84.

[6] *Ibid.*, vol. II (Part One), document A/CN.4/654, para. 73.

[7] *Ibid.*, vol. II (Part Two), paras. 86–139.

[8] *Ibid.*, vol. II (Part One), document A/CN.4/654, para. 5.

[9] *Ibid.*, para. 72.

7. The preliminary report also included certain methodological considerations that must be taken into account in the Commission's work on the topic covered in this report during the present quinquennium. These methodological considerations, which were set out by the Special Rapporteur in introducing her preliminary report to the Commission, can be summarized as follows:

(*a*) Future work on the topic should be based on the reports submitted previously by the former Special Rapporteur and on the Secretariat's study. However, bearing in mind that there are clear differences of opinion among members of the Commission and within the Sixth Committee, it should also take into consideration the various opinions expressed in both forums in order to move forward from the previous work of the Secretariat and the former Special Rapporteur;

(*b*) The topic of the immunity of State officials from foreign criminal jurisdiction must be approached from the perspective of both *lex lata* and *lex ferenda*; in other words, of both codification and progressive development. In any event, owing to the difficult and sensitive nature of the topic, it seems more appropriate to begin with *lex lata* considerations and, at a later date, to consider whether it is necessary and possible to formulate proposals *de lege ferenda*;

(*c*) Consideration of the topic should take a consistently systemic approach, thus ensuring that any normative proposals made by the Commission fit seamlessly into the international legal system as a whole. Therefore, all the norms, principles and values of international law that are relevant to the topic under consideration must be taken into account;

(*d*) Matters related to the immunity of State officials from foreign criminal jurisdiction should be considered in a structured and progressive manner, addressing, step by step, the various issues included in the aforementioned four thematic groups;

(*e*) The Commission's consideration of the topic should include discussion of the draft articles contained in the annual reports prepared by the Special Rapporteur.

8. The Commission held an interesting debate on the preliminary report, covering the main issues raised therein from both a methodological and a substantive perspective.[10] Generally speaking, a methodological approach based on structured handling of the issues received widespread support. The majority also endorsed the systemic approach suggested by the Special Rapporteur, although some members of the Commission voiced reservations regarding inclusion of the principles and values of current international law as an analytical tool. With regard to substantive considerations, the various statements by members of the Commission revealed a broad consensus on the identification of issues that require further consideration during the present quinquennium. However, differences of opinion on substantive aspects of a number of issues raised in the preliminary report remained.

9. On the basis of this debate, the Commission decided to request States

to provide information on their national law and practice on the following questions:

(*a*) Does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently?

(*b*) What criteria are used in identifying the persons covered by immunity *ratione personae*?[11]

The General Assembly also drew States' attention to the benefits of providing the Commission with the above information.[12] The Special Rapporteur would like to thank the States that responded to those questions in November 2012, during the discussions of the Sixth Committee, for their cooperation.

10. The Sixth Committee examined the preliminary report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction as part of its consideration of the report of the Commission during the sixty-seventh session of the General Assembly.[13] The interesting statements made during that discussion show that there is broad support for the methodological approaches outlined in the preliminary report and the workplan contained therein, including the proposal to organize future work around the introduction of draft articles. It should also be noted that many delegations endorsed the use of a dual methodological approach based on both codification and progressive development, including the prudent approach advocated by the Special Rapporteur in her preliminary report, in which she suggested that the work should begin with an analysis of *lex lata* and continue with proposals *de lege ferenda*.

11. With regard to the substantive issues outlined in the preliminary report, there was also extensive discussion of the key points on which there is still disagreement. In particular, the debate focused both directly and indirectly on exceptions to immunity, on the impact that new developments in international criminal law could or should have on the topic, and on the growing importance of this new area within the overall system of contemporary international law. However, it should also be noted that there is still no consensus on the majority of the topic's substantive issues.

12. In any event, it should be noted that the States involved in the work of the Sixth Committee continue to attach great importance to the topic. This was demonstrated once again by General Assembly resolution 67/92, adopted by consensus on 14 December 2012, paragraph 8 of which invites the Commission to continue to give priority to the topic "Immunity of State officials from foreign criminal jurisdiction".

[10] For a summary of that debate, see *ibid.*, vol. II (Part Two), paras. 86–139. See also *ibid.*, vol. I, 3143rd–3147th meetings.

[11] See *ibid.*, vol. II (Part Two), para. 28.

[12] See General Assembly resolution 67/92 of 14 December 2012, para. 4.

[13] The Sixth Committee considered the question of the immunity of State officials from foreign criminal jurisdiction at its 20th–23rd meetings during that session. In addition, two States referred to the question at the 19th meeting (see *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th–23rd meetings (A/C.6/67/SR.19–23). See also Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session, prepared by the Secretariat, A/CN.4/657, paras. 26–38.

## Chapter I

## Workplan and structure of the present report

13. The present report builds on the methodological approaches and general workplan set out in the preliminary report. It also takes into account the debates in both the Commission and the Sixth Committee in 2012 and, from a practical point of view, the need to provide the Commission with an operational tool so that it can begin discussions at this session. To that end, the report takes into consideration the relevant theoretical studies and the analysis of practice contained in the reports prepared by the former Special Rapporteur and in the Secretariat's study.[14] New developments over the past year, particularly the jurisprudence of ICJ and of one domestic court, have also been taken into account as appropriate. Worthy of particular note is the 25 July 2012 judgment of the Swiss Federal Criminal Court.[15]

14. Based on these considerations, and with the methodological goal of facilitating a structured and systemic discussion of the topic, this report will address, in order, the following issues:

(*a*) The scope of the topic and of the draft articles (chap. II);

(*b*) The concepts of immunity and jurisdiction (chap. III);

(*c*) The distinction between immunity *ratione personae* and immunity *ratione materiae* (chap. IV);

(*d*) Identification of the basic norms comprising the regime of immunity *ratione personae* (chap. V).

15. Thus, the fundamental issues set out in sections 1.1, 2.1 and 2.2 of the thematic groups referred to in the preliminary report will be addressed.[16] In addition, there are three issues that should be considered at the outset: a clear delimitation of the scope of the draft articles to be prepared under the topic, the concept of criminal jurisdiction, and the concept of immunity from foreign criminal jurisdiction.

16. Each of the aforementioned issues is covered in draft articles, the nature of which is necessarily different. Thus, in the draft articles on scope, the terms "immunity" and "jurisdiction" and the terms "immunity *ratione personae*" and "immunity *ratione materiae*" are introductory and descriptive, and should therefore be included in an introductory part one of the draft articles that focuses on establishing their scope and on definitions. On the other hand, the draft articles on the norms governing immunity *ratione personae* are designed to establish the substantive legal regime applicable to this type of immunity, and should therefore be included in a separate and specific part of the draft articles.

17. Lastly, it was deemed unnecessary to consider separately, at this time, sections 1.2 (Immunity in the system of values and principles of contemporary international law) and 1.3 (The relationship between immunity, on the one hand, and the responsibility of States and the criminal responsibility of individuals, on the other), contained in the first group of issues set out in the preliminary report. While it is true that these are cross-cutting issues when considering the topic of the immunity of State officials from foreign criminal jurisdiction as a whole, an in-depth study of them will be most relevant in the context of other issues to be taken up in future reports.

18. The same can be said of the omission from this second report of any consideration of section 2.3 (The absolute or restricted nature of immunity and, in particular, the role that international crimes play or should play), contained in the second group of issues set out in the preliminary report. Although these issues concern immunity *ratione materiae*, their consideration is closely related to the general issues associated with exceptions to immunity; therefore, it is considered more useful to address them at a later stage of the work.

[14] A/CN.4/596 and Corr.1 (see footnote 3 above).

[15] This is the judgment handed down in case No. BB.2011.140, which involved the prosecution of a former minister of defence of Algeria, TPF 2012, p. 97.

[16] See paragraph 6 and footnote 9 above.

## Chapter II

## The scope of the topic and of the draft articles

19. The scope of the topic "Immunity of State officials from foreign criminal jurisdiction" was addressed by the former Special Rapporteur in his preliminary report,[17] in which he identified a number of issues to be considered when establishing that scope, namely, the criminal, the foreign and the national (not international) nature of the jurisdiction from which immunity would be granted. A fourth issue, unrelated to jurisdiction, concerns the person who enjoys immunity, who must be an official of a State other than the one that purports to exercise jurisdiction. Lastly, his report also refers to the special status of diplomatic agents, consular officials, members of special missions and agents or officials of an international organization, although this status is not considered as a criterion for establishing the scope of the topic.

20. On the basis of these issues, the scope of the topic was discussed by both the Commission and the Sixth Committee. It became clear that there was broad support

[17] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, in particular, pp. 184–185, paras. 103–104, and pp. 191–192, para. 130.

for the aforementioned issues, which, moreover, States commonly face in practice when dealing with the question of the immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur therefore considers that these criteria should be borne in mind when establishing the scope of potential draft articles; this will require proposals that clearly establish their scope.

21. To that end, it would seem advisable to take a dual approach, considering both inclusive and exclusive issues, which can be summarized as follows:

(*a*) The draft articles deal only with criminal jurisdiction, not immunity from civil or administrative jurisdiction;[18]

(*b*) The draft articles deal only with immunity from foreign criminal jurisdiction; in other words, jurisdiction exercised by a State other than the State of nationality of the official whose immunity is invoked. Thus, they do not cover immunity granted under the domestic law of the official's own State;

(*c*) The draft articles deal only with immunity from States' domestic criminal jurisdiction, not immunity before international criminal courts;

(*d*) The draft articles do not deal with persons who are subject to a more specific immunity regime, such as diplomatic agents, consular officials, members of special missions, and agents and officials of international organizations;

(*e*) The draft articles deal only with the immunity of State officials.

22. The reasons for limiting the topic in this manner have been largely explained in previous reports, but some of the most important reasons given should be briefly recalled in order to reiterate or strengthen the arguments put forward by the previous Special Rapporteur and by other members of the Commission, and to add new material that may be of interest.

23. With regard to limitation of the scope of the draft articles to the immunities that arise in the context of criminal jurisdiction, the Special Rapporteur would like to point out that this decision was taken by the Commission itself, primarily because it is with respect to this form of jurisdiction that the most serious problems occur in practice. The specificities of criminal jurisdiction, which give rise to issues that are unlikely to arise in connection with civil or administrative jurisdiction, must also be taken into account. These include, for example, the impact that the exercise of criminal jurisdiction can have on the freedom of movement of the persons concerned, not only in the event of a conviction entailing a custodial sentence, but even at an earlier stage if, for example, the accused person is held in custody or pretrial detention as a purely precautionary measure. Other interim measures—such as passport confiscation, house arrest and the obligation to appear before a judicial authority at regular intervals—are common in the exercise of criminal jurisdiction. Lastly, a criminal trial has a devastating impact on a person's credibility, integrity and dignity. It should also be recalled that the primary conventions on the immunity of State authorities from foreign jurisdiction clearly differentiate between immunity from criminal jurisdiction and immunity from civil and administrative jurisdiction; the two are subject to different rules.[19]

24. In the light of the above, the Special Rapporteur still considers it most appropriate to limit the scope of the draft articles to immunity from criminal jurisdiction. This does not mean, however, that the existence of immunity from civil and administrative jurisdiction should be completely ignored. These two types of jurisdiction and criminal jurisdiction have in common the fact that immunity from any of them can be invoked; moreover, in practical terms, there are obviously links between the three forms of jurisdiction. For now, suffice it to note that criminal and administrative penalties are clearly related, as seen in national and international jurisprudence, and, from a broader perspective, that civil compensation suits may be an indirect remedy for serious violations of the law, including criminal offences. Lastly, rulings on immunity in the context of civil jurisdiction, in particular, are common and may be applicable, *mutatis mutandi*, to immunity invoked in the context of criminal jurisdiction.

25. In any event, these arguments do not outweigh the aforementioned reasons for limiting the draft articles to criminal jurisdiction. To include in the draft articles specific provisions relating to civil and/or administrative jurisdiction would introduce a distorting element that could well undermine the final outcome of the Commission's work. However, this does not preclude the Commission from taking State practice concerning immunity from civil or administrative jurisdiction into consideration, to the extent possible and as needed, if it can be used as a basis for conceptual or other arguments supplementing the Commission's work on the topic of immunity from criminal jurisdiction.

26. With regard to limiting the scope of the draft articles to foreign criminal jurisdiction, it suffices, at the outset, to note that immunity granted under domestic law and immunity granted under international law do not necessarily have the same nature, function and purpose, nor are they designed to protect the same values and principles. Therefore, the "foreign" proviso, which ultimately leads to the principle of the sovereign equality of States and the need for the continued maintenance of sustainable and peaceful international relations, is sufficient to justify the Commission's consideration of the topic of immunity from criminal jurisdiction. Furthermore, it should be recalled that granting immunity from foreign criminal jurisdiction to certain State officials or representatives does not automatically imply granting them immunity from domestic

[18] One member of the Commission recently suggested that it would be interesting to consider immunity from civil jurisdiction, and one State reported that its practice was limited to the question of the immunity of State officials from foreign civil jurisdiction. Such comments and reflections, however interesting, cannot be interpreted as a proposal to expand the scope of the draft articles beyond immunity from criminal jurisdiction.

[19] See, in particular, the Vienna Convention on Diplomatic Relations, arts. 31 and 37; the Vienna Convention on Consular Relations, art. 43, *a contrario*; and the Convention on Special Missions, art. 31.

jurisdiction; in fact, as noted by ICJ, the exercise of criminal jurisdiction by the domestic courts of the State of the official is one way of ensuring that the procedural instrument of immunity is not automatically interpreted as an instrument that relieves that person of all substantive criminal responsibility. Consequently, continuing to limit the scope of the draft articles in this manner is fully justified, and a study of State practice on immunity would be relevant to the Commission's work only to the extent that such practice involves the immunity of a foreign official or representative.

27. With regard to the exclusion of immunity before international criminal courts from the scope of the draft articles, the former Special Rapporteur drew attention to the first criterion: the fact that national and international jurisdiction are different in nature. In the Special Rapporteur's opinion, there is also another obvious and equally important reason: immunity before international criminal courts has already been specifically regulated by the international instruments that established and regulated the functioning of the international criminal courts. Therefore, there is no need for the Commission to revert to a matter that has already been sufficiently delimited and clarified, regardless of the differing interpretations that may arise in practice when applying these international legal norms.

28. There is also widespread agreement that immunity before international criminal courts should not be included in the topic. Nevertheless, it should be noted that acceptance of this criterion has been the subject of different views regarding the consequences that it could or should have for the Commission's future work. It should be recalled that some members of the Commission and some States have maintained, either directly or indirectly in their statements in the Sixth Committee, that the exclusion of immunity before international criminal courts would completely exclude the question of international criminal jurisdiction from the Commission's work on the topic.

29. This is, however, a somewhat inconsistent position in terms of methodology. On the contrary, as noted above with regard to civil and administrative jurisdiction, in establishing the scope of the draft articles, it is also necessary to make a distinction between, on the one hand, rejecting the proposal to include specific provisions on immunity from international criminal jurisdiction and, on the other, taking interpretations arising from or related to such jurisdiction into account. But this is not the time to enter into a debate on this issue; suffice it to note that it would be surprising if the Commission decided that it could take the actions of other international courts (such as ICJ and regional human right courts) into account but that it must ignore the very existence of a specifically criminal international court that shares with domestic courts the goal of prosecuting certain particularly serious international crimes.

30. In any event, suffice it to note the need for a clear distinction between direct consideration of international criminal jurisdiction within the framework of this topic (which must not be done) and consideration of such jurisdiction as supplementary, useful and, where appropriate, an aid to interpretation. This cannot and should not result in automatic inclusion in the draft articles of the principles on immunity contained in the instruments that regulate the international criminal courts. However, it should at least allow for study of these courts' own rules and jurisprudence to the extent that they are relevant to or provide clarification of the topic of the immunity of State officials from foreign criminal jurisdiction. This approach does not contradict either the hermeneutic criteria specific to international law or the practice followed by the Commission in considering other topics.

31. With regard to the third of the aforementioned criteria, it seems unnecessary to give a special reason for excluding from the scope of the draft articles the specific regimes governing immunity from criminal jurisdiction on the grounds of the status of the individuals who are deemed to enjoy such immunity or the functions that they perform. Both diplomatic and consular immunities and the immunity of international organizations have been the subject of considerable normative development (in treaty and customary law). Therefore, it seems unnecessary for the Commission to reconsider, let alone modify, these already well-established and generally accepted regimes. However, this does not preclude it from taking these supplementary regimes into account in its work on the immunity of State officials from foreign criminal jurisdiction, especially as the Commission played a significant role in the establishment of those regimes.

32. Lastly, with regard to subjective limitation of the scope of the draft articles, it should be recalled that the title of the topic refers to "officials" in English, "*représentants*" in French and "*funcionarios*" in Spanish. While it is generally agreed that these terms basically refer to individuals who act in the name and on behalf of the State, it is also true that the terminological differences have given rise to debate on the need to define the term "official" for the purposes of this topic and, in particular, of the draft articles in question. This task is certainly essential, but it should be noted that, in the opinion of the Special Rapporteur, it is particularly important in the context of immunity *ratione materiae* and should therefore be addressed in that connection. Consequently, the term "official" will continue to be used on a provisional basis in this report and in the draft articles contained therein, with the proviso that the latter's wording may be modified once a decision on the aforementioned terminological issue has been taken.

33. On the basis of the above, two draft articles that establish the scope of the draft articles from a dual perspective—both positive and negative—may be formulated. The Special Rapporteur is of the view that the scope should be established at the outset of the work in order to avoid gaps that could hinder it in the future. In addition, these draft articles should be placed in part one of the draft articles so as to provide, together with the definitions, a framework for them.

34. To that end, the following draft articles are proposed:

*"Draft article 1. Scope of the draft articles*

"Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of

certain State officials from the exercise of criminal jurisdiction by another State.

"*Draft article 2. Immunities not included in the scope of the draft articles*

"The following are not included in the scope of the present draft articles:

"(*a*) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;

"(*b*) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;

"(*c*) Immunities established under other *ad hoc* international treaties;

"(*d*) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory."

## Chapter III

## The concepts of immunity and jurisdiction

35. Immunity and jurisdiction are the two basic concepts on which consideration of this topic and the draft articles resulting therefrom will be based, since their purpose is, in fact, to identify the situations in which a State's courts may not exercise jurisdiction in criminal matters owing to the immunity enjoyed by certain officials of another State. Consequently, although the concepts are separate from one another, as correctly noted by ICJ in the *Arrest Warrant of 11 April 2000* case,[20] and recalled by the Special Rapporteur, Mr. Kolodkin,[21] only the relationship between them can justify the Commission's consideration of this topic.[22] Therefore, defining the two concepts separately is a precondition for proper handling of the topic and the draft articles. These definitions should, of course, logically be included in part one of the draft articles in order to provide a framework for the rest.

### A. The concept of criminal jurisdiction

36. The concept of immunity is, by necessity, based on the prior existence of the criminal jurisdiction of the State, without which the institution of immunity itself would be meaningless.[23] Consequently, irrespective of the procedural handling of immunity, it is first necessary to determine what we mean by "jurisdiction" for the purposes of these draft articles.

37. It may at first appear unnecessary[24] to define "jurisdiction", since it is a generally accepted term that is an uncontested component of all domestic legal systems under which immunity can be invoked. While this may be true, the fact remains that the concept of jurisdiction has been dealt with on many occasions in connection with international law and that the term can have different meanings in different States' legal systems.[25] In any event, it should be borne in mind that references to jurisdiction in the present report are always made in the context of immunity from criminal jurisdiction; this introduces a distinction that should be duly taken into account.[26] Thus, while the present report does not purport to enter into a theoretical analysis of the matter, it is necessary first to establish that conceptual distinction in order to show that the term "jurisdiction" cannot refer to civil jurisdiction in the context of the topic under consideration, owing not only to the conceptual distinction noted above, but also to the fact that identification of the types of acts that fall into the general category of "jurisdiction" is an important matter that should be taken up by the Commission in due course, particularly when it addresses the issue of immunity from foreign criminal jurisdiction from a procedural standpoint. Consider, for example, the potential impact that the adoption of an executive act—such as the detention of an individual, the confiscation of travel documents or the incorporation into an international system of police cooperation and assistance of a warrant for the arrest and capture of an accused person—prior to or independently of the work of the judiciary, could have on immunity from foreign criminal jurisdiction. Thus, for the purposes of this exercise, it is particularly important to define the term "criminal jurisdiction".

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[20] *Democratic Republic of the Congo v. Belgium, Judgment, I.C.J. Reports 2002*, p. 19, para. 46.

[21] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 173, para. 61.

[22] See *ibid.*, pp. 170–171, para. 43 and footnote 88. As the former Special Rapporteur recalled, ICJ stated in the *Arrest Warrant of 11 April 2000* case that "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction" (*I.C.J. Reports 2002*, p. 19, para. 46).

[23] In this connection, see the memorandum by the Secretariat (footnote 14 above), paras. 7 and 14. The close relationship between "jurisdiction" and "immunity" is also addressed in art. I, para. 2, of the resolution on immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, adopted by the Institute of International Law in 2009, which reads: "For the purposes of this Resolution 'jurisdiction' means the criminal, civil and administrative jurisdiction of national courts of one State as it relates to the immunity of another State or its agents conferred by treaties or customary international law" (Institute of International Law, "Resolution on immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", *Yearbook*, vol. 73, p. 227).

[24] It should be borne in mind that the definitions of the terms "jurisdiction" and "immunity" were also discussed by the Commission during its consideration of the United Nations Convention on Jurisdictional Immunities of States and Their Property, although the Special Rapporteur's proposals in that connection were rejected by the Commission and were not reflected in the Convention adopted by the General Assembly in 2004.

[25] The former Special Rapporteur addressed the concept of jurisdiction in a broad sense in his preliminary report; his analysis may still be considered useful. See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 170–171, paras. 43–47. The concept was also addressed in the memorandum by the Secretariat (footnote 14 above), paras. 7–13.

[26] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 171–172, paras. 48–55.

38. However, the intention at this stage of the work is not to compile a detailed list of all the types of acts covered by the term "jurisdiction", but rather to provide a definition of the term that is broad enough for it to be effectively compared with the various factors that establish immunity and with the various acts—judicial and executive—in respect of which immunity can be invoked. The Special Rapporteur is of the view that, in the context of the immunity of State officials from foreign jurisdiction, this comparison should be based on the premise that the State already has criminal jurisdiction and is therefore competent to perform a set of judicial and, in some cases, executive acts, the sole purpose of which is to determine whether, or establish that, there is specific individual criminal responsibility for acts that constitute crimes or misdemeanours under the domestic law of the State in question.

39. Thus, the very concept of jurisdiction is closely related to the determination of criminal jurisdiction and should be included therein. In this connection, it should also be borne in mind that the concept of jurisdiction and the legislation on which it is based are not identical in every State; they have their source not only in the norms and principles of international law but in the State's own legislation, which is adopted on the basis of those international norms and principles, and grants jurisdiction to its own courts. In this regard, the Special Rapporteur considers that it is not the purpose of this report to analyse such legal bases for jurisdiction and jurisdictional links or to debate the question of whether and to what extent the granting of such jurisdiction is fully consistent with international law; whether the international norms on which States rely in granting domestic jurisdiction to national courts are norms that impose obligations, or whether they merely enable or authorize the granting of such jurisdiction; and what the implications of this distinction might be in practice. Such a debate falls outside the agreed mandate of the Commission for the consideration of this topic and could have a greater impact on other issues that are included in the Commission's long-term (extraterritorial jurisdiction) or current (the obligation to extradite or prosecute (*aut dedere aut judicare*)) programme of work, or that could be included in its programme of work should the General Assembly so decide (international jurisdiction).

40. At a minimum, however, attention must be drawn to the variety of bases for jurisdiction upon which States have built their systems of domestic criminal jurisdiction, since the issue of immunity will ultimately arise under domestic jurisdiction (in other words, the criminal jurisdiction of a specific State). For now, suffice it to note that such a system may be based on territorial jurisdiction, personality (active or passive), the protection principle or universal jurisdiction. All of these systems are potential sources of States' competence to exercise criminal jurisdiction *stricto sensu* and, with the exception of active personality, any of them may give rise to the exercise of criminal jurisdiction in respect of an alien who might be categorized as an official and could therefore invoke immunity. The use of one or another of these systems is contingent on the will of the State concerned and, in practice, results in a multiplicity of national jurisdictional models that the Commission should not fail to take into account, especially as many of the cases that arise in practice rely heavily on the use of a system of jurisdiction that is based on some form of extraterritorial jurisdiction.[27] However, they should be taken into consideration for the sole purpose of establishing jurisdiction as a precondition for immunity. The Special Rapporteur is therefore of the view that, when defining the term "jurisdiction" for the purposes of this topic and these draft articles, the nature of each of the legal systems on which a State that purports to exercise jurisdiction may rely is irrelevant. To summarize, the existence of a multiplicity of jurisdictional systems, and thus of a multiplicity of jurisdictional models in States' criminal legislation, is a de facto precondition that the Commission should take into account in its work; however, this does not imply any assessment of or pronouncement on any of these jurisdictional systems.

41. Moreover, it should be noted that the term "criminal jurisdiction" refers primarily to a State's competence to exercise its power to prosecute crimes and misdemeanours that are established as such in the applicable provisions of its legislation. This purposive element should therefore be reflected in the definition of "criminal jurisdiction". In any event, care should be taken to ensure that the legal nature of immunity, which is purely procedural, is not affected in any way. Thus, the inclusion in the definition of "criminal jurisdiction" of a reference to the establishment of individual criminal responsibility does not and cannot result in a foreign official who enjoys such immunity being relieved of such responsibility; this issue will be addressed in the future.[28]

42. In the light of the foregoing considerations, the Special Rapporteur considers it useful to include in the draft articles a definition of "foreign criminal jurisdiction" as part of an introductory draft article on "definitions". To that end, the following draft article is proposed:

"*Draft article 3. Definitions*

"For the purposes of the present draft articles:

"(*a*) The term 'criminal jurisdiction' means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term 'criminal jurisdiction', the basis of the State's competence to exercise jurisdiction is irrelevant."

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[27] In this regard, suffice it to note the recent judgement of the Swiss Federal Criminal Court (Appeals Chamber) of 25 July 2012 (case No. BB.2011.140), in which the Court, in the exercise of universal jurisdiction, ruled on the immunity from foreign criminal jurisdiction of a former Minister of Defence of Algeria.

[28] The jurisprudence of ICJ on this matter has been reiterated and consistent. See the judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000, I.C.J. Reports 2002*, p. 25, para. 60; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 244, para. 196; and the judgment of 3 February 2012 in *Jurisdictional Immunities of the State: Germany v. Italy: Greece intervening, I.C.J. Reports 2012*, p. 124, para. 58 and p. 143, para. 100.

### B. The concept of immunity from foreign criminal jurisdiction

43. Like the term "jurisdiction", the term "immunity" is not usually defined in the international instruments that, in one way or another, have dealt with the immunities of the State and its officials or agents, including the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Vienna Convention on Diplomatic Relations and the Convention on Special Missions. In particular, with regard to "immunity from criminal jurisdiction", normative practice has, in the past, tended simply to mention "immunity from criminal jurisdiction" as one component of the regime of privileges and immunities set out in each of those instruments without defining it. This presents us with a nebulous legal concept, the scope of which must be determined through an analysis of practice and, in particular, State practice.

44. Notwithstanding the aforementioned practice, the task of integrating this nebulous legal concept is not particularly difficult since the concept of immunity from jurisdiction was the subject of lengthy discussion, including within the Commission, during the *travaux préparatoires* of the aforementioned instruments. In addition, the concept—that is, criminal jurisdiction in the context of the topic under consideration—was studied in detail by the Secretariat in its memorandum[29] and by the former Special Rapporteur in his preliminary report.[30]

45. A set of characteristics of the concept of "immunity from foreign criminal jurisdiction" has emerged from all this previous work and can be summarized as follows:

(*a*) Immunity prevents a State from exercising its criminal jurisdiction even though its courts would, in principle, be competent to prosecute a given misdemeanour or crime;

(*b*) Immunity arises only as a result of the existence of a foreign component, referred to generically as an "official" of another State;

(*c*) Immunity from foreign criminal jurisdiction is, by nature, eminently procedural and has no effect on the substantive criminal law of the State that has jurisdiction or on the individual criminal responsibility of the person who enjoys immunity.[31]

46. In the light of the above, a definition of "immunity from foreign criminal jurisdiction" that incorporates these general characteristics can be formulated. The following wording is suggested:

"*Draft article 3. Definitions*

"For the purposes of the present draft articles:

"(*b*) 'Immunity from foreign criminal jurisdiction' means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials."

[29] See the memorandum by the Secretariat (footnote 14 above), paras. 14–66.

[30] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 172–175, paras. 56–70.

[31] See footnotes 15 and 27 above.

## Chapter IV

## The distinction between immunity *ratione personae* and immunity *ratione materiae*

47. The distinction between immunity *ratione personae* and immunity *ratione materiae* has been discussed and generally accepted in doctrine, either in those words or as "personal immunity" and "functional immunity". As both types of immunity have also been adequately addressed in the preliminary report of the former Special Rapporteur[32] and in the memorandum by the Secretariat,[33] there is no need to revert to the issues discussed in those documents at this time. It should also be noted that the distinction between immunity *ratione personae* and immunity *ratione materiae* is one of the few matters on which there has been broad consensus during the Commission's discussions on this topic.

48. The two types of immunity have both significant elements in common and elements that clearly differentiate them from one another. The former include their basis and purpose, which is simply to ensure respect for the principle of the sovereign equality of States, prevent interference in their internal affairs and facilitate the maintenance of stable international relations by ensuring that the officials and representatives of States can carry out their functions without external difficulties or impediments.[34] This means that consideration of immunity from criminal jurisdiction must necessarily take a functional point of view or approach, since the protection afforded to persons who enjoy immunity is ultimately granted to them by virtue of the functions or tasks that each of them performs within his or her

[32] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 177–178, paras. 78–83.

[33] See the memorandum by the Secretariat (footnote 14 above), paras. 88 *et seq*.

[34] In this regard, the Institute of International Law, in its 2009 resolution on immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes (see footnote 23 above), states that "immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States" (*Yearbook*, vol. 73, art. II, para. 1). ICJ stressed this functional and purposive nature of immunity in its decision of 14 February 2002 in *Arrest Warrant of 11 April 2000, Judgment, I.C.J. Reports 2002*, p. 21, para. 53.

hierarchical official relationship with the State. These tasks are necessarily different depending on the status of the various categories of protected persons; this will result in different manifestations of the functional nature of immunity and, consequently, in the establishment of a different legal regime for each of the aforementioned types of immunity from foreign criminal jurisdiction. Since this "functional" component is common to both types, for the purposes of the present report and of the draft articles it is considered preferable to refer to them as "immunity *ratione personae*" and "immunity *ratione materiae*" in order to avoid terminological confusion that could have an unwanted conceptual effect.

49. In addition, both immunity *ratione personae* and immunity *ratione materiae* protect and are granted to individuals even though the ultimate purpose of granting them is to protect the rights and interests of the State. Therefore, whatever position the State takes with regard to these forms of immunity should be examined, particularly in the context of invocation or waiver of immunity. Thus, it must be borne in mind that immunity from foreign criminal jurisdiction precludes the exercise of criminal jurisdiction; it applies to specific categories of persons who, if they did not enjoy immunity, might be subject to criminal proceedings in order to establish whether they had individual criminal responsibility. Consequently, while this is not the time to address the matter in depth, it should be noted that immunity from foreign criminal jurisdiction (both *ratione personae* and *ratione materiae*) must be distinguished from the immunity of the State, with which it must not be confused, even though they have points in common.[35]

50. However, in addition to the common elements outlined above, there are also significant differences between immunity *ratione personae* and immunity *ratione materiae* that should be noted. It can be concluded from practice that immunity *ratione personae* has the following characteristics:

(*a*) It is granted only to certain State officials who play a prominent role in that State and who, by virtue of their functions, represent it in international relations automatically under the rules of international law;

(*b*) It applies to all acts, whether private or official, that are performed by the representatives of a State;

(*c*) It is clearly temporary in nature and is limited to the term of office of the person who enjoys immunity.[36]

Immunity *ratione materiae*, for its part, has the following characteristics:

(*a*) It is granted to all State officials;

(*b*) It is granted only in respect of acts that can be characterized as "official acts" or "acts performed in the exercise of official functions";

(*c*) It is not time-limited, since immunity *ratione materiae* continues even after the person who enjoys such immunity has left office.

51. Although the distinction between immunity *ratione personae* and immunity *ratione materiae* is widely accepted in doctrine and reflected in judicial practice, it is noteworthy that it is not similarly reflected in national legislation. Of the States that replied to the first of the questions posed by the Commission at its previous session, the majority indicated that their domestic law did not contain any specific provisions establishing such a distinction. However, some of them provided examples showing that the distinction was made indirectly in their domestic law or, more frequently, in their jurisprudence. In reality, this response is not entirely unexpected as it relates to two elements of practice that cannot be ignored: (*a*) State practice concerning immunity from foreign criminal jurisdiction is not very extensive; and (*b*) With the exception of generic references to the applicability of international law, domestic law does not typically include immunity provisions with a foreign component.

52. Nevertheless, for the purposes of this topic and the draft articles that may result from it, it is useful and necessary to make a clear distinction between immunity from foreign criminal jurisdiction *ratione personae* and *ratione materiae*, not only for analytical or descriptive reasons but, above all, because the normative elements of each of these types of immunity must be determined in order to establish the legal regime applicable to it, including the procedural approaches that must be followed in order to give effect to the immunity of State officials from foreign criminal jurisdiction. Furthermore, this distinction is not unrelated to the general issue of the applicable exceptions to immunity from such jurisdiction, which is undoubtedly one of the issues on which there is the greatest degree of uncertainty and disagreement.

53. In the light of these observations, it is considered necessary to define the two types of immunity in general terms as a frame of reference for their further consideration. These definitions, for which the following wording is suggested, should be included in draft article 3 on "definitions":

*"Draft article 3. Definitions*

"For the purposes of the present draft articles:

"(*c*) 'Immunity *ratione personae*' means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;

"(*d*) 'Immunity *ratione materiae*' means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as 'official acts'."

[35] ICJ referred to the distinction between the immunity of the State and the immunity of State officials from foreign criminal jurisdiction explicitly, in *Jurisdictional Immunities of the State, I.C.J. Reports 2012*, pp. 137–138, para. 87, and implicitly, in the same case, *ibid.*, p. 139, para. 91.

[36] Concerning these characteristics, see chap. V of the present report.

# Chapter V

## Immunity *ratione personae*: normative elements

54. In this report, the term "normative elements" refers to the aspects of immunity *ratione personae* that are relevant in establishing the legal regime applicable to this type of immunity from foreign criminal jurisdiction. On the basis of the definition of immunity *ratione personae* provided in chapter IV above and contained in draft article 3 (*c*), these normative elements can be identified as follows:

(*a*) The subjective scope of immunity *ratione personae*: who enjoys immunity?

(*b*) The material scope of immunity *ratione personae*: what types of acts performed by these individuals are covered by immunity?

(*c*) The temporal scope of immunity *ratione personae*: over what period of time can immunity be invoked and enjoyed?

Each of these elements will be considered separately below.

55. Issues surrounding potential exceptions to immunity *ratione personae* and procedural aspects of such immunity are not dealt with in this chapter as they will be examined at a later stage.

### A. The subjective scope of immunity *ratione personae*

56. Identification of the persons who enjoy immunity is clearly a prerequisite for its exercise and is particularly important in the case of immunity from criminal jurisdiction, where, apart from other considerations, the question is whether, in a given case, the State has jurisdiction to conclude that criminal responsibility lies with the individual, not the State. In the case at hand, the identification of these persons is also of interest since the title of the topic, as chosen by the Commission, refers generically to State "officials" ("*funcionarios*" in Spanish and "*représentants*" in French), which has caused concern regarding the definition of the term "official".

57. This concern is relevant to the consideration of immunity *ratione personae*, which, as noted above, necessarily refers to a small number of people who perform State functions or hold State office at the highest level, by virtue of which they are authorized to represent the State at the international level.[37] Therefore, the definition of "official" may not be relevant to this type of immunity if it is decided to follow a strict interpretation that links and restricts immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. On the other hand, that definition could take on greater importance if it is decided to follow a broader interpretation whereby immunity might also be enjoyed by other senior State officials, including, as often suggested, other members of the Government such as ministers of defence, ministers of trade and other ministers whose office requires them to play some role in international relations, either generally or in specific international forums, and who must therefore travel outside the borders of their own country in order to perform their functions. In this case, it would be necessary to define "official" for the purposes of immunity *ratione personae*, although it should be noted that this definition would need to be specific and clearly differentiated from the generic definition of "official" to be used in the context of immunity *ratione materiae* since the legal regimes applicable to the two categories of officials would also necessarily be different.

58. First, following the stricter interpretation, it is evident that, generally speaking, the granting of immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs is established practice. Thus, while it is true that the granting of such immunity was originally limited to Heads of State and subsequently extended to Heads of Government,[38] its extension to Ministers for Foreign Affairs is not in doubt in the light of the judgment of ICJ in the *Arrest Warrant of 11 April 2000* case: "In international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal".[39] Thus, while it is true that there has been some disagreement in the Commission and the Sixth Committee with regard to the granting of immunity to Ministers for Foreign Affairs,[40] it should be recalled that this opposing view regarding such ministers is unusual and, moreover, difficult to reconcile with the judgment of the Court, which can be assumed to reflect the applicable customary law at the time of its issuance.

59. The basis for the view that immunity is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs is the fact that their functions include representing the State in international relations, a function that, it should be borne in mind, is based on international

[37] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, pp. 186–190, paras. 109–121; and the memorandum by the Secretariat (footnote 14 above), paras. 96–136.

[38] In this connection, the origin of this type of immunity, which is linked to the person of the sovereign, should be borne in mind. While this interpretation has been superseded, it is true that various international instruments adopted in the fairly recent past refer exclusively to the Head of State in establishing special personal immunity rules; see, for example, art. 3, para. 2, of the United Nations Convention on Jurisdictional Immunities of States and Their Property. On the other hand, the Convention on Special Missions separates the immunities of the Head of State (art. 21, para. 1) from those of "the Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission" (art. 21, para. 2). In the context of private codification, it should be noted that the Institute of International Law, in its resolution in the Session of Vancouver in 2001, focuses first on the Head of State and then extends the immunity and inviolability regime to the Head of Government, but does not grant the same status to the Minister for Foreign Affairs (Institute of International Law, "Immunities from jurisdiction and execution of Heads of State and of Government in international law", *Yearbook*, vol. 69).

[39] *I.C.J. Reports 2002*, pp. 20–21, para. 51.

[40] The case against granting immunity *ratione personae* to Ministers for Foreign Affairs has been made repeatedly by South Africa.

law and performed automatically, without the need for any express authorization by the State that they represent.[41] In essence, their function is to represent the State under its political and administrative model and its domestic law, which, in their respective States, sets the requirements for the post of Head of State, Head of Government or Minister for Foreign Affairs. It is a representational function which international law attributes to these offices, independently of a State's domestic law, the sole function of which is to establish a homogeneous hierarchical model for representation of the State within the international community as a whole, and which promotes and facilitates the maintenance of international relations.[42] It is precisely this automatic representational nature, based on international law, which explains the status that is granted to these three State officials within the framework of international law as a whole (for example, in treaty law and the law of international responsibility) and which is also recognized in the context of immunity from foreign criminal jurisdiction, whereby the regime that applies to such officials (immunity *ratione personae*) differs from the regime that applies to other State officials.

60. From this perspective, once it is acknowledged that the basis of this special regime is the very special representational status of Heads of State, Heads of Government and Ministers for Foreign Affairs, which is specifically based on and recognized by international law, it is undeniable that this is an extraordinary situation that cannot be extrapolated to include other people, including members of Government, regardless of whether they hold senior posts in their States of nationality.[43] It is, of course, possible to identify norms of international law, similar to those applied to members of the "troika", which confer on them a representative function comparable to that of Heads of State, Heads of Government and Ministers for Foreign Affairs, but in the absence of such norms, immunity *ratione personae* cannot be granted to any State official other than Heads of State, Heads of Government and Ministers for Foreign Affairs, even though other senior officials may also play a role in international relations.[44]

61. In contrast to this first approach, a broader interpretation of immunity *ratione personae* would allow certain other senior State officials, in addition to the troika—primarily those who, as a result of their functions under the domestic law that governs their activities, must play a role in international affairs and who travel abroad frequently and even represent the State, albeit in a specific area—to be included in the scope of subjective application of such immunity. Thus, granting these individuals the immunity *ratione personae* that is already enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs, whose functions are comparable to theirs, would help to strengthen the secure and sustainable nature of international relations and the sovereign equality of States in the light of new models of diplomacy and international relations.[45] Advocates of this broader interpretation have sought to justify it by a literal reading of the wording of the judgment of ICJ in the aforementioned *Arrest Warrant of 11 April 2000* case, especially the use of the expression "such as", which makes that wording non-restrictive. In addition, there are examples of State judicial practice in which certain domestic courts have granted immunity *ratione personae* to senior State officials other than the troika. This should therefore be taken into consideration.

62. With regard to "broader tendency" described above, it should be noted, first, that the interpretation of the aforementioned wording of the judgment of ICJ should be read in context. Thus, despite its literal meaning, it is difficult to conclude that the Court was referring to the existence of an open-ended list of persons who enjoy immunity *ratione personae*. On the contrary, when the Court has had an opportunity to expand the list of people protected by such immunity, as in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, it has not done so, limiting its pronouncements in that regard to the Head of State. With respect to the Public Prosecutor and the Chief of National Security, it is clear that the Court has made no explicit pronouncement as to whether they enjoy general immunity *ratione personae*, although it has concluded that these senior officials do not enjoy personal immunity because they are not diplomatic agents and are not covered by the Convention on Special Missions.[46]

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[41] The following statement by ICJ in the *Arrest Warrant of 11 April 2000* case is particularly enlightening; although it refers to the Minister for Foreign Affairs, its basic elements can easily be applied to the Head of State and the Head of Government:

> "He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings... His or her acts may bind the State represented... The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence" (*ibid.*, pp. 21–22, para. 53).

[42] The regime of diplomatic and consular relations was established on a similar basis, as was the regime applicable to special missions; both also introduced rules governing immunity from foreign criminal jurisdiction that can be characterized as immunity *ratione personae*.

[43] In this regard, it should also be recalled that various international instruments and laws distinguish between the Head of State, the Head of Government and the Minister for Foreign Affairs, on the one hand, and other senior State officials, including at the ministerial level, on the other; see, in particular, art. 21 of the aforementioned Convention on Special Missions. Similarly, although from a different perspective, the definition of "protected persons" in the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, makes a clear distinction between the Head of State, the Head of Government and the Minister for Foreign Affairs, on the one hand (art. 1, para. 1 (*a*)), and "any representative or official of a State", on the other (art. 1, para. 1 (*b*)). Furthermore, the Institute of International Law, in its 2001 resolution, makes a clear distinction between the immunities of the Head of State and Head of Government and the "immunities to which other members of the government may be entitled on account of their official functions" (art. 15, para. 2) (*Yearbook*, vol. 69, see footnote 38 above).

[44] In the Sixth Committee during the most recent session of the General Assembly, the following States indicated that they were in favour of restricting immunity *ratione personae* to the troika: Austria, Belgium, the Congo, Greece, Ireland, Jamaica, Malaysia, the Netherlands, New Zealand, Portugal, Slovenia, Spain and the United States of America.

[45] In this connection, the following States have indicated, to varying degrees, their willingness to explore a non-restrictive interpretation: Algeria, Belarus, Chile, China, France, Israel, Norway, Peru, Portugal, the Russian Federation, Switzerland, the United Kingdom of Great Britain and Northern Ireland and Viet Nam.

[46] *I.C.J. Reports 2008*, p. 244, para. 194. However, it must be borne in mind that in this judgment, ICJ seems, if only partially, to equate the immunity of these senior officials with that of the State (see *ibid.*, p. 242, paras. 187–188, and p. 244, para. 196).

63. Second, State practice on this matter is not widespread, nor is it coherent or consistent with regard to the remedies provided in a particular case and the arguments advanced by different national courts. In the light of the pronouncements that support the expansion of immunity *ratione personae*, consideration should be given to other cases where the reverse was true[47] or where, while there was no ruling on the type of immunity that was invoked or granted, there was a clear difference between the treatment accorded to a member of the troika and that accorded to other senior State officials. Consequently, given the lack of consistent State practice, it is impossible to find arguments in favour of extending immunity *ratione personae* to include senior State officials other than the troika, as this would amount to giving them the direct, automatic function of representing the State in international relations on the basis of a rule of international law that cannot be shown to exist.[48]

64. Lastly, attention should be drawn to the fact that, even among those who support the expansion of immunity *ratione personae* to include officials other than the troika, there is general agreement on the impossibility of drawing up an exhaustive list of these officials, since very different opinions regarding the nature and range of the senior officials who should enjoy this type of immunity have been expressed.[49] There is, however, a consistent tendency for proponents of the broader interpretation to suggest a more suitable method of identifying the criteria that would justify granting immunity *ratione personae* to these "other senior State officials".[50]

65. It is true that, in practice, it is not unusual to find examples of the granting of general immunity *ratione personae* under international law to State officials other than Heads of State, Heads of Government and Ministers for Foreign Affairs. Undoubtedly, the most important example is the immunity of diplomatic agents from criminal jurisdiction, which could be supplemented by cases involving the granting of immunity *ratione personae* under the rules applicable to special missions, and even some cases in which, under unilateral agreements, the same protection has been granted to certain senior officials on official visit to a specific country. These are, however, special regimes that fall outside the scope of this topic and should therefore also be excluded from the scope of the draft articles that the Commission may eventually adopt. It is precisely within the framework of these special regimes, and particularly under a broad interpretation of the special missions regime, that concerns regarding the immunity of a group of senior State officials, who are required to travel outside their countries more or less permanently and more or less often—and might therefore be subject to foreign criminal jurisdiction that would clearly hinder the performance of their functions and violate the principle of the sovereign equality of the States on whose behalf they perform these functions—can be addressed.

66. Lastly, it should be noted that granting a form of immunity *ratione personae* that equates other senior State officials, including Government officials, to the troika could prevent the competent courts of other States from exercising their jurisdiction, thereby depriving those States of a power that is an aspect of their sovereignty. Only pursuant to a rule of customary international law that so provided could these characteristics have effect. Such a rule has become established for members of the troika, but its applicability to other senior State officials cannot be demonstrated at the present stage in the development of international law.

67. In the light of the above, the Special Rapporteur considers that the subjective scope of immunity from foreign criminal jurisdiction *ratione personae* should be limited to Heads of State, Heads of Government and Ministers for Foreign Affairs. She therefore proposes the following draft article:

"*Draft article 4. The subjective scope of immunity* ratione personae

"Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals."

68. However, it is true that, in practice, a few examples of the granting of immunity *ratione personae* on a one-time basis to senior officials other than the troika can be found. In addition, some members of the Commission and some States have spoken in favour of considering the expansion of this type of immunity to include senior State officials. The Special Rapporteur would like to point out that if the Commission considers it appropriate to discuss the process of expanding immunity *ratione personae*, this process would, in her opinion, constitute progressive development. In any event, the correct approach to such an expansion would require that this type of immunity be addressed independently of and separately from the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs, particularly in order to ensure that the factors that distinguish such immunity from the immunity *ratione personae* traditionally granted to members of the troika are taken into account. In this process, particular consideration should be given to the new territorial element that characterizes this specific type of immunity *ratione personae* owing to the inclusion of the concept of the "official visit", which should be central to this discussion and about which some States have recently expressed particular concern.[51]

[47] In this connection, see the recent Swiss Federal Criminal Court judgment of 25 July 2012 (footnote 15 above).

[48] Several States have urged caution in any broad interpretation, since there is a significant difference in the level at which the two categories of senior officials represent the State (Malaysia, Norway and Slovenia).

[49] Some States are of the opinion that immunity *ratione personae* should be granted to ministers of defence and trade (Norway and Switzerland), to ministers responsible for the financial system, in the light of the current international situation (Norway) or to deputy prime ministers, all Government ministers and parliamentary leaders (China, Ireland and the United Kingdom).

[50] The need to establish these criteria has been stressed by, in particular, Chile, China, France, India, Ireland, Israel, Japan, Portugal, the Republic of Korea and the Russian Federation. Some States have especially emphasized that the primary criteria should be the rank, involvement in cooperation and international relations, and need to travel of the person concerned (see, in particular, the statement made by the United Kingdom).

[51] In the Sixth Committee, during the most recent session of the General Assembly, Switzerland maintained that the question of whether a State official was on an official visit to the territory of another State was a methodological criterion that should be borne in mind when considering immunity *ratione personae*. The importance of taking official visits by State representatives into account was also raised by Norway, speaking on behalf of the Nordic countries.

## B. The material scope of immunity *ratione personae*

69. The second normative element that characterizes immunity *ratione personae* is the type of acts that are covered by such immunity. In that regard, it should be noted that, unlike the subjective scope of immunity *ratione personae*, abstract discussion of its material scope has caused no difficulty in practice. Thus, there has been no objection to the expansion of such immunity to include all acts, whether private or official, that are performed by Heads of State, Heads of Government and Ministers for Foreign Affairs. This is largely explained by the aforementioned special basis of this type of immunity from foreign criminal jurisdiction.

70. This solution is consistent with the provisions of various international instruments that establish specific regimes and provide for a type of immunity that corresponds to immunity *ratione personae*, such as the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.[52] Since protection from the exercise of foreign criminal jurisdiction under these Conventions follows the same logic as the immunity granted to Heads of State, Heads of Government and Ministers for Foreign Affairs, it follows that its material scope should also be identical. On the other hand, the various attempts at private codification, particularly by the Institute of International Law, also include both private and official acts under the umbrella of immunity *ratione materiae*.[53]

71. It should be borne in mind that this approach is reflected in international jurisprudence, which refers to this type of immunity as "full", "total", "complete", "integral" or "absolute" immunity precisely in order to show that it applies to any act performed by a person who enjoys immunity. The practice of domestic courts has traditionally been along similar lines.[54]

72. Consequently, it can be concluded that, to use the term employed by ICJ, immunity from foreign criminal jurisdiction *ratione personae* is full immunity. Therefore, there is no need to consider in depth which types of acts constitute "private acts" or "official acts" or to ask, as a matter of principle, when or under which circumstances such acts were performed or where the persons who enjoy immunity *ratione personae* were when the acts covered by such immunity were performed or when an attempt was made to exercise jurisdiction over them.[55] The "fullness" of immunity *ratione personae* means that it is enjoyed in respect of any act performed by a Head of State, Head of Government or Minister for Foreign Affairs, regardless of the nature of the act, the place where it was performed and the nature of the foreign travel (official or private) during which a specific State sought to exercise foreign criminal jurisdiction. In any event, from this point of view and in the opinion of the Special Rapporteur, the term "full immunity" is preferable to "absolute immunity", which could have other meanings in the light of developments in immunity in the context of international law in recent decades.

73. However, it should be noted that this qualification of immunity *ratione personae* as "full" does not imply any pronouncement on potential exceptions thereto. Any such exceptions would, by their very nature, imply a departure from the general rule, which is "full" immunity. In any event, the question of possible exceptions to immunity is not the subject of this report and should therefore not be reflected in the draft articles proposed below. As noted above in chapter I, it will be considered at a later time.

74. In the light of the above, the following draft article on the material scope of immunity *ratione personae* is proposed:

"*Draft article 5. The material scope of immunity* ratione personae

"1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.

"2. Heads of State, Heads of Government and Ministers for Foreign Affairs do not enjoy immunity *ratione personae* in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office."

## C. The temporal scope of immunity *ratione personae*

75. Like the material aspects of immunity *ratione personae*, the temporal scope of this type of immunity is not controversial. On the contrary, there is broad consensus regarding the assertion that immunity from criminal jurisdiction *ratione personae* applies only while the Head of State, Head of Government or Minister for Foreign Affairs holds office. Thus, immunity *ratione personae* begins when the person who enjoys it takes office and ends when that person leaves office.[56] In other words, immunity *ratione personae* is unequivocally temporary in nature and is contingent on the term of office of the person who enjoys such immunity.[57]

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[52] See article 31 and, *a contrario*, article 39, para. 2, of the Vienna Convention on Diplomatic Relations; see also article 31 and, *a contrario*, article 43, para. 2, of the Convention on Special Missions. In both cases, it should be noted that immunity from criminal jurisdiction and immunity from civil and administrative jurisdiction are accorded different treatment since the latter is directly linked to the performance of private acts. Similarly, by establishing the point at which immunity ends, these Conventions make a distinction between official acts and other acts; this is an implicit acknowledgement that unofficial (private) acts are protected by immunity during the period when immunity *ratione personae* is enjoyed by a diplomatic agent or member of a special mission.

[53] See, in particular, the resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, adopted by the Institute of International Law in Vancouver at its 2001 session (*Yearbook*, vol. 69, p. 743). Article 2 is particularly noteworthy and, for the purposes of this topic, should be read in conjunction with article 3 and article 13, para. 2 (*ibid.*, pp. 745 and 753, respectively).

[54] In this regard, see the interesting analysis contained in the memorandum prepared by the Secretariat (footnote 14 above), paras. 137–140. The recent judgment of the Swiss Federal Criminal Court (see footnotes 15 and 27 above), referred to repeatedly in this report, also endorses the commonly accepted doctrine that immunity covers all acts performed, in this case, by a Head of State (para. 5.3.1).

[55] See the judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000, Judgment, I.C.J. Reports 2002*, p. 22, para. 55.

[56] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 177, para. 79; and the memorandum by the Secretariat (footnote 14 above), para. 90.

[57] This was expressly stated by ICJ in its judgment of 14 February 2002 in *Arrest Warrant of 11 April 2000, I.C.J. Reports 2002*, p. 22, para. 54; see also para. 61 of the same judgment. The same temporal aspect of immunity *ratione personae* was noted by the Institute of

76. This characteristic of immunity *ratione personae* has been consistently reflected in State practice and in international and national jurisprudence. However, it is also true that occasional terminological ambiguity and/or confusion may have an impact on the legal nature of this type of immunity. Thus, it has been reported that, in some cases, there is a certain "residual immunity"[58] in respect of official acts performed by Heads of State, Heads of Government and Ministers for Foreign Affairs after they have left office. Or, to put it differently, it is sometimes maintained that immunity *ratione personae* extends beyond the term of office of the individuals who enjoy such immunity in respect of official acts performed by them while in office. The intended purpose of these positions is clear: to preserve some form of immunity from foreign criminal jurisdiction in respect of official acts after these individuals have left office. However, the nature of the immunity applicable to the aforementioned official acts should be clarified and specified as this may, in some cases, have an impact on the legal regime applicable to such immunity.

77. In that regard, it should be noted, first, that immunity *ratione personae* is justified by the special position held by the persons who enjoy it; as the highest-level representatives of the State, they represent it in international relations automatically and without the need for any specific authorization, and are automatically empowered to express the will and engage the responsibility of the State. In particular, this explains the special legal regime governing immunity *ratione personae*, which allows it to be invoked in respect of any act performed by a Head of State, Head of Government or Minister for Foreign Affairs, and makes it neither possible nor necessary, for the purpose of granting them immunity, to establish the abstract nature of the act performed. In other words, the nature of the act performed by the person who enjoys immunity is irrelevant to the application of this legal institution. In addition, such immunity has a clear time limit that corresponds to the length of the term of office. Thereafter, the nature of the act performed once again becomes relevant: on the one hand, private acts performed by Heads of State, Heads of Government and Ministers for Foreign Affairs are no longer protected by immunity and, on the other, official acts may be so protected but must first be identified as official acts.[59] This requires that an act be recognized as official before immunity can be granted, which is foreign to the very nature of immunity *ratione personae*; it is, however, one of the characteristics of immunity *ratione materiae*.

78. Therefore, in the event that immunity is invoked in respect of an official act performed by a former Head of State, Head of Government or Minister for Foreign Affairs, that individual is presumed to enjoy a type of immunity *ratione materiae* that covers acts performed by State officials in the exercise of their functions, regardless of whether they were representing the State at the highest level at the time when the act was performed and irrespective of whether they had left office at the time when immunity was invoked. Thus, this is not a prolongation of immunity *ratione personae* or a residual enjoyment of any part thereof, but rather an application of the general rules governing immunity *ratione materiae*. Since the distinction between the two types of immunity from foreign criminal jurisdiction has been generally accepted, and since it is also accepted that the two types are governed in part by different legal regimes, the aforementioned distinction with regard to the types of immunity enjoyed by former Heads of State, Heads of Government and Ministers for Foreign Affairs in respect of official acts performed while in office should be clearly established in the draft articles.

79. In the light of the above, the following draft article, which takes the two aforementioned factors into account, is proposed:

"*Draft article 6. The temporal scope of immunity* ratione personae

"1. Immunity *ratione personae* is limited to the term of office of a Head of State, Head of Government or Ministers for Foreign Affairs and expires automatically when it ends.

"2. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Ministers for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office."

International Law in its 2009 resolution on immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes: "When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases" (art. III, para. 2) (*Yearbook*, vol. 73, p. 227).

[58] The Swiss Federal Criminal Court's judgment of 25 July 2012 (footnote 15 above) appears to be consistent with this position, maintaining that a degree of immunity remains after the term of office has ended even while expressly stating that immunity *ratione personae* is temporary in nature (paras. 5.3.1 and 5.3.2).

[59] In this respect, the Institute of International Law, in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, stated that a former Head of State does not "enjoy immunity from jurisdiction, in criminal… proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof" (art. 13, para. 2) (*Yearbook*, vol. 69, p. 753).

## Chapter VI

## Future workplan

80. Following the workplan set out in her preliminary report, the Special Rapporteur proposes to devote her third report to a study of the normative elements of immunity *ratione materiae*, focusing primarily on two particularly complex issues: the terms "official" and "official act". This report, which will be submitted to the Commission at its sixty-sixth session, in 2014, will also include draft articles on these issues.

81. The Special Rapporteur will then begin to consider the issue of exceptions to immunity, with the intention of submitting some initial observations to the Commission at its sixty-sixth session.

ANNEX

# PROPOSED DRAFT ARTICLES

## PART ONE

## INTRODUCTION

### *Draft article 1. Scope of the draft articles*

Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of certain State officials from the exercise of criminal jurisdiction by another State.

### *Draft article 2. Immunities not included in the scope of the draft articles*

The following are not included in the scope of the present draft articles:

(*a*) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;

(*b*) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;

(*c*) Immunities established under other *ad hoc* international treaties;

(*d*) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory.

### *Draft article 3. Definitions*

For the purposes of the present draft articles:

(*a*) The term "criminal jurisdiction" means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term "criminal jurisdiction", the basis of the State's competence to exercise jurisdiction is irrelevant;

(*b*) "Immunity from foreign criminal jurisdiction" means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;

(*c*) "Immunity *ratione personae*" means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;

(*d*) "Immunity *ratione materiae*" means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as "official acts".

## PART TWO

## IMMUNITY *RATIONE PERSONAE*

### *Draft article 4. The subjective scope of immunity* ratione personae

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals.

### *Draft article 5. The material scope of immunity* ratione personae

1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.

2. Heads of State, Heads of Government and Ministers for Foreign Affairs do not enjoy immunity *ratione personae* in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office.

### *Draft article 6. The temporal scope of immunity* ratione personae

1. Immunity *ratione personae* is limited to the term of office of a Head of State, Head of Government or Minister for Foreign Affairs and ends automatically when it expires.

2. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.

# SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

[Agenda item 6]

**DOCUMENT A/CN.4/660**

## First report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur

[*Original: English*]
[*19 March 2013*]

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"L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Collected Courses of The Hague Academy of International Law, 1976-III*, vol. 151, Leiden, Sijthoff, 1978, pp. 1–114.

## Introduction and previous work of the Commission*

1. During its sixty-fourth session, in 2012, the International Law Commission decided to change the format of work on the topic "Treaties over time" and to appoint Georg Nolte as Special Rapporteur[1] for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[2] The present report builds upon and continues the previous work of the Commission on "Treaties over time".

2. The topic "Treaties over time" was included in the Commission's programme of work at its sixtieth session, in 2008.[3] At its sixty-first session, in 2009, the Commission established a Study Group on Treaties over time, chaired by Mr. Nolte.[4] At the sixty-second session, in 2010, the Study Group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chair on the relevant jurisprudence of ICJ and arbitral tribunals of *ad hoc* jurisdiction.[5] At the sixty-third session, in 2011, the Study Group began its consideration of the second report by the Chair on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice,

* The Special Rapporteur gratefully acknowledges the research assistance in the preparation of the present report provided by Katharina Berner, Stefan Raffeiner and Alejandro Rodiles Bretón, as well as the technical assistance of Prisca Feihle and Moritz von Rochow (all of Humboldt University, Berlin).

[1] *Yearbook … 2012*, vol. I, 3136th meeting.

[2] *Ibid.*, vol. II (Part Two), para. 269.

[3] *Yearbook … 2008*, vol. II (Part Two), p. 148, para. 353. For the syllabus of the topic, see *ibid.*, annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[4] *Yearbook … 2009*, vol. II (Part Two), pp. 148–149, paras. 220–226.

[5] *Yearbook … 2010*, vol. II (Part Two), pp. 194–195, paras. 344–354. The introductory, second and third reports, originally informal working papers, will be included in Nolte, *Treaties and Subsequent Practice*.

focusing on 12 of the general conclusions proposed therein.[6] In the light of the discussions in the Study Group, the Chair reformulated the text of his proposed conclusions to what became nine preliminary conclusions.[7]

3. At the sixty-fourth session, in 2012, the Study Group completed its consideration of the second report by its Chair.[8] In so doing, the Study Group examined six additional general conclusions proposed in the second report. In the light of the discussions in the Study Group, the Chair reformulated the text of what became six additional preliminary conclusions.[9] The Study Group agreed that the preliminary conclusions by its Chair would be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur.[10] In addition to considering the remainder of the second report, the Study Group also considered parts of the third report prepared by its Chair on subsequent agreements and subsequent practice of States outside of judicial and quasi-judicial proceedings.[11]

[6] *Yearbook … 2011*, vol. II (Part Two), pp. 168–169, paras. 336–341.

[7] For the text of the nine preliminary conclusions by the Chair of the Study Group, see *ibid.*, pp. 169–171, para. 344.

[8] *Yearbook … 2012*, vol. II (Part Two), pp. 77–79, paras. 225–239.

[9] *Ibid.*, pp. 79–80, para. 240.

[10] *Ibid.*, pp. 77–78, para. 231.

[11] *Ibid.*, p. 78, paras. 232–234.

## Chapter I

## Scope, aim and possible outcome of the work

4. The original purpose for the Commission to pursue work on the topic "Treaties over time" within the format of a Study Group had been to give the members the opportunity to consider whether the topic should be approached with a broad focus, which would have also involved, *inter alia*, an in-depth treatment of the termination and the formal amendment of treaties, or whether the topic should be limited to a narrower focus on the aspect of subsequent agreements and subsequent practice. The discussions within the Study Group have led to the agreement, in accordance with the view originally expressed by the Chair, that it would be preferable to limit the topic to the narrower aspect of the legal significance of subsequent agreements and practice. The Study Group ultimately agreed that the main focus of the future work would be on the legal significance of subsequent agreements and subsequent practice for interpretation (Vienna Convention on the Law of Treaties (hereinafter the "1969 Vienna Convention"), art. 31) and related aspects,[12] as explained in the original proposal for the topic.[13] According to the original proposal, these means of interpretation are important because of their function with regard to the interpretation of treaties over time:

> As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties' provisions will be subject to efforts of reinterpretation, and possibly even of informal modification. This may concern technical rules as well as more general substantive rules. As their context evolves, treaties face the danger of either being "frozen" into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.[14]

5. The present report, in accordance with the discussions in the Study Group on treaties over time at the Commission's sixty-fourth session, in 2012, synthesizes elements of the three reports of the Study Group[15] and takes into account the discussions within that Group. It contains four proposed draft conclusions, explained by commentaries, which cover some basic aspects of the topic. Due to certain constraints, in particular space constraints, it has not been possible to synthesize the entirety of the three reports for the Study Group into the present report. However, the Special Rapporteur is confident that it will be possible to synthesize the remainder of those reports in a further report which will cover other and more specific aspects of the topic. He envisages that the work on the topic will be finalized, as foreseen, within the current quinquennium (see the future programme of work in chapter VI below).

6. The aim of the discussion on the present topic is to examine the role which subsequent agreements and subsequent practice play in the interpretation of treaties, and to give, thereby, some orientation to those who interpret or apply treaties. This group includes judges (at the international and the national levels), officials of States and international organizations, academics and other private actors. The materials and analyses that are contained in the present report and in the future reports, as well as the conclusions of the Commission, should provide a common reference and thereby contribute, as far as possible and reasonable, to a common and uniform approach to the interpretation and application of a particular treaty. The present report is based primarily on the jurisprudence of, it is hoped, a representative group of international courts, tribunals and other adjudicative bodies,[16] as well as on documented instances of State practice. Together, this collection is an element, necessarily incomplete, of a repertory of practice. As it is formulated in the original proposal for the topic of Treaties over time:

[12] *Ibid.*, p. 79, para. 238.

[13] *Yearbook … 2008*, vol. II (Part Two), annex I, pp. 153 *et seq.*, paras. 11 *et seq.*

[14] *Ibid.*, p. 154, para. 14.

[15] See footnotes 5, 6 and 11 above.

[16] The term "jurisprudence" is used in the sense of legal assessments in individual cases by competent adjudicatory bodies which are composed of independent members. Such legal assessments are not limited to binding judgments by international courts or tribunals, but also include "views" by the Human Rights Committee under the International Covenant on Civil and Political Rights and reports by the Panels and the Appellate Body under the World Trade Organization (WTO) Dispute Settlement Body. The report covers only pronouncements by adjudicatory bodies that concentrate on legal (not factual) assessments, that are sufficiently accessible and that have already generated a significant number of decisions.

> The … goal of the consideration of the topic should be to derive some general conclusions or guidelines from the repertory of practice. Such conclusions or guidelines should not result in a draft convention, if only for the reason that guidelines to interpretation are hardly ever codified even in domestic legal systems. Such general conclusions or guidelines could, however, give those who interpret and apply treaties an orientation for the possibilities and limits of an increasingly important means of interpretation that is specific to international law. These conclusions, or guidelines, would neither provide a straightjacket for the interpreters, nor would they leave them in a void. They would provide a reference point for all those who interpret and apply treaties, and thereby contribute to a common background understanding, minimizing possible conflicts and making the interpretive process more efficient.[17]

7. The delineation of the present topic from other topics is reasonably clear. One topic which might raise questions in this respect is "Formation and evidence of customary international law". In this respect, the Special Rapporteur is in agreement with the opinion of Sir Michael Wood, Special Rapporteur on the topic of "Formation and evidence of customary international law", that, while the effect of treaties on the formation of customary international law is part of that topic, the role of customary international law in the interpretation of treaties is part of the present topic. Needless to say, the topic does not concern the determination of the content of particular treaty rules, but is rather focused on the elucidation of the role and possible effects of subsequent agreements and subsequent practice in relation to treaty interpretation. Another topic which could have points of contact is "Provisional application of treaties". The focus of this topic does not, however, seem to be on the effect of provisional application on the interpretation of a treaty.[18]

[17] *Yearbook … 2008*, vol. II (Part Two), annex I, p. 156, para. 22.

[18] *Yearbook … 2012*, vol. II (Part Two), p. 67–68, paras. 144–155.

## Chapter II

## General rule and means of treaty interpretation

8. The legal significance of subsequent agreements and subsequent practice for the interpretation of treaties depends, as a point of departure, on the general rule regarding treaty interpretation. This general rule, consisting of different subrules or elements, is codified in article 31 of the 1969 Vienna Convention, which entered into force on 27 January 1980. ICJ has recognized that this general rule on treaty interpretation reflects customary international law.[19] Together with article 32, article 31 of the Convention lists a number of relevant "means of interpretation"[20] (among them "subsequent agreement" and "subsequent practice" as "authentic means of interpretation"[21]) which shall be taken into account in the process of interpretation.

9. It is generally recognized that article 31 of the 1969 Vienna Convention must not "be taken as laying down a hierarchical order" of the different means of interpretation contained therein, but that these are to be applied by way of "a single combined operation".[22] Thus, the application of the general rule on treaty interpretation to different treaties, or treaty provisions, in a specific case may result in a different emphasis on the various means of interpretation contained therein, in particular in more or less emphasis on the text of the treaty or on its object and purpose. This is confirmed by the jurisprudence of various representative international adjudicatory bodies.

### A. International Court of Justice

10. After an initial period of hesitation,[23] ICJ began to refer to articles 31 and 32 of the 1969 Vienna Convention in the 1990s.[24] Since then, the Court has routinely based its treaty interpretation on the general rule and the other means of interpretation according to articles 31 and 32 of the 1969 Vienna Convention.[25] The Court also typically reaffirms their customary nature, allowing the Court to apply the rules contained therein in cases where one or more parties to the dispute are not parties to the 1969 Vienna Convention, as well as in relation to treaties concluded before its entry into force in 1980.[26]

### B. Adjudicative bodies under international economic regimes

11. The WTO Appellate Body bases its practice of treaty interpretation on articles 31 and 32 of the 1969 Vienna

[19] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 109, para. 160.

[20] Article 32. See also *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 218–223, paragraphs (2), (5), (8), (10), (15), (18) and (19) of the commentary to section 3: Interpretation of treaties.

[21] *Ibid.*, p. 222, para. (15); see also paragraphs 30 and 64 (draft conclusion 2) below.

[22] *Ibid.*, p. 219, para. (8).

[23] On the different periods of reception of the Vienna rules by ICJ, see Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", p. 721; see also Gardiner, *Treaty Interpretation*, pp. 12 *et seq.*

[24] *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 69, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 582, para. 373 and p. 584, para. 376.

[25] For a recent case, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, *I.C.J. Reports 2011*, p. 673, para. 91.

[26] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (footnote 19 above); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (footnote 19 above); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 48, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 645, para. 37; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 501, para. 99; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 46, para. 65 (Vienna Convention, art. 31); *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1059, para. 18 (Vienna Convention, art. 31); *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, para. 41, without expressly mentioning art. 32, but referring to the supplementary means of interpretation.

Convention.[27] Panels and the Appellate Body typically concentrate on the text of the respective agreement.[28] So far, the Appellate Body has not put a particular emphasis on the object and purpose as a means of interpretation.[29] It has only occasionally resorted to an evolutive interpretation[30] or applied the principle of effectiveness in order to avoid "reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[31]

12. The Iran–United States Claims Tribunal has also recognized the rules of interpretation as they are enunciated in articles 31 and 32 of the 1969 Vienna Convention.[32] In its jurisprudence it has primarily relied on the ordinary meaning of the terms in question and on their object and purpose.[33] Thus, the Tribunal is following a rather balanced interpretative approach, which does not put particular emphasis on one particular means of interpretation.[34]

13. Tribunals established by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the settlement of investment disputes between States and nationals of other States have also recognized that they must apply articles 31 and 32 of the 1969 Vienna Convention either as treaty law or as customary law.[35] They regularly invoke jurisprudence of ICJ, PCIJ and arbitral tribunals, and they thereby place their reasoning within the context of general international law.[36] Although their jurisprudence is far from following a uniform approach, the ICSID tribunals have, so far, neither put a conspicuous emphasis on the object and purpose as a means of interpretation nor on the presumed intentions of the parties to the Convention when they concluded it.[37]

14. The general approach to interpretation by Panels under the North American Free Trade Agreement (NAFTA) can be described as proceeding from the 1969 Vienna Convention rules on interpretation, with an emphasis on trade liberalization as the main object and purpose of the Agreement.[38]

### C. Human rights courts and the Human Rights Committee

15. The European Court of Human Rights, in the early case of *Golder v. the United Kingdom*,[39] has considered "that it should be guided by Articles 31 to 33 of the Vienna Convention"[40] and has reiterated the explanation given by ILC for the process of interpretation under the Convention:

> In the way in which it is presented in the "general rule" in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.[41]

16. Since then, the European Court of Human Rights has regularly reconfirmed its attachment, in principle, to articles 31 to 33 of the 1969 Vienna Convention as the basis for interpreting the European Convention on Human Rights.[42] The Court, however, distinguishes the European Convention from "international treaties of the classic kind".[43] According to the Court:

> The Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement."[44]

17. The interpretation of the Convention would therefore have to take into account the "effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)".[45] The identification of these characteristics of the Convention has contributed to the recognition by the European Court of Human Rights "that

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[27] Abi-Saab, "The appellate body and treaty interpretation", pp. 99–109.

[28] WTO, *Brazil: Export Financing Programme for Aircraft*, recourse by Canada to article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Report of the Appellate Body (21 July 2000), WT/DS46/AB/RW, para. 45.

[29] McRae, "Approaches to the interpretation of treaties: The European Court of Human Rights and the WTO Appellate Body".

[30] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (12 October 1998), WT/DS58/AB/R, para. 130.

[31] WTO, *Japan: Alcoholic Beverages II*, Report of the Appellate Body (4 October 1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, sect. D.

[32] Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal*, pp. 361–362, citing Decision No. DEC 12-A1-FT (1982), *Iran–United States Claims Tribunal Reports* (hereinafter "Iran-USCTR") (Cambridge, Grotius, 1983), vol. 1, p. 189, paras. 190–192.

[33] *Ibid.*, pp. 362–365.

[34] Böckstiegel, "Zur Auslegung völkerrechtlicher Verträge durch das Iran–United States Claims Tribunal", pp. 119–131; Aldrich (see footnote 32 above), pp. 360 *et seq.*; Brower and Brueschke, *The Iran–United States Claims Tribunal*, pp. 263 *et seq.*

[35] Schreuer, "Diversity and harmonization of treaty interpretation in investment arbitration", pp. 129 *et seq.*; Fauchald, "The legal reasoning of ICSID Tribunals—An empirical analysis", p. 314; Weeramantry, *Treaty Interpretation in Investment Arbitration*.

[36] Fauchald (see preceding footnote), pp. 311, 313 and 341.

[37] *Ibid.*, pp. 315–319.

[38] *Tariffs Applied by Canada to Certain US–Origin Agricultural Products* (Final Report of the Panel) Arbitral Panel Established Pursuant to article 2008, Secretariat File No. CDA-95-2008-01 (2 December 1996), paras. 118 and 119; for Chapter 11 Panels, see also *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (Award on Jurisdiction), UNCITRAL Arbitration under the North American Free Trade Agreement, chapter 11 (28 January 2008), paras. 45–48 and 122.

[39] 21 February 1975, Series A, No. 18.

[40] *Ibid.*, para. 29.

[41] *Ibid.*, para. 30; for the wording of ILC, see *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 219–220, para. (8) of the commentary to section 3: Interpretation of treaties.

[42] *Mamatkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, paras. 111 and 123, ECHR 2005-I; *Banković and Others v. Belgium and Others* (dec.) [GC], No. 52207/99, paras. 55–58, ECHR 2001-XII; *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, para. 55, ECHR 2001-XI; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, para. 73, Series A, No. 310; *Cruz Varas and Others v. Sweden*, 20 March 1991, para. 100, Series A, No. 201; *Johnston and Others v. Ireland*, 18 December 1986, para. 51, Series A, No. 112; *Al-Saadoon and Mufdhi v. the United Kingdom*, No. 61498/08, para. 126, ECHR 2010; *Rantsev v. Cyprus and Russia*, No. 25965/04, paras. 273–274, ECHR 2010; *Demir and Baykara v. Turkey* [GC], No. 34503/97, ECHR 2008, para. 65.

[43] *Ireland v. the United Kingdom*, 18 January 1978, para. 239, Series A, No. 25; *Al-Saadoon and Mufdhi* (see previous footnote), para. 127; *Soering v. the United Kingdom*, 7 July 1989, para. 87, Series A, No. 161.

[44] *Ireland* (see previous footnote), para. 239.

[45] *Loizidou* (footnote 42 above), para. 75.

the Convention is a living instrument which … must be interpreted in the light of present-day conditions".[46] This "living instrument" approach is not, however, an exception to the general method of interpretation on the basis of articles 31 to 33 of the 1969 Vienna Convention. Indeed, the Court has regularly reiterated "that the Convention must be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties" and that it "must determine the responsibility of the States in accordance with the principles of international law governing this sphere, while taking into account the special nature of the Convention as an instrument of human rights protection".[47]

18. In a similar vein, the Inter-American Court of Human Rights acknowledges that, according to the 1969 Vienna Convention, "the process of interpretation should be taken as a whole".[48]

19. Although the Inter-American Court of Human Rights usually begins its reasoning by looking at the text,[49] it has, in general, not relied on a primarily textual approach but rather resorted to other means of interpretation.[50] The Court's reluctance to assign a more prominent role to a provision's ordinary meaning is ultimately the consequence of the Court's emphasis on object and purpose.[51] Thus, the Court stressed that "the 'ordinary meaning' of terms cannot of itself become the sole rule, for it must always be considered within its context and, in particular, in the light of the object and purpose of the treaty".[52]

20. In the jurisprudence of the Inter-American Court of Human Rights, the "object and purpose" appears to play the most important role among the different means of interpretation. A characteristic feature of this Court's object and purpose-based approach is its emphasis on the overriding aim of the Convention as a whole to effectively protect human rights. According to the Court, "when interpreting [the] Convention the Court must do it in such a way that the system for the protection of human rights has all its appropriate effects (*effet utile*)".[53]

21. The Human Rights Committee has recognized the 1969 Vienna Convention rules on interpretation[54] but applies them mostly by implication. In its jurisprudence, the "object and purpose" of the International Covenant on Civil and Political Rights has played the most important role among the various means of interpretation that are referred to in articles 31 and 32 of the Vienna Convention.[55] One important aspect of the Human Rights Committee's interpretative approach is its evolutive understanding of the rights of the Covenant. For example, in the case of *Yoon and Choi v. the Republic of Korea*, the Committee stressed that any right contained in the Covenant evolved over time,[56] and by this reasoning justified a certain departure from its own prior jurisprudence.[57] However, in the case of *Atasoy and Sarkut v. Turkey*, the Committee has emphasized that evolutive interpretation "cannot go beyond the letter and spirit of the treaty or what the States parties initially and explicitly so intended".[58]

### D. Other international adjudicative bodies

22. Other international adjudicative bodies have also recognized that the 1969 Vienna Convention articulates the basic rules on the interpretation of treaties.

23. The Seabed Disputes Chamber has outlined the importance of the 1969 Vienna Convention for ITLOS in its Advisory Opinion on the *Responsibilities and obligations of States with respect to activities in the Area*:

> Among the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role. The applicable rules are set out in Part III, Section 3, entitled "Interpretation of Treaties" and comprising articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties... These rules are to be considered as reflecting customary international law. Although the Tribunal has never stated this view explicitly, it has done so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation (see the Tribunal's Judgment of 23 December 2002 in the *"Volga"* Case … ).[59]

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[46] *Tyrer v. the United Kingdom*, 25 April 1978, para. 31, Series A, No. 26; *Al-Saadoon and Mufdhi* (footnote 42 above), para. 119, quoting *Öcalan v. Turkey* [GC], No. 46221/99, para. 163, ECHR 2005-IV; *Selmouni v. France* [GC], No. 25803/94, para. 101, ECHR 1999-V.

[47] *Mamatkulov and Askarov* (footnote 42 above), para. 111; see also *Al-Saadoon and Mufdhi* (footnote 42 above), para. 119; *Al-Adsani* (footnote 42 above), para. 55, *Loizidou* (footnote 42 above), para. 73; and *Bayatyan v. Armenia* [GC], No. 23459/03, paras. 98–108, ECHR 2011.

[48] *"White Van" (Paniagua-Morales and others v. Guatemala)* (Preliminary objections), judgment, 25 January 1996, Inter-American Court of Human Rights, Series C, No. 23, para. 40.

[49] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Inter-American Court of Human Rights, Series A, No. 2, para. 19; *Enforceability of the Right to Reply or Correction (Articles 14(1) 1(1) and 2, American Convention on Human Rights)*, Advisory Opinion OC-7/85, 29 August 1986, Inter-American Court of Human Rights, Series A, No. 7.

[50] *The Effect of Reservations* (see footnote 49 above), para. 19; *González and others ("Cotton Field")* v. *Mexico* (Preliminary objection, Merits, Reparations and Costs), Judgment, 16 November 2009, Inter-American Court of Human Rights, Series C, No. 205, para. 29.

[51] Lixinski, "Treaty interpretation by the Inter-American Court of Human Rights", pp. 587–588.

[52] *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984, Inter-American Court of Human Rights, Series A, No. 4, para. 23; *Article 55 of the American Convention on Human Rights*, Advisory Opinion OC-20/09, 29 September 2009, Inter-American Court of Human Rights, Series A, No. 20, para. 26.

[53] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, Inter-American Court of Human Rights, Series A, No. 16 para. 58.

[54] Communication No. 118/1982, *J.B. et al. v. Canada*, Views adopted on 18 July 1986, *Official Records of the General Assembly, Forty-first Session, Supplement No. 40* (A/41/40), annex IX, p. 151, para. 6.3.

[55] Communication No. 63/1979[R.14/63], *Setelich v. Uruguay*, Views adopted on 28 October 1981, *Official Records of the General Assembly, Thirty-Seventh Session, Supplement No. 40* (A/37/40), annex VIII, p. 114, paras. 11, 14 and 18.

[56] Communication Nos. 1321/2004 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006, *Official Records of the General Assembly, Sixty-Second Session, Supplement No. 40* (A/62/40), vol. II, annex VII, p. 195, para. 8.2.

[57] Communication No. 185/1984, *L.T.K. v. Finland*, Views adopted on 9 July 1985, *Official Records of the General Assembly, Fortieth Session, Supplement No. 40* (A/40/40), annex XXI, p. 240, para. 5.2.

[58] Communication Nos. 1853/2008 and 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, *Official Records of the General Assembly, Sixty-Seventh Session, Supplement No. 40* (A/67/40), vol. II, annex IX, p. 248, para. 7.13.

[59] *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, para. 57. See also para. 58.

24. On occasion, ITLOS has shown its readiness to employ a dynamic and evolutive approach to interpretation. Thus, the Seabed Disputes Chamber has characterized certain "obligations to ensure"[60] as "due diligence" obligations[61] which were "variable concepts" and which "may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge".[62] Thus, where appropriate, the Tribunal seems to be prepared to interpret the United Nations Convention on the Law of the Sea in an evolutive and dynamic manner on the basis of the 1969 Vienna Convention, presumably as a feature of the object and purpose of the provision.

25. The International Criminal Court has repeatedly pronounced that, in interpreting its Statute and other applicable treaties, it follows the rules of the 1969 Vienna Convention.[63] The International Tribunal for the Former Yugoslavia has also stated on several occasions that the Vienna Convention rules are applicable to the interpretation of treaties.[64]

26. The European Court of Justice treats the rules of the founding treaties ("primary Union law") as constituting an "autonomous legal order" and accordingly does not refer to the 1969 Vienna Convention when interpreting those treaties. In contrast, when the European Court of Justice interprets agreements of the European Union with third States, it considers itself bound by the rules of customary international law as they are reflected in the rules on interpretation of the Vienna Convention.[65] In *Brita GmbH v. Hauptzollamt Hamburg-Hafen*,[66] the European Court of Justice remarked:

> Even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the Community institutions and form part of the Community legal order.[67]

The Court concluded:

> The rules laid down in the Vienna Convention apply to an agreement concluded between a State and an international organisation, such as the [European Community]–Israel Association Agreement, in so far as the rules are an expression of general international customary law.[68]

27. Quoting article 31 of the 1969 Vienna Convention, the European Court of Justice then noted that treaties must not only be interpreted according to their textual meaning, but also in the light of their object and purpose. For example, in a case concerning the draft agreement relating to the creation of the European Economic Area between the Community and the countries of the European Free Trade Association,[69] the Court stressed that "the fact that the provisions of the agreement and the corresponding Community provision are identically worded does not mean that they must be interpreted identically."[70] The Court determined that the meaning of identically worded provisions in the agreement and the Treaty establishing the European Economic Community differed.[71]

### E. Conclusion: draft conclusion 1

28. Taken together, these sources suggest the following draft conclusion:[72]

"*Draft conclusion 1. General rule and means of treaty interpretation*

"Article 31 of the Vienna Convention on the Law of Treaties, as treaty obligation and as reflection of customary international law, sets forth the general rule on the interpretation of treaties.

"The interpretation of a treaty in a specific case may result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Vienna Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned."

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[60] United Nations Convention on the Law of the Sea, art. 153, para. 4 and art. 4, para. 4 of annex III.

[61] *Responsibilities and obligations of States* (footnote 59 above), para. 110.

[62] *Ibid.*, para. 117; see also para. 211.

[63] *Thomas Lubanga Dyilo* (Decision on the Final System of Disclosure and the Establishment of a Timetable) ICC (Pre-Trial Chamber) (15 May 2006), annex I, para. 1; *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal), International Criminal Court (Appeals Chamber) (13 July 2006), paras. 6 and 33; *Thomas Lubanga Dyilo* (Decision on the Practices of Witness Familiarisation and Witness Proofing), ICC (Pre-Trial Chamber) (8 November 2006), para. 8.

[64] See *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999, *Judicial Supplement*, No. 10, para. 61; *Prosecutor v. Delalić et al. ("Čelebići")*, Case No. IT-96-21-A, Judgment, 20 February 2001, *Judicial Supplement*, No. 23, paras. 67 *et seq.*; *Krstić*, IT-98-33-T, Judgment, 2 August 2001, *Judicial Supplement*, No. 27, para. 541; *Stakić*, IT-97-24-T, Judgment, 31 July 2003, *Judicial Supplement*, No. 43, para. 501; *Galić*, IT-98-29-T, Judgment and Opinion, 5 December 2003, *Judicial Supplement*, No. 46, para. 91.

[65] See Kuijper, "The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969"; Case C-344/04, *The Queen on the application of: International Air Transport Association and European Low Fares Airline Association v. Department for Transport* (Preliminary Ruling) (2006), *European Court Reports 2006*, p. I-403, para. 40.

[66] Case C-386/08, *European Court Reports 2010*, p. I-01289.

[67] *Ibid.*, para. 42.

[68] *Ibid.*, para. 41; see also Case C-6/60, *Jean-E. Humblet v. Belgian State* (1960), *European Court Reports 1960*, p. 559, at p. 574.

[69] European Court of Justice, Opinion 1/91 (1991), *European Court Reports 1991*, p. I-6079.

[70] *Ibid.*, para. 14.

[71] *Ibid.*, para. 35.

[72] See *Yearbook … 2011*, vol. II (Part Two), para. 344, preliminary conclusions 1 to 3 of the Chair of the Study Group on treaties over time, in particular preliminary conclusion (1) and (2) (first paragraph):

"(1) *General rule on treaty interpretation*

"The provisions contained in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), either as an applicable treaty provision or as a reflection of customary international law, are recognized by the different adjudicatory bodies reviewed as reflecting the general rule on the interpretation of treaties which they apply.

"(2) *Approaches to interpretation*

"Regardless of their recognition of the general rule set forth in Article 31 VCLT as the basis for the interpretation of treaties, different adjudicatory bodies have in different contexts put more or less emphasis on different means of interpretation contained therein."

## Chapter III

## Subsequent agreements and subsequent practice as means of interpretation

29. The general rule on the interpretation of treaties recognizes subsequent agreements and subsequent practice of the parties under certain conditions to be among the different means of interpretation (1969 Vienna Convention, art. 31, para. (3) (*a*) and (*b*)). The Commission, in its commentary on the draft articles on the Law of Treaties, underlined:

> The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[73]

30. By considering subsequent agreement and subsequent practice according to article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention to be "objective evidence of the understanding of the parties", the Commission conceived them as "authentic"[74] means of interpretation. This understanding as an authentic means of interpretation suggests that such subsequent agreements and subsequent practice of the parties are often, but not necessarily always,[75] particularly important factors for the interpretation of treaties.[76]

### A. Recognition by international adjudicatory bodies

31. Subsequent agreements and subsequent practice of the parties have been recognized and applied as means of interpretation by international adjudicatory bodies, albeit with somewhat different emphasis.

#### 1. International Court of Justice

32. ICJ "has itself frequently examined the subsequent practice of the parties in the application of [a] treaty".[77] Its jurisprudence provides a general orientation and significant examples of the possible legal effects of subsequent agreements and subsequent practice as means of interpretation as well as their interplay with other means of interpretation (see more detailed discussion in paras. 58–63 below).

#### 2. Adjudicatory bodies under economic treaty regimes

33. International adjudicatory bodies under economic treaty regimes have frequently addressed subsequent agreements and subsequent practice as means of interpretation. Thus, the WTO Appellate Body has recognized subsequent practice as a means of interpretation and has applied it on several occasions[78] and has also taken a subsequent agreement into account.[79] The same is true for the Iran–United States Claims Tribunal,[80] which has held:

> Hence, far from playing a secondary role in the interpretation of treaties, the subsequent practice of the Parties constitutes an important element in the exercise of interpretation. In interpreting treaty provisions, international tribunals have often examined the subsequent practice of the parties. The Tribunal has also recognized the importance of the subsequent practice of the parties and has referred to it in several cases.[81]

34. ICSID tribunals have frequently recognized subsequent agreements and subsequent practice as means of interpretation.[82] In some decisions, tribunals have even emphasized that subsequent practice is a particularly important means of interpretation for such provisions which the parties to the treaty intended to evolve in the light of subsequent treaty practice. In the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, for example, the Tribunal held:

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[73] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (15) of the commentary to article 27 in section 3: Interpretation of treaties.

[74] *Ibid*.

[75] It has been asserted that the interpretation of treaties which establish rights for other States or actors is less susceptible to "authentic" interpretation by their parties, for example in the context of investment treaties: *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (28 September 2007), para. 386; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (22 May 2007), para. 337.

[76] See Jennings and Watts, *Oppenheim's International Law*, p. 1268, para. 630; G. Fitzmaurice, "The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and certain other treaty points", pp. 223–225; WTO, *United States: Large Civil Aircraft (2nd complaint)*, Report of the Panel (31 March 2011) (WT/DS353/R, para. 7.953).

[77] *Kasikili/Sedudu Island (Botswana/Namibia)* (see footnote 26 above), p. 1076, para. 50; see also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)* (footnote 25 above), p. 675, para. 99.

[78] WTO, *Japan: Alcoholic Beverages II* (see footnote 31 above), Report of the Appellate Body (4 October 1996), WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, at sect. E; Report of the Panel (11 July 1996), WT/DS8/R, WT/DS10/R and WT/DS11/R; *European Communities: Chicken Cuts*, Report of the Appellate Body (12 September 2005), WT/DS269/AB/R and WT/DS286/AB/R, para. 259, and Report of the Panel (30 May 2005), WT/DS269/R and WT/DS286/R; *European Communities: Computer Equipment*, Report of the Appellate Body (5 June 1998), WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, paras. 92 and 93, and Report of the Panel (5 February 1998), WT/DS62/R, WT/DS67/R and WT/DS68/R; *United States: Upland Cotton*, Report of the Appellate Body (3 March 2005), WT/DS267/AB/R; Report of the Panel (8 September 2004), WT/DS267/R; see also *European Communities and its Member States: Information Technology Products*, Report of the Panel (16 August 2010), WT/DS375/R, WT/DS376/R and WT/DS377/R, para. 7.558.

[79] WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* ("*Tuna II (Mexico)*"), Report of the Appellate Body (16 May 2012), WT/DS381/AB/R, para. 372.

[80] *The United States of America (and others) v. The Islamic Republic of Iran (and others)*, Award No. 108-A-16/582/591-FT (1984), 5 Iran–USCTR 57; *International Schools Services, Inc. v. National Iranian Copper Industries Company*, Interlocutory Award No. ITL 37-111-FT (1984), 5 Iran-USCTR 338; *United States–Iran*, Case No. A17, Decision No. DEC 37-A17-FT (1985), 8 Iran-USCTR 189; *Burton Marks (and others) v. The Islamic Republic of Iran*, Interlocutory Award No. ITL 53-458-3 (1985), 8 Iran-USCTR 290; *The Islamic Republic of Iran v. The United States of America*, Interlocutory Award No. ITL 63-A15-FT (1986), 12 Iran-USCTR 40; *The Islamic Republic of Iran v. The United States of America*, Award No. 382-B1-FT (1988), 19 Iran-USCTR 273.

[81] *The Islamic Republic of Iran v. The United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (9 September 2004), 38 Iran-USCTR 77, p. 117, para. 111.

[82] See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (7 October 2008), para. 70; *Siemens AG v. Argentine Republic* (Germany/Argentina bilateral investment treaty) (Decision on Jurisdiction), ICSID Case No. ARB/02/8 (3 August 2004), para. 105; *National Grid PLC v. The Argentine Republic* (United Kingdom/Argentina bilateral investment treaty) (Decision on Jurisdiction) UNCITRAL Arbitral Tribunal (20 June 2006), paras. 84–85.

Neither party asserted that the ICSID Convention contains any precise *a priori* definition of "investment". Rather, the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.[83]

35. NAFTA panels have on several occasions recognized subsequent agreements and subsequent practice as means of interpretation.[84] While NAFTA Panels do not seem to have discussed subsequent practice very often,[85] they have intensely argued about the legal effects of a document held to be a subsequent agreement.[86]

### 3. Human rights courts and the Human Rights Committee

36. Human rights courts and treaty bodies have followed a somewhat different approach with regard to subsequent agreements and subsequent practice than adjudicative bodies under international economic treaty regimes. Thus, human rights courts and treaty bodies do not seem to have considered subsequent agreements by the parties in their interpretation of substantive human rights provisions. The situation is different, however, for subsequent practice by the parties.

37. The European Court of Human Rights has from time to time invoked article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, mostly in cases which concerned the relationship of the Court with the member States, and in cases which raised questions of general international law.[87] More often, however, the Court has referred to the legislative practice of member States without explicitly mentioning article 31, paragraph 3 (*b*), of the Vienna Convention.[88] In such cases the Court has confirmed that uniform, or largely uniform national legislation, and even domestic administrative practice, can in principle constitute relevant subsequent practice[89] and may have effects which can go beyond even that of being merely a means of interpretation according to article 31, paragraph 3 (*b*), of the Vienna Convention.[90] Thus, judgments in which the Court has relied on subsequent State practice without explicitly quoting article 31, paragraph 3 (*b*), are more characteristic than those in which it has. Since *Tyrer v. the United Kingdom*, the Court has typically relied on subsequent State (and other) practice as orientation for its "dynamic" or "evolutive" interpretation. The Court determines the character and the extent of its evolutive interpretation by looking at the more or less specific "present-day conditions"[91] and "developments in international law" which the Court recognizes on the basis of

> a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States [which] reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.[92]

38. Indeed, whenever the Court has recognized that it is engaging in "evolutive interpretation", it has typically referred to State, social or international legal practice as orientation.[93]

39. It appears that the Inter-American Court of Human Rights, in contrast to the European Court of Human Rights, has so far not referred to article 31, paragraph 3 (*a*) or (*b*), of the 1969 Vienna Convention, and the number of decisions in which the Court has referred to subsequent practice is rather limited.[94] However, despite its rare mentioning of subsequent practice *stricto sensu*, the Inter-American Court makes abundant references to international developments in a broader sense, which are located somewhere between subsequent practice, in the sense of article 31, paragraph 3 (*b*), and other "relevant rules" related to article 31, paragraph 3 (*c*), of the Vienna Convention.[95] The Human Rights Committee, for its part, has occasionally considered subsequent State practice more closely.[96] The reason why the Inter-American Court of Human Rights and the Human Rights Committee refer

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[83] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (United States/Sri Lanka bilateral investment treaty) (Award and Concurring Opinion), ICSID Case No. ARB/00/2 (15 March 2002) [2004], *ICSID Reports*, vol. 6, p. 310, at para. 33; similarly *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela* (Decision on Jurisdiction), ICSID Case No. ARB/00/5 (27 September 2001) [2004], *ICSID Reports*, vol. 6, p. 419, at para. 97.

[84] *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (footnote 38 above), paras. 181–183.

[85] *In the Matter of Cross-Border Trucking Services* (Final Report of the Panel), Arbitral Panel Established Pursuant to article 2008, Secretariat File No. USA-MEX-98-2008-01 (6 February 2001), paras. 220, 221 and 235; *Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (footnote 38 above), paras. 119, 141 and 142.

[86] See paragraphs 88–90 below.

[87] *Cruz Varas*, para. 100; *Loizidou*, para. 73; *Banković*, para. 56 (see footnote 42 above).

[88] See, for example, *Lautsi and Others v. Italy* [GC], No. 30814/06, judgment of 18 March 2011 (extracts), para. 61, ECHR 2011-III; and *Herrmann v. Germany* [GC], No. 9300/07, para. 78, judgment of 26 June 2012.

[89] See, for example, *Mamatkulov and Askarov*, paras. 111 and 123; *Johnston*, para. 51; *Al-Saadoon and Mufdhi*, para. 126; *Rantsev*, paras. 273 and 274; *Demir and Baykara* (see footnote 42 above), para. 65 .

[90] *Soering* (footnote 43 above), para. 103; *Al-Saadoon and Mufdhi* (see footnote 42 above), para. 119, quoting *Öcalan* (footnote 46 above), para. 163.

[91] *Tyrer* (footnote 46 above), para. 31.

[92] *Demir and Baykara* (footnote 42 above), para. 76.

[93] See, for example, *Öcalan* (footnote 46 above), paras. 163 and 191; *Vo v. France* [GC], No. 53924/00, ECHR 2004-VIII; *Johnston* (footnote 42 above), para. 53; *Bayatyan* (footnote 47 above), para. 63; *Soering* (footnote 43 above), para. 103; *Al-Saadoon and Mufdhi* (footnote 42 above), para. 119.

[94] Inter-American Court of Human Rights, *Gelman v. Uruguay*, Merits and Reparations, Judgment of 24 February 2011, Series C, No. 221, paras. 215–224; and the Concurring Opinion of Judge Vio Grossi in *López Mendoza v. Venezuela* (Merits, Reparations and Costs), Judgment, 1 September 2011, Inter-American Court of Human Rights, Series C, No. 233, para. 3; see also *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago* (Merits, Reparations and Costs, Judgment, 21 June 2002, Inter-American Court of Human Rights, Series C, No. 94, para. 12; see also *"White Van" (Paniagua-Morales and others v. Guatemala)* (footnote 48 above).

[95] See, for example, *Velásquez-Rodríguez v. Honduras* (Merits), Judgment, 29 July 1988, Inter-American Court of Human Rights, Series C, No. 4, para. 151; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (footnote 53 above), paras. 130–133 and 137.

[96] Communication No. 470/1991, *Kindler v. Canada*, views adopted on 30 July 1993, (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40* (A/48/40)) (Part II), annex XII, para. 14.2; Communication No. 829/1998, *Judge v. Canada*, views adopted on 5 August 2002 (*ibid., Fifty-eighth Session, Supplement No. 40* (A/58/40)), vol. II, annex V, para. 10.3; Communications No. 270/1988 and 271/1988, *Barrett and Sutcliffe v. Jamaica*, views adopted on 30 March 1992 (*ibid., Forty-seventh Session, Supplement No. 40* (A/47/40)), annex IX, para. 8.4; Communication No. 541/1993, *Simms v. Jamaica*, views adopted on 3 April 1995, (*ibid., Fiftieth Session, Supplement No. 40* (A/50/40)), vol. II, annex XI, para. 6.5.

less to subsequent practice than the European Court of Human Rights may, *inter alia*, have to do with a lack of resources to reliably verify a sufficiently representative part of the relevant practice.

#### 4. Other international adjudicative bodies

40. ITLOS has, on some occasions, considered the subsequent practice of the parties as means of interpretation.[97] The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda have recognized that the interpretation of substantive international criminal law, including treaties, must take into account the subsequent interpretative practice of national courts.[98] Neither tribunal has limited itself to considering the subsequent jurisprudence of domestic courts, but each also refers to subsequent executive or military State practice.[99] The International Tribunal for the Former Yugoslavia has even taken more general forms of State practice into account, including trends in the legislation of member States which, in turn, can give rise to a changed interpretation of the scope of crimes or their elements. In *Furundžija*, for example, the Chamber of the International Tribunal for the Former Yugoslavia, in search of a definition for the crime of rape as prohibited by article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), article 76, paragraph 1, of the first additional Protocol, and article 4, paragraph 2 (*e*), of the second additional Protocol,[100] examined the principles of criminal law common to the major legal systems of the worldc and held

> that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault: the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.[101]

41. The European Court of Justice, in contrast to other international adjudicatory bodies, has refrained from taking subsequent practice of the member States into account when interpreting the founding treaties of the European Union (primary Union law). This is in keeping with its general approach to treat the founding treaties as constituting an "autonomous legal order" and thus not to refer to and apply the 1969 Vienna Convention when interpreting those treaties.[102] However, the Court does take subsequent practice into account when it interprets agreements which the Union has concluded with third States, and it has recognized the relevance of "settled practice of the parties to the Agreement" for the purpose of their interpretation.[103]

### B. Subsequent agreements and subsequent practice among the different means of interpretation

42. The recognition of subsequent agreements and subsequent practice as means of interpretation by international adjudicatory bodies has led to their application in a wide variety of situations. For the present purpose, it is sufficient to point to a few cases in the jurisprudence of ICJ which exemplify the role which subsequent agreements and subsequent practice can play in relation to other means of interpretation. The most important of such other means of interpretation are the "ordinary meaning" of the terms of a treaty, their "context", and the "object and purpose" of the treaty (article 31, para. 1, of the 1969 Vienna Convention).

#### 1. Ordinary meaning

43. As far as the "ordinary meaning" of treaty terms is concerned, the Court has, for example,[104] determined in the *Nuclear Weapons* advisory opinion that "poison or poisonous weapons"

> have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.[105]

44. In the *Case concerning rights of nationals of the United States of America in Morocco*, ICJ stated:

> The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs... have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner. In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute.[106]

45. And in the case of *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ held:

> In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials... In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.[107]

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[97] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999), *ITLOS Reports 1999*, p. 10, at paras. 155–156; see also *M/V "SAIGA" (No. 1) (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, Judgment, 4 December 1997, *ITLOS Reports 1997*, p. 16, at para. 57.

[98] *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, *Judicial Supplement*, No. 11, para. 541; see also *Akayesu* (Judgment), ICTR-96-4-T, T Ch I (2 September 1998), paras. 503 and 542 *et seq.*

[99] *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, *Judicial Reports 1999*, para. 94; *Jelisić* (see footnote 64 above), para. 61 (footnotes omitted).

[100] *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, *Judicial Reports 1998*, vol. I, paras. 165 *et seq.*

[101] *Ibid.*, para. 179; similarly, International Tribunal for Rwanda, *Musema* (Judgment), ICTR-96-13-A, Trial Chamber I (27 January 2000), paras. 220 *et seq.*, in particular para. 228.

[102] See paragraphs 26–27 above.

[103] See Case C-52/77, *Leonce Cayrol v. Giovanni Rivoira & Figli* [1977], *European Court Reports 1977*, p. 2261, para. 18, at p. 2277; see also Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd. and others* [1994], *European Court Reports 1994*, p. I-3087, paras. 43 and 50.

[104] See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 306, para. 67; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 815, para. 30; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, *I.C.J. Reports 1950*, p. 9.

[105] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 248, para. 55.

[106] *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952, *I.C.J. Reports 1952*, p. 211.

[107] Advisory Opinion, *I.C.J. Reports 1989*, p. 177, at p. 194, para. 48.

46. In most cases, ICJ considered the determination of the "ordinary meaning" of a treaty term, as it was specified by the subsequent practice of the parties, to be determinative, regardless of whether this practice suggested a broader or a more restrictive interpretation of the "ordinary meaning".[108] One well-known example is the interpretation by ICJ in the *Certain expenses* advisory opinion of the terms "expenses" (broad interpretation) and "action" (restrictive interpretation) in the light of the subsequent practice of the Organization.[109]

47. Subsequent practice of the parties thus often exerts a pull towards a narrowing of different possible textual meanings. It is also possible, however, that subsequent practice indicates openness for different shades of meaning or suggests a broad interpretation of the terms of a treaty.[110]

### 2. Context

48. The interpretation of a treaty is not confined to the interpretation of the text of its specific terms but also encompasses the "terms of the treaty in their context" (art. 31, para. 1, of the 1969 Vienna Convention) as a whole. Subsequent agreements and subsequent practice may also influence the interpretation of a particular rule when the practice relates to the treaty as a whole or to other relevant treaty rules.[111] Accordingly, ICJ held in *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*:

> This reliance upon registered tonnage in giving effect to different provisions of the Convention... persuade[s] the Court to the view that it is unlikely that when the latter Article [28 (*a*)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest ship-owning nations.[112]

49. While subsequent agreements and subsequent practice are mostly used to elucidate ambiguous or general terms,[113] it would go too far to assume that the meaning of apparently clear terms is largely immune from being called into question by subsequent agreements or subsequent practice of the parties.[114] ICJ has indeed, on occasion, found subsequent practice to render an apparently clear treaty provision more open-ended. One example is the *Wall* advisory opinion, in which ICJ held "that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter".[115]

50. Article 12 of the Charter of the United Nations is a provision whose text does not clearly reflect what the subsequent practice of the General Assembly was suggesting.

### 3. Object and purpose

51. Article 31, paragraph 1, of the 1969 Vienna Convention provides that a treaty shall also be interpreted "in the light of its object and purpose". Subsequent agreements and subsequent practice, on the one hand, and the object and purpose of a treaty, on the other, can be closely interrelated. Thus, subsequent conduct of the parties is sometimes used for specifying the object and purpose of the treaty in the first place.[116] In *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, for example, ICJ clarified the object and purpose of a bilateral agreement on the delimitation of the continental shelf by referring to subsequent practice as well as to the implementation by the parties.[117] In *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, ICJ held:

> From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not, however, have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.[118]

52. It has been suggested that the character of an instrument (for example, multilateral/bilateral/unilateral; law-making/contractual) and the nature of the subject matter (for example, technical/value-oriented; economic/human rights) as elements of the object and purpose of a treaty would contribute to determining how much room is available for subsequent agreements and subsequent practice as a means of interpretation.[119] Such assumptions cannot, however, be clearly confirmed by the jurisprudence of ICJ. Subsequent agreements and subsequent practice have been used as important means of interpretation of the Charter of the United Nations,[120] as well as for bilateral

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[108] See, for an exception, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)* (see footnote 24 above), p. 586, para. 380.

[109] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *I.C.J. Reports 1962*, p. 151, at pp. 158 *et seq.* ("expenses") and pp. 164 *et seq.* ("action").

[110] The European Court of Human Rights, in particular, accepts that diverse or non-uniform practice may indicate that the contracting parties enjoy a wide margin of appreciation in complying with their obligations under the European Convention on Human Rights; see, for example, *Lautsi* (footnote 88 above), para. 61; and *Van der Heijden v. the Netherlands* [GC], No. 42857/05, 3 April 2012, paras. 31 and 61.

[111] See, for example, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 87, para. 40.

[112] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, *I.C.J. Reports 1960*, p. 169; and, in the same sense, *Proceedings pursuant to the OSPAR Convention (Ireland–United Kingdom)* (2003), UNRIAA, vol. XXIII (Part II), p. 99, para. 141.

[113] *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, Judgment of 18 November 1960, *I.C.J. Reports 1960*, pp. 208 *et seq.*; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19 above), Declaration of Judge *ad hoc* Guillaume, p. 290.

[114] *Certain expenses of the United Nations*, Advisory Opinion (see footnote 109 above), Separate Opinion of Judge Spender, p. 189.

[115] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (see footnote 26 above), *I.C.J. Reports 2004*, p. 150, para. 28.

[116] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, separate opinion of Judge De Castro at p. 179; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (see footnote 26 above), p. 179, para. 109; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment (see footnote 104 above), p. 815, para. 30; Higgins, "Some observations on the inter-temporal rule in international law", p. 180; Distefano, "La pratique subséquente des États Parties à un traité", pp. 52–54.

[117] Judgment, *I.C.J. Reports 1993*, p. 50, para. 27.

[118] Preliminary Objections (see footnote 104 above), p. 306, para. 67.

[119] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ... (footnote 116 above), Separate Opinion of Judge Dillard, p. 154, footnote 1.

[120] See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ... (footnote 26 above), p. 149, para. 27.

boundary treaties[121] and for unilateral submissions to the jurisdiction of a court or tribunal.[122] And there seems to be no conspicuous difference with respect to the relative importance of subsequent agreements or subsequent practice between "law-making" and "contractual" treaties, if such a distinction can be drawn at all. The same is true for the difference between more technical and more value-oriented treaties or provisions.

53. This observation from the jurisprudence of ICJ cannot, however, be taken to apply generally. Adjudicative bodies under international economic, human rights and other treaties sometimes put more emphasis on the "object and purpose" of a treaty, or on the "ordinary meaning" of a term of a treaty, depending on the regime in question.[123] It would therefore be premature to conclude from the jurisprudence of ICJ that the character of the instrument and the nature of the subject matter, as elements of the object and purpose of a treaty, do not influence the relative importance of subsequent agreements or subsequent practice for the interpretation of a treaty. It is possible that the comparatively low number of cases and the lack of specialization of ICJ have so far prevented a more differentiated picture to emerge from its jurisprudence. It may, therefore, be appropriate to review this question more closely at a later stage of the work.

## C. Contemporaneous and evolutive interpretation

54. The possible legal significance of subsequent agreements and subsequent practice as means of interpretation also depends on the so-called intertemporal law.[124] This concerns the question of whether a treaty must be interpreted in the light of the circumstances at the time of its conclusion ("contemporaneous interpretation"), or rather in the light of the circumstances at the time of its application ("evolutive interpretation").[125] Originally, Max Huber's dictum in the *Island of Palmas* case according to which "a judicial fact must be appreciated in the light of the law contemporary with it"[126] had led many to generally favour "contemporaneous interpretation".[127]

### 1. The Commission's previous work

55. The Commission has dealt with the question of intertemporal law primarily in its work on the law of treaties and on the fragmentation of international law. During its work on the draft articles on the law of treaties, the Commission discussed the question of treaty interpretation "over time" in the context of what would later become article 31, paragraph (3) (*c*), of the 1969 Vienna Convention. At the time, the Commission found that "to attempt to formulate a rule covering comprehensively the temporal element would present difficulties" and it, therefore, "concluded that it should omit the temporal element".[128]

56. The matter was addressed again within the Study Group on the fragmentation of international law.[129] The debates within that Study Group led to the conclusion that it is difficult to formulate and to agree on a general rule which would give preference either to a principle of contemporaneous interpretation or to one of evolutive interpretation. In his final report, the Chair of the Study Group, Mr. Martti Koskenniemi, therefore, concluded that it would be "best... to merely single out some considerations" to be taken into account when interpreting a particular treaty:

> The starting-point must be... the fact that deciding this issue is a matter of interpreting the treaty itself. Does the language used give any indication? The starting-point of the argument might plausibly be the "principle of contemporaneity" – with regard to the normative environment as it existed at the moment when the obligation entered into force for a relevant party. When might the treaty language itself, in its context, provide for the taking account of future developments? Examples of when this might be a reasonable assumption include at least:
>
> (*a*) Use of a term in the treaty which is "not static but evolutionary" [...]
>
> (*b*) The description of obligations in very general terms, thus operating a kind of *renvoi* to the state of the law at the time of its application.[130]

57. Thus, the previous work of the Commission leaves open the possibility that subsequent agreements and subsequent practice play a role in the determination of whether a more contemporaneous or a more evolutive interpretation is appropriate in a particular case.

### 2. The relationship between evolutive interpretation and interpretation in the light of subsequent practice

58. ICJ addressed the relationship between evolutive interpretation and subsequent practice of the parties in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*.[131] This case concerned a treaty between Costa Rica and Nicaragua of 1858, which granted Costa Rica freedom of navigation on the San Juan River for the "*objetos de comercio*" ("purposes of commerce"). Nicaragua asserted that, at the time when the treaty was concluded and for a long time thereafter, the term "*comercio*" was understood by the States parties to be limited to goods and did not cover services, and in particular not the transport of persons for the purpose of tourism. The Court, however, did not consider this argument to be conclusive:

> On the one hand, the subsequent practice of the parties, within the meaning of article 31, paragraph 3 (*b*) of the Vienna Convention, can

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[121] See, for example, *Kasikili/Sedudu Island (Botswana/Namibia)* (footnote 26 above), p. 1087, para. 63.

[122] See, for example, *Anglo-Iranian Oil Co. case (jurisdiction)*, Preliminary Objection, Judgment of 22 July 1952, *I.C.J. Reports 1952*, p. 106.

[123] See paragraphs 11–27 above.

[124] M. Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties" pp. 101 *et seq.*; Elias, "The doctrine of intertemporal law" pp. 285 *et seq.*; Greig, *Intertemporality and the Law of Treaties*; Kotzur, "Intertemporal Law"; Linderfalk, "Doing the right thing for the right reason: why dynamic or static approaches should be taken in the interpretation of treaties"; Verdross and Simma, *Universelles Völkerrecht*, pp. 496 *et seq.*, paras. 782 *et seq.*

[125] M. Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties", p. 102.

[126] *Island of Palmas* case *(Netherlands v. USA)* (1928), UNRIAA, vol. II, p. 845.

[127] Higgins, "Some observations on the inter-temporal rule in international law", p. 174.

[128] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (16) of the commentary to article 27; Higgins, "Some observations on the inter-temporal rule in international law", p. 178.

[129] Document A/CN.4/L.682 and Add.1 (available from the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)), para. 475.

[130] *Ibid.*, para. 478.

[131] Judgment, *I.C.J. Reports 2009*, p. 213.

result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was... to give the terms used... a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.[132]

59. ICJ then held that the term "*comercio*" was a "generic term" of which "the parties necessarily" had "been aware that the meaning... was likely to evolve over time" and that "the treaty has been entered into for a very long period", and concluded that "the parties must be presumed... to have intended" this term to "have an evolving meaning".[133] And since the term "commerce" would today generally be understood to cover both goods and services, the Court concluded that Costa Rica had the right, under the treaty, to transport not only goods but also persons on the San Juan River.[134] Judge Skotnikov, while considering that an evolutive treaty interpretation was not appropriate, arrived at the same result by accepting that a subsequent practice of Costa Rican-operated tourism on the San Juan River "for at least a decade" against which Nicaragua "never protested" but rather "engaged in consistent practice of allowing tourist navigation" had led to a different understanding of the treaty, which would result in such services being included in the term "*objetos de comercio*".[135] Judge *ad hoc* Guillaume also found "that the practice accords with this, as shown by the Memorandum of Understanding of 5 June 1994 between the two States' Ministers of Tourism and by the growth of tourist cruise traffic on the San Juan in recent years".[136]

60. The *Dispute regarding Navigational and Related Rights* judgment demonstrates that subsequent agreements and subsequent practice of the parties can have both a supportive and a restrictive effect on the possibility of an evolutive interpretation. The supportive effect consists in confirming that an evolved understanding of a treaty can be based on subsequent practice as an authentic means of interpretation. The restrictive effect of subsequent practice[137] emerges when it is contrasted with an evolutive interpretation which is based on other grounds, in particular on the object and purpose of the treaty. Thus, the judges who emphasized the need for stability of treaty relations (Skotnikov and Guillaume) favoured the recognition of informally developed interpretation by way of subsequent practice, whereas the opinion of the Court adopts a more dynamic approach by engaging in a more abstract form of evolutive interpretation. In any case, all judges in the case *Dispute regarding Navigational and Related Rights* supported the conclusion that an evolutive interpretation is possible if it is accompanied by a common subsequent practice of the parties.

61. The nuanced approach, which is reflected in the report of the Study Group on fragmentation of international law and in the *Dispute regarding Navigational and Related Rights* judgment, is well-grounded in the jurisprudence of ICJ. This does not, however, prevent the alternative between a more contemporaneous or a more evolutive interpretation from re-emerging in specific cases. Judge *ad hoc* Guillaume, in particular, has suggested that two different strands of jurisprudence existed, one tending towards a more contemporaneous and the other towards a more evolutive interpretation.[138] It is noteworthy, however, that the cases which, according to him, favour a more contemporaneous approach mostly concern rather specific terms in boundary treaties ("watershed",[139] "main channel/Thalweg",[140] names of places,[141] "mouth" of a river[142]). In such cases, it is plausible that changes in the meaning of a (general or specific) terminology normally do not affect the substance of the specific arrangement, which is designed to be as stable and as divulged from contextual elements as possible. On the other hand, those cases which would support the legitimacy of an evolutive interpretation turn around terms whose meaning is inherently more context dependent. This is true, in particular, for the terms "the strenuous conditions of the modern world" or "the well-being and development of such peoples" in article 22 of the Covenant of the League of Nations, which ICJ, in its opinion in the case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, has given a progressive interpretation by referring to the evolution of the right of peoples to self-determination after the Second World War.[143] Other recognized grounds for the possibility of an evolutive interpretation are the "generic" character of a particular term in a treaty[144] and the fact that the treaty is designed to be "of continuing duration".[145] There may even be more specific reasons which can justify an evolutive interpretation. In the *Iron Rhine* case, for example, the continued viability and effectiveness of the arrangement, as such, was an important reason for the Permanent Court of Arbitration to accept that even rather technical rules may have to be given an evolutive interpretation.[146]

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[132] *Ibid.*, p. 242, para. 64.

[133] *Ibid.*, p. 243, para. 66.

[134] *Ibid.*, p. 244, para. 71.

[135] *Ibid.*, p. 285, para. 9, separate opinion of Judge Skotnikov.

[136] *Ibid.*, Declaration of Judge *ad hoc* Guillaume, p. 299, para. 16.

[137] See, for example, Boyle and Chinkin, *The Making of International Law*, p. 246.

[138] *Dispute regarding Navigational and Related Rights* (footnote 19 above), Declaration of Judge *ad hoc* Guillaume, pp. 294 *et seq.*, paras. 9 *et seq.*; see also *Yearbook … 2005*, vol. II (Part Two), pp. 86 and 89, paras. 467 and 479; Report of the International Law Commission Study Group on fragmentation of international law, finalized by Martti Koskenniemi (document A/CN.4/L.682 and Add.1 (footnote 129 above), para. 478); resolution of the Institute of International Law, "The intertemporal problem in public international law".

[139] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports 1962*, p. 15.

[140] *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment (footnote 26 above), pp. 1060–1061, para. 21.

[141] *Decision regarding delimitation of the border between Eritrea and Ethiopia (Eritrea v. Ethiopia)* (2002) UNRIAA, vol. XXV, p. 110, para. 3.5.

[142] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 338–339, para. 48.

[143] Advisory Opinion (footnote 116 above), pp. 30–31, para. 51.

[144] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 32, para. 77.

[145] *Dispute regarding Navigational and Related Rights* (footnote 19 above), p. 243, para. 66.

[146] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. the Netherlands)*, Permanent Court of Arbitration (award of 24 May 2005), UNRIAA, vol. XXVII (Sales No. E/F.06.V.8), para. 80 ("In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway"); see also *Aegean Sea Continental Shelf*, Judgment (footnote 144 above), p. 32, para. 77; see *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (Award of 31 July 1989), UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 151, para. 85.

62. In any case, the decisions in which ICJ has undertaken an evolutive interpretation have not strayed far from the text and from the determinable intention of the parties to the treaty, as they had also been expressed in their subsequent agreements and subsequent practice.[147] Thus, evolutive interpretation does not seem to be a separate method of interpretation but rather the result of a proper application of the usual means of interpretation.[148] It is therefore appropriate that subsequent agreements and subsequent practice have played an important role in leading cases in which international courts and tribunals have recognized and practised evolutive interpretation. In the case of *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, for example, ICJ referred to the practice of United Nations organs and of States in order to specify the conclusions which it derived from the inherently evolutive nature of the right to self-determination. In the *Aegean Sea Continental Shelf* case, the Court found it "significant" that what it had identified as the "ordinary, generic sense" of the term "territorial dispute" was confirmed by the administrative practice of the United Nations and by the behaviour of the party which invoked the restrictive interpretation in a different context.[149]

63. On balance, the jurisprudence of ICJ and arbitral tribunals does not seem to contradict the "general support among the leading writers today for evolutive interpretation of treaties", as the Tribunal in the *Iron Rhine* case has noted.[150] Other international adjudicatory bodies have displayed different degrees of openness towards evolutive interpretation. While the Appellate Body of WTO has only exceptionally recognized and performed an evolutive interpretation, an evolutive approach to interpretation has become a characteristic feature of the jurisprudence of the European Court of Human Rights (European Convention on Human Rights as a "living instrument").[151] Thus, even if it would be still appropriate to proceed from a presumption that a treaty should be given a contemporaneous interpretation, this is not a strong presumption and it stands in the face of an open list of exceptions.

### D. Conclusion: draft conclusion 2

64. Taken together, the preceding considerations suggest the following draft conclusion:[152]

*"Draft conclusion 2. Subsequent agreements and subsequent practice as authentic means of interpretation*

"Subsequent agreements and subsequent practice between the parties to a treaty are authentic means of interpretation which shall be taken into account in the interpretation of treaties.

"Subsequent agreements and subsequent practice by the parties may guide an evolutive interpretation of a treaty."

[147] See also *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (previous footnote), p. 151, para. 85.

[148] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (footnote 19 above), Declaration of Judge *ad hoc* Guillaume, p. 294, para. 9; Verdross and Simma, *Universelles Völkerrecht*, p. 498.

[149] *Aegean Sea Continental Shelf*, Judgment (footnote 144 above), p. 31, para. 74.

[150] *Iron Rhine ("Ijzeren Rijn")* (footnote 146 above), para. 81; see, for example, Sorel, "Article 31", p. 834, para. 55.

[151] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (footnote 30 above), para. 130; European Court of Human Rights, *Tyrer* (footnote 46 above), para. 31; *Al-Saadoon and Mufdhi* (footnote 42 above), para. 119, quoting *Öcalan* (footnote 46 above), para. 163; *Selmouni* (footnote 46 above), para. 101.

[152] See preliminary conclusions 4 and 7 of the Chair of the Study Group on Treaties over time (*Yearbook … 2011*, vol. II (Part Two), p. 170, para. 344):

"(4) *Recognition in principle of subsequent agreements and subsequent practice as means of interpretation*

"All adjudicatory bodies reviewed recognize that subsequent agreements and subsequent practice in the sense of article 31 (3) (*a*) and (*b*) of the 1969 Vienna Convention are a means of interpretation which they should take into account when they interpret and apply treaties.

…

"(7) Evolutionary interpretation and subsequent practice

"Evolutionary interpretation is a form of purpose-oriented interpretation. Evolutionary interpretation may be guided by subsequent practice in a narrow and in a broad sense."

## Chapter IV

## Definition of subsequent agreement and subsequent practice as means of treaty interpretation

65. Article 31, paragraph 3 (*a*), of the 1969 Vienna Convention recognizes "any subsequent agreement" and article 31, paragraph 3 (*b*), admits "subsequent practice" under certain conditions as means of treaty interpretation. Subsequent practice by one or more parties to a treaty may also be a means of interpretation under article 32 of the Convention even if not all conditions of article 31, paragraph 3 (*b*), are fulfilled. The concepts of "subsequent agreement" and "subsequent practice" thus need to be defined.

### A. Subsequent agreement

66. The concept "subsequent agreement" raises questions as to: (*a*) its form and distinction from "subsequent practice… which, establishes the agreement of the parties"; (*b*) its relational character; (*c*) the required number of parties; and (*d*) its subsequent character.

#### 1. Form of "any subsequent agreement" and distinction from "subsequent practice… which establishes the agreement of the parties"

67. Article 31, paragraph 3 (*a*), of the 1969 Vienna Convention uses the term "subsequent agreement" and not the term "subsequent treaty". This does not mean, however, that a "subsequent agreement" is necessarily less formal than a "treaty". Whereas a "treaty" within the meaning of the Convention must be in written form (art. 2, para. 1 (*a*)),

general international law knows no such requirement.[153] The term "agreement" in the Convention[154] and in general international law equally does not imply any particular degree of formality. Article 39 of the Convention, which lays down the general rule according to which "[a] treaty may be amended by agreement between the parties", has been explained by the Commission to mean that "[a]n amending agreement may take whatever form the parties to the original treaty may choose".[155] The drafters of the Vienna Convention have also not envisaged any particular formal requirements for agreements in the sense of article 31, paragraph 3 (*a*) and (*b*), of the Convention.[156]

68. While every treaty is an agreement, not every agreement is a treaty. It is precisely the purpose of a "subsequent agreement" within the meaning of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention that it "shall [only] be taken into account" in the interpretation of a treaty, but not necessarily be binding.[157] The question of the delimitation of when a subsequent agreement between the parties is binding and under which circumstances it is merely a means of interpretation among several others will be addressed in a later report.

69. It is, however, necessary to distinguish a "subsequent agreement" in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention from "any subsequent practice… which establishes the agreement of the parties regarding its interpretation" in the sense of article 31, paragraph 3 (*b*). Otherwise, all agreements which are established by subsequent practice would simultaneously also be "subsequent agreements regarding the interpretation of the treaty" in the sense of article 31, paragraph 3 (*a*).

70. It should be noted at the outset that by distinguishing between "any subsequent agreement" (art. 31, para. 3 (*a*) of the Convention), and "subsequent practice... which establishes the agreement of the parties" (art. 31, para. 3 (*b*)), the Commission did not intend to denote a difference concerning their possible legal effect. The Commentary describes a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[158] and states that "subsequent practice" "similarly" "constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".[159] This explanation suggests that the difference between the two concepts lies in the fact that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a "subsequent practice" only has this effect if it "shows the common understanding of the parties as to the meaning of the terms".[160] This suggests that a "subsequent agreement between the parties" is typically easier to prove than a "subsequent practice... which establishes the agreement of the parties".[161]

71. The jurisprudence of international courts and other adjudicative bodies shows a certain reluctance to clearly distinguish between subsequent agreements and subsequent practice. In *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ used the expression "subsequent attitudes" both to denote what it later described as "subsequent agreements" as well as subsequent unilateral "attitudes".[162] In the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ left the question open whether the use of a particular map could constitute a subsequent agreement or subsequent practice.[163] In the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case, the Court spoke of "subsequent positions" in order to establish that "[t]he explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable".[164] In the *CME* award, an UNCITRAL tribunal recalled the term "common position" between the State of the investor and the respondent State in order to confirm its interpretation of the investment treaty without identifying this as a case of article 31, paragraph 3 (*a*) or (*b*), of the 1969 Vienna Convention.[165] Similarly, the Panels and the Appellate Body of WTO also do not always distinguish clearly between subsequent agreement and subsequent practice.[166]

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[153] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112; see Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 81; Gautier, "Article 2", pp. 38 *et seq.*; Klabbers, *The Concept of Treaty in International Law*, pp. 49 *et seq.*; see also Aust, "The theory and practice of informal international instruments", pp. 787 and 794 *et seq.*

[154] See articles 2, para. 1 (*a*); 3; 24, para. 2; 39–41, 58 and 60 of the 1969 Vienna Convention.

[155] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 232, para. (4) of the commentary to article 35; see also Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, art. 39, p. 513, para. 7; Sands, "Article 39", pp. 971–972, paras. 31–34.

[156] ILC draft art. 27, para. 3 (*b*), which later became art. 31, para. 3 (*b*) of the 1969 Vienna Convention, contained the word "understanding", which was changed to "agreement" by the United Nations Conference on the Law of Treaties. As Australia pointed out, this change was "merely a drafting matter". See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), vol. I, p. 169, para. 59); Fox, "Articles 31 (3) (*a*) and (*b*) of the Vienna Convention and the *Kasikili/Sedudu Island* case", p. 63; see also the case of *Kasikili/Sedudu Island* (footnote 26 above), p. 1045, Dissenting Opinion of Vice-President Weeramantry, p. 1061 *et seq.*, paras. 23 *et seq.*

[157] But see Ronald Bettauer, Deputy Legal Adviser, United States Department of State, remarks at the meeting, held on 10 October 2006, of the Lawyers' Committee on Nuclear Policy, New York City Bar, on the topic "Is the United States in compliance with international law on nuclear weapons?", excerpts reprinted in Cummins, *Digest of United States Practice in International Law 2006*, pp. 1260 and 1261.

[158] *Yearbook … 1966*, vol. II, document A/6309/Rev.1 p. 221, para. (14) of the commentary to article 27.

[159] *Ibid.*, para. 15.

[160] *Ibid.*; Wolfram, *Vertrag und spätere Praxis im Völkerrecht*, p. 294.

[161] *Kasikili/Sedudu Island* (see footnote 26 above), p. 1087, para. 63.

[162] *Territorial Dispute* (footnote 26 above), p. 34, paras. 66 *et seq.*

[163] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (footnote 26 above), p. 656, para. 61.

[164] Judgment, *I.C.J. Reports 1997*, p. 77, para. 138; see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 153 above), p. 122, para. 28 ("subsequent conduct").

[165] *CME Czech Republic B.V. (The Netherlands) v. the Czech Republic* (Final Award), UNCITRAL Arbitration (14 March 2003), para. 437.

[166] See "Scheduling guidelines" in *Mexico: Telecoms—Report of the Panel* (2 April 2004), WT/DS204/R, and in *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, Report of the Appellate Body (7 April 2005), WT/DS285/AB/R and Corr.1; to qualify "1981 Understanding" see *United States—Tax*

(*Continued on next page.*)

72. The NAFTA Panel in *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America*[167] addressed the question of the distinction between a subsequent agreement in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention and subsequent practice in the sense of article 31, paragraph 3 (*b*), of the Convention more explicitly. In this case, the United States asserted that a number of unilateral actions by each of the three parties to NAFTA would, taken together, constitute a subsequent agreement.[168] In a first step, the Panel did not find that the evidence was sufficient to establish a subsequent agreement:

> The Respondent maintains that there is such a "subsequent agreement", and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico's Article 1128 submission in this arbitration; and to Canada's statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the *Myers* case.
>
> All of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a "subsequent agreement" by the NAFTA Parties… The Tribunal concludes that there is no "subsequent agreement" on this issue within the meaning of Article 31, paragraph 3 (*a*) of the Vienna Convention.[169]

73. In a second step, however, the Panel concluded that the very same evidence constituted a relevant subsequent practice:

> The question remains: is there "subsequent practice" that establishes the agreement of the NAFTA Parties on this issue within the meaning of Article 31, paragraph 3 (*b*)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," the available evidence cited by the Respondent demonstrates to us that there is nevertheless a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications".[170]

74. This jurisprudence suggests that the distinction between a "subsequent agreement" and "subsequent practice… which establishes the agreement of the parties" in the sense of article 31, paragraph 3, of the 1969 Vienna Convention points to a different evidentiary standard for the determination of the "authentic" expression of the will of the parties. Subsequent agreements and subsequent practice are distinguished according to whether a common position can be identified *as such*, in a common expression, or whether it is necessary to indirectly identify an agreement through particular conduct or circumstances. In this sense, a "subsequent agreement" in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention must be manifested as such, though not necessarily in written form,[171] whereas "subsequent practice" encompasses all (other) forms of relevant subsequent conduct by one or more parties to a treaty which contributes to the manifestation of an agreement of the parties regarding the interpretation of the treaty.

75. Thus, while "subsequent practice" can contribute to identifying an agreement between the parties, such practice is not the agreement itself. It is, however, not excluded that "practice" and "agreement" coincide and cannot be distinguished by external evidence. This explains why the term "subsequent practice" is often used in the sense of a broader general category which encompasses both means of interpretation that are referred to in article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention.[172] Such a broad understanding of "subsequent practice", while perfectly possible in theory, would, however, level the distinction which is contained in the Convention and which serves the purpose of alerting States and other law appliers to different types of relevant subsequent interpretative conduct of the parties.

### 2. Relational character

76. A "subsequent agreement" in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention must be made "regarding the interpretation of the treaty or the application of its provisions", and thus be relational. By such an agreement, the parties must purport, possibly among other aims, to clarify the meaning of a treaty or to indicate how the treaty is to be applied.[173]

77. A reference "regarding the… treaty" can often be identified by some indication of subordination of the "subsequent agreement" under the treaty to which it refers. Such reference may also be comprised in a later treaty which contains an agreement regarding the meaning of a previous treaty between the same parties. In the case of *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, for example, ICJ considered whether a "subsequent treaty" between the parties "in the same field" could be used for the purpose of the interpretation of the previous treaty, but rejected this possibility because the later treaty did not in any way "refer" to the previous treaty.[174] In the case of *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judge *ad hoc* Guillaume

(*Footnote 166 continued.*)

*Treatment for Foreign Sales Corporations*, Report of the Panel, unopposed (8 October 1999), WT/DS108/R. See "SCM Code" in *Brazil: Measures affecting desiccated coconut, Report of the Panel, unopposed* (17 October 1996), WT/DS22/R, and a "waiver" in *European Communities: Bananas III, second recourse to article 21.5, Appellate Body Report* (26 November 2008), WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA.

[167] *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (see footnote 38 above); *Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic* (Decision on the challenge to the President of the Committee) ICSID Case No. ARB/97/3 (3 October 2001) [2004], *ICSID Reports*, vol. 6, p. 330, para. 12; see M. Fitzmaurice and Merkouris, "Canons of treaty interpretation: selected case studies from the World Trade Organization and the North American Free Trade Agreement", pp. 217–233.

[168] *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (see footnote 38 above), paras. 174–177.

[169] *Ibid.*, paras. 186–187.

[170] *Ibid.*, para. 188; in a similar sense, *Aguas del Tunari SA v. Republic of Bolivia* (Netherlands/Bolivia bilateral investment treaty), Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005, *ICSID Review–Foreign Investment Law Journal*, vol. 20, no. 2 (2005), p. 450, para. 251; *Proceedings pursuant to the OSPAR Convention (Ireland–United Kingdom)* (2003) (see footnote 112 above), p. 110, para. 180.

[171] Sorel, "Article 31", pp. 1320–1321, para. 43; Gardiner, *Treaty Interpretation*, p. 209.

[172] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment (Provisional Measures, Order of 13 July 2006) [2006], *I.C.J. Reports 2006*, p. 113, para. 53 (in this case, even an explicit subsequent verbal agreement has been characterized by one of the parties as "subsequent practice").

[173] WTO, *United States: Tuna II (Mexico)* (see footnote 79 above), paras. 366–378, in particular para. 372; Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, pp. 164 *et seq.*

[174] Judgment, *I.C.J. Reports 1993*, p. 51, para. 28.

referred to the actual practice of tourism on the San Juan River in conformity with a memorandum of understanding between the two States.[175] The question is, however, whether this particular memorandum of understanding was meant by the parties to serve as an interpretation of the boundary treaty under examination. Thus, even an explicit agreement between the parties is not necessarily a "subsequent agreement" in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention if it does not sufficiently relate to the treaty under review.

78. For the present definitional purpose, it is not necessary to develop the relational character of a "subsequent agreement" more specifically. This will be done at a later stage of the work.

### 3. Number of parties

79. A "subsequent agreement" in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention is one between "the parties", that is, between all the parties to the treaty (art. 2, para. 1 (*g*), of the Convention). This does not necessarily mean, however, that the term "subsequent agreement", in itself and independently of article 31, paragraph 3 (*a*), of the Convention, is limited, for the purpose of the interpretation of treaties, to agreements between all the parties to a treaty. There are indeed also examples of agreements between a limited number of parties to a treaty regarding its interpretation.

80. Treaties with a broader membership are sometimes implemented by subsequent bilateral or regional agreements. Such agreements usually imply assertions concerning the permissible interpretation of the underlying treaty itself ("serial bilateralism").[176] The Convention on International Civil Aviation is an example of such a form of subsequent implementation through bilateral agreements within a multilateral treaty framework. Between 3,000 and 4,000 mostly bilateral air service agreements or air transport agreements[177] have been concluded since the entry into force of the Convention. This bilateral system has been described as a "complex web ... of interlocking air service agreements",[178] which "evolved through subsequent State practice".[179] Such bilateral treaties are not, as such, subsequent agreements in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention, since they are only concluded between a limited number of the parties to the multilateral treaty. However, if taken together and sufficiently consistent and widespread, they may establish an agreement between all the parties regarding the meaning and scope of a respective multilateral treaty provision.

81. Should such agreements between a limited number of parties to a treaty regarding its interpretation be considered a "subsequent agreement" (in a broader sense) or should the use of the term "subsequent agreement" be limited to such agreements which are "between [all] the parties" of a treaty, as provided for in article 31, paragraph 3 (*a*), of the 1969 Vienna Convention? This is ultimately a question of terminological convenience since its response does not imply a conclusion regarding the value of a "subsequent agreement" between a limited number of States parties for the purpose of interpretation of the treaty. It is therefore theoretically possible to distinguish between a (subsequent) agreement between a limited number of parties regarding the interpretation of a treaty, on the one hand, and (subsequent) agreements regarding the interpretation of a treaty between all parties to the treaty. Such a distinction would not contradict article 31, paragraph 3 (*a*), since this provision only speaks of the latter without excluding that the former might be a supplementary means of interpretation under article 32 of the Vienna Convention or otherwise.

82. Ultimately, however, it is more convenient for the purpose of the present project to limit the use of the term "subsequent agreement" to such agreements between all the parties to a treaty which are manifested in one individual agreement (or in one act with regard to which all parties agree in whatever form).[180] The example of bilateral air service agreements demonstrates that a group of different agreements between a limited number of parties of a multilateral treaty can just as well be conceived as a set of different factual elements—a "subsequent practice"—which together "establish the agreement of [all] the parties regarding" the interpretation of the treaty in the sense of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention.

83. A group of different agreements between a limited number of parties is not one individual agreement, as the term "any subsequent agreement" in article 31, paragraph 3 (*a*), of the 1969 Vienna Convention suggests. The concept "subsequent agreement" should, for the sake of terminological clarity, be limited to individual agreements between all the parties, as indicated in article 31, paragraph (3) (*a*). Subsequent agreements (in a broader sense) between a limited number of parties may have interpretative value as a supplementary means of interpretation within the meaning of article 32 of the Convention, but in this case they are a form of "subsequent practice" (in a broader sense) which does not (yet) establish the agreement of all the parties (see paras. 92–110 below).

### 4. "Subsequent"

84. The Commission has explained that "subsequent agreements" in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention are only those which are reached "after the conclusion of the treaty".[181] This point

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[175] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, Declaration of Judge *ad hoc* Guillaume, pp. 298–299, para. 16.

[176] The expression is borrowed from Benvenisti and Downs, "The empire's new clothes: Political economy and the fragmentation of international law", pp. 610–611.

[177] See Bowen, "The Chicago International Civil Aviation Conference (1944–1945)", pp. 308 and 309 *et seq.*

[178] Department of Infrastructure, Regional Development and Cities, Australia, "The Bilateral System—how international air services work", available from www.infrastructure.gov.au/aviation/international/bilateral_system.aspx.

[179] Havel, *Beyond Open Skies: A New Regime for International Aviation*, p. 10.

[180] WTO, *United States: Tuna II (Mexico)* (see footnote 79 above), para. 371; Review Conference of the Rome Statute (Kampala, 31 May–11 June 2010), RC/Res. 6, annex III, adopted at the 13th plenary meeting, on 11 June 2010; and, generally, Barriga and Groover, "A historic breakthrough on the crime of aggression", pp. 517 and 533. This aspect will be addressed in more detail in a later report.

[181] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14) of the commentary to article 27.

in time is not necessarily the moment in which the treaty has entered into force (art. 24). Articles 18 and 25 of the Convention show that a treaty can already be regarded as being "concluded" for certain purposes before its actual entry into force. In such cases the relevant point in time is when the text of the treaty has been established as definite.[182]

85. This point in time is also appropriate for the determination of the moment from which an agreement can be regarded as "subsequent" in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention. It would be difficult to identify a reason why an agreement by the parties which occurs between the moment when the text of a treaty has been established as definite and the entry into force of the treaty should not be as relevant for the purpose of interpretation as an agreement which occurs after the entry into force. This is in line with the reservations regime under articles 19 to 23 of the Convention and with the rules on interpretative declarations which are *lex specialis*.[183]

86. The question from which point an agreement is "subsequent" must be distinguished from the question from which point the agreement is operative between the parties as a means of interpretation of the treaty. This depends on the moment when the States which have arrived at the agreement actually become a "party" to the treaty, that is, "a State which has consented to be bound by the treaty and for which the treaty is in force" (art. 2, para. 1 (*g*), of the 1969 Vienna Convention).

87. "Agreements" and "instruments"[184] which "are made in connection with the conclusion of the treaty" (art. 31, para. 2, of the 1969 Vienna Convention) can be made either before or after the moment when the text of the treaty was established as definite.[185] If they are made after this moment, such "agreements" and agreed "instruments" are special forms of "subsequent agreements".

### 5. Interpretative agreements pursuant to a specific treaty provision

88. Certain treaty provisions, such as article IX, paragraph 2, of the Marrakesh Agreement establishing the World Trade Organization, provide that the parties may, under certain conditions, adopt more or less binding interpretations with respect to certain or all provisions of the treaty. The legal effects of decisions by the parties pursuant to such provisions are governed, in the first place, by the respective special treaty provisions. This does not exclude, however, that such decisions may, at the same time, constitute a "subsequent agreement" in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention. This has been recognized, for example, by a Panel under NAFTA in the *Methanex* case. This case concerned a provision (art. 1105 of NAFTA) with respect to which the parties to NAFTA had adopted an "interpretative note" ("Free Trade Commission Note") pursuant to article 1131, paragraph 2, of NAFTA, according to which "the (intergovernmental) Free Trade Commission may adopt an interpretation of a provision of NAFTA which shall be binding on a Tribunal established under Chapter 11":

> Leaving to one side the impact of Article 1131 (2) NAFTA, the FTC's interpretation must also be considered in the light of Article 31, paragraph 3 (*a*) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA.[186]

89. Although the Federal Trade Commission Note has received a mixed reaction from some Chapter Eleven panels,[187] panels have generally not disputed that a decision pursuant to article 1131, paragraph 2, of NAFTA can, in principle, simultaneously be a subsequent agreement within the meaning of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention. In a similar vein, the WTO Appellate Body has held in *European Communities: Bananas III*:

> We consider that a multilateral interpretation pursuant to Article IX:2 of the WTO Agreement can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31 (3) (*a*) of the Vienna Convention, as far as the interpretation of the WTO agreements is concerned.
>
> ...
>
> We further observe that, in its commentary on the Draft Articles on the Law of Treaties, the International Law Commission (the "ILC") describes a subsequent agreement within the meaning of Article 31 (3) (*a*) of the Vienna Convention "as a further *authentic element of interpretation* to be taken into account together with the context". In our view, by referring to "authentic interpretation", the ILC reads Article 31 (3) (*a*) as referring to agreements bearing specifically upon the interpretation of a treaty. In the WTO context, multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement are most akin to subsequent agreements within the meaning of Article 31 (3) (*a*) of the Vienna Convention.[188]

90. This does not mean, however, that any decision or agreement of the parties pursuant to a specific treaty provision with implications for interpretation is necessarily also a subsequent agreement in the sense of article 31, paragraph 3 (*a*), of the 1969 Vienna Convention. For the present definitional purpose, however, it is sufficient to note that a subsequent agreement within the meaning of article 31, paragraph 3 (*a*), must not necessarily be self-standing, but may also be provided for in the treaty itself.

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[182] *Yearbook … 1951*, vol. II, document A/CN.4/43, pp. 70 *et seq.*; *Yearbook … 1956*, vol. II, p. 112; Rosenne, "Treaties, conclusion and entry into force", pp. 464–467: "Strictly speaking it is the negotiation that is concluded through a treaty"; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, pp. 78–79, paras. 9–13.

[183] See Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three).

[184] This may include unilateral declarations if the other party did not object; see Federal Constitutional Court of Germany, *BVerfGE*, vol. 40, p. 176; see generally Gardiner, *Treaty Interpretation*, pp. 215 and 216.

[185] Jennings and Watts, *Oppenheim's International Law*, p. 1271, para. 632.

[186] *Methanex Corporation v. United States of America* (Final Award of the Tribunal on Jurisdiction and Merits) UNCITRAL Arbitration under NAFTA, Chapter Eleven (3 August 2005), Part II, chap. H, para. 23.

[187] *Pope and Talbot Inc. (Claimant) v. Government of Canada (Respondent)* (Award on the Merits of Phase 2), UNCITRAL Arbitration under NAFTA Chapter Eleven (10 April 2001), para. 46 *et seq.*; *ADF Group Inc. v. United States of America* (Award), ICSID Arbitration under NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/1 (9 January 2003), para. 177; Brower, "Why the FTC notes of interpretation constitute a partial amendment of NAFTA article 1105", pp. 349–350 with further citations; Roberts, "Power and persuasion in investment treaty interpretation", pp. 179–225.

[188] *European Communities: Bananas III* (see footnote 166 above), paras. 383 and 390.

## B. Subsequent practice

91. Like "subsequent agreement", the concept of "subsequent practice" raises a number of definitional questions. The most important are: (*a*) whether the term should be understood narrowly or broadly; (*b*) the "relational" character of subsequent practice; (*c*) the meaning of "subsequent"; and (*d*) who are the relevant actors.

### 1. Narrow or broad definition?

92. In *Japan: Alcoholic Beverages II*,[189] the WTO Appellate Body has formulated a narrow definition of subsequent practice for the purpose of treaty interpretation:

> Subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[190]

93. This definition is not limited to defining "subsequent practice" by parties in the application of the treaty *as such*, but it adds other elements which are contained in article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, in particular "the agreement of the parties regarding its interpretation". The definition suggests that only such "subsequent practice in the application of the treaty" "which establishes the agreement of the parties regarding its interpretation" can at all be relevant for the purpose of treaty interpretation, and not any other form of subsequent practice by one or more parties. This suggestion, however, is misleading. The jurisprudence of ICJ and other international courts and tribunals, and even the jurisprudence of WTO itself, demonstrate that subsequent practice which fulfils all the conditions of article 31, paragraph 3 (*b*), of the Vienna Convention is not the only form of subsequent practice by parties in the application of a treaty which is relevant for the purpose of treaty interpretation. This leads to the conclusion that "subsequent practice" in the application of a treaty by one or more parties as such should be distinguished from the question whether any such "subsequent practice" "establishes the agreement between the parties regarding its interpretation".

### (a) *Jurisprudence of ICJ and other international courts and tribunals*

94. International courts and tribunals have distinguished between agreed "subsequent practice" in the sense of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, on the one hand, and subsequent practice in a broader sense by one or more parties to the treaty which may also be relevant for the purpose of interpretation.

95. In the case of *Kasikili/Sedudu Island (Botswana/Namibia)*, for example, ICJ held that a report by a technical expert which had been commissioned by one of the parties and which had "remained at all times an internal document",[191] while not representing "subsequent practice which establishes the agreement of the parties within the meaning of" article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, could "nevertheless support the conclusions" which the Court had reached by other means of interpretation.[192] The same was true with respect to "factual findings that the parties concerned arrived at separately" and "which were expressed in concurrent terms in a joint report".[193] Of course, such unilateral or parallel subsequent interpretative practice does not carry the same weight as subsequent practice which establishes the agreement of all the parties and thus cannot embody an "authentic" interpretation of a treaty by its parties.

96. ICSID Tribunals have also used subsequent State practice as means of interpretation in a broad sense.[194] For example, when addressing the question of whether minority shareholders can acquire rights from investment protection treaties and have standing in ICSID procedures, the tribunal in *CMS Gas Transmission Company v. Argentine Republic* held:

> State practice further supports the meaning of this changing scenario... Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements... among other examples, evidence increasing flexibility in the handling of international claims.[195]

97. The European Court of Human Rights has in some cases referred to article 31, paragraph 3 (*b*), of the 1969 Vienna Convention without identifying an agreement between the parties in the respective subsequent practice. Thus, the Court asserted in *Loizidou v. Turkey*[196] that its interpretation was "confirmed by the subsequent practice of the Contracting parties"; that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46... of the Convention do not permit territorial or substantive restrictions".[197]

98. More often, the European Court of Human Rights has relied on not necessarily uniform, subsequent State practice by referring to national legislation, and even domestic administrative practice, as means of interpretation: Since *Tyrer v. the United Kingdom*, the Court has typically given its "dynamic" or "evolutive" interpretations direction by describing and relying on subsequent State (and other) practice.[198] Depending on the outcome of its analysis—consensus, no consensus, or a sufficiently qualified majority or tendency—the Court proceeds with a dynamic interpretation or not. In the case of *Demir and Baykara*, for example, the Court held that "as to the practice of European States, it

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[189] WTO, *Japan: Alcoholic Beverages II* (see footnote 31 above), and *Report of the Panel* (11 July 1996), WT/DS8/R, WT/DS10/R and WT/DS11/R.

[190] WTO, *Japan: Alcoholic Beverages II* (see footnote 31 above), sect. E.

[191] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1078, para. 55.

[192] *Ibid.*, p. 1096, para. 80.

[193] *Ibid.*

[194] Fauchald, "The legal reasoning of ICSID Tribunals—An empirical analysis", p. 345.

[195] *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina bilateral investment treaty) (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB/01/8 (17 July 2003), *ICSID Reports*, vol. 7, p. 492 (2003), para. 47.

[196] See footnote 42 above, para. 79.

[197] *Ibid.*, paras. 79–80; it is noteworthy that the Court described "such a State practice" as being "uniform and consistent" (*ibid.*, para. 82), despite the fact that it had recognized that two States possibly constituted exceptions (Cyprus and the United Kingdom; "whatever its meaning").

[198] See footnote 46 above.

can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognized"[199] and that "the remaining exceptions can be justified only by particular circumstances".[200] In *Koch*, on the other hand, the Court remarked that the contracting parties were "far from reaching a consensus" in respect of allowing assistance to suicide and thus refused to limit their margin of appreciation by adopting an evolutive interpretation.[201] Finally, in *SH and Others*, the Court noted that an "emerging consensus" alone was not sufficient to restrict the member States' margin of appreciation for allowing or not allowing gamete donation for the purpose of *in vitro* fertilization.[202]

99. Even in those rare cases in which the Inter-American Court of Human Rights and the Human Rights Committee have taken subsequent practice of the parties into account,[203] they have not limited its use to cases in which the practice established the agreement of the parties. Thus, in the case of *Hilaire*, the Inter-American Court held that the mandatory imposition of the death penalty for every form of conduct which resulted in the death of another person was incompatible with article 4, paragraph 2, of the American Convention on Human Rights (imposition of the death penalty only for the most serious crimes). In order to support this interpretation, the Court held that it was "useful to consider some examples in this respect, taken from the legislation of those American countries that maintain the death penalty" and observed that "in these countries the gradation according to gravity of each theory of deprivation of life is well recognized: from homicide to parricide. In all these countries, there exists a diversity of penalties corresponding to the diversity in gravity."[204]

100. Like the European Court of Human Rights, the Human Rights Committee is open to arguments based on subsequent practice when it comes to the justification of interference with the rights set forth in the Covenant. Interpreting the rather general terms contained in article 19, paragraph 3, of the International Covenant on Civil and Political Rights (permissible restrictions of the freedom of expression), the Committee looked at relevant State practice. Based on the observation that "similar restrictions can be found in many jurisdictions",[205] the Committee concluded that the aim pursued by the contested law did not, as such, fall outside the legitimate aims of article 19, paragraph 3, of the International Covenant on Civil and Political Rights.[206] The Committee, however, when it takes account of subsequent practice typically does so by way of a summary assessment and does not give specific references.[207]

101. ITLOS has on some occasions referred to the subsequent practice of the parties without verifying whether such practice actually established an agreement between the parties regarding the interpretation of the treaty. In *"SAIGA" (No. 2)*, for example, the Tribunal reviewed State practice with regard to the right of self-defence under Article 51 of the Charter of the United Nations. Relying on the "normal practice used to stop a ship", the Tribunal did not specify the respective State practice, but rather assumed a certain general standard to exist.[208] In the *Southern Bluefin Tuna Cases*, the Tribunal held that the practice by parties under the Convention for the Conservation of Southern Bluefin Tuna was relevant to evaluate the extent to which States have complied with their obligations under the United Nations Convention on the Law of the Sea.[209] Thus, by taking into account the practice under another treaty with different parties, the Tribunal has used the (subsequent) practice under a different treaty which does not encompass all parties to the Law of the Sea Convention.[210]

102. The *Jelisić* Judgment describes the overall methodological approach of the International Criminal Tribunals. Referring to the Convention on the Prevention and Punishment of the Crime of Genocide and the practice performed under it,

> the Trial Chamber... interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties... The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgements rendered by the Tribunal for Rwanda… The practice of States, notably through their national courts, and the work of international authorities in this field have also been taken into account.[211]

103. The International Tribunal for the Former Yugoslavia has taken even more general forms of State practice into account, including trends in the legislation of member States which in turn can give rise to a changed interpretation of the scope of crimes or their elements.[212]

### (b) *Jurisprudence by WTO adjudicatory bodies*

104. Even the WTO adjudicatory organs occasionally distinguish between "subsequent practice" that satisfies all the conditions of article 31, paragraph 3 (*b*), of

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[199] *Demir and Baykara* (see footnote 42 above), para. 52.

[200] *Ibid.*, para. 151; similarly *Jorgic v. Germany*, No. 74613/01, para. 69, ECHR 2007-III; *Sigurdur A. Sigurjónsson v. Iceland*, 30 June 1993, para. 35, Series A, No. 264; *A.* v. *the United Kingdom*, No. 35373/97, paras. 80 and 83, ECHR 2002-X.

[201] *Koch v. Germany*, application No. 497/09, para. 70, 19 July 2012.

[202] *S.H. and Others v. Austria* [GC], application No. 57813/00, para. 96, ECHR 2011; see also *Stummer v. Austria* [GC], application No. 37452/02, ECHR 2011, paras. 105–109 and 129–132, where the Court also merely observed an "evolving trend" and, failing to identify a "European consensus", refused to proceed with a dynamic interpretation.

[203] See para. 39 above.

[204] *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago* (see footnote 94 above), para. 12 (separate concurring opinion of Judge Sergio García Ramírez).

[205] Communication No. 968/2001, *Kim Jong-Cheol v. the Republic of Korea*, Views adopted on 27 July 2005, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 40* (A/60/40), vol. II, para. 8.3.

[206] *Ibid.*

[207] For a similar case, see *Yoon and Choi v. The Republic of Korea* (footnote 56 above), para. 8.4; in this case, Committee Member Wedgwood criticized the approach of the Committee as displaying a selective perspective.

[208] *M/V "SAIGA" (No. 2)* (see footnote 97 above), para. 156; see also *"Tomimaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, para. 72.

[209] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999), *ITLOS Reports 1999*, p. 280, at para. 50.

[210] *Ibid.*, p. 293, para. 45.

[211] *Jelisić* (see footnote 64 above), para. 61; similarly, *Krstić* (see footnote 64 above) para. 541.

[212] *Furundžija* (see footnote 100 above), paras. 165 *et seq.* and 179.

the 1969 Vienna Convention and other forms of subsequent practice in the application of the treaty, which they also recognize as being relevant for the purpose of treaty interpretation. In *United States—Section 110 (5) Copyright Act*[213] (not appealed), for example, the Panel had to determine whether a "minor exceptions doctrine" concerning royalty payments applied.[214] The Panel found evidence in support of the existence of such a doctrine in several member States' national legislation and noted:

> We recall that Article 31 (3) of the Vienna Convention provides that together with the context (*a*) any subsequent agreement, (*b*) subsequent practice, or (*c*) any relevant rules of international law applicable between the parties, shall be taken into account for the purposes of interpretation. We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine. In our view, State practice as reflected in the national copyright laws of Berne Union members before and after 1948, 1967 and 1971, as well as of WTO members before and after the date that the TRIPS Agreement became applicable to them, confirms our conclusion about the minor exceptions doctrine.[215]

And the Panel added the following cautionary footnote:

> By enunciating these examples of State practice we do not wish to express a view on whether these are sufficient to constitute "subsequent practice" within the meaning of article 31 (3) (*b*) of the Vienna Convention.[216]

105. Another example of a use of subsequent practice in the broad sense is in the case of *European Communities: Computer Equipment*, where the Appellate Body criticized the Panel for not having considered decisions by the Harmonized System Committee of the World Customs Organization (WCO) as a relevant subsequent practice:

> A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions... However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant.[217]

106. Thus, on closer inspection, the jurisprudence of the WTO adjudicatory bodies distinguishes between a narrow definition which sets out the conditions under which "subsequent practice" is fully relevant in the sense of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention and a broader concept of subsequent practice which does not presuppose an agreement between all the parties of the treaty.[218] Such subsequent practice in a broader sense may then be relevant as a supplementary means of treaty interpretation within the meaning of article 32 of the Vienna Convention.

### (c) *Conclusion*

107. The jurisprudence of international courts and tribunals, including the Dispute Settlement Body of WTO, recognizes that not only "subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation" may be relevant for the purpose of interpretation, but possibly also other subsequent practice which does not reflect an agreement on interpretation by all the parties. The concept of "subsequent practice" should therefore be defined broadly. A narrow definition such as the one by the WTO Appellate Body in the *Japan: Alcoholic Beverages II* case[219] may be helpful in identifying a fully agreed and authentic interpretation of a treaty in the sense of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention. The taking into account of other treaty practice by States for the purpose of interpretation should not be excluded at the outset, since it may in some situations serve as a supplementary means of interpretation in the sense of article 32 of the Convention. Such use of subsequent practice (in a broad sense) must, however, always remain within the limit of the rule that treaty interpretation is not self-judging and that "the view of one State does not make international law".[220] The distinction between agreed subsequent practice in the narrow sense of article 31, paragraph 3 (*b*), of the Convention and all other subsequent practice (in a broad sense) then serves to indicate a greater interpretative value which is to be attributed to the former.

108. The distinction between (agreed) subsequent practice in the narrow sense of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention and subsequent practice in a broad sense of any particular instance of treaty interpretation or application by a party also helps to answer the question whether "subsequent practice" requires repeated action with some frequency[221] or whether a one-time application of the treaty may be enough.[222] Within the WTO framework, the Appellate Body has found that "[a]n isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."[223]

109. If, however, the concept of subsequent practice is divulged from a possible agreement between the parties, as it is recognized by international adjudicatory bodies, frequency is not a necessary element of the definition of the concept of "subsequent practice".[224]

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[213] *United States—Section 110(5) Copyright Act*, Report of the Panel (15 June 2000), WT/DS160/R.

[214] See Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 9, para. 1.

[215] *United States—Section 110(5) Copyright Act*, Report of the Panel (see footnote 213 above), para. 6.55.

[216] *Ibid.*, footnote 68.

[217] *European Communities: Computer Equipment* (see footnote 78 above), para. 90; see also Van Damme, *Treaty Interpretation by the WTO Appellate Body*, p. 342.

[218] See also WTO, *United States: COOL—Report of the Appellate Body* (29 June 2012), WT/DS384/AB/R and WT/DS386/AB/R, para. 452.

[219] See para. 92 and footnote 31 above; the Appellate Body has taken the formula from a publication by Sinclair (*The Vienna Convention on the Law of Treaties*, p. 137), who drew on a similar formulation in French by Yasseen ("L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", pp. 48–49). Yasseen, a former member of ILC, had relied on elements from the work of the Commission, but this definition has never been adopted by ILC or ICJ.

[220] *Sempra Energy International v. Argentine Republic* (see footnote 75 above), para. 385; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (see footnote 75 above), para. 337; WTO, *United States: Large Civil Aircraft (2nd complaint)* (see footnote 76 above), para. 7.953, footnote 2420.

[221] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 431.

[222] Linderfalk, *On the Interpretation of Treaties*, p. 166.

[223] WTO, *Japan: Alcoholic Beverages II* (see footnote 31 above) sect. E.

[224] Kolb, *Interprétation et création du droit international: Esquisses d'une herméneutique juridique moderne pour le droit international public*, pp. 506 *et seq.*

110. Thus, "subsequent practice" in the broad sense covers any application of the treaty by one or more parties. It can take various forms.[225] Practice may either consist of a direct application of the respective treaty or be a statement regarding the interpretation or application of the treaty. Such practice may include official statements concerning the treaty's meaning, protests against non-performance, or tacit consent to statements or acts by other parties.[226]

### 2. Relational character

111. Like a subsequent agreement under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention, subsequent practice must be "in the application of the treaty". This is true not only for agreed subsequent practice within the meaning of article 31, paragraph 3 (*b*), of the Vienna Convention, but also for subsequent practice generally. Thus, action or relevant silence[227] must be taken in application of the treaty, including the invocation of provisions of the treaty; the same is true for pronouncements regarding the treaty in the course of a legal dispute or at a diplomatic conference, official communications for which the treaty gives cause, or the enactment of domestic legislation or conclusion of new international agreements for the purpose of implementing a treaty.

112. It should be mentioned, however, that a NAFTA Panel has denied that domestic legislation can be used as an interpretative aid:

> Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to Article 27 of the Vienna Convention, which states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework.[228]

113. While the rule contained in article 27 of the 1969 Vienna Convention is certainly valid and important, it does not follow from it that national law may not be taken into account as a possible interpretative aid in the form of subsequent State practice in the implementation of the treaty. Other international adjudicatory bodies, in particular in the context of WTO and the European Court of Human Rights, have recognized and regularly distinguish between national legislation (and other implementing measures at the national level) which violates treaty obligations, and national legislation and measures which can serve as a means to interpret the treaty.[229]

114. Subsequent practice for the purpose of treaty interpretation should, on the other hand, be distinguished from other, less immediate subsequent developments which may or may not have an influence on treaty interpretation. This is because subsequent agreements and subsequent practice of parties "regarding the interpretation of a treaty" contribute at least potentially to an "authentic" element to treaty interpretation. While there may ultimately be no clear dividing line between subsequent practice by the parties which specifically relate to a treaty and practice which bears some meaningful relationship with that treaty, it nevertheless makes sense to distinguish between both categories. Only such conduct which the parties undertake "regarding the interpretation of the treaty" should benefit from being treated as an "authentic" contribution to interpretation.

115. It is also not always easy to distinguish subsequent agreements and subsequent practice from subsequent "other relevant rules of international law applicable in the relations between the parties" (art. 31, para. 3 (c)). It appears that the most important distinguishing factor is whether an agreement is made "regarding the interpretation" of a treaty.

### 3. "Subsequent"

116. As with regard to subsequent agreements, relevant interpretative practice is "subsequent" if it has taken place "after the conclusion of the treaty",[230] that is, after the text of the treaty has been established as definite.[231]

### 4. Actors

117. An important question relates to the actors who may perform relevant subsequent practice. Article 31, paragraph 3 (*b*), of the 1969 Vienna Convention does not explicitly require that it must be the practice of the parties to the treaty themselves, but the provision seems to imply this requirement. It is certainly the parties themselves, acting through their organs,[232] who are competent to engage in interpretative treaty practice and to apply or to comment upon a treaty. However, it is also not excluded that private (natural and legal) persons "apply" a treaty in certain cases. Such non-State practice, however, needs to be attributable to a particular State party in order to be relevant for the purpose of establishing an authentic element of interpretation.[233] This point is developed below in chapter V (draft conclusion 4).

## C. Conclusion: draft conclusion 3

118. Taken together, these sources and considerations suggest the following draft conclusion 3:[234]

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[225] Aust, *Modern Treaty Law and Practice*, p. 239.

[226] Wolfram, *Vertrag und spätere Praxis im Völkerrecht*, p. 114.

[227] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 221–222, para. (15) of the commentary to article 27; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (see footnote 139 above), p. 23; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction and Admissibility), *I.C.J. Reports 1984*, p. 410, para. 39; *Dispute between Argentina and Chile concerning the Beagle Channel* (1977), UNRIAA, vol. XXI, part II, paras. 168 and 169; the role of silence will be elaborated upon in greater detail in the next report on the topic.

[228] *In the Matter of Cross-Border Trucking Services* (see footnote 85 above), para. 224.

[229] See, for example, *United States—Section 110 (5) Copyright Act*, Report of the Panel (footnote 213 above), para. 6.55; WTO, *United States: Continued Zeroing Methodology*, Report of the Panel (1 October 2008), WT/DS350/R, para. 7.217; WTO, *United States: Anti-Dumping and Countervailing Duties (China)*, Report of the Appellate Body (11 March 2011), WT/DS379/AB/R, paras. 335 and 336; *CMS Gas Transmission Company v. Argentine Republic* (footnote 195 above), para. 47; *V. v. the United Kingdom* [GC], No. 24888/94, para. 73, ECHR 1999-IX; *Kart v. Turkey* [GC], No. 8917/05, para. 54, ECHR 2009 (extracts); *Sigurjónsson v. Iceland* (footnote 200 above), para. 35; *A.* v. *the United Kingdom* (footnote 200 above), para. 80.

[230] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 221, para. 14.

[231] See paragraphs 84–87 above.

[232] Wolfram, *Vertrag und spätere Praxis im Völkerrecht*, p. 115 *et seq.*

[233] See paragraphs 119–144 below.

[234] See preliminary conclusions 5 and 8 of the Chair of the Study Group on Treaties over time (*Yearbook … 2011*, vol. II (Part Two), pp. 169–171, para. 344), in particular, preliminary conclusion 5 (at p. 170):

"*Draft conclusion 3. Definition of subsequent agreement and subsequent practice as means of treaty interpretation*

"For the purpose of treaty interpretation, a "subsequent agreement" is a manifested agreement between the parties after the conclusion of a treaty regarding its interpretation or the application of its provisions.

"For the purpose of treaty interpretation, "subsequent practice" consists of conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application.

"Subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is a means of interpretation according to article 31, paragraph 3 (*b*), of the Vienna Convention. Other subsequent practice may under certain circumstances be used as a supplementary means of interpretation according to article 32 of the Vienna Convention."

"(5) *Concept of subsequent practice as a means of interpretation*

"Most adjudicatory bodies reviewed have not defined the concept of subsequent practice. The definition given by the WTO Appellate Body ('a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties [to the treaty] regarding its interpretation') combines the element of 'practice' ('sequence of acts or pronouncements') with the requirement of agreement ('concordant, common') as provided for in article 31 (3) (*b*) of the 1969 Vienna Convention (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed have, however, also used the concept of 'practice' as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense)."

## Chapter V

## Attribution of treaty-related practice to a State

119. Whereas article 31, paragraph 3 (*a*), of the 1969 Vienna Convention speaks of any subsequent agreement "between the parties", article 31, paragraph 3 (*b*), merely speaks of "subsequent practice in the application of the treaty". This raises the question under which circumstances practice "in the application of the treaty" can be attributed to a State and thus be relevant interpretative State practice. Related questions are whether social developments and practice by other actors than States can also be relevant for the interpretation of a treaty and, in particular, whether they "can establish the agreement of the parties regarding its interpretation".

### A. Scope of relevant State practice

120. Whether a certain conduct amounts to a relevant subsequent treaty practice by a State depends, *inter alia*, on the applicable rules of attribution. In its draft articles on State responsibility for internationally wrongful acts, the Commission has adopted rules on the attribution of conduct to a State.[235] The determination of State responsibility, however, serves a different purpose than the attribution of practice for the purpose of identifying relevant interpretative practice. The range of possible wrongful acts by a State is necessarily much wider than those which are "in application of" a treaty. It is, for example, difficult to conceive of a relevant treaty practice by way of the "conduct of an organ of a State" which "exceeds its authority" (art. 7, draft articles on State responsibility for internationally wrongful acts), or by way of the "conduct of an insurrectional movement" (art. 10, draft articles on State responsibility for internationally wrongful acts).

121. The pertinent rules of attribution for the present purpose of treaty interpretation must therefore be derived from the specific character of the interpretation and the application of treaties by their parties. This suggests that only such conduct which is undertaken or deemed to be accepted by those organs of a State party which are internationally regarded as being responsible for the application of the treaty (as a whole, or of a particular provision of a treaty) may be attributed to a State. Subsequent practice of States may certainly be performed by high-ranking government officials in the sense of article 7 of the 1969 Vienna Convention. Yet, since many treaties are typically not applied by high government officials, international courts and tribunals have recognized that the conduct of minor authorities, or even other actors, can also be relevant subsequent conduct for the interpretation of a treaty. Thus, ICJ has recognized in the *Case concerning the rights of nationals of the United States of America in Morocco* that article 95 of the General Act of Algeciras had to be interpreted flexibly in the light of the inconsistent practice of local customs authorities.[236] In the case of *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ even considered that the regular use of an island on the border between Namibia (former South West Africa) and Botswana (former Bechuanaland) by members of a local tribe, the Masubia, could be regarded as subsequent practice in the sense of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention if it "was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the Southern Channel of the Chobe, and second, that the Bechuanaland authorities were fully aware and accepted this as a confirmation of the treaty boundary".[237]

122. The *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, however, illustrates that situations may arise in which the conduct of minor officials and local practice cannot be attributed to the State. Trying to defend a boundary, Thailand argued that certain maps, delivered by France and apparently deviating from the line which had originally been agreed on, had only been

[235] *Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76.

[236] *I.C.J. Reports 1952*, p. 211.

[237] *Kasikili/Sedudu Island (Botswana/Namibia), I.C.J. Reports 1999*, p. 1094, para. 74.

"seen" by Siamese officials of lower rank who were not in a position to agree on behalf of Siam with the boundary line as it was drawn on the maps. The Court held:

> If the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk, and the claim by Thailand could not, on the international plane, derive any assistance from that fact.[238]

The Court thus seems to have implied that if the higher authorities had no knowledge of the map, the knowledge or conduct of minor officials alone would not have been attributed to Thailand.

123. The jurisprudence of arbitral tribunals confirms that relevant subsequent practice can emanate from lower government officials if they can be internationally expected as being responsible for the application of the treaty. In the *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts*, the Arbitral Tribunal considered a letter of the Bank of England to the German Federal Debt Administration as relevant subsequent practice.[239] And in the case concerning the *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice, but ultimately considered a few official pronouncements by a higher authority, the Government of France, to be decisive.[240]

124. It follows that the practice of lower and local authorities in the application of a treaty can be considered to be relevant subsequent practice for the purpose of treaty interpretation when the higher authorities can be expected to be aware of this practice and to accept it as an element of treaty interpretation or application.[241]

### B. Attribution to States of subsequent conduct by private actors and social developments

125. "Subsequent practice in the application of a treaty" will normally be brought about by those who are called by the treaty to apply it, which are the States parties themselves. It is nevertheless also conceivable that "the agreement of the parties regarding its interpretation" is "established" indirectly by way of the practice of other actors. So far, however, such practice by other actors has only to a very limited extent been judicially recognized as being attributable to a State party for the purpose of treaty interpretation.

126. The Iran–United States Claims Tribunal, being concerned with matters which involve a close cooperation between State organs and private entities, has been confronted with the question of whether certain conduct by private entities could be attributed to one of the two States for the purpose of determining relevant subsequent State practice:

> It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty. Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be attributed as such to the United States as the other party to the Algiers Declarations.[242]

127. This approach was criticized by Judge Ansari, who in his dissenting opinion held that the role of supervisory State organs should have been taken into account by the majority:

> Iran has further argued that the subsequent practice of the parties during their settlement negotiations shall be given due consideration with respect to the interpretation of the "Undertakings". In support of this argument Iran has furnished the Tribunal with settlement agreements reached in pursuance of the "Undertakings" and as a result of which Iran was paid fresh money directly by the U.S. banks. The said agreements by their very terms could not become operative without the approval of the United States Treasury and the Federal Reserve Bank of New York (The "Fed") acting as the fiscal agent of the United States. Such subsequent practice of the parties is decisive and provides additional evidence in support of Iran's argument.[243]

128. While the dissenting opinion raises an important consideration, it seems that the State involvement "by supervision" was not meant, in this particular context, to make a pronouncement regarding interpretation towards the other State and was therefore not sufficient to attribute the conduct of the private entities to the State for the purpose of treaty interpretation.

129. The European Court of Human Rights seems to be the only[244] international judicial body to have occasionally considered "increased social acceptance"[245] (of certain behaviour or personal characteristics) and "major social changes"[246] to be relevant, for the purpose of treaty inter-

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[238] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (see footnote 139 above), p. 25.

[239] Award of 16 May 1980, UNRIAA, vol. XIX, part III, p. 103, para. 31.

[240] Award of 14 January 2003, UNRIAA, vol. XXV, part IV, p. 257, para. 66 and p. 259, para. 74.

[241] See also Kamto, "La volonté de l'État en droit international", pp. 141–144.

[242] *The United States of America (and others) v. The Islamic Republic of Iran, (and others)*, Award No. 108-A-16/582/591-FT (1984), 5 Iran–USCTR 57, p. 71; similarly, *The Islamic Republic of Iran v. the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (9 September 2004) (Iran–USCTR), paras. 127–128; see also Dissenting Opinion of President Lagergren in *International Schools Services, Inc. v. National Iranian Copper Industries Company*, 5 Iran–USCTR 338, at pp. 348 and 353: "the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case".

[243] Dissenting Opinion of Parviz Ansari in *The United States of America v. The Islamic Republic of Iran, Award No. 108-A-16/582/591-FT* (1985), 9 Iran–USCTR 97, at p. 99.

[244] See, however, WTO, *United States: Certain Country of Origin*, Report of the Appellate Body (29 June 2012), WT/DS384/AB/R and WT/DS386/AB/R, para. 448.

[245] *Christine Goodwin v. the United Kingdom* [GC], No. 28957/95, para. 85, ECHR 2002-VI.

[246] *Ibid.*, para. 100.

pretation, without clearly linking such developments in society to specific decisions of State organs. The two most important[247] cases are *Dudgeon*[248] and *Goodwin*.[249]

130. The *Dudgeon* case concerned the right of mutually consenting adult homosexuals not to be criminalized for their sexual intercourse. The European Court of Human Rights held with respect to the Northern Irish legislation at the time that "as compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour".[250] The Court based this assertion on the fact

> that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.[251]

131. The *Goodwin* case concerned the right of transsexuals to marry in their assigned gender. In this case, the European Court of Human Rights stated that it "must have regard to the changing conditions within the respondent State and within Contracting States generally"[252] and admonished the respondent State that it "had not yet taken any steps to... [keep the need for appropriate legal measures under review] despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted".[253]

132. A close analysis of the case law of the European Court of Human Rights, however, reveals that the invocation by the Court, for the purpose of treaty interpretation, of "social changes" or "social acceptance" ultimately remained linked to State practice. In the *Dudgeon* case, the Court demonstrated the "increased tolerance of homosexual behaviour" by pointing to the fact "that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied" and that it could therefore not "overlook the marked changes which have occurred in this regard in the domestic law of the member States".[254] The Court further pointed to the fact that "in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law".[255] Even in the *Goodwin* case, the Court attached importance "to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".[256]

133. Invocation of "social acceptance" by the European Court of Human Rights is rare and has been limited to cases which concerned marginal groups whose situations had not been fully considered within the political and legal system of the State concerned.[257] In contrast, the Court does not rely on politically contested social developments. In the case of *Johnston*, for example, which concerned the claim that the right to marry implied the right to have a divorce in order to be able to remarry, "the applicants set considerable store on the social developments that have occurred since the [European Convention on Human Rights] was drafted, notably an alleged substantial increase in marriage breakdown".[258] The Court, however, while recognizing "that the Convention and its Protocols must be interpreted in the light of present-day conditions", refused to take a closer look at those "social developments" and concluded that it could not "by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset".[259] In the same vein, the Court held in *Schalk and Kopf*:

> Although, as it noted in *Christine Goodwin*, the institution of marriage has undergone major social changes since the adoption of the Convention, the Court note[s] that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage.[260]

134. Thus, the European Court of Human Rights typically determines, explicitly or implicitly, whether social developments are actually reflected in State practice and it takes this reflection in legislative or administrative practice as being the most relevant indicator.[261] This was true, for example, in cases concerning the status of children born out of wedlock[262] and in cases which concerned the alleged right of Gypsy people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.[263] The European Court of Human Rights has only exceptionally implied that the

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[247] See also European Court of Human Rights, *I. v. the United Kingdom* [GC], No. 25680/94, para. 65, 11 July 2002; *Burden and Burden v. the United Kingdom*, No. 13378/05, para. 57, 12 December 2006; *Shackell v. the United Kingdom* (dec.) No. 45851/99, para. 1, 27 April 2000; *Schalk and Kopf v. Austria*, No. 30141/04, para. 58, ECHR 2010, citing *Goodwin* (see footnote 245 above), para. 100.

[248] *Dudgeon v. the United Kingdom*, 22 October 1981, Series A, No. 45.

[249] See footnote 245 above.

[250] *Dudgeon* (see footnote 248 above), para. 60.

[251] *Ibid.*

[252] *Goodwin* (see footnote 245 above), para. 74.

[253] *Ibid.*, para. 92.

[254] *Dudgeon* case (see footnote 248 above), para. 60.

[255] *Ibid.*

[256] *Goodwin* case (see footnote 245 above), para. 85; see also para. 90.

[257] See Brauch, "The margin of appreciation and the jurisprudence of the European Court of Human Rights", p. 145.

[258] *Johnston and Others v. Ireland*, (see footnote 42 above), para. 53.

[259] *Ibid.*

[260] *Schalk and Kopf v. Austria* (see footnote 247 above), para. 58.

[261] But see Letsas, "Strasbourg's interpretative ethic: lessons for the international lawyer", p. 530.

[262] *Mazurek v. France*, No. 34406/97, para. 52, ECHR 2000-II ("The Court notes at the outset that the institution of the family is not fixed, be it historically, sociologically or even legally"); see also European Court of Human Rights, *Marckx* v. *Belgium*, 13 June 1979, para. 41, Series A, No. 31; *Inze v. Austria*, 28 October 1987, para. 44, Series A, No. 126; and *Brauer v. Germany*, No. 3545/04, para. 40, 28 May 2009.

[263] *Chapman v. the United Kingdom* [GC], No. 27238/95, paras. 70 and 93, ECHR 2001-I; see also European Court of Human Rights, *Lee v. the United Kingdom* [GC], No. 25289/94, paras. 95–96, 18 January 2001; *Beard v. the United Kingdom* [GC], No. 24882/94, paras. 104–105, 18 January 2001; *Coster v. the United Kingdom* [GC], No. 24876/94, paras. 107–108; and *Jane Smith v. the United Kingdom* [GC], No. 25154/94, paras. 100 and 101, 18 January 2001.

existence of contrary legislation in the respondent State was due to administrative or legislative inertia and did not any more reflect the considered view of the responsible State bodies.[264] It can therefore be concluded that mere (subsequent) social practice, as such, is not sufficient to constitute relevant subsequent treaty practice but that it must be supported by some form of accompanying State practice.

### C. Practice of other actors as evidence of State practice

135. Subsequent practice of the parties to a treaty can be reflected in, or be initiated by, the pronouncements or conduct of other actors, such as international organizations or non-State actors. Such initiation of subsequent practice of the parties by international organizations or by non-governmental organizations should not, however, be confounded with the practice by the parties to the treaty themselves. Activities of other bodies may rather constitute evidence of a subsequent agreement or practice of the parties in question.

#### 1. International organizations

136. Decisions, resolutions and other practice by international organizations can possess relevance for the interpretation of treaties in their own right. This is recognized, for example, in article 2, paragraph 1 (*j*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which mentions the "established practice of the organization" as one form of the "rules of the organization". This aspect of subsequent practice to a treaty will be the subject of a later report. In the present report, the focus is limited to whether the practice of international organizations may be indicative of, or evidence for, relevant State treaty practice.

137. In this sense, collections and other reports by international organizations on subsequent State practice can possess, more or less, evidentiary weight. Reports by organizations at the universal level which are prepared on the basis of a specific mandate to provide accounts on the State practice in a particular field enjoy considerable authority without necessarily being authoritative in all cases. For example, State officials who are responsible for interpreting and applying the Convention relating to the Status of Refugees resort to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* as a reference work for State practice.[265] Although the UNHCR Handbook is sometimes loosely referred to as if it would itself express State practice, this view has correctly been rejected by the Federal Court of Australia in *Semunigus*.[266] Another example is the work of the United Nations Committee of the Security Council established pursuant to resolution 1540 (2004),[267] which has proved to be of relevance for the interpretation of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction. As part of its work on the implementation of Security Council resolution 1540 (2004), the Committee entertains a systematic compilation of implementation measures taken by Member States, the so-called 1540 matrix.[268] As far as the matrix relates to the implementation of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, as well as to the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, it is a source of evidence of subsequent State practice with regard to the said treaties.[269]

#### 2. Non-governmental organizations

138. Non-governmental organizations can play an important role in collecting subsequent practice, in particular through the monitoring of the implementation practice of a specific treaty.

139. This is the case, for example, for the Landmine and Cluster Munition Monitor, which is a joint initiative of the International Campaign to Ban Landmines and the Cluster Munition Coalition. The Monitor is described as the "*de facto* monitoring regime"[270] for the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction and the Convention on Cluster Munitions. Apart from providing country profiles for States parties, signatories, States not parties and "Other Areas",[271] the Cluster Munition Monitor 2011 identifies different interpretative issues concerning the Convention on Cluster Munitions, and lists pertinent statements and practice by States parties and signatories. These concern the prohibition on assistance and interoperability, foreign stockpiling and transit, and the issue of disinvestment.[272]

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[264] *Goodwin* case (see footnote 245 above), para. 92.

[265] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (January 1992) foreword at para. VII; see also Gardiner, *Treaty Interpretation*, p. 239.

[266] Federal Court of Australia, *Semunigus v. the Minister for Immigration and Multicultural Affairs* [1999] FCA 422 (14 April 1999) paras. 5–13; this does not exclude that the Handbook possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based not only on its quality as a professional collection, but also on art. 35, para. 1 of the Convention relating to the Status of Refugees, according to which "the Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees… in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention".

[267] Security Council resolution 1540 (2004), para. 8 (*c*).

[268] According to the 1540 Committee's webpage, "the 1540 Matrix has functioned as the primary method used by the 1540 Committee to organize information about implementation of United Nations Security Council resolution 1540 by Member States… The 1540 Committee uses the matrices as a reference tool to examine the status of implementation of Security Council resolution 1540 (2004)" (available from www.un.org/en/sc/1540/national-implementation/1540-matrices.shtml).

[269] See Gardiner, *Treaty Interpretation*, p. 239.

[270] See www.the-monitor.org, Introduction.

[271] *Cluster Munition Monitor 2011*, pp. 59–344.

[272] *Ibid.*, pp. 24–31; the same interpretative issues have already been assessed in the 2009 and 2010 reports.

140. The example of the Landmine and Cluster Munition Monitor shows that non-governmental organizations can provide a source of evidence for subsequent practice of State parties and even solicit its coming into being. In fact, by urging States to provide their views on certain issues, the amount of evidence for practice available to interpreters can be increased considerably. The example also demonstrates that non-governmental organizations can try to shape subsequent practice by providing their reading of disputed provisions. Indeed, such organizations can pursue their own agenda, which may be different from that of States. This may result in a certain bias in their research, which needs to be critically reviewed. This does not exclude the fact that State practice gathered by non-governmental organizations is often a valuable source of evidence for the subsequent practice of all the parties and that it enhances transparency, which in turn tends to increase compliance.

### 3. The special role of ICRC

141. The role which ICRC assumes with regard to the Geneva Conventions for the protection of war victims and their Additional Protocols is a case apart. ICRC, formally a private, non-profit association incorporated under Swiss domestic law,[273] has been a catalyst in the development of international humanitarian law treaties since the original Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[274] ICRC has the legal personality in international law as the entity responsible for carrying out the mandate conferred on it by the international community through the Geneva Conventions for the protection of war victims and by the statutes of the International Red Cross and Red Crescent Movement.[275] In addition, ICRC occasionally provides interpretative guidance on the Geneva Conventions for the protection of war victims and their Additional Protocols, a mandate it derives from the statutes of the Movement, adopted at the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006.[276] Article 5, paragraph 2 (*g*), of the statutes provides:

> The role of the International Committee, in accordance with its Statutes, is in particular:
>
> …
>
> (*g*) to work for the *understanding** and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.

142. In 2009, ICRC published, on the basis of its mandate,[277] a handbook on interpretative guidance on the notion of direct participation in hostilities under international humanitarian law.[278] The guidance is the outcome of an "expert process" conducted from 2003 to 2008 drawing from academic, military, governmental and non-governmental circles, all participating in their private capacity, but ostensibly basing their analysis on State treaty and customary practice. The interpretative guidance consists of 10 recommendations with accompanying commentary and "reflect[s] the ICRC's institutional position as to how existing international humanitarian law should be interpreted".[279] It is too early for a general assessment of the significance of the Guidance, but its impact on the subsequent practice of States will be of interest.

143. In this context, States have reaffirmed their role in the development of international humanitarian law. While resolution 1 of the 31st International Red Cross and Red Crescent Conference of 2011 recalls that "one of the important roles of the ICRC… is in particular 'to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof'", it also emphasizes "the primary role of States in the development of international humanitarian law".[280] It should be noted that ICRC purports to interpret international humanitarian law as such, and not only the Geneva Conventions and the Additional Protocols.[281] The distinction between subsequent practice of States parties pursuant to treaties and pursuant to general customary practice may thus be blurred.

## D. Conclusion: draft conclusion 4

144. Taken together, these sources and considerations suggest the following draft conclusion:[282]

*"Draft conclusion 4. Possible authors and attribution of subsequent practice*

"Subsequent practice can consist of conduct of all State organs which can be attributed to a State for the purpose of treaty interpretation.

"Subsequent practice by non-State actors, including social practice, may be taken into account for the purpose of treaty interpretation as far as it is reflected in or adopted by subsequent State practice, or as evidence of such State practice."

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[273] Gasser, "International Committee of the Red Cross (ICRC)", para. 20.

[274] *Ibid.*, para. 14.

[275] *Ibid.*, para. 25.

[276] ICRC/IFRC, *Handbook of the International Red Cross and Red Crescent Movement*, 14th ed., Geneva, 2008.

[277] "The responsibility for the interpretive guidance is assumed by ICRC as a neutral and independent humanitarian organization mandated by the international community of States to promote and work for a better understanding of international humanitarian law," citing art. 5, para. 2 (*c*) and (*g*) of the statutes of the Movement.

[278] ICRC, *Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law; for the expert process*, Geneva, 2009.

[279] *Ibid.*, p. 9.

[280] Resolution 1—Strengthening legal protection for victims of armed conflicts (31st International Conference of the Red Cross and Red Crescent, Geneva Switzerland, 28 November–1 December 2011).

[281] See ICRC, *Interpretive guidance* … (see footnote 278 above), p. 9.

[282] See preliminary conclusion (9) of the Chair of the Study Group on Treaties over time, *Yearbook … 2011*, vol. II (Part Two), p. 171, para. 344:

"(9) *Possible authors of relevant subsequent practice*

"Relevant subsequent practice can consist of acts of all State organs (executive, legislative and judicial) which can be attributed to a State for the purpose of treaty interpretation. Such practice may under certain circumstances even include 'social practice' as far as it is reflected in State practice."

## Chapter VI

# Future programme of work

145. The Special Rapporteur proposes to submit, for the session in 2014, his second report on further aspects of the topic, most of which have been addressed in his three reports for the Study Group on Treaties over time[283] and which the Study Group has, in part, discussed in 2011 and 2012.[284] In 2015, he envisages submitting the third report, in which he will discuss the practice of international organizations and on the jurisprudence of national courts.[285] In 2016, the Special Rapporteur will submit a final report, with revised conclusions and commentaries, in particular taking into account the discussions in the Commission and the debates in the Sixth Committee.

[283] See footnotes 4, 5 and 10 above.

[284] *Yearbook … 2011*, vol. II (Part Two), pp. 168–169, paras. 336–341; and *Yearbook … 2012*, vol. II (Part Two), pp. 77–80, paras. 229–240.

[285] As it was envisaged in the original proposal, see *Yearbook … 2008*, vol. II (Part Two), annex I, pp. 155 *et seq.*, paras. 17, 18, 39 and 42.

# PROVISIONAL APPLICATION OF TREATIES

[Agenda item 7]

**DOCUMENT A/CN.4/664**

## First report on the provisional application of treaties, by Mr. Juan Manuel Gómez Robledo, Special Rapporteur

[*Original: English/Spanish*]
[*3 June 2013*]

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# Introduction

## A. Purpose of the present report

1. The present first report on the provisional application of treaties will attempt to establish, in general terms, the principal legal issues that arise in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The study of provisional application will,

of course, begin with article 25 of the Vienna Convention on the Law of Treaties (hereinafter the "1969 Vienna Convention").

2. Since the purpose of the report is to identify the issues that should be given further consideration in subsequent reports and in the International Law Commission's discussion of those reports, its scope will be limited to systematizing some general aspects of the concept of the provisional application of treaties in order to determine, at the outset, the principal parameters for the usefulness of this concept in the light of the needs of States and the dynamics of international relations.

## B. Background

3. The topic of the provisional application of treaties was included in the long-term programme of work of the Commission in 2011 during its sixty-third session.[1] During this session, Mr. Giorgio Gaja submitted a document that described some of the legal problems arising from the provisional application of treaties.[2]

4. In 2012, during its sixty-fourth session, the Commission decided to include the topic in its programme of work and to appoint a special rapporteur. At that time, the recently appointed Special Rapporteur held informal consultations with the members of the Commission in order to open a dialogue on issues relevant to the handling of the topic, and delivered an oral report on those consultations. The Commission then decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention.[3] The Special Rapporteur would like to thank the Secretariat for preparing this memorandum,[4] which sets out the legislative history of the wording of article 25 of the 1969 Vienna Convention and contains an extremely useful analysis of several substantive issues that arise in that regard. He also notes that the discussions in the Sixth Committee of the General Assembly during its consideration of the report of the Commission on the work of its sixty-fourth session were very useful to him in preparing this report.

5. Article 25 of the 1969 Vienna Convention is the outcome of a discussion in the Commission that began in the 1950s. The legislative history of the article in question is highly relevant to the handling of this topic. As mentioned in the previous paragraph, the Secretariat prepared a memorandum that summarizes both the procedural history and the substantive issues discussed by the Commission during the process leading to the drafting of article 25. The Special Rapporteur considers it unnecessary to summarize the Secretariat's investigation in his report but will refer to the memorandum in order to review the history of the topic in question.

6. The Special Rapporteur also sees no need to discuss the drafting of article 25 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations at this stage of his study of the topic. However, the issue may be considered at a later date.

## C. Terminology

7. An analysis of the concept of the provisional application of treaties must begin with the distinction between "provisional application" and "provisional entry into force"; these terms are not synonymous and refer to different legal concepts.

8. The topic of provisional entry into force was officially proposed by Special Rapporteur Sir Humphrey Waldock in the context of "mode and date of entry into force" and "legal effects of the entry into force of a treaty".[5] However, the Commission's Drafting Committee decided to combine these issues in a single article entitled "Provisional entry into force",[6] which it adopted on first reading as draft article 24.[7] During the discussion of the draft article on second reading, Mr. Paul Reuter mentioned that the words "come into force provisionally" were incorrect and proposed that they be replaced by "be applied provisionally".[8] However, the Commission decided to retain the words "provisional entry into force" and adopted draft article 24[9] in 1965 with several modifications to the previous text:

> 1. A treaty may enter into force provisionally if:
>
> (*a*) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or
>
> (*b*) The contracting States have in some other manner so agreed.
>
> 2. The same rule applies to the entry into force provisionally of part of a treaty.

9. The Commission adopted the draft article, renumbered as 22, on second reading.[10]

10. In the reactions to the draft article, it is interesting to note the position taken by States such as the Netherlands, which ultimately considered that such a situation would only result in a non-binding agreement concerning provisional entry into force, which the States would be free to suspend.[11] This shows that the legal consequences of the provisional entry into force of treaties were, to say the least, not entirely clear.

11. During the United Nations Conference on the Law of Treaties, however, a draft amendment submitted by Yugoslavia and Czechoslovakia that would have replaced

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[1] *Yearbook … 2011*, vol. II (Part Two), para. 365.

[2] *Ibid.*, annex III.

[3] *Yearbook … 2012*, vol. II (Part Two), para. 143.

[4] Document A/CN.4/658, reproduced in the present volume.

[5] *Yearbook … 1962*, vol. II, document A/CN.4/144, pp. 68–71.

[6] *Ibid.*, vol. I, 668th meeting, p. 259, paras. 37–40.

[7] *Ibid.*, vol. II, pp. 161 *et seq.*, document A/5209, para. 23.

[8] *Yearbook ... 1965*, vol. I, p. 106, 790th meeting, para. 75.

[9] *Ibid.*, vol. II, p. 159, document A/6009, para. 29.

[10] *Yearbook ... 1966*, vol. II, p. 177, document A/6309/Rev.1, para. 38.

[11] *Ibid.*, p. 279 *et seq.*, annex.

the words "entry into force provisionally" by "provisional application"[12] was discussed. Various delegations supported the idea that a distinction must be made between provisional application and provisional entry into force. Italy was in favour of changing the wording, stating that this would avoid confusion between application, which was a question of practice, and entry into force, which was a formal legal notion.[13]

12. France and Japan expressed concern at the lack of clarity regarding the legal nature of provisional entry into force. Japan also wondered whether there was sufficient practice to establish a distinct legal institution, while France stated that the existence of practice made it necessary for the Convention to safeguard the freedom of States to agree that a treaty could enter into force provisionally.[14]

13. After stating that the issue was the application of the treaty rather than its entry into force, Israel said that the word "provisionally" referred to time, not to legal effects.[15]

14. It is also interesting to note that in its *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*,[16] published in 1994, the Treaty Section of the Office of Legal Affairs deals with matters relating to the provisional application and the provisional entry into force of treaties under the same heading; this suggests that, for the Secretariat, at least at the time, the two legal concepts were comparable.

15. However, Aust believes that "to speak of provisional entry into force is confusing, and could mislead one into believing that the treaty is already in force, albeit on some kind of conditional basis".[17]

16. There is no doubt that, in practice, the indiscriminate use of the two terms has led to confusion regarding the scope and content of the concept of the provisional application of treaties. Consider, for example, the uncertainty arising from situations in which the national authorities responsible for the implementation of a treaty do not know whether its provisional application has legal consequences, and even whether all the procedures for ratification of a treaty are required if the contracting parties have agreed to its provisional application.

17. In any event, article 25 of the 1969 Vienna Convention sets the minimum standard on the matter:

*Provisional application*

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) The treaty itself so provides; or

(*b*) The negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

18. This article has been criticized as difficult to understand[18] and lacking in legal precision.[19] However, it has also been said that article 25 "provides the technical framework of how States may go about the provisional application of a treaty".[20]

19. While article 25 has sometimes been described as the basis for the "provisional entry into force" of a treaty, it refers expressly to the provisional application of a treaty and makes no mention of its entry into force.

20. The legal regime will depend on both the interpretation of the State that has recourse to this concept and the terms in which provisional application is agreed in a treaty or, where applicable, a separate agreement.

21. In fact, while article 25 of the 1969 Vienna Convention presupposes supplementary application, and in the light of the lack of uniform regulations on the matter, the content and scope of the provisional application of a treaty will depend largely on the terms in which such application is envisioned in the treaty to be applied provisionally. In some cases, a single clause establishes the applicable regime[21] while, in others, its inclusion is far more complex and detailed and may lead to the establishment of some form of special regime.[22] All of these factors raise various questions regarding the interpretation and scope of the provisional application of treaties. However, there are also common elements that can provide guidance in identifying potential legal effects of the concept, which will be mentioned below.

22. For example, without in any way claiming to provide an exhaustive set of definitions, the following characteristics, which take into account the variety of situations that arise in practice, may be identified:

(*a*) some treaties state that explicit acceptance of provisional application of a treaty is required, while others do not;

(*b*) the expression of intention may be unilateral, but it may also be made by two or more contracting parties;

(*c*) in some cases, a statement of the acceptance of provisional application may be made when the treaty is signed while, in other cases, it is to be made when depositing the instrument of ratification, accession or acceptance;

[12] See the comments made by Switzerland and the United Kingdom of Great Britain and Northern Ireland in *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968* (United Nations publication, Sales No. E.68.V.7), A/CONF.39/11, Summary records of meetings of the Committee of the Whole, 26th meeting, paras. 46–50.

[13] *Ibid.*, p. 142, para. 43.

[14] *Ibid.*, pp. 141–142, paras. 39–41 and 45.

[15] *Ibid.*, p. 142, para. 44.

[16] United Nations publication, Sales No. E.94.V.15, document ST/LEG/7/Rev.1, paras. 237–241.

[17] Aust, *Modern Treaty Law and Practice*, p. 139.

[18] Geslin, *La mise en application provisoire des traités*, p. 111.

[19] Rogoff and Gauditz, "The provisional application of international agreements", p. 41.

[20] Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature*, p. 22.

[21] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art. 18; Arms Trade Treaty, art. 23.

[22] Energy Charter Treaty, art. 45; Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, art. 7.

(*d*) provisional application may also be limited to specific provisions of the treaty;

(*e*) such application may end with the entry into force of the treaty itself, or with its entry into force for the State that had decided to apply it provisionally;

(*f*) the provisional application clause may also require or involve an expression of the State's ultimate intention to ratify the treaty.

23. It is, however, possible to identify common elements that can provide guidance in identifying the legal effects of the provisional application of treaties:

(*a*) an unequivocal expression of the State's intention that the treaty be applied provisionally is invariably required;

(*b*) generally speaking, provisional application is intended as a transitory mechanism pending the entry into force of the treaty; however, there is no reason that it cannot bind the State indefinitely, even after the entry into force of the treaty, if the parties so desire.

24. Specific cases that reflect the issues raised in the previous paragraph will be referred to throughout this report. This exercise does not claim to be exhaustive; it simply offers examples of the broad range of possibilities offered by State practice in this area.

## Chapter I

## Purposes and usefulness of provisional application

25. The purpose of provisional application is to give immediate effect to all or some of the substantive provisions of a treaty without waiting for the completion and effects of the formal requirements for entry into force contained therein.[23] Specifically, it is a mechanism that allows States to give legal effect to a treaty by applying its provisions to certain acts, events and situations before it has entered into force.[24] The concept has been defined as "the application of and binding adherence to a treaty's term before its entry into force"[25] and as "a simplified form of obtaining the application of the entire treaty, or of certain provisions, for a limited period of time".[26]

26. Some of the primary factors that may lead States to resort to the provisional application of treaties are addressed below.

### A. Urgency

27. During the United Nations Conference on the Law of Treaties, Romania and Venezuela stressed the need for this provision in situations of urgency.[27] These circumstances have occurred, for example, in treaties relating to the ending of hostilities.[28] This is true of the clauses contained in the 1934 Pact of Balkan Entente between Greece, Roumania, Turkey and Yugoslavia and the 1940 Moscow Peace Treaty between Finland and the Union of Soviet Socialist Republics.[29] There has also been a great need for provisional application clauses in the event of a natural disaster. The Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency include express provisions on their provisional application. These Conventions were concluded in response to the 1986 accident at the Chernobyl nuclear power plant. Trade and customs treaties are another example of urgency that has been mentioned in the work of the Commission.[30]

### B. Flexibility

28. During the United Nations Conference on the Law of Treaties, various delegations recognized that a provision on provisional application reflected the growing practice of States in that area.[31] Delegations such as those of Costa Rica and Italy said that it would provide a tool that would give greater flexibility to the treaty regime.[32]

29. This element of flexibility in a treaty regime may take various forms. During the work of the Commission, Mr. El-Erian has said that it served a useful purpose where the subject matter was urgent, implementation of the treaty was of great political significance or it was important not to wait for completion of the lengthy process of compliance with States' constitutional requirements for the approval of treaties.[33]

30. The flexibility provided by the provisional application of treaties may have various consequences. Geslin suggests that provisional application may be used to modify the provisions of a treaty without the need for an

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[23] Mathy, "Article 25", p. 640.

[24] See Quast Mertsch, *Provisionally Applied Treaties*, p. 22.

[25] Lefeber, "Treaties, provisional application", p. 1, para. 1.

[26] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 354.

[27] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 12 above), 27th meeting, para. 5; and 26th meeting, para. 29, respectively.

[28] Krieger, "Article 25", p. 408.

[29] Signed in Moscow, 12 March 1940, AJIL, vol. 34 (1940) (Supplement), p. 127.

[30] *Yearbook ... 1959*, vol. I, 487th meeting, p. 36, para. 37.

[31] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 12 above), 26th meeting, statements made by Venezuela (paras. 29 and 31), Israel (para. 44), France (para. 45), Switzerland (para. 46) and the United Kingdom (para. 48); and 27th plenary meeting, statements made by Cambodia (para. 4) and Romania (para. 5); and *ibid., Second Session, Vienna, 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.6), *Summary records of the plenary meetings*, 11th plenary meeting, statements made by Greece (para. 73), Italy (para. 83) and Poland (para. 87).

[32] *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (footnote 31 above), 11th plenary meeting, Costa Rica (para. 82) and Italy (paras. 83–84).

[33] *Yearbook ... 1965*, vol. I, 790th meeting, pp. 107–108, para. 96.

amendment process.[34] On the other hand, Dalton is of the view that provisional application "generally takes place after the signatories have agreed ... to apply such provisions [of a treaty] prior to completing the steps that must be taken under their internal law before the treaty can be brought into force. Thus, agreements concluded in simplified form (i.e. that enter into force on signature) are not normally susceptible of provisional application".[35]

### C. Precaution

31. Provisional application of a treaty may arise where States have concluded highly sensitive political agreements and wish to build trust in order to prevent the contracting parties from reconsidering their position regarding the entry into force of the treaty during the ratification process.[36] As an example of this situation, Krieger mentions the Protocol on the Provisional Application of Certain Provisions of the 1990 Treaty on Conventional Armed Forces in Europe, the 1992 Treaty on Open Skies and the 1993 Treaty between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms (START II).[37] Lefeber notes that provisional application provisions may be motivated by "the aspiration to adopt and implement without delay confidence-building measures, notably in economic matters, following the resolution of an international conflict";[38] article 23 of the Arms Trade Treaty is an example of this.[39] The importance of the legal assets protected by a treaty may also lead States to seek its provisional application. For example, Austria, Mauritius, South Africa, Sweden and Switzerland issued declarations of provisional application, based on humanitarian concerns, when ratifying the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.[40]

32. This may also be true of the Arms Trade Treaty and of the Maritime Boundary Agreement between the United States and Cuba,[41] for which there is a provisional application agreement that has been renewed on several occasions.[42]

### D. Transition to imminent entry into force

33. Some scholars have considered other reasons for seeking provisional application; one of the primary motives is the prevention of legal gaps between successive treaty regimes.[43] Article 7 of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 is an example of this. The provisional application provided for in this clause was included out of a desire to ensure, in light of the imminent entry into force of that Convention (the necessary instruments of ratification having already been received), that the Agreement's interpretation of Part XI would be effective prior to its entry into force.[44]

### E. Other

34. Treaties may also be applied provisionally in order to expedite their implementation prior to completion of the constitutional procedures for their ratification and entry into force. This has also been considered desirable in order to create an incentive for ratification.[45] During the United Nations Conference on the Law of Treaties, Romania said that provisional application was a tool through which delays in ratification, approval or acceptance could be avoided.[46] Malaysia observed that the provisional application of a treaty was useful in order to avoid the delay entailed by going through the traditional national channels.[47] Thus, the advantages offered by provisional application are sometimes viewed in light not so much of its international legal effects as of its potential effects at the domestic level.

35. The recent practice of the European Union is relevant in this regard.[48] However, others have called for caution; for example, Greece noted that the provisional application of treaties could lead to a conflict between international law and constitutional law,[49] and Viet Nam, Venezuela, Switzerland, the United States and Malaysia made similar comments.[50] It has also been said that the provisional application of a treaty may be a subterfuge aimed at evading the domestic legal requirements for its approval and subsequent ratification for the sole purpose of avoiding domestic policy situations that make it inconceivable for the competent legislative body to approve the treaty. One relevant example of this situation and the dilemmas that accompany it is the 1977 Maritime Boundary Agreement between the United States and Cuba.[51]

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[34] Geslin, *La mise en application provisoire des traités*, p. 32. On provisional application in the context of the United Nations Convention on the Law of the Sea, see Treves, "L'entrée en vigueur de la Convention des Nations Unies sur le droit de la mer et les conditions de son universalisme", p. 869.

[35] Dalton, "Provisional application of treaties", p. 221.

[36] Krieger, "Article 25", p. 409.

[37] *Ibid*.

[38] Lefeber, "Treaties, provisional application", p. 1, para. 2.

[39] "Provisional application. Any State may at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State".

[40] Andrew Michie, "The provisional application of arms control treaties", *Journal of Conflict and Security Law*, vol. 10, No. 3 (2005), p. 362, cited in Krieger, "Article 25", p. 409. See also *Multilateral Treaties Deposited with the Secretary-General, status as at 1 April 2009* (United Nations publication, Sales No. E.09.V.3), ST/LEG/SER.E/26, chap. XXVI.5.

[41] Maritime Boundary Agreement between the United States of America and the Republic of Cuba (16 December 1977), art. V, ILM, vol. XVII, No. 1, January 1978, p. 110.

[42] Agreements between the United States of America and Cuba extending the provisional application of the agreement of December 16, 1977, effected by exchange of notes at Havana and Washington, signed on 27–28 December 1979, 16 and 28 December 1981, 27 and 30 December 1983 and 3 December 1985 (*United States Treaties and Other International Agreements*, vol. 32, part one, p. 840; vol. 33, part four, p. 4652; and vol. 35, part four, pp. 4150 and 11228, respectively).

[43] Lefeber, "Treaties, provisional application", p. 1, para. 2.

[44] Krieger, "Article 25", p. 410.

[45] *Ibid.*, p. 408.

[46] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 12 above), 27th meeting, para. 5.

[47] *Ibid.*, para. 7.

[48] Bartels, "Withdrawing provisional application of treaties: Has the EU made a mistake?", p. 118.

[49] *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (footnote 31 above), 11th meeting, para. 73.

[50] *Ibid., First Session* (footnote 12 above), 26th meeting, paras. 26, 30, 46 and 51; and 27th meeting, para. 7, respectively.

[51] See para. 32 above.

## Chapter II

# Legal regime of provisional application

36. As mentioned at the beginning of the present report, while article 25 of the 1969 Vienna Convention establishes a general regulatory framework for the provisional application of treaties, it does not contain the entire legal regime that applies to this issue. The primary legal regime that regulates provisional application is the regime established for this purpose in the treaty that provides for such application or in another manner, as agreed by the contracting parties.

37. Clearly, the provisional application of treaties has consequences that arise both within the State and at the international level. Like any other engagement between States, a provisional application agreement produces legal effects at the international level.[52] However, in the light of the extensive study warranted by this issue, its legal effects will be studied at a later date so that, if the Commission deems it appropriate, their potential impact on the regime of the international responsibility of States can also be explored.

38. It should be noted that, in dealing with the issue of provisional application, the Treaty Section of the Office of Legal Affairs, in its *Treaty Handbook*, states:

> A State provisionally applies a treaty that has entered into force when it unilaterally undertakes, in accordance with its provisions, to give effect to the treaty obligations provisionally, even though its domestic procedural requirements for international ratification, approval, acceptance or accession have not yet been completed. The intention of the State would generally be to ratify, approve, accept or accede to the treaty once its domestic procedural requirements have been met ... In contrast, a State that has consented to be bound by a treaty through ratification, approval, acceptance, accession or definitive signature is governed by the rules on withdrawal or denunciation specified in the treaty as discussed in section 4.5 [of the *Treaty Handbook*] (see articles 54 and 56 of the Vienna Convention 1969).[53]

39. It is interesting to note that this approach assumes that a State will apply provisionally a treaty that is already in force pending its entry into force for that particular State. However, as mentioned above, it is generally assumed that the regime set out in article 25 of the 1969 Vienna Convention is based on the scenario of provisional application while the treaty is not yet in force.

40. The following is a review of some of the modalities that occur in State practice.

## A. Source of the obligations

### 1. In a treaty provision

41. Examples include article 7 of the Protocol on the provisional application of certain provisions of the Treaty on Conventional Armed Forces in Europe and article 10 of the 1947 Franco-Belgian Convention for the avoidance of double taxation in regard to taxes on capital.[54]

### 2. In a separate agreement concerning the treaty

42. Provisional application of part of a treaty may be regulated through an agreement that is separate and different from the treaty. Examples include the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, the Agreement providing for the provisional application of the Draft International Customs Conventions on Touring, on Commercial Road Vehicles and on the International Transport of Goods by Road, and the Final Act of the International Health Conference, Arrangement concluded by the Governments represented at the International Health Conference.

## B. Forms of expression of intention

43. Whether envisioned in a treaty provision or in a separate agreement between parties, because a State's commitment to apply all or part of a treaty provisionally is the result of an unequivocal expression of its intention, whether implicit or explicit, this expression of intention is the source of the resulting inter-State obligations.

44. However, some are of the view that, depending on the form in which the provisional application clause is drafted, there may be some doubt as to the State's consent.[55] On the one hand, the wording may be straightforward in the sense that no particular provisional application mechanism is required.[56] On the other hand, the clauses may make provisional application contingent on compatibility with States' domestic law.[57] Although the issue of domestic law will not be discussed in this report, it is relevant to note that for the purposes of this section, such a condition is irrelevant, provided that the States have freely consented, since the State has expressed its intention to apply the treaty provisionally under the stipulated modalities. Suffice it to note that, in principle, domestic law does not constitute a barrier to provisional application.[58] It should, of course, be noted that matters not covered by the provisional application regime of a specific treaty are governed by the provisions of the 1969 Vienna Convention.

### 1. Express

45. While the parties may express their intention to apply a treaty provisionally,[59] they may also make a declara-

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[52] Mathy, "Article 25", p. 652.

[53] *Treaty Handbook* (United Nations publication, Sales No. E.12.V.1), p. 11, sect. 3.4.

[54] Signed in Paris on 29 December 1947 (United Nations, *Treaty Series*, vol. 46, No. 704, p. 111).

[55] See Quast Mertsch, *Provisionally Applied Treaties*, pp. 198–199.

[56] For instance, "This Agreement shall be applied provisionally from 1 January 2006" in the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the transmission of natural gas through a pipeline between the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, signed at The Hague, 21 March 2005 (United Nations, *Treaty Series*, vol. 2398, No. 43316), art. 20, para. 2.

[57] For example, Convention on the elaboration of a European Pharmacopoeia, art. 17: "Pending the entry into force of the present Convention in accordance with the provisions of Article 11, the signatory States agree, in order to avoid any delay in the implementation of the present Convention, to apply it provisionally from the date of signature, *in conformity with their respective constitutional systems**".

[58] Mathy, "Article 25", p. 646.

[59] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994), art. 7, para. 1 (*c*).

tion to the contrary—in other words, States may expressly state that a treaty shall not be applied provisionally.[60]

46. Article 45 of the Energy Charter Treaty states:

(2) (*a*) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depositary a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depositary.

#### 2. Tacit

47. Article 7, paragraph 1 (*a*), of the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 provides one example of tacit acceptance:

*Provisional application*

1. If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by:

(*a*) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing.

### C. Forms of termination

48. Except where provisional application terminates naturally with the entry into force of the instrument in question, termination is also contingent on the State's expression of intention pursuant to article 25, paragraph 2, of the 1969 Vienna Convention.

#### 1. Unilateral notification

49. The Office of Legal Affairs *Treaty Handbook* reflects the general rule set out in article 25, paragraph 2, of the 1969 Vienna Convention: "The State may unilaterally terminate such provisional application at any time unless the treaty provides otherwise (see article 25 of the Vienna Convention 1969)."[61]

50. Similarly, article 45 of the Energy Charter Treaty mentions the possibility of terminating provisional application, provided that the State expresses its intention not to be a party to the Treaty:

(3) (*a*) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty.

Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

#### 2. By arrangement between the parties

51. Article 7, paragraph 3, of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 states:

Provisional application shall terminate upon the date of entry into force of this Agreement. In any event, provisional application shall terminate on 16 November 1998 if at that date the requirement in article 6, paragraph 1, of consent to be bound by this Agreement by at least seven of the States (of which at least five must be developed States) referred to in paragraph 1 (*a*) of resolution II has not been fulfilled.

52. What is interesting about this article is that termination of the provisional application of the Agreement does not require an act or declaration by the State; it occurs when the date established for this purpose is reached.

[60] *Ibid.*, art. 7, para. 1 (*b*).

[61] *Treaty Handbook* (footnote 53 above), sect. 3.4.

## Chapter III

## Conclusion and future workplan

53. The views and information presented in this first report raise various issues that can be summarized as follows:

(*a*) recourse to the mechanism of provisional application of treaties is neither uniform nor consistent, which suggests that States are unaware of its potential;

(*b*) the practice described above demonstrates the usefulness that the provisional application of treaties may have under certain circumstances in order to give effect to all or part of the treaty in question;

(*c*) the variety of situations that occur in contractual relations between States warrants in-depth consideration of State practice, if only to determine the most common systems of domestic law;

(*d*) as with any institution that is regulated by international law, it is necessary to determine whether there are procedural requirements for the provisional application of treaties;

(*e*) it might be asked what the relationship is between the article 25 regime and other provisions of the 1969 Vienna Convention, as well as other rules of international law;

(*f*) lastly, if the provisional application of a treaty is deemed to produce legal effects, the legal consequences of violation of the obligations assumed through such application must be determined.

54. The next report will address all of these issues in order to determine whether, in the light of the presumed

usefulness of the provisional application of treaties, guidelines or model clauses could be developed to encourage States to use this mechanism more often. The Special Rapporteur hopes to create incentives for greater use of this treaty law mechanism and, for the moment, he has no more ambitious plans. In any event, it is important to resist the temptation to attempt to overregulate this institution, whose real value stems largely from the degree of flexibility that article 25 of the 1969 Vienna Convention gives to contracting parties.

55. The Special Rapporteur awaits the comments and suggestions of the Commission's members and thanks them in advance.

# PROVISIONAL APPLICATION OF TREATIES

[Agenda item 7]

**DOCUMENT A/CN.4/658**

## Memorandum by the Secretariat

[*Original: English*]
[*1 March 2013*]

**CONTENTS**




### Summary

Article 25 of the Vienna Convention on the Law of Treaties provides for the possibility of the application of treaties on a provisional basis. Its origins lie in proposals for a provision recognizing the practice of the "provisional entry into force" of treaties, made by Special Rapporteurs Sir Gerald Fitzmaurice and Sir Humphrey Waldock during the Commission's consideration of the law of treaties. The provision, which was included as article 22 in the 1966 articles on the law of treaties, was amended at the United Nations Conference on the Law of Treaties by, *inter alia*, substituting the concept of provisional "application" for "entry into force". The present memorandum traces the negotiating history of the provision both in the Commission and at the Conference, and provides a brief analysis of some of the substantive issues raised during its consideration.


## Introduction

1. At its sixty-fourth session, held in 2012, the International Law Commission included the topic "provisional application of treaties" in its programme of work. At that session, the Commission decided to request from the

Secretariat a memorandum on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the Convention on the Law of Treaties (hereinafter the "1969 Vienna Convention").[1]

2. The present memorandum provides, in chapter I below, a description of the procedural history of the consideration by the Commission of what it called the "provisional entry into force" of treaties, as well as of the negotiation, at the United Nations Conference on the Law of Treaties, of article 25 of the 1969 Vienna Convention:

*Provisional application*

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

3. Chapter II below contains a description of some of the substantive issues raised during the discussions in the Commission, as well as during the negotiations at the United Nations Conference on the Law of Treaties.

[1] *Yearbook … 2012*, vol. II (Part Two), para. 143. The Vienna Convention on the Law of Treaties was signed in Vienna on 23 May 1969.

## Chapter I

## Procedural history

4. The topic "law of treaties" was among those selected by the Commission in 1949 for codification, and was subsequently considered by the Commission at its second to eighteenth sessions, from 1950 to 1966, during which time four successive Special Rapporteurs were appointed.[2] Following an initial consideration of the topic, on the basis of Special Rapporteur Mr. James L. Brierly's first and second reports,[3] submitted in 1950 and 1951, respectively, the Commission next held a substantive discussion of the topic in 1959, on the basis of the first report of Sir Gerald Fitzmaurice,[4] which he had submitted in 1956.[5] The Commission took a further hiatus from the topic in order to concentrate its efforts on other topics, and returned to its consideration of the law of treaties at its fourteenth to eighteenth sessions, from 1962 to 1966, which it undertook on the basis of six reports submitted by Sir Humphrey Waldock,[6] who had since been appointed to replace Sir Gerald as Special Rapporteur for the topic. It was on the basis of Sir Humphrey's reports that the Commission completed the first (in 1964) and second (in 1966) readings of the draft articles on the law of treaties,[7] which it adopted in 1966.

5. The 1966 draft articles on the law of treaties included draft article 22, entitled "Entry into force provisionally", which read as follows:

1. A treaty may enter into force provisionally if:

(*a*) The treaty itself prescribes that it shall enter into force provisionally pending ratification, acceptance, approval or accession by the contracting States; or

(*b*) The negotiating States have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty.[8]

### A. International Law Commission, 1950 to 1966

#### 1. Consideration at the second to sixth sessions, 1950 to 1954

6. Mr. Brierly and Sir Hersch Lauterpacht dealt only with the question of the "provisional entry into force" of a treaty, indirectly (in the case of the former) or as part of the broader question of ratification (in that of the latter). In his proposal for an article 5 (entitled "When ratification is necessary"), submitted in 1951, Mr. Brierly envisaged several scenarios in which a State would not be deemed to have undertaken a final obligation under the treaty until it ratified that treaty.[9] The provision was subsequently recast to deal with the legal effect of signature prior to ratification and was adopted that year, on a preliminary basis, as article 4, which envisaged the possibility of a State being deemed to have undertaken a final obligation

[2] Mr. James L. Brierly (in 1949), Sir Hersch Lauterpacht (in 1952), Sir Gerald Fitzmaurice (in 1955) and Sir Humphrey Waldock (in 1961).

[3] *Yearbook … 1950*, vol. II, document A/CN.4/23, p. 222; and *Yearbook … 1951*, vol. II, document A/CN.4/43, p. 70, respectively.

[4] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 104.

[5] While the Commission did not consider Mr. Brierly's third report (*Yearbook … 1952*, vol. II, document A/CN.4/54, p. 50) or the two reports presented by Sir Hersch (*Yearbook … 1953*, vol. II, document A/CN.4/63, p. 90; and *Yearbook … 1954*, vol. II, document A/CN.4/87, p. 123, respectively), owing to a lack of time and to postponement following the resignation of both Rapporteurs, both Sir Gerald and Sir Humphrey drew on the reports of their predecessors when developing their own proposals, and the positions taken by both Mr. Brierly and Sir Hersch were referred to on numerous occasions during the discussions within the Commission in later years. Likewise, owing to lack of time, the Commission was unable to consider Sir Gerald's second to fifth reports, submitted in 1957 to 1960 (*Yearbook … 1957*, vol. II, document A/CN.4/107, p. 16; *Yearbook … 1958*, vol. II, document A/CN.4/115, p. 20; *Yearbook … 1959*, vol. II, document A/CN.4/120, p. 37; and *Yearbook … 1960*, vol. II, document A/CN.4/130), p. 69, respectively. Nonetheless, those reports were referred to extensively by Sir Humphrey.

[6] *Yearbook … 1962*, vol. II, document A/CN.4/144 and Add.1, p. 27; *Yearbook … 1963*, vol. II, document A/CN.4/156 and Add.1–3, p. 36; *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 5; *Yearbook … 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 3; *Yearbook … 1966*, vol. II, document A/CN.4/183 and Add.1–4, p. 1; and *ibid.*, A/CN.4/186 and Add.1–7, p. 51.

[7] *Yearbook … 1966*, vol. II, p. 177, para. 38.

[8] *Ibid.*, p. 180.

[9] See *Yearbook … 1951*, vol. II, document A/CN.4/43, p. 70.

by its signature of a treaty "if the treaty provides that it shall be ratified but that it shall come into force before ratification".[10]

7. An early direct reference to the provisional entry into force of a treaty was made by J.P.A. François, in 1951, when he called on the Commission "to consider the imaginary case of a treaty between two States which had been signed and ratified by both parties. The heads of State had exchanged the instruments of ratification. Provisionally the treaty was in force".[11]

8. In his first report, submitted in 1953, Sir Hersch, in his proposal for article 6, on ratification, anticipated the possibility of a treaty expressly providing for entry into force prior to ratification.[12]

### 2. Consideration at the eighth to twelfth sessions, 1956 to 1960

9. Although Sir Gerald submitted five reports, the Commission was able to consider only parts of his first report[13] (in 1959), in which he proposed a set of 42 draft articles, focusing primarily on the framing, conclusion and entry into force of treaties.

10. The Special Rapporteur's proposal for article 42 (Entry into force (legal effects)), indicated, in its paragraph 1:

> A treaty may … provide that it shall come into force provisionally on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications. In such cases an obligation to execute the treaty on a provisional basis will arise, but, subject to any special agreement to the contrary, will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable.[14]

The commentary to the provision simply stated that it covered the case of provisional entry into force and stated the rule applicable in case this situation became unduly prolonged.[15]

11. While the proposal was never discussed by the Commission, passing references to the possibility of the provisional entry into force of a treaty were made during the debate held in 1959. For example, in the context of the discussion on the general conditions for the obligatory force of treaties, Milan Bartoš suggested that some consideration should be given to the growing practice, particularly in commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification[16] and that there were valid practical considerations for the inclusion of a clause concerning the provisional entry into force of treaties.[17]

### 3. Consideration at the fourteenth session, 1962

12. The provisional entry into force of treaties was dealt with by Sir Humphrey in his first report, which was considered in 1962. The concept was introduced in paragraph 6 of his proposal for article 20 (Mode and date of entry into force): "a treaty may prescribe that it shall come into force provisionally on signature or on a specified date or event, pending its full entry into force in accordance with the rules laid down in this article".[18]

13. The Special Rapporteur explained that paragraph 6 sought to cover what in modern practice was a not infrequent phenomenon—a treaty brought into force provisionally, pending its full entry into force when the required ratifications or acceptances had taken place.[19] He noted that a treaty clause having this effect was, from one aspect, a clause relating to a mode of bringing a treaty into force.[20] The Commission focused on other aspects of article 20,[21] with only passing reference made to paragraph 6.

14. Sir Humphrey's proposal for article 21, dealing with the legal effects of the entry into force of a treaty, also included the following reference to the effects of provisional entry into force:

> 2. (*a*) When a treaty lays down that it shall come into full force provisionally upon a certain date or event, the rights and obligations contained in the treaty shall come into operation for the parties to it upon that date or event and shall continue in operation upon a provisional basis until the treaty enters into full force in accordance with its terms.
>
> (*b*) If, however, the entry into full force of the treaty is unreasonably delayed and, unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis, any of the parties may give notice of the termination of the provisional application of the treaty; and when a period of six months shall have elapsed, the rights and obligations contained in the treaty shall cease to apply with respect to that party.[22]

15. The discussion on paragraph 2 focused on subparagraph (*b*), which the Special Rapporteur had proposed *de lege ferenda*. After several doubts had been expressed regarding the advisability of including the provision,[23] the Special Rapporteur withdrew it and the Commission referred subparagraph (*a*) to the Drafting Committee.[24] The Commission had earlier accepted a procedural proposal by the Special Rapporteur that article 20, paragraph 6, be considered by the Drafting Committee together with article 21, paragraph 2, with a view to being included in an article 19 *bis*, which would contain all the provisions on the rights and obligations of States prior to the entry into force of the treaty.[25]

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[10] See *ibid.*, document A/CN.4/L.28, p. 73. A revised version of the provision, with commentary thereto, was subsequently included (as article 6) in Mr. Brierly's third report, submitted in 1952 (footnote 5 above), which reproduced the articles tentatively adopted by the Commission at its second and third sessions, in 1950 and 1951. However, owing to the resignation of the Special Rapporteur, the Commission never debated that report.

[11] *Yearbook … 1951*, vol. I, 88th meeting, p. 47, para. 37.

[12] *Yearbook … 1953*, vol. II, p. 112, art. 6, para. 2 (*b*): "2. In the absence of ratification a treaty is not binding upon a Contracting Party unless: … (*b*) The treaty, while providing that it shall be ratified, provides also that it shall come into force prior to ratification".

[13] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 104.

[14] *Ibid.*, p. 116.

[15] *Ibid.*, p. 127, para. 106.

[16] *Yearbook … 1959*, vol. I, 487th meeting, p. 36, para. 37.

[17] *Ibid.*, para. 40.

[18] *Yearbook … 1962*, vol. II, p. 69.

[19] *Ibid.*, p. 71, para. (7) of the commentary to article 20.

[20] *Ibid.*

[21] See *ibid.*, vol. I, 656th and 657th meetings, pp. 175 *et seq.*

[22] See *ibid.*, vol. II, document A/CN.4/144, p. 71.

[23] See the discussion on the termination of the provisional application of treaties in paragraphs 85–108 below.

[24] *Yearbook … 1962*, vol. I, 657th meeting, pp. 179–180, paras. 12–18.

[25] *Ibid.*, p. 179, para. 3.

16. The Drafting Committee, however, adopted a narrower article 19 *bis* (renumbered as article 17) limited to the general obligation of good faith prior to the entry into force of a treaty. In introducing that article, the Special Rapporteur recalled that, in the course of the discussion of various articles, it had been suggested that particular points should be transferred to article 19 *bis*. One of those points was the question of provisional entry into force. The Drafting Committee had decided, however, that the question should be dealt with in the articles concerning entry into force.[26]

17. The Drafting Committee's subsequent proposal for a revised article 20 (entitled "Entry into force of treaties") no longer included a reference to provisional entry into force.[27] The issue was, instead, entirely subsumed in its proposal for a revised article 21 (entitled "Provisional entry into force"), which read as follows:

> A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.[28]

The Commission adopted the article, on first reading, in the form proposed, as (renumbered) article 24.

18. "Provisional entry into force" was also referred to during the consideration of other articles that year. Several members discussed the provisional entry into force of treaties in the context of article 9 (Legal effects of a full signature), in particular the reference in paragraph 2, subparagraph (*c*), to the obligation of good faith on the part of a signatory State, and paragraph 2, subparagraph (*d*), concerning the right of the signatory State to insist on the performance of other signatories.[29] Reference was also made in the commentary to article 12 (Ratification), as adopted in 1962, in which it was noted that "[i]t may not be very often that a treaty expressed to come into force upon signature is made subject to ratification; but this does sometimes happen in practice when a treaty which is subject to ratification is expressed to come into force provisionally upon signature."[30]

### 4. Consideration at the fifteenth and sixteenth session, 1963 and 1964

19. Sir Humphrey's second and third reports[31] did not revisit the concept of the "provisional entry into force of treaties" directly. Nonetheless, his second report dealt with, *inter alia*, the question of constitutional limitations on the validity of treaties, including those not yet in force.[32] The report also considered the question of the termination of a treaty, which would *ex hypothesi* also terminate the provisional entry into force of the treaty.

20. A passing reference was made in the third report, in which, in the discussion on article 57 (Application of treaty provisions *ratione temporis*), it was indicated, *inter alia*, that the rights and obligations created by a treaty could not come into force until the treaty itself was in force, either definitively or provisionally under article 24.[33]

### 5. Consideration at the seventeenth session (first part), 1965

21. Article 24 was considered again in 1965, in the context of the second reading of the articles on the law of treaties. The Commission had before it Sir Humphrey's fourth report,[34] which contained an analysis of comments and observations received from Governments, together with his suggestions for amendments. Japan noted that the technique of provisional entry into force was in fact sometimes resorted to as a practical measure, but the precise legal nature of such provisional entry into force did not seem to be very clear. Unless its legal effect could be precisely defined, it seemed best to leave the matter entirely to the intention of the contracting parties. Provisions of article 23, paragraph 1, could perhaps cover this eventuality.[35] Such sentiments were echoed by the United States, which took the view that while the article accorded with present-day requirements and practices, it might be questioned whether such a provision in a convention on treaties was necessary.[36] Sweden, and later the Netherlands, commented on substantive aspects of the provision.[37]

22. In response, the Special Rapporteur recalled that the Commission had considered that "provisional entry into force" occurred in modern treaty practice with sufficient frequency to require notice in the draft articles, and it seemed desirable for the legal character of that situation to be recognized in the draft articles, lest the omission be interpreted as denying it.[38] He added that leaving the matter to the application of the general rule in article 23, paragraph 1 (on entry into force of a treaty), would not cover the problem altogether, as the States concerned sometimes brought about the "provisional entry into force" by a separate agreement in simplified form.[39]

23. The second-reading debate on article 24[40] was held on the basis of a revised version proposed by the Special

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[26] *Ibid.*, 661st meeting, p. 212, para. 2.

[27] *Ibid.*, 668th meeting, p. 258, para. 34.

[28] *Ibid.*, p. 259, para. 37.

[29] *Ibid.*, 643rd meeting, p. 88, paras. 86–87; and 644th meeting, p. 93, para. 69 and p. 94, para. 87.

[30] *Yearbook … 1962*, vol. II, p. 173, para. (8) of the commentary to article 12.

[31] See footnote 6 above.

[32] See *Yearbook … 1963*, vol. II, p. 41, proposal for article 5 (Constitutional limitations on the treaty-making power).

[33] *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 10, para. (2) of the commentary to article 57.

[34] *Yearbook … 1965*, vol. II, document A/CN.4/177 and Add.1–2.

[35] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, p. 303, comments on article 24 .

[36] *Ibid.*, p. 351, comments on article 24.

[37] *Ibid.*, p. 337 (Sweden) and p. 316 (Netherlands). References to the provisional entry into force of treaties were also made in the comments by Luxembourg on article 12 (Ratification) (*ibid.*, p. 310) and by Cyprus (*ibid.*, p. 285) and Israel (*ibid.*, p. 298) in relation to the applicability of article 55 (*Pacta sunt servanda*).

[38] *Yearbook … 1965*, vol. II, document A/CN.4/177 and Add.1, p. 58, art. 24, observation of the Special Rapporteur, para. 1.

[39] *Ibid.*

[40] Provisional entry into force was also referred to in the debate on other articles. In connection with article 12, see the statements of Mr. Abdullah El-Erian (*Yearbook … 1965*, vol. I, 784th meeting, p. 64, para. 86), Mr. Antonio de Luna (*ibid.*, 785th meeting, p. 70, para. 69)

Rapporteur.[41] While different opinions were expressed, in particular as to how the question of the termination of the provisional entry into force was dealt with, the Commission decided to retain a distinct provision in the draft articles.[42] The Commission also debated a proposal by Mr. Paul Reuter to refer to the provisional "application" of a treaty, as opposed to its provisional "entry into force".[43]

24. On 2 July 1965, the Commission adopted, by a vote of 17 to none, article 24, as follows:[44]

1. A treaty may enter into force provisionally if:

(*a*) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or

(*b*) The contracting States have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty.

#### 6. Consideration at the eighteenth session, 1966

25. Article 24 was next referred to in 1966, in Sir Humphrey's sixth report,[45] in the context of its relationship with articles 55 (*Pacta sunt servanda*)[46] and 56 (Application of a treaty in point of time), primarily in response to a set of comments received from the Government of Israel.

26. The Commission returned to the consideration of article 24 during the adoption of the final draft articles on the law of treaties. While a suggestion by Mr. Shabtai Rosenne to reverse the order of articles 23 and 24[47] was not adopted, the Commission accepted the Drafting Committee's proposal that the words "negotiating States" be substituted for the words "contracting States" in paragraph 1, subparagraph (*b*).[48] With that final amendment, article 24 (subsequently renumbered as article 22) was adopted, on second reading. The Commission also adopted a commentary containing four paragraphs, dealing with the two recognized bases for provisional entry into force (i.e. in accordance with the terms of a provision in the treaty itself or on the basis of a separate agreement), the practice of bringing into force provisionally only a certain part of a treaty, and an explanation of the decision to exclude reference to the termination of provisional entry into force.[49]

### B. General Assembly, 1966 and 1967

27. Upon receiving the report of the Commission, the General Assembly, at its twenty-first session, in 1966, decided, in its resolution 2166 (XXI) of 5 December 1966, to invite the submission of written comments and observations on the draft articles. Of those member Governments submitting such comments and observations, only Belgium commented on article 22 (focusing on the mode of termination of provisional entry into force).[50] At the twenty-second session of the Assembly, in 1967, during the debate on the law of treaties, Sweden referred, with approval, to the Belgian comment.[51]

### C. United Nations Conference on the Law of Treaties, 1968 and 1969

28. The United Nations Conference on the Law of Treaties was held in Vienna, in two sessions, from 26 March to 24 May 1968 and from 9 April to 22 May 1969, respectively.

#### 1. Consideration at the first session, 1968

29. Draft article 22 was first considered by the Committee of the Whole of the Conference,[52] which had before it 10 proposals for amendments.[53] A proposal to delete the article was not pressed by the sponsors.[54] A number of drafting proposals were referred to the Drafting Committee. Two proposals to delete paragraph 2 were rejected.[55] A proposal to refer to the provisional "application", as opposed to the "entry into force", of treaties was adopted.[56] The Committee of the Whole approved, in principle, two proposals to include a new paragraph, on the termination of the provisional entry into force or provisional application of a treaty.[57]

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and Mr. Roberto Ago (*ibid.*, p. 71, para. 81). The practice was also referred to by Mr. Paul Reuter, in the context of article 17, concerning the rights and obligations of States prior to the entry into force of the treaty (*ibid.*, 788th meeting, p. 90, para. 36).

[41] The proposal for a revised text was as follows: "A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty or the specified part shall come into force as prescribed or agreed, and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it" (*ibid.*, 790th meeting, p. 106, para. 73).

[42] However, Mr. Taslim Olawale Elias opposed the retention of article 24, since the issue appeared to be covered by paras. 1 and 3 of article 23 (*ibid.*, p. 107, para. 84). See also the views of Mr. Senjin Tsuruoka (*ibid.*, 791st meeting, pp. 109–110, paras. 9, 10, 12 and 26). While Mr. José Maria Ruda expressed his sympathy for such views, he nonetheless supported the retention of the article for practical reasons (*ibid.*, 790th meeting, p. 107, para. 85).

[43] *Ibid.*, 790th meeting, p. 106, para. 75. See the discussion in paragraphs 48 and 49 below.

[44] An earlier version proposed by the Drafting Committee was sent back (*ibid.*, 814th meeting, pp. 274–275, paras. 38–56).

[45] *Yearbook … 1966*, vol. II, document A/CN.4/186 and Add.1–7.

[46] See the discussion in paragraphs 75 and 76 below.

[47] *Yearbook … 1966*, vol. I (Part Two), 886th meeting, p. 284, para. 63.

[48] *Ibid.*, 887th meeting, p. 293, para. 69.

[49] *Ibid.*, vol. II, p. 210. See also para. (3) of the commentary to article 23 (*Pacta sunt servanda*), previously article 55 ("The words 'in force' of course cover treaties in force provisionally under article 22", p. 211).

[50] A/6827, p. 6. See also paragraph 95 below.

[51] *Official Records of the General Assembly, Twenty-second Session, Sixth Committee*, 980th meeting, para. 13.

[52] At its 26th and 27th meetings, held in April 1968 (see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), pp. 140–146).

[53] *Ibid., First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole, pp. 143–144, paras. 222–230.

[54] Proposal by the Republic of Korea, the Republic of Viet Nam and the United States (see *ibid.*, p. 143, para. 224 (i) (*a*)).

[55] By 63 votes to 11, with 12 abstentions (see *ibid.*, para. 227 (*a*)).

[56] By 72 votes to 3, with 11 abstentions (*ibid.*, para. 227 (*b*)).

[57] By 69 votes to 1, with 20 abstentions (*ibid.*, para. 227 (*c*)).

30. With the aforementioned understanding and decisions, the article was referred to the Drafting Committee, which subsequently proposed the following revised text for article 22:[58]

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

31. In introducing the revised text, the Chair of the Drafting Committee pointed out that the article reflected a modified version of the proposal by Czechoslovakia and Yugoslavia for the *chapeau* to paragraph 1, including the reference to the "provisional application" of treaties. The concept of the provisional application of part of a treaty, previously set out in paragraph 2, had been incorporated into paragraph 1. New paragraph 2 reintroduced the issue of the termination of the provisional application of a treaty. All other proposals were rejected by the Drafting Committee. The Committee of the Whole adopted article 22, as proposed by the Drafting Committee, without a vote.[59]

### 2. Consideration at the second session, 1969

32. The report of the Committee of the Whole on draft article 22 was taken up in the plenary of the United Nations Conference on the Law of Treaties at the second session. The Conference adopted article 22 by 87 votes to 1, with 13 abstentions.[60] Article 22 was renumbered as article 25 of the 1969 Vienna Convention.

[58] *Ibid., First Session ...* (A/CONF.39/11/Add.1)(see footnote 52 above), 72nd meeting of the Committee of the Whole, p. 426, para. 24.

[59] *Ibid.*, p. 427, para. 28.

[60] *Ibid., Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1, United Nations publication, Sales No. E.70.V.6), 11th plenary meeting, p. 43, para. 101. The Drafting Committee subsequently rejected several proposals to modify article 22, raised during the debate immediately prior to its adoption, as well as a proposal by Yugoslavia to include a new article (see para. 79 below); *ibid.*, 28th plenary meeting, p. 157, paras. 45–47.

## Chapter II

## Substantive issues discussed during the development of article 25

### A. *Raison d'être* of provisional application of treaties

33. As early as 1953, when Sir Hersch referred to the existence of a treaty which, "while providing that it shall be ratified, provides also that it shall come into force prior to ratification",[61] a common theme in the reports of the Special Rapporteurs and in the debate in the Commission was the extent to which this phenomenon was common in the practice of States. Sir Hersch noted that there were frequent examples of this type of treaty.[62]

34. During the debate on the first report by Sir Gerald,[63] held in 1959, Mr. Bartoš suggested that some consideration should be given to the growing practice, particularly in commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification.[64] He reiterated the suggestion in 1962, when he referred to the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once, pending definitive ratification.[65]

35. In the commentary to his proposal for article 20, paragraph 6, Sir Humphrey alluded to a modern practice which was a not infrequent phenomenon: a treaty brought into force provisionally, pending its full entry into force.[66] The commentary to (renumbered) article 24, adopted by the Commission in 1962, stated: "This article recognizes a practice which occurs with some frequency today and requires notice in the draft articles".[67]

36. In 1965, Mr. Grigory Tunkin considered article 24 to be descriptive of an existing practice rather than expressive of a rule of law. His own experience showed that it was not uncommon for a bilateral treaty to be subject to ratification but to enter into force immediately upon signature.[68] The Special Rapporteur subsequently noted that the Commission as a whole appeared to be firmly of the opinion that it was dealing with a common phenomenon which had become an ordinary part of existing treaty practice.[69]

37. These views were echoed at the United Nations Conference on the Law of Treaties.[70] Venezuela expressed

[61] *Yearbook … 1953*, vol. II, p. 91, art. 6, para. 2 (*b*).

[62] *Ibid.*, pp. 114–115, para. 5 (*b*) of the commentary to article 6, para. 2 (*b*). Specific examples were cited in 1962, in the statement by Mr. Briggs (*Yearbook … 1962*, vol. I, 644th meeting, p. 94, para. 87), in 1965, in the statements by Mr. El-Erian (*Yearbook … 1965*, vol. I, 790th meeting, p. 112, para. 98), Mr. Bartoš (*ibid.*, 791st meeting, p. 115, para. 23) and Mr. Pessou (*ibid.*, p. 116, para. 31), as well as in the statement by Venezuela at the first session of the United Nations Conference on the Law of Treaties in 1968 (see *Official Records of the United Nations Conference on the Law of Treaties, First Session …* (A/CONF.39/11) (footnote 52 above), 26th meeting of the Committee of the Whole, p. 141, para. 29).

[63] See *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 104. In his commentary to article 42, para. 1, the Special Rapporteur simply noted, "This covers the case of provisional entry into force" (p. 127, para. 106).

[64] *Yearbook … 1959*, vol. I, 487th meeting, p. 36, para. 37.

[65] *Yearbook … 1962*, vol. I, 643rd meeting, p. 88, para. 86. See also *ibid.*, 647th meeting, p. 117, para. 97.

[66] *Ibid.*, vol. II, p. 71, para. (7) of the commentary to article 20.

[67] *Ibid.*, p. 182, para. (1) of the commentary to article 24.

[68] *Yearbook … 1965*, vol. I, 791st meeting, pp. 110–111, para. 28.

[69] *Ibid.*, pp. 112–113, para. 55.

[70] See also the view expressed by Sir Humphrey, in his capacity as Expert Consultant to the Vienna Conference, that the practice of provisional application was now well established among a large number of States. See *Official Records of the United Nations Conference on the Law of Treaties, Second Session ...* (A/CONF.39/11/Add.1) (footnote 60 above), 11th plenary meeting, para. 89.

the view that entry into force provisionally corresponded to a widespread practice and that provisional application met real needs in international relations.[71] A number of delegations opposed a proposal to delete the article on the grounds that it reflected existing practice.[72]

38. The need to expedite the application of a treaty, typically as a matter of urgency, was the common justification offered for the practice. In 1959, Mr. Bartoš referred to the valid practical considerations for the inclusion of a clause,[73] and Mr. Georges Scelle was prepared to admit it in some very exceptional cases, e.g. customs agreements intended essentially for the immediate protection of a country's economy.[74] The commentary to article 24, adopted in 1962, stated: "Owing to the urgency of the matters dealt with in the treaty or for other reasons the States concerned may provide in a treaty, which it is necessary for them to bring before their constitutional authorities for ratification or approval, that it shall come into force provisionally".[75] Mr. Abdullah El-Erian, in 1965, shared this understanding when he stated that the inclusion of a clause on provisional entry into force in a treaty served a useful purpose where the subject matter was urgent, the immediate implementation of the treaty was of great political significance, or it was psychologically important not to wait for completion of the lengthy process of compliance with constitutional requirements.[76]

39. At the United Nations Conference on the Law of Treaties, Venezuela noted that the practice was based on the urgency of certain agreements.[77] Romania stated that the practice of applying treaties provisionally arose in cases where immediate application was necessitated by the urgency of the content of the treaty.[78] Malaysia observed that the advantages of the treaty could be obtained much sooner.[79] Austria noted that the closely knit structure of international relations might require the immediate application of a treaty.[80] Costa Rica was of the view that the practice should be commended on grounds of flexibility.[81] Italy noted that the purpose of article 22 was, *inter alia*, to provide the necessary element of flexibility to regulate present international treaties.[82] Similarly, the Expert Consultant (Sir Humphrey) recalled that provisional application was typically resorted to in two situations: (*a*) when, because of a certain urgency in the matter at issue, particularly in connection with economic treaties, it was highly desirable that certain steps should be taken by agreement in the very near future; and (*b*) when it was not so much a question of urgency as that the matter was regarded as manifestly highly desirable and almost certain to obtain parliamentary approval.[83]

40. Another reason cited pertained to considerations of domestic law. For example, Sweden noted that provisional application was provided for because there was often no absolute assurance that the outcome of internal constitutional procedures would confirm the provisional acceptance of the treaty.[84] Mr. Antonio de Luna had, in 1965, alluded to this when he noted that the method referred to in article 24 was a much more elegant means of overcoming the difficulties raised by constitutional requirements for ratification than the method of using a special terminology so as to avoid the terms "treaty" and "ratification".[85] At the same session, Mr. Bartoš observed that if a treaty was applied only provisionally, most legal systems would regard that situation as a practical expedient which did not introduce the rules of international law into internal law.[86]

41. Several delegations at the United Nations Conference on the Law of Treaties were of the same view. For example, Yugoslavia considered the article to be useful legally.[87] Romania observed that provisional application satisfied the actual requirements of States by setting up machinery through which delays in ratification, approval or acceptance could be avoided.[88] Malaysia noted that it was often expedient to avoid the unnecessary delay entailed by going through the traditional channels.[89]

42. However, a number of delegations expressed doubts precisely for reasons of compliance with domestic law. For example, Viet Nam noted that States might commit themselves hastily under the pressure of circumstances without weighing all the difficulties that the subsequent ratification of their commitments might encounter.[90] Venezuela observed that Governments hesitated to commit themselves without complying with the procedure prescribed by internal law unless they were certain that ratification would not give rise to any political difficulty.[91] Greece stated that the provisions of article 22 could lead to a conflict between international law and the constitutional

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[71] *Ibid., First Session* ... (A/CONF.39/11) (footnote 52 above), 26th meeting of the Committee of the Whole, paras. 29 and 31. However, see also the view of Bulgaria that article 22 involved a situation which seldom arose (*ibid.*, para. 59).

[72] See the comments of Israel (*ibid.*, para. 44), France (*ibid.*, para. 45), Switzerland (*ibid.*, para. 46), the United Kingdom (*ibid.*, para. 48), Cambodia (*ibid.*, 27th meeting of the Committee of the Whole, para. 4), Romania (*ibid.*, para. 5), Italy (*ibid., Second Session* ... (A/CONF.39/11/Add.1) (footnote 60 above), 11th plenary meeting, para. 83) and Poland (*ibid.*, para. 87).

[73] *Yearbook … 1959*, vol. I, 487th meeting, p. 36, para. 40.

[74] *Ibid.*, para. 41.

[75] *Yearbook … 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

[76] *Yearbook … 1965*, vol. I, 790th meeting, pp. 107–108, para. 96; see also the example referred to in *ibid.*, para. 98.

[77] *Official Records of the United Nations Conference on the Law of Treaties, First Session* ... (A/CONF.39/11) (footnote 52 above), 26th meeting of the Committee of the Whole, para. 29.

[78] *Ibid.*, 27th meeting, para. 5.

[79] *Ibid.*, para. 7.

[80] *Ibid., Second Session* ... (A/CONF.39/11/Add.1) (footnote 60 above), 11th plenary meeting, para. 59.

[81] *Ibid.*, para. 67.

[82] *Ibid.*, para. 83.

[83] *Ibid.*, para. 89.

[84] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, pp. 337 *et seq.*

[85] *Yearbook … 1965*, vol. I, 790th meeting, p. 107 para. 92.

[86] *Ibid.*, 791st meeting, p. 110, para. 21. See also the comment of Mr. Eduardo Jiménez de Aréchaga that it was because of the constitutional difficulties which sometimes delayed ratification that he considered article 24 particularly useful (*ibid.*, p. 112, para. 50).

[87] *Official Records of the United Nations Conference on the Law of Treaties, First Session …* (A/CONF.39/11) (footnote 52 above), 26th meeting of the Committee of the Whole, para. 28.

[88] *Ibid.*, 27th meeting, para. 5.

[89] *Ibid.*, para. 7.

[90] *Ibid.*, 26th meeting, para. 26.

[91] *Ibid.*, para. 30. See also the comments of Switzerland (*ibid.*, para. 46), the United States (*ibid.*, para. 51) and Malaysia (*ibid.*, 27th meeting, para. 7).

law of a State and thereby give rise to delicate situations.[92] Several delegations, however, observed that the solution for States facing constitutional difficulties was not to conclude treaties containing clauses permitting their provisional application.[93] The Expert Consultant expressed surprise at the degree of anxiety, since to him the article seemed to offer a protection to the constitutional position of certain States rather than the contrary, because there was no need for the State concerned to resort to the procedure of provisional application at all.[94]

43. Guatemala,[95] Costa Rica,[96] Cameroon[97] and Uruguay[98] announced that they could not support the article for reasons of conflict with their respective Constitutions. The Republic of Korea indicated that it had abstained from voting on the provision as that might place its Government in a difficult position because of constitutional considerations.[99] El Salvador indicated that, although article 22 raised certain problems for its delegation, it had voted in favour of the article in recognition of the importance of the international practice involved.[100] Following the adoption of the entire 1969 Vienna Convention, the delegation of Guatemala placed on record its reservations regarding, *inter alia*, article 25, in the light of limitations imposed by its Constitution.[101]

### B. Shift from provisional "entry into force" to provisional "application"

44. The various iterations of the provision developed by the Commission were framed in terms of "entry into force" on a provisional basis. Nonetheless, references to the phrase "provisional application" can be found in the Commission's records as far back as 1962. For example, that year, Mr. Alfred Verdross referred to a practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification.[102] Mr. Herbert Briggs cited the example of a treaty between the United States and the Philippines of which a provision had been given application by presidential proclamation on a date earlier than that of entry into force.[103] Mr. Bartoš, referring to several agreements between Italy and Yugoslavia, indicated that those agreements had provided for provisional application pending ratification.[104]

45. Sir Humphrey's proposal for article 21, in paragraph 2, subparagraph (*b*), stated that any of the parties might give notice of the termination of the provisional application of the treaty.[105] He explained that there must come a time when States were entitled to say that the provisional application of the treaty must come to an end,[106] and suggested that it was desirable to make withdrawal from the provisional application of the treaty an orderly process.[107] Mr. Tunkin doubted the advisability of including subparagraph (*b*) because it might be interpreted in such a manner as to allow a State to terminate the provisional application of a treaty, notwithstanding the provisions of the treaty itself.[108]

46. Article 21 (renumbered 24), adopted by the Commission in 1962, included the following clause: "or the States concerned shall have agreed to terminate the provisional application of the treaty".[109] The commentary to the article indicated that the "provisional" application of the treaty would terminate upon the treaty being duly ratified or approved or when the States concerned agreed to put an end to the provisional application of the treaty.[110]

47. Some of the written comments submitted by Governments were formulated in terms of provisional "application". For example, Sweden referred to the termination of provisional application of the treaty.[111] The Netherlands considered the difference between provisional entry into force and provisional application, and suggested that the term "provisional application" might also be understood to refer to a non-binding form of provisional application.[112]

48. It was in the context of a comment by Mr. Reuter, in 1965, that the propriety of referring to "provisional application", as opposed to "provisional entry into force", was raised directly. In his view:

> The expression "provisional entry into force" no doubt corresponded to practice, but it was quite incorrect, for entry into force was something entirely different from the application of the rules of a treaty. Entry into force might depend on certain conditions, a specified term or procedure, which dissociated it from the application of the rules of the treaty. The practice to which the article referred was not to bring the whole treaty into force with its conventional machinery, including, in particular, the final clauses, but to make arrangements for the immediate application of the substantive rules contained in the treaty.[113]

49. Support for this view was expressed by Mr. Verdross, who stated that what was involved was obviously the application of some of the provisions of the treaty, not the treaty as a whole, and certainly not the final clauses;[114] the Chair (Mr. Bartoš);[115] Mr. de Luna, who agreed about the inappropriateness of the expression "provisional entry into force";[116] Mr. Manfred Lachs, who expressed the view that the provision really related to the application

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[92] *Ibid., Second Session …* (A/CONF.39/11/Add.1) (footnote 60 above), 11th plenary meeting, para. 73.

[93] See the statements of Uruguay (*ibid.*, para. 78), Canada (*ibid.*, para. 80), Italy (*ibid.*, para. 84), Colombia (*ibid.*, para. 86), Poland (*ibid.*, para. 87) and Uganda (*ibid.*, para. 92).

[94] *Ibid.*, paras. 89 and 90.

[95] *Ibid.*, para. 54.

[96] *Ibid.*, para. 67.

[97] *Ibid.*, para. 72.

[98] *Ibid.*, para. 77.

[99] *Ibid.*, para. 102.

[100] *Ibid.*, paras. 103 and 104.

[101] *Ibid.*, 36th plenary meeting, para. 69.

[102] *Yearbook … 1962*, vol. I, 644th meeting, p. 93, para. 69.

[103] *Ibid.*, p. 94, para. 87.

[104] *Ibid.*, 647th meeting, p. 117, para. 98.

[105] See *Yearbook … 1962*, vol. II, document A/CN.4/144 and Add.1, p. 71.

[106] *Ibid.*, para. (4) of the commentary to article 21.

[107] *Ibid.*

[108] *Yearbook … 1962*, vol. I, 657th meeting, p. 180, para. 15.

[109] *Yearbook … 1962*, vol. II, p. 182.

[110] *Ibid.*, para. (2) of the commentary to article 24.

[111] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, p. 339, comment on article 24; see also the comment by Luxembourg on article 12 (*ibid.*, p. 310).

[112] See *ibid.*, p. 316.

[113] *Yearbook … 1965*, vol. I, 790th meeting, p. 106, para. 75.

[114] *Ibid.*, para. 81.

[115] *Ibid.*, pp. 106–107, para. 83.

[116] *Ibid.*, p. 107, para. 91.

of the clauses of the treaty on a provisional basis;[117] and Mr. Briggs.[118] Mr. Eduardo Jiménez de Aréchaga agreed from a logical point of view, but indicated that the practice of provisional entry into force was a common one.[119]

50. Mr. Roberto Ago explained his understanding of the situation, saying:

> [A]rticle 24 dealt with two entirely different situations. The first, to which Mr. Reuter had referred ... was that where the treaty itself did not enter into force until the exchange of the instruments of ratification or approval; it was by a kind of secondary agreement, separate from the treaty, that the parties, at the time of signing, agreed to apply provisionally certain or even all of the treaty's clauses … The second, and more important, situation was that which the Commission had envisaged in 1962 and which the Special Rapporteur had had in mind when proposing his redraft, the case where the treaty actually entered into force at the time of signature but was subject to subsequent ratification; the ratification did no more than confirm what had existed ever since the time of signature. It might be said that in such a case the treaty entered into force subject to a resolutory condition. If the ratification did not take place within the prescribed time, the treaty would cease to be in force; but it would have been in force and produced its effects from the time of signature up to the time when it ceased to be in force through the absence of ratification ... If ... the entry into force did not take place until the time of ratification, what happened during the interim between signature and ratification was that certain of the treaty's clauses were applied provisionally by virtue of a secondary agreement between the parties, and it was only that agreement which entered into force.[120]

He added later that the first of the situations of which he had spoken, that of the provisional application referred to by Mr. Reuter, should be mentioned in article 24.[121]

51. Mr. Senjin Tsuruoka indicated his agreement with Mr. Ago that what happened was that an agreement distinct from the treaty entered into force in conformity with article 23; the treaty was then applied provisionally according to the conditions provided for in that subsidiary agreement.[122] Mr. Jiménez de Aréchaga, however, was not convinced that there was any practical difference between the two situations that Mr. Ago had mentioned.[123] Mr. Tunkin agreed with Mr. Ago that two possibilities existed, but, on practical grounds, he did not consider that both should be covered in article 24. Provisional entry into force was of importance, and article 24 should be retained to deal with it.[124]

52. Sir Humphrey later recalled that some difference of opinion had arisen as to whether, in the case contemplated by the article, the treaty entered into force provisionally or there was an agreement to apply certain provisions of the treaty. The Drafting Committee had framed article 24 in terms of the entry into force provisionally of the treaty because that was the language very often used in treaties and by States. Moreover, it seemed to him that the difference between the two concepts was a doctrinal question.[125] He added that article 23 (Entry into force of treaties) in fact contemplated cases where a treaty did not provide for its entry into force but where, by separate agreement, the States concerned agreed that it should be brought into force by a certain date. He could not see that there was any great difference between such a case and cases where the States concerned agreed that, although it was subject to ratification, the treaty was to come into force provisionally.[126]

53. At the United Nations Conference on the Law of Treaties, in 1968, the Committee of the Whole considered a joint proposal submitted by Czechoslovakia and Yugoslavia to amend paragraph 1 of article 22 so as to replace the reference to provisional entry into force by provisional application.[127] Support for the amendment was expressed by the United States (if article 22 was to be retained, the words "be applied" should be substituted for "enter into force"),[128] Ceylon (endorsed the use of the term "be applied"),[129] Italy (confusion should be avoided between mere application, which was a question of practice, and entry into force, which was a formal legal notion),[130] Czechoslovakia (the term used should be "provisional application", because there could hardly be two entries into force),[131] Israel (the word "provisionally" introduced a time element, and unless emphasis was placed on application rather than entry into force, it would be necessary to specify that the word "provisionally" referred to time and not to legal effects),[132] France (the notion of provisional entry into force was difficult to define legally),[133] Switzerland,[134] the United Kingdom (it was the application rather than the entry into force of the treaty that was contemplated),[135] Greece,[136] Cambodia,[137] Thailand[138] and Ecuador (the reference to "provisional application" had a more legal connotation and was more accurate than "entry into force provisionally").[139] Iraq, however, disagreed (from the legal point of view, the situation was the same as when the treaty entered into force. The only difference was in the time factor).[140]

54. The Expert Consultant, Sir Humphrey, recalled that the Commission, and especially its Drafting Committee, had discussed at length the choice between the expressions "provisional application" and "entry into force provisionally". The Commission had finally decided to refer to "entry into force provisionally" because it understood

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[117] *Ibid.*, p. 108, para. 100.

[118] *Ibid.*, 791st meeting, pp. 109-–110, para. 3.

[119] *Ibid.*, 790th meeting, p. 106, para. 76. Mr. Tunkin disagreed with Mr. Reuter's view (see *ibid.*, 791st meeting, p. 111, para. 29).

[120] *Ibid.*, 791st meeting, p. 109, paras. 5–7.

[121] *Ibid.*, p. 110, para. 17.

[122] *Ibid.*, p. 109, para. 11.

[123] *Ibid.*, p. 112, para. 53.

[124] *Ibid.*, para. 54.

[125] *Ibid.*, 814th meeting, p. 274, para. 39.

[126] *Ibid.*, para. 40.

[127] A/CONF.39/C.1/L.185 and Add.1, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* ... (A/CONF.39/11/Add.2) (footnote 53 above), Report of the Committee of the Whole, p. 144, para. 224 (ii) (*b*).

[128] *Ibid., First Session* ... (A/CONF.39/11) (footnote 52 above), 26th meeting of the Committee of the Whole, p. 140, para. 24.

[129] *Ibid.*, p. 141, paras. 34 and 35.

[130] *Ibid.*, p. 142, para. 43.

[131] *Ibid.*, p. 141, para. 37.

[132] *Ibid.*, p. 142, para. 44.

[133] *Ibid.*, para. 45.

[134] *Ibid.*, para. 46.

[135] *Ibid.*, para. 49.

[136] *Ibid.*, para. 54.

[137] *Ibid.*, 27th meeting of the Committee of the Whole, p. 144, para. 4.

[138] *Ibid.*, para. 8.

[139] *Ibid.*, p. 145, para. 14.

[140] *Ibid.*, 26th meeting of the Committee of the Whole, p. 143, para. 52.

that the great majority of treaties dealing with the institution under discussion expressly used that term. From the point of view of juridical elegance, it also seemed preferable not to speak of application, since it was clear that before any treaty provisions could be applied, some international instrument must have come into force. That instrument might be the main treaty itself, or an accessory agreement such as an exchange of notes outside the treaty. Another reason was that it was very common for that institution to be used in cases where there was considerable urgency to put the provisions of the treaty into force. In those cases, ratification sometimes never took place, because the purpose of the treaty was actually completed before it could take place. Clearly such acts must have a legal basis, and for that reason reference should be made to "entry into force provisionally".[141]

55. Nonetheless, the amendment was adopted, and subsequent versions of the article reflected the new formulation. The matter arose again the following year when an exchange of views was held in the plenary of the Conference regarding the legal implications of the change in formulation.[142]

### C. Legal basis for provisional application

56. The Commission initially conceived of the practice of provisional entry into force as a possibility afforded only under the terms of the treaty itself. Sir Hersch, in 1953, provided examples of specific provisions in treaties permitting application prior to entry into force.[143] Sir Gerald, in his first report, retained this approach in his proposal for article 42, paragraph 1 ("a treaty may, however, provide that it shall come into force provisionally").[144] Likewise, Sir Humphrey, in his first report, initially also limited it to treaties which expressly provided therefor.[145] The debate in the Commission in 1962 was also framed in such terms. For example, Mr. Bartoš cited examples of international agreements in which it had been stipulated that the treaty should be applied from the day of signature, whereas the treaty's binding force was conditional on the exchange of the instruments of ratification.[146]

57. However, Mr. Rosenne noted that sometimes, where a formal agreement was made subject to ratification, an agreement in simplified form was concluded for the interim period to bring the former provisionally into force until it had been ratified or until it had become clear that it was not going to be ratified.[147] The Special Rapporteur, Sir Humphrey, agreed, stating that an explanation was necessary in the commentary to indicate that this eventuality was covered, since the language of article 21 did not specifically cover the point.[148] While article 21 (renumbered 24), adopted by the Commission that year, retained the earlier approach, the commentary included the observation that one question might be whether the treaty was to be considered as entering into force provisionally in virtue of the treaty itself or by reason of a subsidiary agreement concluded between the States concerned during the adoption of the text.[149]

58. In his fourth report, Sir Humphrey, in response to a comment submitted by Sweden in which the possibility of separate agreement between the parties was raised,[150] proposed to revise article 24 in order to take account of cases where the agreement to bring the treaty into force provisionally was not expressed in the treaty itself but concluded outside it.[151] His proposed text read, *in fine*: "A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force it shall come into force provisionally".[152] The Special Rapporteur explained that the word "otherwise" was intended to cover the case in which there was no provision on the subject in the treaty itself, but the parties made a separate agreement, for example, by an exchange of notes. That agreement would itself constitute a treaty, but would not be the treaty whose provisional entry into force was in question.[153]

59. Different views were expressed on the point in the Commission. For example, while Mr. Rosenne proposed referring only to the agreement of the parties,[154] Mr. Lachs preferred referring to both situations.[155] Mr. El-Erian was of the view that the question of whether provisional entry into force had its source in the treaty itself or in a subsidiary agreement was a doctrinal issue which could be left to interpretation.[156] The Special Rapporteur observed that if no provision was made in the treaty itself, States could not be prevented from bringing the whole or part of the treaty into force by separate agreement.[157]

60. The text eventually adopted by the Commission referred to the provisional entry into force of a treaty in two scenarios: where the treaty itself prescribed, or where the negotiating States had in some other manner so agreed.[158] As regards the latter, the commentary indicated that an alternative procedure having the same effect was for the States concerned, without inserting a clause in the treaty,

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[141] *Ibid.*, 27th meeting of the Committee of the Whole, p. 145, paras. 15–18.

[142] See the discussion in paragraphs 77–79 below.

[143] *Yearbook … 1953*, vol. II, pp. 114–115, para. (5 (*b*)) of the commentary on article 6, paragraph 2 (*b*).

[144] See *Yearbook … 1956*, vol. II, p. 116.

[145] *Yearbook … 1962*, vol. II, p. 69, art. 20, para. 6 ("a treaty may prescribe that it shall come into force provisionally"); and p. 71, art. 21, para. 2 (*a*) ("when a treaty lays down that it shall come into full force provisionally").

[146] *Yearbook … 1962*, vol. I, 647th meeting, p. 117, para. 97. See also the statement of Mr. Yuen-li Liang, Secretary of the Commission, referring to a passage in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7, para. 42), which provided that a State could not become a party to an agreement on a provisional basis, or with respect to certain of its provisions only, unless such a possibility was provided for in the agreement (*ibid.*, para. 40).

[147] *Ibid.*, 668th meeting, p. 259, para. 38.

[148] *Ibid.*, para. 39.

[149] *Ibid.*, vol. II, p. 182, para. (1) of the commentary to article 24.

[150] *Yearbook … 1965*, vol. II, document A/CN.4/177 and Add.1–2, comments of Sweden on article 24, p. 58.

[151] *Ibid.*, para. 3 of the Special Rapporteur's observations and proposals relating to article 24.

[152] *Ibid.*

[153] *Yearbook … 1965*, vol. I, 790th meeting, p. 107, para. 90.

[154] *Ibid.*, para. 95.

[155] *Ibid.*, para. 101.

[156] *Ibid.*, para. 97.

[157] *Ibid.*, 814th meeting, p. 274, para. 46.

[158] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 210, para. (1) of the commentary to article 22.

to enter into an agreement in a separate protocol or exchange of letters, or in some other manner, to bring the treaty into force provisionally.[159]

61. At the United Nations Conference on the Law of Treaties, all the proposals for amendments to paragraph 1 of article 22 retained the two possibilities for bringing about the provisional application of a treaty indicated in the version adopted by the Commission.

### D. Provisional application of part of a treaty

62. The early proposals for a provision on provisional entry into force, up until and including that made by Sir Humphrey in his first report, were focused on the entire treaty. Nonetheless, in 1962 the Commission adopted, on first reading, a revised version of the article which referred to the provisional entry into force of a treaty either in whole or in part.[160] In 1965, the article was restructured by the Drafting Committee by, *inter alia*, moving the question of provisional entry into force of part of a treaty into a second paragraph, which read, in the form subsequently adopted: "The same rule applies to the entry into force provisionally of part of a treaty". The commentary included the following explanation: "No less frequent today is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation or to prepare the way for the entry into force of the whole treaty a little later."[161]

63. While two proposals to delete paragraph 2[162] were rejected[163] at the United Nations Conference on the Law of Treaties, a joint proposal by Czechoslovakia and Yugoslavia for paragraph 1[164] was approved,[165] resulting in the content of paragraph 2 of the Commission's version being moved to the *chapeau* of paragraph 1 ("A treaty or a part of a treaty is applied provisionally").

### E. Conditionality

64. During the early consideration in the Commission, references to the provisional entry into force of a treaty typically also alluded to the conditions under which the treaty would enter into force on a provisional basis. Sir Hersch, in his first report, cited examples of treaties coming into force, prior to ratification, upon a certain date, i.e. the date of signature, or within 15 days therefrom.[166] In his proposal for article 42, paragraph 1, Sir Gerald envisaged the provisional entry into force of a treaty taking place on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications.[167] Similarly, Sir Humphrey included a reference to provisional entry into force taking place "on signature or on a specified date or event", in his proposal for article 20, paragraph 6,[168] as well as "upon a certain date or event", in that for article 21, paragraph 2, subparagraph (*a*).[169] Article 21 (renumbered 24), adopted in 1962, spoke of provisional entry into force "on a given date or on the fulfilment of specified requirements".[170]

65. However, the text adopted by the Commission in 1965 excluded any reference to a date or event upon which a treaty would enter into force on a provisional basis. This was maintained in all subsequent versions, including that eventually adopted as article 25 of the 1969 Vienna Convention.

### F. Juridical nature of provisional application

#### 1. Consideration in the context of the provisional application of treaties

66. The general position of the Commission, maintained throughout its consideration of the provisional entry into force of treaties, was that such practice resulted in an obligation to execute the treaty, even if only on a provisional basis.[171]

67. For example, Sir Gerald, in his first report, proposed article 42, which, in its paragraph 1, provided that in such cases, an obligation to execute the treaty on a provisional basis would arise.[172] During the debate on the report, in 1959, in response to a query by Mr. Bartoš (who wondered what the juridical status of such agreements would be if one of the parties failed to ratify),[173] the Special Rapporteur recalled that the point was covered in article 42, paragraph 1.[174] Mr. Scelle, however, considered that a treaty which had not been ratified could not be regarded as having been concluded or as having effect.[175]

68. The matter was raised again in 1962, during the consideration of Sir Humphrey's first report, and not only in the context of his proposals on the provisional entry into force of treaties. In the context of draft article 9 (Legal effects of a full signature), specifically as regarding the reference to good faith on the part of a signatory State, in paragraph 2, subparagraph (*e*), Mr. Verdross indicated that if a treaty was

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[159] *Ibid.*, para. (2) of the commentary to article 22.

[160] *Yearbook … 1962*, vol. II, document A/6309/Rev.1, p. 182, article 24.

[161] *Yearbook … 1966*, vol. II, p. 210, para. (3) of the commentary to article 22.

[162] Proposals by the Philippines (A/CONF.39/C.1/L.165) and jointly by Czechoslovakia and Yugoslavia (A/CONF.39/C.1/L.185 and Add.1) (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* ... (A/CONF.39/11/Add.2) (footnote 53 above), Report of the Committee of the Whole, p. 143, para. 223). See also the statements of the Philippines (*ibid., First Session* ... (A/CONF.39/11) (footnote 52 above), 26th meeting of the Committee of the Whole, p. 140, para. 25) and of Malaysia and Thailand (*ibid.*, 27th meeting of the Committee of the Whole, p. 144, paras. 7 and 8).

[163] By 63 votes to 11, with 12 abstentions (*ibid., First and Second Sessions* ... (A/CONF.39/11/Add.2, footnote 53 above), Report of the Committee of the Whole, p. 144, para. 227 (*a*)).

[164] See footnote 162 above.

[165] By 72 votes to 3, with 11 abstentions (see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* ... (A/CONF.39/11/Add.2) (footnote 53 above), Report of the Committee of the Whole, p. 144, para. 227 (*b*)).

[166] *Yearbook … 1953*, vol. II, pp. 114–115, para. (5 (*b*)) of the commentary to article 6, para. (2) (*b*).

[167] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 104.

[168] *Yearbook … 1962*, vol. II, document A/CN.4/144, p. 69.

[169] *Ibid.*, p. 71.

[170] *Ibid.*, p. 182.

[171] See the statement by Mr. François, in 1951, which, although pertaining more directly to the question of the impact of internal law on the observance of treaties, illustrated the type of legal complexity that could arise in the context of treaties being provisionally applied (*Yearbook … 1951*, vol. I, 88th meeting, p. 47, paras. 37–38).

[172] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 116.

[173] *Yearbook … 1959*, vol. I, 487th meeting, p. 36, para. 37.

[174] *Ibid.*, para. 38.

[175] *Ibid.*, para. 39.

signed subject to ratification and not ratified, no obligation would arise. That would not preclude the practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification; it would then be ratified *de facto*.[176] The matter was again taken up by Mr. Bartoš, at a later meeting, during the discussion on article 12 (Legal effects of ratification), where he stated that from time to time it happened that the exchange of the instruments of ratification did not take place until some time after the provisions of the treaty, although up to that point only of provisional validity, had been applied in full. Subsequent ratification in such a case gave binding force to the effects of the treaty and to acts based on the treaty.[177]

69. The view of the two Special Rapporteurs who dealt with the question of the provisional entry into force of treaties in their respective reports, Sir Gerald and Sir Humphrey, was clear: both chose to deal with the arrangement as a species of the entry into force of treaties, with all the legal consequences that followed. Sir Humphrey was the more explicit on the point.[178] In explaining his proposal for article 20, paragraph 6, he indicated that a clause providing for the provisional entry into force of the treaty was, from one aspect, a clause relating to a mode of bringing a treaty into force.[179] The "legal effects" of provisional entry into force were then outlined in his proposal for article 21, in paragraph 2, subparagraph (*a*), which provided that the rights and obligations contained in the treaty shall come into operation for the parties to it.[180] He indicated that paragraph 2 sought to formulate the legal effects of the provisional entry into force of a treaty. Clearly, the rule in paragraph 2, subparagraph (*a*), followed simply from the provisional nature of the entry into force.[181]

70. Notwithstanding the contrary view of at least one member,[182] the Commission retained such contextual reference to "entry into force" in article 22 (renumbered 24), as adopted in 1962.[183] Following on the suggestion by Mr. Bartoš that some explanation was needed in the commentary to forestall the argument that there was something illogical in a treaty being brought into force provisionally and made subject to the exchange of instruments of ratification in order to have binding force,[184] the commentary to article 24 confirmed that there could be no doubt that such clauses had legal effect and brought the treaty into force on a provisional basis.[185]

71. In its written comments on the provision, submitted in 1965, the Netherlands indicated that it interpreted this article as referring only to cases in which States had legally committed themselves to a provisional entry into force. It added, however, that the signatory States might also enter into a non-binding agreement concerning provisional entry into force (within the limits imposed by their respective national laws).[186]

72. In 1965, the Chair (Mr. Bartoš), commenting on article 24, expressed the view that international relations would be made easier if States were given the possibility of putting certain treaties into force provisionally, before ratification, not as a mere practical expedient, but with all the legal consequences of entry into force. He was convinced that the provisional entry into force really conferred validity and a legal obligation; even if the treaty subsequently lapsed owing to lack of ratification, that dissolution of the treaty would not be retroactive and did not prevent the treaty from having been in force during a certain time. There had been a legal position which had produced its effects, and situations had been created under that regime; consequently, the question could not be said to be purely abstract.[187]

73. At the United Nations Conference on the Law of Treaties, the question of the legal nature of the provisional application of a treaty was discussed primarily in the context of the principle of *pacta sunt servanda*.

### 2. Consideration in the context of the *pacta sunt servanda* principle

74. The juridical nature of the provisional application of treaties was also raised in the context of the Commission's consideration of the principle of *pacta sunt servanda*. The commentary to article 55, adopted in 1964, indicated that it was necessary on logical grounds to include the words "in force". Since the Commission had adopted a number of articles which dealt with the entry into force of treaties, including cases of provisional entry into force, it seemed necessary to specify that it was treaties in force in accordance with the provisions of the present articles to which the *pacta sunt servanda* rule applied.[188]

75. Israel, in its written comments submitted in 1965, referred to the commentary to article 55, and observed that the question might arise as to the interrelation of this article with article 24 (on provisional entry into force), it being understood, that the general principle of *pacta sunt servanda* would apply to the underlying agreement upon which the provisional entry into force was postulated.[189]

76. In response to the latter observation, Sir Humphrey, in his sixth report, recalled that the Commission had not, either in 1962 or in 1965, sought to specify what precisely

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[176] *Yearbook … 1962*, vol. I, 644th meeting, p. 93, para. 69.

[177] *Ibid.*, 647th meeting, p. 117, para. 97.

[178] For Sir Gerald's view, see paragraph 67 above.

[179] *Yearbook … 1962*, vol. II, document A/CN.4/144 and Add.1, p. 71, para. (7) of the commentary to article 20.

[180] *Ibid.*, art. 21, para. 2.

[181] *Ibid.*, para. (4) of the commentary to article 21.

[182] *Ibid.*, vol. I, 657th meeting, p. 179, para. 9 (Mr. Castrén).

[183] *Ibid.*, vol. II, document A/5209, p. 182 ("the treaty shall come into force as prescribed and shall continue in force"). See also the view of the Sixth Committee, adopted the following year, in the context of the regulations for the implementation of Article 102 of the Charter of the United Nations ("It was recognized that, for the purposes of article 1 of the regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto") (*Yearbook … 1963*, vol. II, p. 29, para. 129).

[184] *Yearbook … 1962*, vol. I, 668th meeting, p. 259, para. 40.

[185] *Ibid.*, vol. II, document A/5209, p. 182, para. (1) of the commentary to article 24 (originally article 21).

[186] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, p. 316.

[187] *Yearbook … 1965*, vol. I, 791st meeting, pp. 110, para. 24. See also the statement of Mr. Tsuruoka (*ibid.*, para. 27).

[188] *Yearbook … 1964*, vol. II, document A/5809, p. 177, para. (3) of the commentary to article 55.

[189] See *Yearbook … 1966*, vol. II, document A/CN.4/186 and Add.1–7, p. 59.

was the source of the parties' obligations in cases of provisional entry into force.[190] He continued:

> Article 24, as it now reads, states the law unambiguously in terms of the treaty's entering into force provisionally; in other words, under article 24 the treaty is stated as being brought "into force". Consequently, there does not appear to be any need in the present article to make special reference to "treaties provisionally in force". Under the present article, the *pacta sunt servanda* rule is expressed to apply to every "treaty in force" ... treaties may be in force under article 24 as well as under article 23.[191]

The commentary to article 23 (formerly article 55), adopted in 1966, confirmed that the words "in force" covered treaties in force provisionally under article 22.[192]

77. At the United Nations Conference on the Law of Treaties, during the discussion on article 23 in 1968, an exchange of views was held as to whether the shift from "provisional entry into force" to "provisional application", in article 22, had modified the juridical nature of that provision. On the one hand, the United Kingdom indicated its understanding that the rule in article 23 continued to apply equally to a treaty which was being applied provisionally under article 22, notwithstanding the minor drafting changes.[193] India disagreed, taking the view that any obligations that might arise under article 22 would come under the heading of the general obligation of good faith on the basis of article 15 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) rather than of article 23 (*Pacta sunt servanda*).[194]

78. Norway advised caution so as to avoid the conclusion that the rule in article 23 did not apply to a treaty which was being provisionally applied.[195] In its view, it was clear that under customary international law the *pacta sunt servanda* principle also applied to a treaty during a period of provisional application.[196] Colombia agreed, proposing that the words "or being applied provisionally" be inserted after the words "in force", in article 23.[197] Yugoslavia also proposed a similar amendment to article 23 with a view to ensuring that the wording of the article should cover treaties applied provisionally, the subject of article 22.[198] Romania expressed the view that it was obvious that the principle of *pacta sunt servanda* was just as applicable to treaties which were in force provisionally.[199]

79. The President of the Conference, Mr. Ago, subsequently noted that no one had doubted the soundness of the Yugoslav and Colombian amendments. He then stated that it was obvious that the expression "treaty in force" also covered treaties applied provisionally.[200] The Yugoslav amendment was referred to the Drafting Committee and was considered together with a further Yugoslav proposal, for the inclusion of an article 23 *bis*, which would have read as follows: "Every treaty applied provisionally in whole or in part is binding on the contracting States and must be performed in good faith".[201] The Chair of the Drafting Committee later indicated that it had considered the Yugoslav proposal to be self-evident and that provisional application also fell within the scope of article 23 on the *pacta sunt servanda* rule.[202]

### 3. Consideration in the context of the obligation not to frustrate the object of the treaty or to impair its eventual performance

80. Treaties being applied on a provisional basis were also referred to in the course of the discussion on the good faith obligation to refrain from the frustration of the object of the treaty or to impair its eventual performance. In his first report, issued in 1962, Sir Humphrey proposed article 9, entitled "Legal effects of a full signature", which, in its paragraph 2, subparagraph (*c*), provided: "The signatory State, during the period before it shall have notified to the other States concerned its decision in regard to the ratification or acceptance of the treaty or, failing any such notification, during a reasonable period, shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance".[203]

81. During the debate on article 9 that year, Mr. Bartoš welcomed the "good faith" clause in subparagraph 2 (*c*), in view of the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification.[204] Mr. Briggs noted that certain provisions of certain treaties might enter into force on signature.[205] He proposed to include a provision to the effect that, pending the entry into force of a treaty, the obligation not to frustrate the objects of the treaty would be not merely one of good faith, but one which derived from a rule of general international law.[206] Furthermore, Mr. Verdross took the view that paragraph 2, subparagraph (*e*) ("The signatory State shall also be entitled to exercise any other rights specifically conferred by the treaty itself or by the present articles upon a signatory State")[207] did not preclude the practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification.[208]

82. In response to the debate, the Special Rapporteur, after proposing to move subparagraph (*d*) into a separate

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[190] See *ibid.*, p. 61, paragraph 3 of the observations and proposals of the Special Rapporteur to article 55.

[191] *Ibid.*

[192] *Ibid.*, vol. II, p. 211, paragraph (3) of the commentary to article 23.

[193] *Official Records of the United Nations Conference on the Law of Treaties, Second Session* ... (A/CONF.39/11/Add.1) (footnote 60 above), 11th plenary meeting, p. 40, para. 58.

[194] *Ibid.*, p. 41, para. 70.

[195] *Ibid.*, 12th plenary meeting, p. 47, para. 32. See also *ibid., First Session* ... (A/CONF.39/11) (footnote 52 above), 29th meeting of the Committee of the Whole, p. 157, para. 58.

[196] *Ibid., Second Session* ... (A/CONF.39/11/Add.1) (footnote 60 above), 12th plenary meeting, p. 47, paras. 33 and 34.

[197] *Ibid.*, pp. 47–48, para. 45.

[198] *Ibid.*, p. 48, para. 50. See also the views of Nepal (*ibid.*, para. 56) and the Ukrainian Soviet Socialist Republic (*ibid.*, p. 49, para. 61).

[199] *Ibid.*, pp. 48–49, para. 58.

[200] *Ibid.*, p. 49, para. 63.

[201] *Ibid., First and Second Sessions* ... (A/CONF.39/11/Add.2) (footnote 53 above), p. 268, A/CONF.39/L.24.

[202] See also *ibid., Second Session* ... (A/CONF.39/11/Add.1) (footnote 60 above), 28th plenary meeting, p. 157, para. 47. See also the statement by Poland (*ibid.*, 29th plenary meeting, p. 158, paras. 2 and 3).

[203] See *Yearbook … 1962*, vol. II, document A/CN.4/144, p. 46.

[204] *Ibid.*, vol. I, 643rd meeting, p. 88, para. 86.

[205] *Ibid.*, 644th meeting, p. 94, para. 87.

[206] *Ibid.*, para. 88.

[207] See *Yearbook … 1962*, vol. II, document A/CN.4/144, p. 46.

[208] *Ibid.*, vol. I, 644th meeting, p. 93, para. 69.

article on the rights and obligations of States pending the entry into force of a treaty in the preparation of which they had participated,[209] added that during the discussion, some members had suggested that the provisions of subparagraph (*e*) could be useful to cover the question of provisional entry into force. He agreed that this was so.[210] The Drafting Committee later proposed a new article (subsequently renumbered as article 17) which was restricted to the general good faith obligation to refrain from acts calculated to frustrate the objects of the treaty.

83. In 1965, Mr. Briggs noted that article 24 (Provisional entry into force) was different from article 17, which set out certain obligations that good faith imposed, pending the entry into force of the treaty, on States which had participated in the preparation of its text. In the case envisaged in article 24, on the other hand, the participants had prescribed that certain parts of the treaty would apply pending the exchange of ratifications.[211]

84. Article 17 was later adopted as article 15 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force). The provisional application of treaties was not raised during the consideration of article 15 at the United Nations Conference on the Law of Treaties.

### G. Termination of provisional application

85. The question of the termination of provisional entry into force featured in the earlier proposals in the Commission. However, it was, for the most part, excluded from article 22 of the 1966 draft articles on the law of treaties,[212] only to be reinserted, into what became article 25, at the United Nations Conference on the Law of Treaties, at the behest of Governments.

86. It is worth recalling that paragraph 2 of article 25 indicates only one method of the termination of provisional application, i.e. through notification by the State wishing to terminate. Other processes or grounds may be expressly provided for by the treaty itself or by separate agreement between the negotiating States. The negotiating history of the provision reveals that other possibilities for the termination of provisional application were considered.

#### 1. Termination upon entry into force of the treaty being provisionally applied

87. Article 20, paragraph 6, as proposed by Sir Humphrey in his first report, provided that a treaty may enter into force provisionally pending its full entry into force.[213] Likewise, subparagraph (*a*) of article 21, paragraph 2, referred to the provisional entry into force of a treaty until the treaty enters into full force in accordance with its terms.[214] This assertion was presented as a matter of logic, arising from the provisional nature of the entry into force.[215]

88. The Special Rapporteur's proposal was reflected in the text of article 22 (renumbered 24), adopted in 1962, which, in its second sentence provided for, *inter alia*, the continuation in force of a treaty on a provisional basis "until … the treaty shall have entered into force definitively".[216] The commentary to article 24 indicated that the "provisional" application of the treaty would terminate upon the treaty being duly ratified or approved in accordance with the terms of the treaty.[217]

89. This understanding was retained in all subsequent versions of the provision, as adopted by the Commission. It even survived the decision, taken in 1965, to delete the clause on the termination of the provisional entry into force of a treaty.[218] The article eventually adopted by the Commission retained the idea, in paragraph 1 (*a*), that provisional entry into force was to be undertaken pending ratification, acceptance, approval or accession by the contracting States.[219]

90. At the United Nations Conference on the Law of Treaties, a proposal was made by Hungary and Poland to, *inter alia*, include a more direct reference to provisional application being terminated when the treaty entered into force, in a new paragraph on termination (together with the other grounds for termination).[220] The text which subsequently emerged from the Drafting Committee (and which was later adopted as article 25 of the Convention), however, maintained the Commission's approach of referring to the termination of provisional application upon the entry into force of the treaty in paragraph 1, as opposed to paragraph 2, on the termination of provisional application. During the debate on article 22, held in the plenary of the Conference, in 1969, the Expert Consultant observed that it was implied in the notion of provisional application that such application was provisional pending definitive entry into force.[221]

#### 2. Unilateral termination versus termination by agreement

91. Sir Humphrey's proposal for subparagraph (*b*) of article 21 paragraph 2, submitted in 1962, included the

[209] *Ibid.*, vol. I, 645th meeting, p. 97, para. 17.

[210] *Ibid.*, para. 18.

[211] *Yearbook … 1965*, vol. I, 791st meeting, p. 108, para. 2.

[212] Up until 1965, the various versions of the draft article, including that adopted in 1962, made specific reference to the termination of provisional entry into force. In 1965, at the suggestion of the Special Rapporteur, who had come to the conclusion that it was somewhat inconsistent that article 24 should be the only article in part I which dealt with termination, the Drafting Committee decided that article 24 should deal only with the case of a treaty's entry into force provisionally (see *ibid.*, 814th meeting, p. 275, para. 44). See also *ibid.*, 791st meeting, p. 113, para. 57, and the views of Mr. Ago (*ibid.*, 814th meeting, p. 275, para. 49). This position was reiterated in para. (4) of the commentary to article 22 of the articles on the law of treaties, of 1966 (see *Yearbook … 1966*, vol. II, p. 210).

[213] *Yearbook … 1962*, vol. II, document A/CN.4/144, p. 69.

[214] *Ibid.*, p. 71.

[215] *Ibid.*, paragraph (4) of the commentary to article 21.

[216] *Ibid.*, p. 182.

[217] *Ibid.*, paragraph (2) of the commentary to article 24.

[218] See footnote 212 above.

[219] *Yearbook … 1965*, vol. II, p. 162.

[220] A/CONF.39/C.1/L.198, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* ... (A/CONF.39/11/Add.2) (footnote 53 above), p. 144, para. 224 (iv) (*b*).

[221] *Ibid., Second Session* ... (A/CONF.39/11/Add.1) (footnote 60 above), 11th plenary meeting, p. 40, para. 63.

possibility of unilateral termination through the giving of notice ("any of the parties may give notice of the termination of the provisional application of the treaty"), the legal effect of which was tied to the lapse of a period of six months (from the giving of the notice).[222] Upon the conclusion of the notice period, the rights and obligations contained in the treaty would cease to apply with respect to that party.[223] In his commentary to the article, he characterized such unilateral termination as a form of withdrawal, and indicated that it seemed desirable to try to give a little more definition to the rule, and perhaps to make withdrawal from the provisional application of the treaty an orderly process.[224] He also hinted at the possibility that this mode of the termination of provisional entry into force might not affect the position of other States for which the treaty had entered into force provisionally, by stating that the draft also suggested that withdrawal would affect only the particular party concerned.[225] However, the text adopted by the Commission in 1962[226] did not include reference to a notice requirement. Instead, the element of initiative, on the part of one or all States, was restricted entirely to mutual agreement.

92. The possibility of termination through notice in subparagraph (*b*) of article 21, paragraph 2, was subject to the general proviso "unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis".[227] Although subparagraph (*b*) was not referred to the Drafting Committee (for other reasons), the notion of the termination of provisional entry into force by agreement between the parties survived in the text for article 22 (renumbered 24), adopted by the Commission in 1962.[228] In that version, agreement of the parties was presented as one of two modes of termination (the other being automatic termination upon the entry into force of the treaty): "the treaty … shall continue in force on a provisional basis until … the States concerned shall have agreed to terminate the provisional application of the treaty".[229]

93. This was criticized by the Netherlands, in a written comment in which it maintained that a Government should also be entitled to terminate a provisional entry into force unilaterally if it had decided not to ratify a treaty that had been rejected by Parliament or if it had decided for other similar reasons not to ratify it.[230]

94. In 1965, Mr. José Maria Ruda stated his view that from the point of view of legal theory, so long as definitive consent had not been given, each of the parties should remain free to withdraw from the treaty and, consequently, to terminate its provisional application.[231] Mr. Lachs went further, suggesting that the right of initiative arose in cases in which the ratification of a treaty had been delayed.[232] Mr. Tsuruoka expressed support for the position that the provisional entry into force of the treaty would be presumed to terminate when one of the parties had given notice that it would not ratify the treaty.[233] However, the matter was overtaken by the decision of the Commission to no longer include a specific provision on the termination of provisional entry into force.[234]

95. Belgium, in its written comments submitted in 1967, referred back to the text adopted by the Commission in 1962 and objected to the linking of the termination of provisional entry into force to mutual agreement. It maintained that this stance meant that it would have been impossible for a State to relinquish the obligation to apply the treaty provisionally unless the other contracting States agreed, adding that it would be advisable to provide a means by which the provisional application of a treaty not yet ratified could be terminated unilaterally.[235] During the debate on the law of treaties held in the Sixth Committee in 1967, Sweden agreed with the Belgian comment, expressing the view that there might be a need to allow States the freedom to terminate such treaties unilaterally without prior notice.[236]

96. At the first session of the United Nations Conference on the Law of Treaties, in 1968, two proposals were made to include a new paragraph reintroducing the question of the termination of provisional application. Under the proposal submitted by Belgium, a State wishing to terminate the provisional entry into force of a treaty could do so by manifesting its intention not to become a party to the treaty, subject to the proviso "unless otherwise provided or agreed".[237] Hungary and Poland submitted a joint proposal for a new paragraph which recognized notification by one of such States of its intention not to become a party to the treaty with respect to that State as among the possible grounds for the termination of provisional application.[238]

97. During the debate, the United States supported the idea of permitting the termination of provisional application either by mutual agreement or upon unilateral notification, and made a proposal of its own.[239] Belgium, referring to its proposed amendment, explained that there was no question of applying the provisions of the draft relating to denunciation of treaties, because a State could not denounce a treaty to which it was not

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[222] *Yearbook … 1962*, vol. II, document A/CN.4/144, p. 71, art. 21, para. 2 (*b*).

[223] *Ibid.*

[224] *Ibid.*, p. 71, para. (4) of the commentary to article 21.

[225] *Ibid.* He qualified the suggestion, however, by stating that this might be a matter for further examination.

[226] *Ibid.*, document A/5209, p. 181.

[227] *Ibid.*, document A/CN.4/144, p. 71, art. 21, para. 2 (*b*).

[228] *Ibid.*, document A/5209, p. 182.

[229] *Ibid.*

[230] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, p. 316.

[231] *Yearbook … 1965*, vol. I, 790th meeting, p. 107, para. 87.

[232] *Ibid.*, p. 108, para. 103.

[233] *Ibid.*, 791st meeting, p. 109, para. 12. Support for a notification requirement was also indicated by Mr. Tunkin (*ibid.*, p. 111, para. 30), Mr. Rosenne (*ibid.*, para. 32), Mr. Jiménez de Aréchaga (*ibid.*, p. 112, para. 51) and Mr. Ago (*ibid.*, 814th meeting, p. 275, para. 49).

[234] See footnote 212 above.

[235] See footnote 50 above.

[236] *Official Records of the General Assembly, Twenty-second Session, Sixth Committee* (A/C.6/SR.980), 980th meeting, para. 13.

[237] A/CONF.39/C.1/L.194, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* (A/CONF.39/11/Add.2) (footnote 53 above), p. 144, para. 224 (iv) (a).

[238] A/CONF.39/C.1/L.198, *ibid.*, para. 224 (iv) (b).

[239] *Official Records of the United Nations Conference on the Law of Treaties, First Session* ... (A/CONF.39/11) (footnote 52 above), 26th meeting of the Committee of the Whole, p. 140, para. 24.

yet party.[240] Italy,[241] France,[242] Switzerland,[243] the United Kingdom[244] and Australia[245] approved of the Belgian amendment.

98. The Committee of the Whole later decided to reinsert a paragraph on termination, based on the Belgian and Polish-Hungarian amendments. The text for article 22, subsequently proposed by the Drafting Committee, contained a new paragraph 2 which established the primary mode of termination of provisional application as being on the basis of unilateral notification, subject to a general proviso as to mutual agreement, reflected in either the treaty or in a subsequent agreement.[246]

99. The new paragraph on the termination of provisional application was scrutinized during the debate on article 22, held in the plenary of the Conference, in 1969. Iran maintained that it allowed the possibility of withdrawal by a State which had already signed a treaty and would seem to undermine the *pacta sunt servanda* rule.[247] In response to a comment by the President of the Conference, pointing to the difficulties in understanding the phrase "unless the treaty otherwise provides",[248] the Chair of the Drafting Committee recalled the decision of the Committee of the Whole to include a paragraph on termination, and clarified that a State which had accepted the provisional application of a treaty could decide later that it did not wish to become a party; upon the other States concerned being notified of that intention, provisional application would cease.[249]

100. Several delegations, including Iran,[250] remained unconvinced. Greece noted that paragraph 2 could give rise to insecurity because in parliamentary systems it was possible for a Government to change its mind and to express a different intention at a later stage.[251] Italy queried as to the legal effect of the termination of provisional application (whether *ex tunc* or *ex nunc*).[252] Poland made a late proposal, which was not adopted, to establish a six-month period before the termination of provisional application could take effect.[253] The Conference subsequently adopted article 22 (later renumbered 25), including paragraph 2, without further amendment.

### 3. Termination as a consequence of unreasonable delay or reduced probability of ratification

101. Sir Gerald's proposal for article 42, made in 1956, included the following reference in paragraph 1: "an obligation to execute the treaty on a provisional basis … will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable".[254] Unreasonable delay, leading to the perception of the reduced likelihood of ratification, as a ground for termination of provisional entry into force was referred to on several subsequent occasions. For example, Mr. Scelle, during the debate in 1959 on another provision, expressed the view that the days when States could disavow the signatures of their plenipotentiaries had passed; those plenipotentiaries were no longer mere authorized agents. They now had special powers which committed the State to some extent, and the authorities competent to ratify the instrument were no longer free to act arbitrarily. If, acting through simple caprice or with ill intent, they delayed entry into force, a certain State responsibility was entailed. That observation applied to some extent to the special case of treaties that entered into force provisionally.[255]

102. Sir Humphrey, in his proposal for article 21, paragraph 2 (*b*), submitted in 1962, cited the circumstance in which the entry into full force of the treaty was unreasonably delayed as the ground for any of the parties to give notice of termination.[256] He explained that he had made the proposal, which was put forward *de lege ferenda*, because it seemed evident that if the necessary ratifications or acceptances, etc., were unreasonably delayed so that the provisional period was unduly prolonged, there had to come a time when States were entitled to say that the provisional application of the treaty had to come to an end.[257]

103. The suggested link to "unreasonable delay" did not, however, find favour with the Commission as a whole. Mr. Erik Castrén considered the expression to be far from clear.[258] Mr. Jiménez de Aréchaga doubted the advisability of the rule proposed *de lege ferenda* in paragraph 2 (*b*); it could have the effect of upsetting certain established treaty relations, and seemed more relevant to the termination of treaties than to the legal effects of entry into force.[259] Mr. Tunkin also expressed doubts, noting that it might be interpreted in such a manner as to allow a State to terminate the provisional application of a treaty, notwithstanding the provisions of the treaty itself, on the ground that, in that State's own view, there had been unreasonable delay in the entry into full force of the treaty.[260] The Special Rapporteur subsequently indicated his willingness to drop subparagraph (*b*), and observed that it sometimes occurred that a treaty remained in force provisionally throughout its life, the device of provisional entry into force being used merely because there was no expectation of parliamentary approval for ratification within due time. In those cases, the treaty never entered formally into full force, because the objects of the treaty were achieved without the "provisional" character of the entry into force ever being terminated.[261]

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[240] *Ibid*., p. 142, para. 42.

[241] *Ibid*., para. 43.

[242] *Ibid*., para. 45.

[243] *Ibid*., para. 47.

[244] *Ibid*., para. 49.

[245] *Ibid*., 27th meeting, p. 144, para. 10.

[246] *Ibid*., *First and Second Sessions* ... (A/CONF.39/11/Add.2) (footnote 53 above), pp. 144–145, para. 230.

[247] *Ibid*., *Second Session* ... (A/CONF.39/11/Add.1) (footnote 60 above), 11th plenary meeting, p. 40, para. 62.

[248] *Ibid*., para. 65.

[249] *Ibid*., para. 66.

[250] *Ibid*., para. 71.

[251] *Ibid*., para. 75.

[252] *Ibid*., para. 84.

[253] *Ibid*., para. 88.

[254] See *Yearbook … 1956*, vol. II, p. 116. In his commentary to the provision, the Special Rapporteur simply noted that it "states the rule applicable in case [provisional entry into force] becomes unduly prolonged" (*ibid.*, p. 127, para. 106).

[255] *Yearbook … 1959*, vol. I, 488th meeting, p. 37, para. 2.

[256] *Yearbook … 1962*, vol. II, p. 71, art. 21, para. 2 (*b*).

[257] *Ibid.*, paragraph (4) of the commentary to article 21.

[258] *Ibid.*, vol. I, 657th meeting, p. 179, para. 11.

[259] *Ibid.*, pp. 179–180, para. 14.

[260] *Ibid.*, p. 180, para. 15.

[261] *Ibid.*, para. 17.

104. Following the demise of subparagraph (*b*), the link between the termination of provisional entry into force and undue delay did not feature in any of the subsequent iterations of the provision up to, and including, article 25 of the 1969 Vienna Convention.

105. Nonetheless, the element of delay, and resultant reduced probability of ratification, was retained in the commentary to article 24, adopted in 1962, which stated, *inter alia*, "Clearly, the 'provisional' application of the treaty will terminate … upon it becoming clear that the treaty is not going to be ratified or approved by one of the parties. It may sometimes happen that the event is delayed".[262]

106. There was an attempt in 1965 to revive the element of reduced probability of ratification. Sweden, in a written comment, recalled the passage in the commentary to article 24 and expressed the view that it came closest to the legal position underlying the prevailing practice.[263] The Special Rapporteur concurred with the Swedish comment and, in his fourth report, submitted in 1965, proposed to include a new reference to the treaty continuing in force provisionally, *inter alia*, until "it shall have become clear that one of the parties will not ratify or, as the case may be, approve it".[264]

107. That year, Mr. Jiménez de Aréchaga, while agreeing with the Special Rapporteur's new clause, observed that the formulation was more suited to bilateral treaties; a multilateral treaty would not necessarily lapse for the other parties concerned.[265] Mr. Castrén was of the view that the new language brought the provision closer to unilateral termination, which he thought went too far.[266] Mr. Lachs pointed out that in some cases the position as to ratification or non-ratification by a State would never become clear and that there were many cases in which treaties had remained for years on the agenda of the legislative bodies empowered to ratify them, without any action being taken.[267] He also suggested that the point could be covered by specifying that a State must clarify its position within a certain period of time.[268] Mr. Tunkin, in expressing misgivings about the Special Rapporteur's new formulation, stated that the matter could not be left to a mere inference.[269] The issue was overtaken by the Commission's decision not to include a specific reference to the termination of provisional entry into force.[270]

108. At the United Nations Conference on the Law of Treaties, in 1968, Ceylon observed that attention should also be given to limiting the period of provisional application. After a specified date, provisional application would cease until ratification.[271] In 1969, Austria proposed the inclusion of a new paragraph providing that the provisional application of a treaty did not release a State from its obligation to take a position within an adequate time limit regarding its final acceptance of the treaty.[272] India expressed the view that it would probably be desirable to lay down some time limit for States to express their intention in the matter, so that the provisional application of a treaty might not be perpetuated.[273] However, such proposals were not accepted, and the Conference subsequently adopted the article without reference to the effect of delay.[274]

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[262] *Ibid.*, vol. II, p. 182, para. (2) of the commentary to article 24.

[263] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, p. 339.

[264] See *Yearbook … 1965*, vol. II, p. 58, para. 3 of the observations and proposals of the Special Rapporteur.

[265] *Ibid.*, vol. I, 790th meeting, p. 106, para. 77.

[266] *Ibid.*, para. 80.

[267] *Ibid.*, p. 108, para. 102. See also the views of Mr. Ago (*ibid.*, vol. I, 791st meeting, p. 109, para. 8).

[268] *Ibid.*, 790th meeting, p. 108, para. 102.

[269] *Ibid.*, 791st meeting, p. 111, para. 30.

[270] See footnote 212 above.

[271] *Official Records of the United Nations Conference on the Law of Treaties, First Session* ... (A/CONF.39//11) (footnote 52 above), 26th meeting of the Committee of the Whole, p. 141, para. 32.

[272] *Ibid., Second Session* ... (A/CONF.39//11/Add.1) (footnote 60 above), 11th plenary meeting, p. 40, para. 61.

[273] *Ibid.*, p. 41, para. 70.

[274] Following the adoption of the article, the Drafting Committee decided not to accept any of the suggestions made during the debate (*ibid.*, 28th plenary meeting, p. 157, paras. 45–47).

# FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

[Agenda item 8]

**DOCUMENT A/CN.4/663**

## First report on formation and evidence of customary international law, by Sir Michael Wood, Special Rapporteur

[*Original: English*]
[*17 May 2013*]

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# Introduction*

## A. Preamble

1. During its sixty-fourth session, in 2012, the International Law Commission decided to place the topic "Formation and evidence of customary international law" on its current programme of work, and appointed Sir Michael Wood as Special Rapporteur.[1] The Special Rapporteur prepared a note setting out his preliminary thoughts on the topic, particularly on the scope and tentative programme of work,[2] which was the basis for an initial debate later in the session.[3]

2. In the course of the debate of the Sixth Committee of the General Assembly later that year, delegations emphasized the importance and utility of the topic, as well as the significant role played by customary international law at the international and national levels. The inherent difficulties of the topic were also stressed, in particular the complexity of assessing the existence of a rule of customary international law. Delegations further underlined the need to preserve the flexibility of the customary process. Other points included the importance of exploring the meaning and manifestations of State practice and *opinio juris* as constitutive elements of customary international law, the relevance of the relationship between treaties and customary international law, the need to examine the role of international organizations with regard to the formation and evidence of rules of customary international law, and the desirability of an outcome that would be practical.[4]

3. In its resolution 67/92 of 14 December 2012, the General Assembly noted with appreciation the Commission's decision to include the topic in its programme of work, and drew the attention of Governments to the importance of having their views on the specific issues identified in chapter III of the report of the Commission on the work of its sixty-fourth session.[5]

4. At its sixty-fourth session, in 2012, the Commission requested States to

provide information on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in:

(*a*) Official statements before legislatures, courts and international organizations; and

(*b*) Decisions of national, regional and subregional courts.[6]

The Special Rapporteur suggested that the Commission request replies by 31 January 2014.

5. The Commission also requested the Secretariat to prepare a memorandum identifying elements of the previous work of the Commission that could be particularly relevant to the topic.[7] As described in section B below, the Secretariat's memorandum gives detailed information on the Commission's past practice that is relevant to the topic,[8] and will be a valuable resource for the Commission's further work.

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* The Special Rapporteur wishes to thank Mr. Omri Sender for his invaluable assistance with the preparation of the present report.

[1] *Yearbook … 2012*, vol. I, 3132nd meeting.

[2] *Ibid.*, vol. II (Part One), document A/CN.4/653.

[3] *Ibid.*, vol. I, 3148th, 3150th and 3152nd meetings; see also *ibid.*, vol. II (Part Two), paras. 156–202.

[4] *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th–25th meetings (A/C.6/67/SR.18–25); see also Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session (A.CN.4/657), paras. 47–52.

[5] General Assembly resolution 67/92 of 14 December 2012, paras. 4 and 7.

[6] *Yearbook … 2012*, vol. II (Part Two) para. 29.

[7] *Ibid.*, para. 159.

[8] Memorandum by the Secretariat; elements in the previous work of the International Law Commission that could be particularly relevant to the topic, document A/CN.4/659, reproduced in the present volume.

6. The present report is introductory in nature. Its aim is to provide a basis for future work and discussions on the topic. As such, after describing the previous relevant work of the Commission, in chapter I it discusses the scope of the topic (including whether *jus cogens* should be covered), and possible outcomes. Chapter II then considers some issues concerning customary international law as a source of law, including article 38.1 (*b*) of the Statute of the International Court of Justice and terminology. Chapter III describes the principal categories of materials on the processes of formation and evidence of customary international law (practice of States and other intergovernmental actors; case law of ICJ and other courts and tribunals; the work of other bodies; and writings). In doing so, it looks at various approaches that have been suggested for, and the experience accumulated with regard to, the formation and evidence of rules of customary international law.

7. The work of the International Law Association deserves special mention at the outset, and is described in greater detail in chapter III, section D, below. The Association's London Statement of Principles Applicable to the Formation of General Customary International Law of 2000 was the culmination of a major exercise—lasting 15 years and concluded some 13 years ago—to examine the process of the formation of customary international law.[9] The Commission's work will differ from that of the Association in important respects, not least because of the Commission's unique position as a subsidiary organ of the General Assembly and the corresponding relationship that the Commission has with States.[10]

### B. Previous work of the Commission

8. It is useful to recall the related work by the Commission, including its early work mandated by article 24 of its statute, and its work on the law of treaties and the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". Much of the Commission's work has been concerned with the identification of customary international law, though it has sometimes been cautious about clearly distinguishing between the codification of international law and its progressive development.[11]

9. In accordance with article 24 of its statute,[12] the Commission considered the topic "Ways and means of making the evidence of customary international law more readily available" at its first and second sessions in 1949 and 1950. Based on a memorandum by the Secretariat[13] and a working paper by Mr. Manley O. Hudson,[14] the Commission made a number of recommendations, including that the General Assembly call to the attention of States the desirability of publishing digests of their diplomatic correspondence and other materials relating to international law, to make evidence of their practice more accessible.[15] This influential report led to a number of important publications in the field of international law, on a national and international level, including the *United Nations Legislative Series* and the *Reports of International Arbitral Awards*, as well as national digests of practice.[16]

10. Two important surveys of international law were prepared, in 1948[17] and in 1971,[18] to assist the Commission in its choice of topics. It is interesting to recall what the 1948 survey said under the heading "Sources of International Law":

> The codification of this aspect of international law has been successfully accomplished by the definition of the sources of international law as given in article 38 of the Statute of the International Court of Justice. That definition has been repeatedly treated as authoritative by international arbitral tribunals. It is doubtful whether any useful purposes would be served by attempts to make it more specific, as, for instance, by defining the conditions of the creation and of the continued validity of international custom or by enumerating, by way of example, some of the general principles of law which article 38 of the Statute recognizes as one of the three principal sources of the law to be applied by the Court. The inclusion of a definition of sources of international law within any general scheme of codification would serve the requirements of systematic symmetry as distinguished from any pressing practical need. A distinct element of usefulness might, however, attach to any commentary accompanying the definition and assembling the experience of the International Court of Justice and of other international tribunals in the application of the various sources of international law.[19]

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[9] Resolution 16/2000, "Formation of general customary international law", adopted at the sixty-ninth Conference of the International Law Association, in London, on 29 July 2000, p. 39; and the London Statement of Principles Applicable to the Formation of General Customary International Law, *Report of the Sixty-ninth Conference held in London 25-29 July 2000*, pp. 712–777.

[10] Danilenko, *Law-Making in the International Community*, pp. 128–129 ("An authoritative clarification of the criteria of custom would be best accomplished through a carefully drafted restatement, prepared, for example, by the United Nations International Law Commission.").

[11] See McRae, "The interrelationship of codification and progressive development in the work of the International Law Commission".

[12] Article 24 of the Statute of the Commission provides that "the Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts and on questions of international law, and shall make a report to the General Assembly on this matter."

[13] *Yearbook … 1949*, document A/CN.4/6, pp. 228–231.

[14] *Yearbook … 1950*, vol. II, document A/CN.4/16 and Add.1. Referring to the scope of customary international law, Mr. Hudson suggested, *inter alia*, that "the emergence of a principle or rule of customary international law would seem to require presence of the following elements: (*a*) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (*b*) continuation or repetition of the practice over a considerable period of time; (*c*) conception that the practice is required by, or consistent with, prevailing international law; and (*d*) general acquiescence in the practice by other States" (*ibid.*, p. 26, para. 11). The working paper further elaborated on the evidence of customary international law.

[15] *Ibid.*, pp. 367–374, document A/1316, paras. 24–94, especially pp. 373–374, paras. 90–94; C. Parry, *The Sources and Evidences of International Law*, pp. 70–82, reproduced in A. Parry, ed., *Collected Papers of Professor Clive Parry*, vol. II, pp. 1–105.

[16] Memorandum by the Secretariat (footnote 8 above), paras. 9–11. The Committee of Ministers of the Council of Europe adopted a Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law in 1968 (CM/Res (68) 17), which has served as a framework for a number of national publications; the Model Plan was substantially revised in 1997 (CM/Rec (97) 11).

[17] *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, Memorandum submitted by the Secretary-General (United Nations publication, Sales No. 1948.V.1(1)). That the 1948 Survey was the work of Sir Hersch Lauterpacht was acknowledged by the Secretary to the Commission in 1960 (*Yearbook … 1960*, vol. I, 535th meeting, p. 52, para. 33).

[18] Survey of international law: Working paper prepared by the Secretary-General, *Yearbook … 1971*, vol. II (Part Two), document A/CN.4/245, p. 1.

[19] *Survey of International Law* (footnote 17 above), p. 22, para. 33.

The 1971 survey did not revisit this issue. But an unofficial survey dating from 1998, under the heading "Items that should not be inscribed on the ILC's agenda", contained the following:

> The ILC should not inscribe the topic "Sources" (with the exception of treaties) on its agenda. It is counterproductive, and may be impossible, to codify the relatively flexible processes by which rules of customary international law are formed. Moreover, in the field of sources the questions are fundamental (e.g., what is custom? how is it formed?) as opposed to secondary (e.g., what are the rules of treaty interpretation?), and such fundamental questions seem to be exceptionally theory-dependent.[20]

In deciding to take up the present topic, the Commission was aware of these past views. But it was also aware that, in the words of the 2011 syllabus:

> An appreciation of the process of [customary international law's] formation and identification is essential for all those who have to apply the rules of international law. Securing a common understanding of the process could be of considerable practical importance. This is so not least because questions of customary international law increasingly fall to be dealt with by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations.[21]

11. As explained in the memorandum by the Secretariat, the Commission has dealt with the formation and identification of customary international law on numerous occasions. Taking account of the Commission's relevant work since 1949 (in particular final drafts adopted by the Commission over the years on the various topics that it has considered), the memorandum "endeavours to identify elements in the previous work of the Commission that could be particularly relevant to the topic 'Formation and evidence of customary international law' ". In its main part, the memorandum considers "the Commission's approach to the identification of customary international law and the process of its formation, by focusing on: (*a*) the Commission's general approach; (*b*) State practice; (*c*) the so-called subjective element (*opinio juris sive necessitatis*); (*d*) the relevance of the practice of international organizations; and (*e*) the relevance of judicial pronouncements and writings of publicists." It also covers "certain aspects of the operation of customary law within the international legal system", relating to "the binding nature and characteristics of the rules of customary international law—including regional rules, rules establishing *erga omnes* obligations and rules of *jus cogens*—as well as to the relationship of customary international law with treaties and 'general international law'."[22]

12. The Secretariat memorandum suggests, *inter alia*, that uniformity and generality of State practice have consistently been regarded by the Commission as key considerations in the formation and evidence of rules of customary international law. It further identifies that, in addition to State practice, the Commission has "frequently referred" in this context—albeit by different formulations—to "what is often defined as the subjective element of customary international law".[23] The memorandum notes that "a variety of materials" have been relied upon by the Commission in assessing both State practice and the "subjective element" associated with it, and that judicial pronouncements and the writings of publicists, as well as the practice of international organizations, have not infrequently proven relevant to such work.

[20] Anderson *et al.*, eds., *The International Law Commission and the Future of International Law*, p. 42, para. 104.

[21] *Yearbook … 2011*, vol. II (Part Two), annex I, para. 3.

[22] Memorandum by the Secretariat (footnote 8 above), summary.

[23] *Ibid.*, para. 26.

# Chapter I

## Scope and outcome

### A. Scope and outcome of the topic

13. The scope of the present topic and possible outcomes of the Commission's work were discussed during the Commission's debate in 2012,[24] and during the debate in the Sixth Committee at the sixty-seventh session of the General Assembly.[25] The question was raised as to whether the title of the topic, with references both to "formation" and "evidence" of customary international law, accurately covered the subject matter envisaged; it was also noted that the various language versions of these references were somewhat inconsistent. It was, moreover, suggested that the central issue was the "identification" of customary international law, and that the reference to "formation" risked making the subject too broad or too theoretical.

14. In the view of the Special Rapporteur, whatever the precise title, the aim of the topic is to offer some guidance to those called upon to apply rules of customary international law on how to identify such rules in concrete cases. This includes, but is not limited to, judges in domestic courts, and judges and arbitrators in specialized international courts and tribunals.

15. In the English version of the title, the terms "formation" and "evidence" were intended to indicate that, in order to determine whether a rule of customary international law exists, it is necessary to consider both the requirements for the formation of a rule of customary international law, and the types of evidence that establish the fulfilment of those requirements. It may, nevertheless, be useful to ensure, at an early stage, that the title accurately reflects the intended scope of the topic in the various languages (including English), and has the same meaning in them all.

16. There are many approaches to customary international law among international lawyers, particularly among writers, some looking at it mainly as a source of international law, others more concerned with its operation within a domestic legal system. While some seek to describe and clarify the current position on the methods

[24] See footnote 3 above.

[25] See footnote 4 above.

of its formation and identification, others explicitly look to the future.[26] The Special Rapporteur is of the opinion that the Commission should aim to describe the current state of international law on the formation and evidence of rules of customary international law, without prejudice to developments that might occur in the future.

17. The debates in the Commission and the Sixth Committee in 2012 suggested that, in order to avoid unnecessary overlap, the scope of the topic needed to be clearly delimited *vis-à-vis* other topics on the Commission's agenda, past and present. Other topics included "Fragmentation of international law: difficulties arising from the diversification and expansion of international law",[27] and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[28] This should not be difficult in practice; the dividing lines are reasonably clear.[29]

18. It should not be expected that the outcome of the Commission's work will be a series of hard and fast rules for the identification of rules of customary international law. Instead, the aim is to shed light on the general processes of the formation and evidence of rules of customary international law: there seemed to be widespread agreement in the discussions thus far that the appropriate outcome for the Commission's work should be a set of "conclusions" with commentaries.[30]

19. One issue that the Commission will need to address is whether there are different approaches to the formation and evidence of customary international law in different fields of international law, such as international human rights law,[31] international criminal law[32] and international humanitarian law.[33] The formation and evidence of rules of customary international law in different fields may raise particular issues and it may therefore be for consideration whether, and if so to what degree, different weight may be given to different materials depending on the field in question.[34] At the same time, it should be recalled that, in the words of Judge Greenwood, "International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law."[35]

20. Another question, raised in the initial debate within the Commission, was whether the approach to be adopted depended on the intended audience.[36] It will be recalled that the "observational standpoint" was also considered at the outset of the International Law Association exercise.[37] In the view of the Special Rapporteur, the accepted approach for identifying the law should be the same for all; a shared, general understanding is precisely what the Commission may hope to achieve.

21. In the course of the Commission's work it will be necessary to address general questions of methodology in the identification of rules of customary international law, such as the relative weight to be accorded to empirical research into State practice, as against deductive reasoning. It is also the case that practical considerations may affect methodology, especially in a world of nearly 200 States (as well as other international actors), though this is not a new challenge. Also noteworthy are the inherent difficulties of the topic, primarily the very nature of customary international law as unwritten law, and the ideological and theoretical controversies that are often associated with it.[38]

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[26] See paragraphs 94–101 below.

[27] For the outcome of the Commission's work on that topic, see *Yearbook … 2006*, vol. II (Part Two), p. 177, para. 251, as well as Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, A/CN.4/L.682 and Add.1 and Corr.1 (available from the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)).

[28] The topic was previously entitled "Treaties over time".

[29] First report on subsequent agreements and subsequent practice in relation to treaty interpretation, by Mr. Georg Nolte, Special Rapporteur (document A/CN.4/660), reproduced in the present volume, para. 7.

[30] The London Statement of Principles... (footnote 9 above) of the International Law Association, likewise, comprises "a statement of the relevant rules and principles, as the Committee understands them... some practical guidance for those called upon to apply or advise on the law, as well as for scholars and students. Many have a need for relatively concise and clear guidelines on a matter which often causes considerable perplexity" (pp. 714–715, para. 4).

[31] See, e.g., Klein (ed.), *Menschenrechtsschutz durch Gewohnheitsrecht, Kolloquium 26–28 September 2002 Potsdam*; Lillich, "The growing importance of customary international human rights law"; and Cohen, "From fragmentation to constitutionalization".

[32] See, e.g., Schabas, "Customary law or 'judge-made' law: Judicial creativity at the UN criminal tribunals".

[33] See, e.g., D'Aspremont, "Théorie des sources"; and Meron, "The continuing role of custom in the formation of international humanitarian law". Meron has also suggested that "it is difficult to find positive, concrete State practice with respect to rules that are largely prohibitive—as the rules of humanitarian law generally are—because such rules are largely respected through abstentions from violations, rather than affirmative practice" (*The Making of International Criminal Justice: A View from the Bench*, p. 32).

[34] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment, 3 February 2012, I.C.J. Reports 2012*, p. 132, para. 73 ("for the purposes of the present case the most pertinent State practice is to be found in… national judicial decisions…"); *The Prosecutor v. Duško Tadić a/k/a/ "DULE"*, case No. IT–94–1–AR72, International Tribunal for the Former Yugoslavia, Appeals Chamber, decision on the defence motion for interlocutory appeal on jurisdiction (2 October 1995), p. 465, para. 99 ("Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.").

[35] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 19 June 2012*, Declaration of Judge Greenwood, *I.C.J. Reports 2012*, p. 394, para. 8. See also *Yearbook … 2006*, vol. II (Part Two), p. 177, para. 251; and the analytical study finalized by the Chairman of the Study Group (Fragmentation of international law ..., A/CN.4/L.682 and Add.1 and Corr.1 (see footnote 27 above)), paras. 33–34.

[36] *Yearbook … 2012*, vol. I, 3148th meeting, paras. 18 *et seq.*, declaration of Mr. Murase.

[37] The London Statement of Principles (footnote 9 above), p. 716, para. 7, footnote 11; appendix to the First Report of the Rapporteur, "Formation of International Law and the Observational Standpoint" (1986), *Report of the Sixty-Third Conference held at Warsaw, August 21st to August 27th, 1988*, p. 941.

[38] See also the London Statement of Principles (footnote 9 above), pp. 713–714, para. 2.

22. The present topic deals with the processes involved in the formation of rules of customary international law and with the necessary evidence for identifying them. The topic is not concerned with determining the substance of particular rules.[39] It aims to provide guidance on how to identify a rule of customary international law at a given moment, not to address the question of which particular rules have achieved such status.[40] Nor is it the purpose to consider the position of customary international law within the law to be applied by the various courts and tribunals, or special provisions and procedures that may exist at the various domestic levels for identifying rules of customary international law (though these must be borne in mind when assessing the decisions of domestic courts).

23. It follows that (subject to any change that the Commission may make to the title of the topic[41]) a first conclusion, on the scope of the draft conclusions, could read:

"1. *Scope*.

"The present draft conclusions concern the formation and evidence of rules of customary international law."

### B. Whether *jus cogens* should be covered

24. The question was raised, in the debates in the Commission and the Sixth Committee in 2012, as to whether the present topic should cover the formation and evidence of peremptory norms of general international law (*jus cogens*).[42]

25. Rules of *jus cogens* are legal norms "accepted and recognized by the international community of States as a whole" as norms "from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character".[43] While the existence of this category of "superior" international law is no longer seriously contested,[44] doctrinal controversy still abounds with regard to its substantive content, as well as the evidentiary elements associated with it.[45] It is particularly relevant in the present context to note that an "aura of mystery"[46] still surrounds the source of *jus cogens* rules: some international lawyers consider them to be a special category of customary international law;[47] others deny that they can derive from custom;[48] still others are of the view that customary international law is merely one possible source of *jus cogens*.[49] It has been suggested that one's view as to the relationship between *jus cogens* and customary international law depends, essentially, on the conception that one has of the latter.[50]

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[39] See the distinction between primary and secondary rules that was so important in the Commission's work on Responsibility of States for Internationally Wrongful Acts.

[40] In any event it is important to bear in mind that "the customary law process is a continuing one: it does not stop when a rule has emerged": Mendelson, "The formation of customary international law", p. 188; see also Wolfke, "Some persistent controversies regarding customary international law", p. 15. ("Ascertaining international customs and the formulations of the corresponding legal rules may be carried out repeatedly on various occasions. Such identification is never final.")

[41] See footnotes 3 and 4 above.

[42] Vienna Convention on the Law of Treaties (1969 Vienna Convention), arts. 53 and 64. The definition in the Vienna Convention is of general application: see para. (5) of the commentary to article 26 of the Articles on State Responsibility, *Yearbook … 2001*, vol. II (Part Two), p. 85, cited in para. (2) of the commentary to article 26 of the Articles on the Responsibility of International Organizations, *Yearbook … 2011*, vol. II (Part Two).

[43] 1969 Vienna Convention, art. 53; see also Daillier, Forteau and Pellet, *Droit international public*, pp. 220–229; and Frowein, "*Ius cogens*", p. 443.

[44] See, e.g., the conclusions emerging from the studies and discussions of the International Law Commission's Study Group on Fragmentation of international law: difficulties arising from the diversification and expansion of international law, chaired by Mr. Martti Koskenniemi: report of the International Law Commission on the work of its 58th session, 1 May–9 June and 3 July–11 August 2006, document A/CN.4/L.702 (mimeographed); and the references to *jus cogens* in judgments of ICJ, e.g. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 52; *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, *I.C.J. Reports 2012*, pp. 140–142, paras. 92–97); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, *I.C.J. Reports 2012*, p. 457, para. 99. See also Frowein, "*Ius Cogens*", p. 444, para. 5. ("It can thus be said that the existence of *ius cogens* in public international law is recognized today by State practice, by codified treaty law, and by legal theory".)

[45] See, e.g., D'Amato, "It's a bird, it's a plane, it's *jus cogens*"; Kawasaki, "A brief note on the legal effects of *jus cogens* in international law"; Charlesworth, "Law-making and sources", p. 191; Tavernier, "L'identification des règles fondamentales, un problème résolu?", pp. 1 and. 19; Kadelbach, "*Jus cogens*, obligations *erga omnes* and other rules—the identification of fundamental norms", p. 28; and Villiger, *Customary International Law and Treaties: A Manual of the Theory and Practice of the Interrelation of Sources*, p. 7.

[46] Bianchi, "Human rights and the magic of *jus cogens*", p. 493.

[47] See, e.g., de Hoogh, *Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, pp. 45–48; Reuter, *Introduction au droit des traités*, pp. 139–140; Mendelson, "The formation of customary international law", p. 181; Kaczorowska, *Public International Law*, p. 28; Jennings and Watts (eds.), *Oppenheim's International Law*, pp. 7–8; Baker, "Customary international law in the 21st century: Old challenges and new debates", p. 177; D'Amato, *The Concept of Custom in International Law*, p. 132; Cassese, "For an enhanced role of *jus cogens*", p. 164; Meron, "On a hierarchy of international human rights", pp. 13–21; McNair, *Law of Treaties*, pp. 213–215; Paust, "The reality of *jus cogens*", p. 82; Crawford, *Brownlie's Principles of Public International Law*, p. 594; Onuf and Birney, "Peremptory norms of international law: Their source, function and future", p. 191; Orrego Vicuña, "Customary international law in a global community: Tailor made?" pp. 36–37; and Lepard, *Customary International Law: A New Theory with Practical Applications*, pp. 243–260; Mr. Forteau also said during the Commission's sixty-fourth session that "[*j*]*us cogens* rules were by definition part of customary law" (*Yearbook … 2012*, vol. I, 3150th meeting).

[48] See, e.g., O'Connell, "*Jus cogens*: international law's higher ethical norms", p. 83; Janis, "The nature of *jus cogens*", pp. 359–361; van Hoof, *Rethinking the Sources of International Law*, p. 164; Vidmar, "Norm conflicts and hierarchy in international law: Towards a vertical international legal system?", p. 26; and Domb, "*Jus cogens* and human rights", p. 106. Mr. Murphy said during the Commission's sixty-fourth session, with reference to *jus cogens*, that "it was not a creature of any one source of international law but rather a limitation on those sources"; Mr. Tladi also suggested that "customary international law and treaty law were based on a theory of State consent, while *jus cogens* was … based on something different" (*Yearbook … 2012*, vol. I, 3148th meeting).

[49] See, e.g., Akehurst, "The hierarchy of the sources of international law", pp. 282–284; Tunkin, "*Jus cogens* in contemporary international law", p. 116; Shaw, *International Law*, p. 127; Bradley and Gulati, "Withdrawing from international custom", p. 212; Nieto-Navia, "International peremptory norms (*jus cogens*) and international humanitarian law", pp. 613–614; Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 58; and Orakhelashvili, *Peremptory Norms in International Law*, p. 126.

[50] Van Hoof, *Rethinking the Sources of International Law,* pp. 163–164 ("The answer to the question of whether or not customary international law can play an important role in establishing *jus cogens* also depends on what concept of this source one takes as a point of departure. Those who adhere to a flexible conception of custom are most likely

26. There are arguments for and against covering *jus cogens* in the present topic. On one view, rules of customary international law may possibly be found to be, or evolve into, rules of *jus cogens*, and the two may be linked by common constitutive elements. Another view is that *jus cogens* "present[s] its own difficulties in terms of evidence, formation and classification, which [are] outside the scope of the [present] topic".[51] A majority of members of the Commission, and of representatives in the Sixth Committee, who addressed the matter in 2012, considered that it would be better not to cover *jus cogens* in the present topic.

27. For essentially pragmatic reasons, so as not to complicate further what is already a complex topic,[52] the Special Rapporteur considers that it would be preferable not to deal with the issue as a part of the present topic. However, as members of the Commission observed, this does not mean that reference will not be made from time to time to rules of *jus cogens* in particular contexts.

to consider customary international law a perfect source of *jus cogens*, because in their view it produces rules of general international law binding upon all States in the world … Those, in contrast, who start from a more rigid conception of custom are likely to reach the opposite conclusion; adherents to this view argue that, as a result of changes in the international law-making process prompted by the structure of present international society, there are not many customary rules of international law left, which bind the entire international community of States, and, moreover, such rules cannot be expected to be very numerous in the future").

[51] *Yearbook … 2012*, vol. I, 3148th meeting, declaration of Mr. Murphy.

[52] Mr. Tladi, for example, expressed doubts that that the Commission "would be able to reach agreement on various aspects of *jus cogens*" (*ibid.*); Mr. Park suggested that dealing with *jus cogens* might at this time open a "Pandora's box" (*ibid.*, 3152nd meeting). See also the proposal by Mr. Jacovides that the Commission should take on the topic (*Yearbook … 1993*, vol. II (Part One), document A/CN.4/454, pp. 213–220).

# Chapter II

# Customary international law as a source of international law

## A. Customary international law and its relationship to other sources listed in article 38 of the Statute of the International Court of Justice

28. Public international law is law,[53] and customary international law is one of the main sources of that law.[54] By "source" in this context, it is meant a formal source,[55] "that which gives to the content of rules of international law their character as law".[56]

29. Article 38, paragraph 1, of the Statute of the International Court of Justice, which is widely regarded as an authoritative statement of sources of international law,[57] reads as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (*a*) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (*b*) international custom, as evidence of a general practice accepted as law;
>
> (*c*) the general principles of law recognized by civilized nations;
>
> (*d*) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

30. Article 38, paragraph 1 (*b*), is identical to article 38, paragraph 2, of the Statute of PCIJ, which itself had been prepared for the Council of the League of Nations by an Advisory Committee of Jurists in 1920.[58] The Chairman of the Advisory Committee of Jurists, Baron Descamps, had originally proposed the following: "international custom, being practice between nations accepted by them as law".[59] There is little recorded discussion of this provision in the Advisory Committee, or in the Council or Assembly of the League. In the Root-Phillimore plan, this provision read: "International custom, as evidence of a common practice in use between nations and accepted by them as law".[60] Ultimately, however, the following text emerged from the Drafting Committee: "international custom, as evidence of a general practice, which is accepted as law".[61] This text was submitted to the League of

[53] For a recent examination, see Mégret, "International law as law".

[54] It is important, for the authority of international law, to maintain a clear distinction between law and non-law, between rules of law and non-legal principles and standards. "Soft law", a term without clear meaning that has been described as more of a "catchword" and mostly refers to rules that are deliberately made non-binding, is not law (see, e.g., Thürer, "Soft law"; Lowe, *International Law*, pp. 95–97; Shaw, *International Law*, pp. 117–119; and Murphy, *Principles of International Law*, pp. 111–123). Soft law may, however, contribute to the formation of customary international law; this will be explored in future reports.

[55] The formal sources of international law are "the processes through which international law rules become legally relevant", while the material sources "can be defined as the political, sociological, economic, moral or religious origins of the legal rules": Pellet, "Article 38", p. 774, para. 111.

[56] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 2.

[57] Pellet, "Article 38", pp. 813–832, paras. 209–249. There is no need, for present purposes, to enter into the debate as to whether Article 38, paragraph 1, drawn up in 1920, remains a complete list: see Wolfrum, "Sources of international law", para. 10.

[58] There had been earlier attempts to address the issue. In particular, under article 7 of the (unratified) Convention XII of 1907 Relative to the Creation of an International Prize Court, that Court was to apply, in the absence of a treaty in force, "rules of international law", provided that they were "generally recognized"; see Pellet, "Article 38", pp. 736–737, paras. 11–13. On the work of the Advisory Committee, see Spiermann, "'Who attempts too much does nothing well': the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice" and "Historical Introduction", pp. 52–59, paras. 6–22.

[59] PCIJ, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes* (The Hague, Van Langenhuysen, 1920), 13th meeting, p. 306, Annex No. 3. The United States member of the Advisory Committee, Mr. Root, proposed a text that was identical except for the addition of "recognized" before "practice" (*ibid.*, 15th meeting, p. 344, annex No. 1). Mr. Descamps referred to customary international law as "a very natural and extremely reliable method of development [of international law] since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual intercourse" (*ibid.*, 14th meeting, p. 322, annex No. 1).

[60] *Ibid.*, 24th meeting, p. 548.

[61] *Ibid.*, 25th meeting, p. 567, annex No. 2, art. 31.

Nations, and adopted with only drafting changes.[62] It does not seem to have been discussed during the preparation and adoption of the Statute of the International Court of Justice in 1944–1945.[63]

31. Article 38, paragraph 1 (*b*), is often said to be "badly drafted".[64] On the other hand, it has been said that "[t]here are two key elements in the formation of a customary international law rule. They are elegantly and succinctly expressed in Article 38 of the ICJ Statute";[65] and that "Article 38 of the ICJ Statute cannot be considered a simple guide, limited solely to a technical role in the court, but rather—despite its imperfections—the enunciations of the modes of law formation".[66]

32. Article 38, paragraph 1, has frequently been referred to or reproduced in later instruments.[67] Although in terms it only applies to ICJ,[68] the sources defined in Article 38, paragraph 1, are generally regarded as valid for other international courts and tribunals as well, subject to any specific rules in their respective statutes.[69]

33. It is necessary, for the purposes of the present topic, to consider the relationship between customary international law and the other sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, though the present topic is not intended to cover these other sources as such.

34. The relationship between customary international law and treaties is an important aspect of the topic,[70] to be discussed in later reports. In short, the interplay between these two "entangled" sources of international law may be highly relevant for the present purposes as it is generally recognized that treaties may be reflective of pre-existing rules of customary international law; generate new rules and serve as evidence of their existence; or, through their negotiation processes, have a crystallizing effect for emerging rules of customary international law.[71] Such a relationship is particularly interesting in the light of the fact that "contemporary customary international law, although unwritten, is increasingly characterized by the strict relationship between it and written texts".[72] It should also be borne in mind that customary international law has an "existence of its own" even where an identical rule is to be found in a treaty.[73]

35. It is sometimes suggested that treaties are now a more important source of international law than customary international law.[74] Such generalizations are neither particularly illuminating nor necessarily accurate. Even in fields where there are widely accepted "codification" conventions, the rules of customary international law continue to govern questions not regulated by the conventions[75] and continue to apply in relations with and

[62] *Ibid.*, 32nd meeting, p. 680, annex No. 1, art. 35. As adopted by the Advisory Committee on first reading, the subparagraph was changed to read: "International custom, being the recognition of a general practice, accepted as law". The change was not maintained in the text submitted to the League.

[63] On the negotiating history of Article 38, paragraph 1 (*b*), see Haggenmacher, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale", pp. 19–32; Pellet, "Article 38", pp. 738–745, paras. 17–48; and Kearney, "Sources of law and the International Court of Justice". Looking back at the negotiation in 1950, Mr. Hudson remarked that the drafters of the Statute "had no very clear idea as to what constituted international custom" (*Yearbook … 1950*, vol. I, 40th meeting, p. 6, para. 45).

[64] See, e.g., Kunz, "The nature of customary international law", p. 664; and Wolfke, "Some persistent controversies regarding customary international law". Villiger has written, "It is notorious that this provision is lacking … For the Court cannot apply a custom, only customary *law*; and subpara. 1 (*b*) reverses the logical order of events, since it is general practice accepted as law which constitutes evidence of a customary rule" (Villiger, *Customary International Law and Treaties*, p. 15).

[65] Bederman, *The Spirit of International Law*, pp. 9 and 33; see also Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium, p. 116. ("Article 38 itself of the ICJ Statute duly qualifies international custom in referring to it as 'evidence of a general practice accepted as law'.")

[66] Sur, *International Law, Power, Security and Justice: Essays on International Law and Relations*, p. 166; see also Jennings, "The identification of international law".

[67] Pellet, "Article 38", pp. 745 *et seq.*, paras. 49–54; art. 28 of the 1928 General Act for the Pacific Settlement of International Disputes (and art. 28 of the 1948 Revised General Act); art. 33 of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. Sometimes we find a cross-reference to Article 38 of the Statute; for example, in articles 74 and 83 of the United Nations Convention on the Law of the Sea. Other instruments use different terms: for example, article 21, paragraph 1 (*b*), of the Rome Statute of the International Criminal Court ("applicable treaties and the principles and rules of international law, including the established principles of the law of armed conflict"); article 20, paragraph 1, of the Protocol of the Court of Justice of the African Union, which includes but expands on the language of ICJ: art. 20, para. 1 (*c*) is identical to Art. 38, para. 1 (*b*)). For the use of Article 38, paragraph 1, in the work of the Commission, see article 12 of the 1953 Draft Convention on Arbitral Procedure (*Yearbook … 1953*, vol. II, p. 210), and article 10 of the 1958 draft model rules on arbitral procedure (*Yearbook … 1958*, vol. II, document A/3859, p. 84) (each of which begins with the important qualification "In the absence of any agreement between the parties concerning the law to be applied").

[68] Forteau, "The diversity of applicable law before international tribunals as a source of forum shopping and fragmentation of international law: An assessment", pp. 420–421.

[69] See paragraphs 66–85 below. Thirlway has written: "it is generally agreed that the sources defined in Art. 38 are valid also for other international tribunals" ("Unacknowledged legislators: some preliminary reflections on the limits of judicial lawmaking", p. 313). Of the reference to "other rules of international law not incompatible with this Convention" in art. 293 of the United Nations Convention on the Law of the Sea, Thirlway writes that "no further definition is offered, leaving Art. 38 of the ICJ Statute as the recognized yardstick" (*ibid.*, p. 314, footnote 9).

[70] Memorandum by the Secretariat (footnote 8 above), paras. 37–40.

[71] See, in general, Schachter, "Entangled treaty and custom"; Jia, "The relations between treaties and custom"; Boas, *Public International Law: Contemporary Principles and Perspectives*, p. 84; Gamble, "The treaty/custom dichotomy: An overview"; Wolfke, "Treaties and custom: aspects of interrelation"; Scott and Carr, "Multilateral treaties and the formation of customary international law"; Villiger, *Customary International Law and Treaties*; and Baxter, "Treaties and custom".

[72] Treves, "Customary international law", p. 938, para. 2.

[73] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 94–96, paras. 177–178.

[74] "In the past decades, treaties have superseded customary international law as the most important source of international law…": (Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, p. 11).

[75] See, for example, the 1969 Vienna Convention, final preambular paragraph; and art. 4 (non-retroactivity). The Martens clause was an early example of the continuing importance of customary international law, notwithstanding a treaty (von Bernstorff, "Martens clause"). In the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), the expression "the usages established between civilized nations" was replaced by "established custom", the term also used in later conventions: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, fifth preambular paragraph; and Convention on Cluster Munitions, eleventh preambular paragraph.

between non-parties.[76] Rules of customary international law may also fill possible lacunae in treaties, and assist in their interpretation.[77] An international court may also decide that it may apply customary international law where a particular treaty cannot be applied because of limits on its jurisdiction.[78]

36. The distinction between customary international law and "general principles of law"[79] is also important, but not always clear in the case law or the literature.[80] Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice lists "general principles of law recognized by civilized nations" as a source of international law separately from customary international law. In the case law and in writings this is sometimes taken to refer not only to general principles common to the various systems of internal law but also to general principles of international law. ICJ itself may have recourse to general principles of international law in circumstances when the criteria for customary international law are not present. As one author has explained:

> The relatively frequent reference by the ICJ to principles that are not part of municipal laws is explained, at least in part, by the narrow definition of customary international law that is provided in Art. 38 (1) (*b*) [of the] ICJ Statute. Should custom be regarded, as stated in that provision, as "evidence of a general practice accepted as law", given the insufficiency of practice, several rules of international law which are not based on treaties would not fit in the definition of custom. Hence the reference to principles or general principles.[81]

While it may be difficult to distinguish between customary international law and general principles in the abstract, whatever the scope of general principles it remains important to identify those rules which, by their nature, need to be grounded in the actual practice of States.[82]

37. Customary international law is also to be distinguished from conduct by international actors that neither generates a legal right or obligation nor carries such a legal implication. Not all international acts bear legal significance: acts of comity and courtesy, or mere usage, even if carried out as a matter of tradition, thus lie outside the scope of customary international law and the present topic.[83]

38. It is perhaps unnecessary, at least at this stage, to enter upon the question of the nature of the rules governing the formation and identification of rules of customary international law, for example, whether such rules are themselves part of customary international law.[84] But as in any legal system, there must in public international law be rules for identifying the sources of the law. These can be found for present purposes by examining in particular how States and courts set about the task of identifying the law.

## B. Terminology

39. Terminology is important. "Customary international law" or "rules of customary international law"[85] would seem to be the expressions in most common use for the source of international law with which the present topic is concerned.[86] The expression "general customary inter-

[76] For example, the 1969 Vienna Convention only directly applies in relations between the States parties thereto. The rules of customary international law on the law of treaties apply in relations between States not party to the Vienna Convention, and between a State party and a non-party; see Vierdag, "The law governing treaty relations between parties to the Vienna Convention on the Law of Treaties and States not party to the Convention", p. 779.

[77] 1969 Vienna Convention, art. 31, para.3 (*c*); Conclusions of the work of the study group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, conclusions (17) to (20) (*Yearbook … 2006*, vol. II (Part Two), p. 177, para. 251). See also *Amoco International Finance Corporation v. Iran* (1987-II), *Iran-United States Claims Tribunal Reports*, vol. 15 (Cambridge, Grotius, 1988), p. 222, para. 112; Baxter, "Treaties and custom", p. 103 ("Treaties will continue to exercise a most important impact on the content of general international law. Even if all States should expressly assume the obligations of codification treaties, regard will still have to be paid to customary international law in the interpretations of those instruments, and the treaties will in turn generate new customary international law growing out of the application of the agreements.").

[78] As in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, at pp. 92–97, paras. 172–182. The Court concluded that "it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes 'arising under' the United Nations and Organization of American States Charters" (*ibid.*, p. 97, para. 182).

[79] Gaja, "General principles of law"; Pellet, "Article 38", pp. 832–841, paras. 250–269.

[80] On the different meanings of "general principles of law" see, e.g., Schachter, *International Law in Theory and Practice*, pp. 50–55; see also Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International* ad hoc *Criminal Tribunals for Rwanda and Yugoslavia*, pp. 71–86. On a call for clarity in this regard, see Simma and Alston, "The sources of human rights law: Custom, *jus cogens*, and general principles"; Petersen, "Customary law without custom? Rules, principles, and the role of State practice in international norm creation".

[81] Gaja, "General principles of law", p. 374, para. 18.

[82] Crawford, *Brownlie's Principles of Public International Law*, p. 37.

[83] Tunkin, "Remarks on the juridical nature of customary norms of international law", p. 422; Crawford, *Brownlie's Principles of Public International Law*, pp. 23–24.

[84] See the debate on the nature of some rules of treaty law, particularly *pacta sunt servanda*. Sinclair refers in this connection to "doctrinal arguments" consideration of which "of necessity leads us into somewhat metaphysical regions" (*The Vienna Convention on the Law of Treaties*, pp. 2–3). See also Kammerhofer, "Uncertainty in the formal sources of international law: Customary international law and some of its problems", pp. 538–542.

[85] 1969 Vienna Convention, eighth preambular paragraph. Article 38 of the Vienna Convention has "customary rule of international law". The word "rules" is used in this report to include "principles". As a Chamber of ICJ said (in the context of maritime delimitation), "The association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, pp. 288–290, para. 79); Gaja has written, "While the distinction between principles and rules has not been elaborated in judicial or arbitral decisions, the use of the term principles denotes the general nature of the norm in question" ("General principles of law", p. 376, para. 31).

[86] An older term for "international law" is "the law of nations", which has by no means fallen out of use: Janis, "International law?"; Janis, *America and the Law of Nations 1776–1939*, chap. 1 ("Blackstone and Bentham: The *Law of Nations* and *International Law*"); Clapham, *Brierly's Law of Nations*, pp. xiii–xiv. It is sometimes suggested that "law of nations" is the more appropriate term given the expanding actors in the field, for example, in Daillier, Forteau and Pellet, *Droit international public*, pp. 43–50. Blackstone's *Commentaries on the Laws of England* (1765–1769) uses the term "law of nations" to refer broadly to the field of what is now known as international law,

(*Continued on next page.*)

national law" is sometimes found, usually in contradistinction to "special" or "regional" customary international law.[87] The term "universal customary international law" may have a similar meaning.

40. The expression "international customary law" is also found, but might suggest a subcategory of "customary law", and hence a misleading relationship between customary international law and the customary law found in some domestic legal systems.

41. Customary international law is commonly referred to as "international custom" or "custom", but this also may be misleading, depending on the context.[88] These terms may be confused with the objective element in the formation of customary international law (practice), where other related terms that are often used interchangeably are "usage" and "practice".[89]

42. The term "general international law" is commonly used,[90] but needs some explanation.[91] ICJ, and the Commission itself, have used the term in a variety of contexts and with a variety of meanings.[92] Its use to mean only customary international law can be confusing. At times the term is used to mean something broader than general customary international law, such as customary international law together with general principles of law, and/or together with widely accepted international conventions. It is desirable that the specific meaning intended by this term be made clear whenever the context leaves the meaning unclear.

43. Accuracy and consistency in the use of terminology by practitioners and scholars alike could help clarify the treatment of customary international law as a source of law. The Special Rapporteur proposes to use the terms "customary international law" and "rules of customary international law".

44. One obstacle to achieving a consistent use of terms is the different usages in different languages. The establishment of a short lexicon of relevant terms, in the six official languages of the United Nations, to be developed as work on the topic proceeds, could be helpful. In addition to the term "customary international law", it could include "State practice", "practice", "usage", and "*opinio juris sive necessitatis*".

45. The following conclusion is proposed on the use of terms, which can be developed as work on the topic proceeds:

"2. *Use of terms.*

"For the purposes of the present draft conclusions:

"(*a*) 'Customary international law' or 'rules of customary international law' means the rules of international law referred to in Article 38, paragraph 1 (*b*) of the Statute of the International Court of Justice;

"(*b*) ['State practice' or 'practice'…]

"(*c*) ['*opinio juris*' or '*opinio juris sive necessitatis*'…]

"(*d*) …"

(*Footnote 86 continued.*)

thus encompassing both treaties and customary international law. Yet sometimes the term "law of nations" has been used to refer to international law other than treaties. Thus, in the First Judiciary Act of 1789, Ch. 20, § 9, 1 Stat. 73 (1789), the United States Congress adopted a provision that refers to violations of "the law of nations or a treaty of the United States" (*The Public Statutes at Large of the United States of America*, vol. I, Boston, Little and Brown, 1848). In this sense, the term "law of nations" is a synonym for what is now called customary international law, rather than international law generally. As the *Restatement (Third) of U.S. Foreign Relations Law*, § 111, Introductory Note (1987) puts it, the term "'law of nations' was used to describe the customary rules and obligations that regulated conduct between States and certain aspects of State conduct towards individuals" (*Restatement of the Law Third*, vol. I, St. Paul, Minnesota, American Law Institute Publishers, 1987, p. 40).

[87] Terms used in the internal law of the various States to refer to customary international law vary considerably.

[88] It will be recalled, however, that the term "international custom" appears in article 38, para. 1 (*b*) of the Statute of the International Court of Justice.

[89] See also Tunkin, "Remarks on the juridical nature of customary norms of international law", p. 422 (differentiating between "usage" and "custom" on the one hand, and "customary norm of international law" on the other hand); Wolfke, "Some persistent controversies regarding customary international law", p. 2 (referring to the "notorious inconsistency in the use of terminology related to customary international law" and calling for a distinction between "international custom" on the one hand and "practice", "habit" or "usage" on the other hand); and Ochoa, "The individual and customary international law formation", pp. 125–129.

[90] See, for example, articles 53 and 64 of the 1969 Vienna Convention (*jus cogens*).

[91] Buzzini, "La 'généralité' du droit international general: Réflexions sur la polysémie d'un concept" and *Le droit international général au travers et au-delà de la coutume*; Tomuschat, "What is 'general international law'?"; and Wolfrum, "General international law (Principles, rules, and standards)".

[92] Memorandum by the Secretariat (footnote 8 above), chap. II, sect. C. As was stated in the fragmentation study (document A/CN.4/L.682 and Add.1 and Corr.1 (footnote 27 above), para. 493), "there is no well-articulated or uniform understanding of what [general international law] might mean. 'General international law' clearly refers to general customary law as well as 'general principles of law recognized by civilized nations' under article 38 (1) (*c*) of the Statute of the International Court of Justice. But it might also refer to principles of international law proper and to analogies from domestic laws, especially principles of the legal process (*audiatur et altera pars*, *in dubio mitius*, estoppel and so on)."

## Chapter III

## Range of materials to be consulted

46. This chapter describes the range of materials to be consulted in the course of the Commission's work on the present topic, that is, in order to reach conclusions about the process of formation and evidence of rules of customary international law. The purpose is not, at this stage, to propose such conclusions. That is for later.

47. The following materials are described below: those demonstrating the attitudes of States and other intergovernmental actors; the case law of ICJ and other courts and tribunals; the work of other bodies, such as the International Law Association; and the views of publicists, in particular as to the general approach to the formation and evidence of customary international law.

### A. Approach of States and other intergovernmental actors

48. Apart from the domestic court cases (see paras. 83–85 below), there seems to be relatively little publicly available material that directly addresses the attitude of States to the formation and evidence of customary international law. Even so, the approach of States may be gleaned from their statements on particular issues, as well as from pleadings before courts and tribunals.

49. The Special Rapporteur continues to seek materials concerning the approach of States. So far, there has been only limited response to the Commission's request to States in its 2012 report, set out at paragraph 4 above.[93]

50. The attitude of States to the formation and evidence of customary international law may be seen in their pleadings before international courts and tribunals, though it has to be remembered that here they are in advocacy mode.[94] In such pleadings, States regularly adopt the two-element approach, arguing both on State practice and *opinio juris*, though occasionally they adopt a different approach.[95] They frequently produce much evidence of State practice.

51. States also exchange views among themselves about rules of customary international law, often in a confidential manner, and in doing so they no doubt also reflect on the way such rules emerge and are identified.[96] This may happen at regular meetings of legal advisers within international organizations, such as the United Nations and regional organizations, in smaller groups, or bilaterally.

52. Indications of the approach of States may be found in governmental reactions to codification efforts (not least those of the Commission). The debate provoked by the ICRC 2005 *Customary International Humanitarian Law Study* (para. 92 below), for example, shed rare light on the attitude of some States to the process of formation and evidence of rules of customary international law, in the particular field of the laws of war. The United States, in a first formal response to the study at governmental level, stated, "There is general agreement that customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*", and stressed that evidence for the existence of such law "must in all events relate to State practice".[97] The United Kingdom, in turn, said that for the formation of customary international law "[w]hat is required is a 'general practice accepted as law by States'"; and that "[o]verall, identifying a rule of customary international law is a rigorous process".[98]

53. The approach of other intergovernmental actors, in particular international organizations such as the United Nations, may also prove valuable when surveying practice with regard to the formation and identification of customary international law.[99] Two recent examples may be found in the report of the Working Group on Arbitrary Detention to the Human Rights Council, which referred to "a near universal State practice" accompanied by *opinio juris* as evidence of the "customary nature of the arbitrary deprivation of liberty prohibition";[100] and the report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, which stated that "Custom has the force of law and is binding on States where it reflects the general practice of States, and the recognition by States that this general practice has become law (known as the *opinio juris* requirement)".[101]

### B. ICJ case law

54. The case law of ICJ and its predecessor, PCIJ, will be of great significance for the Commission's work on the present topic. The Court's primary function in relation to customary international law is to identify and apply customary rules as necessary for deciding the cases before it.[102] Its judgments (including separate and dissenting opinions) shed much light on the general approach to the formation and evidence of customary international law (when "what 'is' becomes what 'must be' "),[103] including on specific aspects of these processes.

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[93] *Yearbook … 2012*, vol. II (Part Two), para. 29.

[94] Dupuy, "La pratique de l'article 38 du Statut de la Cour internationale de justice dans le cadre des plaidoiries écrites et orales".

[95] See, as a recent example, Belgium's pleadings in *Belgium v. Senegal*, including its supplementary reply to Judge Greenwood, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Questions put to the Parties by Members of ICJ at the close of the public hearing held on 16 March 2012 (CR 2012/5).

[96] See the London Statement of Principles (footnote 9 above), p. 716, para. 6, footnote 8: "Much of this [how States go about identifying the law] takes place on a basis of confidentiality and official secrecy, so that it has not always been possible to cite chapter and verse"; Bethlehem, "The secret life of international law", p. 34 (referring to "a whole body of specialist practice that is for the most part utterly invisible to the outside world").

[97] Bellinger and Haynes, "A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", pp. 443–444.

[98] Legal Adviser of the Foreign and Commonwealth Office, statement at the Meeting of National Committees on International Humanitarian Law of Commonwealth States, Nairobi, 20 July 2005 (Kaikobad, "United Kingdom materials on international law 2005", pp. 694–695). See also the Updated European Union Guidelines on promoting compliance with international humanitarian law ..., which define customary international law as a source of international law that "is formed by the practice of States, which they accept as binding upon them" (*Official Journal of the European Union*, C 303, 15 December 2009, p. 13, para. 7).

[99] Cahin, *La coutume internationale et les organisations internationales*; and Vanhamme, "Formation and enhancement of customary international law: the European Union's contribution".

[100] A/HRC/22/44, para. 43.

[101] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011 (available from www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf), appendix I: The applicable international legal principles, p. 76, para. 3.

[102] It is not the Court's function to develop the law, though that is occasionally what it may have to do in order to avoid pronouncing a *non liquet*. The separate question of the role of international courts and tribunals in the formation of customary international law will be covered in a subsequent report; for a recent article on this issue, see Thirlway, "Unacknowledged legislators: some preliminary reflections on the limits of judicial lawmaking".

[103] *Case concerning Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 82 (Dissenting Opinion of Judge Armand-Ugon).

55. Examining ICJ's frequent application of article 38, paragraph 1 (*b*), of its Statute, by which it "perform[s] its perfectly normal function of assessing the various elements of State practice and legal opinion adduced … as indicating the development of a rule of customary law",[104] affords an overview of the Court's approach to the matter. As the judgments referred to below indicate, the Court has clearly and consistently held, as did its predecessor, that customary international law is formed through State practice accompanied by *opinio juris*.

56. In the *Lotus* case, PCIJ stated that international law emanates from the free will of States as expressed in conventions or "by usages generally accepted as expressing principles of law".[105] It emphasized the distinction between the two constitutive elements of customary international law, stressing the need for both to be present in order to ground a finding of such law:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstentions were based on their being conscious of having a duty to abstain, would it be possible to speak of an international custom.[106]

57. The classic statement of ICJ on the processes of formation and evidence of rules of customary international law is to be found in the *North Sea Continental Shelf* cases:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. … The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice [*une pratique constante*, in the French text], but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any legal sense of duty.[107]

58. The Court reaffirmed this in *Military and Paramilitary Activities in and against Nicaragua*, where it said that in order to consider what rules of customary international law were applicable it "has to direct its attention to the practice and *opinio juris* of States",[108] and that:

> As was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice" but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitatis*".[109]

59. In its judgment in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ referred to "the actual practice of States" as "expressive, or creative, of customary rules".[110] In the *Gulf of Maine* case, a Chamber of the Court observed that customary international law "comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas".[111]

60. When turning to an examination of customary international law in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ said at the outset that "as the Court has stated, the substance of that law must be 'looked for in the actual practice and *opinio juris* of States' (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29–30, para. 27)".[112] Later in the Opinion it noted the existence of customary rules that "have been developed by the practice of States".[113]

61. The most recent extended pronouncement of ICJ on its basic approach is to be found in *Jurisdictional Immunities of the State*, in which it said:

> It follows that the Court must determine, in accordance with Article 38 (1) (*b*) of its Statute, the existence of "international custom, as evidence of a general practice accepted as law"… To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*… Moreover, as the Court has also observed, "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them. (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29–30, para. 27)."[114]

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[104] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 367, para. 112 (Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Arechaga and Waldock).

[105] *"Lotus" (France v. Turkey), Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18.

[106] *Ibid.*, p. 28.

[107] *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 43, para. 74 and p. 44, para. 77.

[108] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 97, para. 183.

[109] *Ibid.*, pp. 108–109, para. 207.

[110] *Judgment, I.C.J. Reports 1982*, p. 46, para. 43.

[111] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 299, para. 111; ICJ has not referred to such distinguishable categories of customary international law in later jurisprudence. Treves has suggested that in this statement, "the court would thus seem to distinguish from the normal customary law rules, a category of such rules for which the search for the objective and the subjective elements is not required" ("Customary international law", p. 941, para. 19).

[112] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226 at p. 253, para. 64.

[113] *Ibid.*, p. 256, para. 75.

[114] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment, I.C.J. Reports 2012*, pp. 122–123, para. 55.

62. At the risk of oversimplification, it may be said that there are two main approaches to the identification of particular rules of customary international law in the case law of ICJ. In some cases the Court finds that a rule of customary international law exists (or does not exist) without detailed analysis.[115] This may be because the matter is considered obvious (for example, because it is based on a previous finding of the Court[116] or on what the Court views as unquestioned law). A number of examples may be found in the Court's judgment of 19 November 2012 in *Territorial and Maritime Dispute*.[117] In other cases the Court engages in a more detailed analysis of State practice and *opinio juris* in order to determine the existence or otherwise of a rule of customary international law. The Court's judgment of 3 February 2012 in the case of *Jurisdictional Immunities of the State*[118] illustrates this approach. It is particularly these latter cases that are helpful in illustrating the Court's approach to the formation and evidence of customary international law.[119]

63. There are a considerable number of cases in which ICJ has addressed specific aspects of the process of formation and identification of rules of customary international law, covering many of the issues that arise under the present topic, chief among them the nature of the State practice and *opinio juris* elements, and the relationship between treaties and customary international law. While such cases do not provide complete answers, they offer valuable guidance. The case law will be considered in detail in subsequent reports, when specific aspects of the topic will be addressed.

64. It is widely recognized in the literature that ICJ, through its jurisprudence, has enhanced the role of customary international law and clarified some of its aspects.[120] At the same time, commentators have suggested that the Court has thus far provided only limited guidance on how a rule of customary international law is formed and is to be ascertained, having "a marked tendency to assert the existence of a customary rule more than to prove it",[121] and ultimately following a rather flexible approach.[122] It has moreover been observed that the Court

[115] Meron refers to this approach as the "more relaxed approach to customary international law" compared with the "traditional approach" of a detailed discussion of the evidence (Meron, *The Making of International Criminal Justice*, p. 31).

[116] See, e.g., *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, p. 245, para. 41; *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 38, para. 46; Meron (see previous footnote, p. 31) ("the ICJ and other international courts are increasingly relying on precedent rather than repeatedly engaging in detailed analysis of the customary status of the same principles in every case"); Boas, *Public International Law,* pp. 84–86 and 91–93. The question may be asked (including by the Commission in the context of the present topic) how far the fact that a rule of customary international law has been ascertained by one tribunal at a certain point in time (sometimes decades ago) means that such tribunal or other tribunals may simply rely on such finding in the future; see also footnote 40 above. For the opinion that "indirect violation of custom occurs when an international tribunal invokes and applies customary international law, as previously declared by another tribunal, without scrutinizing the basis for such a declaration", see Chigara, "International Tribunal for the Law of the Sea and customary international law", p. 451.

[117] *Nicaragua* v. *Colombia, Judgment, I.C.J. Reports 2012,* p. 645, para. 37 ("Nicaragua's contention that QS 32 cannot be regarded as an island within the definition established in customary international law, because it is composed of coral debris, is without merit… The fact that QS 32 is very small does not make any difference, since international law does not prescribe any minimum size which a feature must possess in order to be considered an island."); p. 666, para. 118 ("The Court considers that the definition of the continental shelf set out in Article 76, paragraph 1, of UNCLOS forms part of customary international law."); p. 673, para. 138 ("The Parties are … agreed that several of the most important provisions of UNCLOS reflect customary international law. In particular, they agree that the provisions of Articles 74 and 83, on the delimitation of the exclusive economic zone and the continental shelf, and Article 121, on the legal regime of islands, are to be considered declaratory of customary international law."); p. 674, para. 139 ("The Court therefore considers that the legal regime of islands set out in UNCLOS Article 121 forms an indivisible regime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law."); p. 690, para. 177 ("International law today sets the breadth of the territorial sea which the coastal State has the right to establish at 12 nautical miles. Article 3 of UNCLOS reflects the current state of customary international law on this point."); p. 693, para. 182 ("The Court has held that this provision [UNCLOS Article 13—Low-tide elevations] reflects customary international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, I.C.J. Reports 2001*, p. 100, para. 201).").

[118] *Judgment, I.C.J. Reports 2012,* pp. 122–123, para. 55.

[119] See also the use of case law to determine the existence of a rule of customary international law, for example, the recent reference by ICJ to "customary international law reflected in the case law of this Court, the International Tribunal for the Law of the Sea (ITLOS) and international arbitral courts and tribunals" (*Territorial and Maritime Dispute, Judgment, I.C.J. Reports 2012,* p. 666, para. 114 (see also footnote 117 above)). One author has suggested that yet another method exists by which the Court declares the existence of customary international law: implicit recognition, whereby "the Court regard[s] a State practice or a treaty provision as if it were customary but without making an explicit pronouncement about its character" (see Alvarez-Jiménez, "Methods for the identification of customary international law in the International Court of Justice's jurisprudence: 2000–2009", pp. 698–703).

[120] See, e.g., Danilenko, *Law-Making in the International Community*, p. 80; Cassese, "General round-up", p. 166.

[121] Pellet, "Shaping the future of international law: the role of the world court in law-making", p. 1076 (referring to "a mysterious and empirical alchemy which leads the Court to 'discover' a rule before applying it in a concrete case"). See also Charney, "Universal international law", pp. 537–538; Kelly, "The twilight of customary international law", p. 469; Skubiszewski, "Elements of custom and the Hague court", p. 853; Treves, "Customary international law", p. 942, para. 21; Geiger, "Customary international law in the jurisprudence of the International Court of Justice: A critical appraisal", p. 692; Bishop, "General course of public international law", p. 220; D'Amato, "Trashing customary international law", p. 101; Scott and Carr, "The International Court of Justice and the treaty/custom dichotomy", p. 353; Meron, *The Making of International Criminal Justice*, p. 30; Ferrer Lloret, "The unbearable lightness of customary international law in the jurisprudence of the International Court of Justice: the *Jurisdictional Immunities of the State* case"; Hagemann, "Die Gewohnheit als Völkerrechtsquelle in der Rechtssprechung des internationalen Gerichtshofes".

[122] Jiménez de Aréchaga, "Custom", pp. 2–3 ("Personally, I believe that the most important contribution made by the Court to the progressive development of international law is to be found … in the flexibility of the jurisprudential conceptions it adopted on this subject of sources, particularly with respect to customary international law"); Benvenisti, "Customary international law as a judicial tool for promoting efficiency", p. 98 (suggesting that the Court's judges, "as the oracles of the mystic 'custom'", at times invent customary international law when "these leaps produce more efficient norms"); Orrego Vicuña, "Customary international law in a global community: tailor made?" pp. 25–26 ("The International Court of Justice has not followed a consistent approach in dealing with customary law … In more recent times … it would seem that far from adhering to a given theory the Court has found a customary rule whenever and wherever it has deemed it necessary or convenient to identify such a rule or to go beyond treaty rules."); MacGibbon, "Means for the identification of international law—General Assembly resolutions: Custom, practice and mistaken identity", p. 21 ("It is difficult to avoid the impression that … the Court, in the realm of international custom, has been painting with a fairly broad and liberal brush."); Geiger, "Customary international law in the jurisprudence of the International Court of

(*Continued on next page.*)

has not always been consistent in its use of terminology relating to customary international law, or in distinguishing the latter from general principles of law.[123]

65. The President of ICJ, addressing the issue of the Court's approach to customary international law, has recently explained:

> Authors are correct in drawing attention to the prevalent use of general statements of rules in the Court's modern practice, although they take the point too far by insisting on theorizing this development. In fact, the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is "general practice accepted as law"—that is, in the words of a recent case, that "the existence of a rule of customary international law requires that there be a 'settled practice' together with *opinio juris*". However, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists. Sometimes this entails a direct review of the material elements of custom on their own, while more often it will be sufficient to look to the considered views expressed by States and bodies like the International Law Commission as to whether a rule of customary law exists and what its content is, or at least to use rules that are clearly formulated in a written expression as a focal point to frame and guide an inquiry into the material elements of custom.[124]

## C. Case law of other courts and tribunals

### 1. Other international courts and tribunals

66. Among the international courts and tribunals whose case law may prove valuable for the present topic are ITLOS, international and internationalized criminal tribunals, WTO dispute settlement organs, inter-State arbitral tribunals and other *ad hoc* tribunals. The case law concerned will be referred to in future reports, when dealing with particular aspects of the formation and evidence of customary international law. For the time being, some examples are given to illustrate the range of courts and tribunals concerned, the general approach adopted by them, and the wealth of material to be found in the case law.[125] One thing stands out: Notwithstanding the specific contexts in which these other courts and tribunals work, overall there is substantial reliance on the approach and case law of ICJ, including the constitutive role attributed to the two elements of State practice and *opinio juris*.

67. ITLOS, which may apply (in addition to the United Nations Convention on the Law of the Sea) "other rules of international law not incompatible with [the] Convention",[126] has had only limited recourse to customary international law. In identifying a rule as having achieved the status of customary international law, the Tribunal has mainly relied on pronouncements of ICJ.[127] It has also referred to findings by other international courts and tribunals,[128] and to the work of the Commission.[129] In one case, the Tribunal relied on "a growing number of international treaties and other instruments" to find that a "trend towards making [the precautionary] approach part of customary international law" has been "initiated".[130] The Tribunal has also signalled the relevance of State practice and case law to attempts to find the existence of an applicable "general rule" or the interpretation of a legal concept or rule of law.[131]

68. The *ad hoc* international tribunals for the former Yugoslavia and for Rwanda have often turned to customary international law in establishing their jurisdiction.[132]

(*Footnote 86 continued.*)

Justice: A critical appraisal", p. 674 ("The Court's openly proclaimed standards for establishing specific customary rules are quite different from how the Court really proceeds."); Baker, "Customary international law in the 21st century: Old challenges and new debates", pp. 178–179 (saying that it was the Court that "in a set of novel, even revolutionary" opinions in the late 1960 and early 1970 set up the doctrinal basis for "a re-think of the traditional sources of customary international law: State practice and *opinio juris*"); Müllerson, "On the nature and scope of customary international law", p. 353 (observing that it is the normative claim which often underlies the Court's decision to recognize customary international law); Yasuaki, "Is the International Court of Justice an emperor without clothes?", p. 16 ("The ICJ has used the notion of customary international law in a highly flexible manner … [and] blurred the distinction between State practice and *opinio juris*."); Kirgis, "Custom on a sliding scale" (suggesting that the importance of the norm or the theme matters for ICJ in finding customary rules; when it is destabilizing or morally distasteful, a restrictive custom is indeed proclaimed); Schlütter, *Developments in Customary International Law,* p. 168 ("The case law of the I.C.J. on custom is not always consistent and does not always appear to follow an overall concept, as envisaged by the different theories on customary international law … the Court has no single approach to the formation of customary international law.").

[123] See, e.g., Wolfke, *Custom in Present International Law,* pp. xv–xvii, 8; Lauterpacht, *The Development of International Law by the International Court*, p. 393; Skubiszewski, "Elements of custom and the Hague court", p. 812; Mendelson, "The International Court of Justice and the sources of international law", p. 64 (saying that the Court "quite frequently fails to specify which source it is applying … [unless the rule in question derives its validity directly from a treaty,] the Court often simply asserts that such-and-such is a 'well-recognized rule [or principle] of international law' or employ[s] some other vague phrase, without identifying whether the rule derives from custom, 'general principles of law recognized by civilized nations', some other source, or a combination of sources"); Bodansky, "Prologue to a theory of nontreaty norms", p. 122 ("Even the International Court of Justice..., whose Statute distinguishes general principles from custom, does not always do so in its decisions.").

[124] Tomka, "Custom and the International Court of Justice", pp. 197–198.

[125] Citation of the cases is for the light they shed on the formation and evidence of customary international law, and should not be taken as endorsement of any particular substantive pronouncements.

[126] Art. 293, para. 1. The Tribunal had also identified that rules of customary international law are implicitly referred to by a number of the Convention's articles; see, e.g., *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, vol. 12, p. 55, para. 183.

[127] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, vol. 3, p. 56, paras. 133–134; *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion (of the Seabed Disputes Chamber), 1 February 2011, *ITLOS Reports 2011*, paras. 57, 147–148, 169 and 178.

[128] *Responsibilities and obligations of States* ... (see preceding footnote), paras. 57 (referring to the Arbitral Tribunal on *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* and WTO's Appellate Body), 178 (referring to the *Rainbow Warrior* Arbitral Tribunal) and 194 (referring to PCIJ).

[129] *Ibid.*, paras. 169, 178, 182, 194 and 210; *"SAIGA" (No. 2)* (see footnote 127 above), para. 171.

[130] *Responsibilities and obligations of States*... (footnote 127 above), para. 135.

[131] *Delimitation of the maritime boundary in the Bay of Bengal* ... (see footnote 126 above), paras. 147 and 150; *M/V "SAIGA" (No. 1) (Saint Vincent and the Grenadines v. Guinea), Prompt Release, Judgment, ITLOS Reports 1997*, p. 16, at pp. 29–30, para. 57.

[132] On customary international law as a source of law in international criminal proceedings in general, see, for example, Akande, "Sources of international criminal law", pp. 49–51; and Cryer *et al.*, *An Introduction to Criminal Law and Procedure*, p. 11. When considering the case law of international criminal courts and tribunals—both the International Criminal Court and the *ad hoc* tribunals—it should be borne in mind that States are rarely directly involved as parties.

In doing so, they have each held, as shown below, that the formation of a rule of customary international law requires State practice and *opinio juris*, and that identifying such a rule generally requires an inquiry into these two elements. This approach was seen as mandated by the tribunals' obligation to pay due heed to the legality principle (*nullum crimen sine lege*), which required that "customary international law can provide a safe basis for conviction, but only if genuine care is taken to determine that the legal principle was firmly established as custom at the time of the offense so that the offender could have identified the rule he was expected to obey".[133] Nonetheless, some have suggested that "customary international law in the context of international criminal law means something different than customary international law in the context of traditional international law",[134] and that the tribunals' jurisprudence often marks a shift "away from a practice-oriented sort of custom to a more specifically *humanitarian* interpretation of the customary process".[135] Others, however, suggest that "the argument that the jurisprudence of the international criminal tribunals has created a new form of custom, rendering state practice and *opinio juris* as no longer indispensable to the formation of custom, is quite wrong".[136]

69. The International Tribunal for the Former Yugoslavia has frequently resorted to customary international law when identifying the international law relating to the crimes and procedure before it. In doing so, it has indicated on several occasions that both State practice and *opinio juris* must be established in order to find that a particular legal principle enjoyed the status of customary international law. In *Prosecutor v. Hadžihasanović*, for example, the Appeals Chamber noted that "to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*";[137] similarly, in *Prosecutor v. Delalić*, the Trial Chamber had expressly referred to "[t]he evidence of the existence of such customary law—State practice and *opinio juris*".[138] Accordingly, for example, in *Prosecutor v. Aleksovski*, the Appeals Chamber held that without "evidence of State practice which would indicate the development in customary international law" of a requirement that violations of laws or customs of war require proof of a discriminatory intent, no such rule may be found.[139] In *Prosecutor v. Tadić*, the Appeals Chamber referred to a "careful perusal of the relevant practice" when determining that "a discriminatory intent is not required by customary international law for all crimes against humanity".[140]

70. On some occasions, however, Chambers of the International Tribunal for the Former Yugoslavia have shown willingness to recognize that a rule of customary international law has emerged even where the two elements (in particular State practice) were not firmly established. In *Prosecutor v. Kupreškić*, the Trial Chamber explicitly asserted that

> principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.[141]

In other cases, Chambers did not always carry out an extensive analysis of State practice and *opinio juris* (nor differentiated between them),[142] or merely cited previous decisions of the Tribunal.[143]

71. The International Tribunal for Rwanda has likewise had recourse to customary international law on several occasions, from which it appears that both the Tribunal and the parties arguing before it have recognized that, in the words of the Appeals Chamber in *Rwamakuba v. Prosecutor*, "Norms of customary international law are characterized by the two familiar components of State practice and

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[133] Meron, "Revival of customary humanitarian law", p. 821.

[134] Schabas, "Customary law or 'judge-made' law", p. 101; see also Baker, "Customary international law in the 21st century", pp. 175 and 184–186; van den Herik, "Using custom to reconceptualize crimes against humanity"; Stahn and van den Herik, " 'Fragmentation', diversification and '3D' legal pluralism: international criminal law as the jack-in-the-box?", p. 63; van Schaack, "*Crimen sine lege*: judicial lawmaking at the intersection of law and morals", p. 165; and Bantekas, "Reflections on some sources and methods of international criminal and humanitarian law".

[135] Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, p. 18.

[136] Boas, *Public International Law*, p. 90.

[137] Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12, available from www.icty.org.

[138] Case No. IT-96-21-T, Judgment, 16 November 1998, *Judicial Reports 1998*, vol. 2, p. 1181, para. 302. See also, for example, Judge Shahabuddeen's Declaration in the Appeals Chamber Judgment in *Prosecutor v. Furundžija*, where it was said that "if the question is whether there has emerged in customary international law a norm … it would be necessary to examine the evolution of customary international law on the point, and that inquiry would of course have to be done in accordance with the principles regulating that evolution"; Shahabuddeen referred in this context to "a comparative review designed to show whether a new customary norm has come into being on the basis of general concordance of State practice", and later indicated that such a survey must be "systematic" (case No. IT-95-17/1-A, 21 July 2000, *Judicial Reports 2000*, vol. 2, pp. 2129 and 2131, 2133, paras. 257–258, 262). Another example is found in the Joint Separate Opinion of Judges McDonald and Vohrah in *Prosecutor v. Erdemovic*: "For a rule to pass into customary international law, the International Court of Justice has authoritatively restated ... that there must exist extensive and uniform State practice underpinned by *opinio juris sive necessitatis*" (case No. IT-96-22-A), Judgment (Appeals Chamber), 7 October 1997, *Judicial Reports 1997*, vol. 2, p. 1701, para. 49.

[139] Case No. IT-95-14/1-A, Judgment, 24 March 2000, *Judicial Reports 2000*, vol. 1, p. 1145, para. 23.

[140] Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 288, see also paras. 287, 289–292. See also *Prosecutor v. Naletilić and Martinović*, case No. IT-98-34-A, Judgment, 3 May 2006, Separate and Partly Dissenting Opinion of Judge Schomburg, para. 15; *Prosecutor v. Kordić and Čerkez*, case No. IT-95-14/2-A, Judgment, 17 December 2004, para. 66; *Prosecutor v. Kunarac et al.*, case Nos. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para. 98, footnote 114; *Prosecutor v. Galić*, case No. IT-98-29-A, Judgment, 30 November 2006, paras. 86–98, and the Separate and Partly Dissenting Opinion of Judge Schomburg, paras. 7–21.

[141] Case No. IT-95-16-T, 14 January 2000, *Judicial Reports 2000*, vol. 2, pp. 1741 and 1743, para. 527. See also Zahar, "Civilizing civil war: writing morality as law at the ICTY".

[142] See, e.g., *Tadić* (footnote 140 above), at paras. 109 (footnote 129) and 303; *Delalić* (footnote 138 above), paras. 452–454; *Prosecutor v. Kordić and Čerkez* (footnote 140 above), paras. 52–54; see also *Prosecutor v. Galić* (footnote 140 above), Separate Opinion of Judge Shahabuddeen, para. 5.

[143] See, e.g., *Prosecutor v. Naletilić and Martinović*, case No. IT-98-34-T, Judgment, 31 March 2003, paras. 228, 250 and 336; *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Judgment, 29 July 2004, paras. 145–148, 157; *Prosecutor v. Kunarac et al.*, case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, paras. 466–486.

*opinio juris*".[144] In another explicit reference, Judge Shahabuddeen has suggested, when referring to the concept of co-perpetratorship in his Separate Opinion in *Gacumbitsi v. Prosecutor* (Appeals Chamber), that "[s]ince several States adhere to one theory while several other States adhere to the other theory, it is possible that the required State practice and *opinio juris* do not exist so as to make either theory part of customary international law".[145] Judge Meron, in his Partly Dissenting Opinion in *Nahimana et al. v. Prosecutor* (Appeals Chamber), suggests that where a "consensus among States has not crystallized, there is clearly no norm under customary international law".[146] When referring to evidence in ascertaining the existence or otherwise of a rule of customary international law, the Tribunal has generally not specified whether such materials were evidence of State practice or *opinio juris* (or both).[147]

72. In some cases, the International Tribunal for Rwanda has avoided an extensive analysis when deciding whether a rule of customary international law has emerged, or relied instead on the inquiry and pronouncements of other judicial institutions. In *Nahimana et al. v. Prosecutor*, for example, the Appeals Chamber merely referred to an explanatory statement in the Draft Code of Crimes against the Peace and Security of Mankind of the Commission[148] when stating that the position according to which direct and public incitement to commit genocide is punishable only if the act in fact occurs "does not reflect customary international law on the matter";[149] and in *Prosecutor v. Akayesu*, the Trial Chamber held that "The Genocide Convention is undeniably considered part of customary international law, as can be seen in the opinion of the International Court of Justice on the provisions of the Genocide Convention, and as was recalled by the United Nations Secretary-General in his Report on the establishment of the International Criminal Tribunal for the Former Yugoslavia".[150]

73. Turning to internationalized courts, the Special Court for Sierra Leone, in *Prosecutor v. Norman*, stated that "the formation of custom requires both State practice and a sense of pre-existing obligation (*opinio iuris*)", adding the borrowed words that "an articulated sense of obligation, without implementing usage, is nothing more than rhetoric. Conversely, State practice, without *opinio iuris*, is just habit".[151] In deciding that the prohibition on child recruitment to armed forces had crystallized into customary international law, the Court referred to the number of States having legislation that prohibits child recruitment ("almost all States ... (... for a long time)"); and stated that from the significantly large number of States that were parties to the Geneva Conventions for the Protection of Victims of War (185) or had ratified the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (133)[152] and the Convention on the Rights of the Child ("all but six States"), it follows that the provisions of these instruments are widely accepted as customary international law (for the latter, "almost at the time of the entry into force").[153] The Court opined that "when considering the formation of customary international law, 'the number of states taking part in a practice is a more important criterion ... than the duration of the practice'".[154] It moreover stated that "customary law, as its name indicates, derives from custom. Custom takes time to develop".[155]

74. In *Prosecutor v. Fofana and Kondewa*,[156] when deciding that the prohibition against pillage as reflected in customary international law did not include a prohibition

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[144] Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 14.

[145] Case No. ICTR-2001-64-A, 7 July 2006, Separate Opinion of Judge Shahabuddeen, para. 51.

[146] Case No. ICTR-99-52-A, 28 November 2007, Partly Dissenting Opinion of Judge Meron, paras. 5–8. Referring to the "number and extent of the reservations [to the relevant provisions relied on by the Trial Chamber as] reveal[ing] that profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited", Judge Meron concluded that no "settled principle" is reflected in such provisions, and found support for this position in the drafting history of the Convention on the Prevention and Punishment of the Crime of Genocide and the *Kordić* Trial Judgment of the International Tribunal for the Former Yugoslavia as well.

[147] See, e.g., *Prosecutor v. Bikindi*, case No. ICTR-01-72-T, 2 December 2008, para. 379; *Prosecutor v. Ntakirutimana and Ntakirutimana*, cases Nos. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, paras. 518–519; *Rwamakuba* (footnote 144 above), para. 14. Another such example may be found in *Prosecutor v. Nahimana et al.* (Trial Chamber), where the Chamber referred to "well-established principles of international and domestic law, and the jurisprudence of the *Streicher* case in 1946 and the many European Court and domestic cases since then" to determine that "hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination" (case No. ICTR-99-52-T, 3 December 2003, *Reports of Orders, Decisions and Judgements 2003*, para. 1076). See also Schabas, "Customary law or 'judge-made' law", pp. 84–85.

[148] *Yearbook … 1996*, vol. II (Part Two), p. 17, para. 50.

[149] *Nahimana*, case No. ICTR-99-52-A (footnote 147 above), para. 678, footnote 1614; see also Judge Shahabuddeen's Partly Dissenting Opinion in that case, referring in the context of the definition of the crime of persecution to a United States Military Tribunal judgment when saying, "[t]hat happened in a trial held immediately after World War II. So, in the usual way, the case may be accepted as reflective of customary international law" (para. 13).

[150] Case No. ICTR-96-4-T, 2 September 1998, *Reports of Orders, Decisions and Judgements 1998*, p. 296, para. 495; see also *Prosecutor v. Kajelijeli*, where the *Tadić* judgment was cited for a "review of the international practice on this issue" of the customary international law status of the proposition that the standard for attack is "widespread or systematic" (case No. ICTR-98-44A-T, 1 December 2003, *ibid., 2003*, p. 2120, para. 869 and footnote 1076); and the words of Judge Güney in his Partially Dissenting Opinion in *Gacumbitsi v. Prosecutor* (footnote 145 above) that "I am concerned by the fact that the majority in this case offers no discussion whatsoever to show that any of these forms of commission are recognized in customary international law. Indeed, no analysis of customary international law is provided to show that 'committing' goes beyond the physical perpetration of a crime or the participation in a joint criminal enterprise" (para. 6). See also *Prosecutor v. Kayishema and Ruzindana* (case No. ICTR-95-1-A), 1 June 2001, *ibid., 2001*, vol. II, p. 2170, para. 51, where the Appeals Chamber "recall[ed] that the principle of the right to a fair trial is part of customary international law" and referred to its embodiment "in several international instruments, including Article 3 common to the Geneva Conventions", citing the *Čelebići* Appeal Judgment (para. 51).

[151] SCSL-2004-14-AR72(E) (31 May 2004), p. 13, para. 17; the quote was cited from Swaine, "Rational custom", *Duke Law Journal*, 52 (2002), pp. 567–568.

[152] *Norman* case (footnote 151 above), para. 18.

[153] *Ibid.*, para. 19.

[154] *Ibid.*, para. 49, quoting Akehurst, "Custom as a source of international law", p. 16 (and adding the sentence, by the same author, that "the number of States needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule and that [even] a practice followed by a very small number of States can create a rule of customary law if there is no practice which conflicts with the rule" (p. 18)).

[155] *Norman* case (footnote 151 above), para. 50. See also the Dissenting Opinion of Judge Robertson, pp. 14–19.

[156] Case No. SCSL-04-14-A, 28 May 2008.

against destruction not justified by military necessity, the Appeals Chamber of the Special Court for Sierra Leone referred to the pronouncement by ICJ in the *North Sea Continental Shelf* cases requiring that State practice be "both extensive and virtually uniform" and demonstrate *opinio juris*.[157] It then conducted an analysis of various materials accordingly, although it did not make clear which of the materials mentioned by it counted as "State practice". When initially stating that prohibitions against pillage and destruction not justified by military necessity both "exist in customary international law applicable to non-international armed conflict at the times relevant to this case", the Court cited in support an Appeals Chamber decision of the International Tribunal for the Former Yugoslavia in *Hadžihasanović*.[158]

75. In a 2010 decision examining the status of joint criminal enterprise under customary international law, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia first referred to Article 38, paragraph 1, of the Statute of the International Court of Justice and the *Fisheries*[159] and *North Sea Continental Shelf* cases, and then said:

> The Pre-Trial Chamber recalls that, when determining the state of customary international law in relation to the existence of a crime or a form of individual responsibility, a court shall assess existence of "common, consistent and concordant" State practice, or *opinio juris*, meaning that what States do and say represents the law. A wealth of State practice does not usually carry with it a presumption that *opinio juris* exists; "not only must the acts concerned amount to a settled practice, but they must also be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[160]

The Chamber then relied on international instruments, international cases and "authoritative pronouncements" in determining that certain forms of joint criminal enterprise (JCE) "were recognized forms of responsibility in customary international law at the time relevant for Case 002". As for JCE III, the Pre-Trial Chamber noted that there is not "sufficient evidence of consistent State practice or *opinio juris* [to conclude that it was recognized under customary international law] at the time relevant to Case 002".[161] The Trial Chamber "agree[d] in substance" with these findings,[162] and in undertaking its own analysis of international cases concluded that "the Co-Prosecutors have failed to establish that JCE III formed part of customary international law between 1975 and 1979".[163]

76. The Special Tribunal for Lebanon, in finding that a rule of customary international law "has evolved in the international community concerning terrorism", made it clear that ascertaining such a rule is to be done by "demonstrating the requisite practice and *opinio juris seu necessitatis*, namely the legal view that it is necessary and indeed obligatory to bring to trial and punish the perpetrators of terrorist attacks".[164] Relying on the "notion of international custom as set out by the International Court in the *Continental Shelf* case",[165] the Court began its analysis of relevant materials by stating that

> as we shall see, a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace*, has indeed emerged.[166]

It further said that "to establish beyond any shadow of doubt whether a customary rule of international law has crystallised", one must in particular

> look to the behaviour of States, as it takes shape through agreement upon international treaties that have an import going beyond their conventional scope or the adoption of resolutions by important intergovernmental bodies such as the United Nations, as well as the enactment by States of specific domestic laws and decisions by national courts.[167]

Having considered such "elements" in detail, the Court then concluded that

> it can be said that there is a settled practice concerning the punishment of acts of terrorism, as commonly defined, at least when committed in time of peace; in addition, this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*).[168]

77. Dispute settlement organs of WTO have also dealt, albeit infrequently, with the ascertainment of rules of customary international law.[169] It appears from such cases that, in determining whether a certain rule of customary international law has or has not emerged, the traditional elements of State practice and *opinio juris* have been

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[157] *Ibid.*, para. 405. See also *North Sea Continental Shelf cases, Judgment, I.C.J. Reports 1969*, p. 43, para. 74.

[158] Case No. SCSL-04-14-A, para. 390. See also *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-AR73.3, International Tribunal for the Former Yugoslavia, Appeals Chamber, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 *bis* Motions for Acquittal, 11 March 2005, paras. 30 and 38.

[159] *Judgment, I.C.J Reports 1951*, p. 116.

[160] Criminal Case No. 002/19-09-2007-EEEC/OICJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 53.

[161] *Ibid.*, paras. 77 and 83; here the Pre-Trial Chamber reviewed "the authorities relied on [by the International Tribunal for the Former Yugoslavia] in *Tadić*" and was of the view that "they do not provide sufficient evidence of consistent State practice or *opinio juris* at the time relevant to Case 002". See also paras. 75, 76 and 78–82.

[162] Case File No. 002/19-09-2007/EEEC/TC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, para. 29.

[163] *Ibid.*, para. 38.

[164] Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, paras. 102–104.

[165] *Ibid.*, para. 102.

[166] *Ibid.*, para. 85.

[167] *Ibid.*, para. 87.

[168] *Ibid.*, para. 102.

[169] It is unnecessary, in the present context, to discuss the extent to which WTO dispute settlement organs may apply customary international law, as to which see, for example, *Korea—Measures Affecting Government Procurement* (Panel Report), WT/DS163/R, 1 May 2000, para. 7.96 (where the Panel said, "To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."). See also Van Damme, *Treaty Interpretation by the WTO Appellate Body*, pp. 13–21; Pauwelyn, "The role of public international law in the WTO: How far can we go?", pp. 542–543; Mohd Zin and Kazi, "The role of customary international law in the World Trade Organisation (WTO) disputes settlement mechanism", pp. 245–248; Lindroos and Mehling, "Dispelling the chimera of 'self-contained regimes': international law and the WTO", pp. 869–873; Palmeter and Mavroidis, "The WTO legal system: sources of law"; and remarks by Joel P. Trachtman in response to the remarks by Joost Pauwelyn, "The jurisdiction of the WTO is limited to trade", American Society of International Law, *Proceedings of the 98th Annual Meeting*, Washington, D.C., 2004, pp.139–142.

considered as essential by Panels and the Appellate Body, although they have thus far generally avoided conducting an independent examination of these elements.

(*a*) In *United States—Standards for Reformulated and Conventional Gasoline*, when stating that the "general rule of interpretation" enumerated in the 1969 Vienna Convention has "attained the status of a rule of customary or general international law", the Appellate Body referred to judgments of ICJ, the European Court of Human Rights and the Inter-American Court of Human Rights, as well as to public international law literature.[170] In *Japan—Taxes on Alcoholic Beverages*, the Appellate Body simply stated that "[t]here can be no doubt that Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status [of 'a rule of customary or general international law']", and in a footnote referred primarily to case law of ICJ.[171]

(*b*) In *EC—Measures Concerning Meat and Meat Products (Hormones)*, when referring to the question of whether the precautionary approach or principle had crystallized into "a principle of general or customary international law" (and ultimately deciding not to take a position on the matter) the Appellate Body noted "The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges", and referred in a footnote to writings according to which there was or was not enough State practice that could give rise to customary international law. It further noted that ICJ had not recognized the principle as a norm that had to be taken into consideration.[172]

(*c*) In *Korea—Measures Affecting Government Procurement* (a Panel Report, which was not appealed), the Panel said with regard to article 48 of the 1969 Vienna Convention that the initial concept of error "has developed in customary international law through the case law of the Permanent International Court of Justice and of the International Court of Justice", and was then codified into the Convention. It concluded, "Since this article has been derived largely from case law of the relevant jurisdiction, the PCIJ and the ICJ, there can be little doubt that it presently represents customary international law."[173] The Panel moreover stated, in a footnote, that article 65 of the *Vienna Convention* "does not seem to belong to the provisions of the Vienna Convention which have become customary international law", but did not provide any reasoning apart from referring a case of the European Court of Justice that makes a similar succinct statement.[174]

78. In other WTO cases, a pronouncement about rules of customary international law was made without accompanying analysis or references, for example in *European Communities—Regime for the Importation, Sale and Distribution of Bananas (EC—Bananas III)*, where the Appellate Body had noted that "[n]othing in … customary international law or the prevailing practice of international tribunals … prevents a WTO member from determining the composition of its delegation in Appellate Body proceedings."[175]

79. The case law of inter-State arbitral tribunals, such as those under annex VII to the United Nations Convention on the Law of the Sea, as well as other *ad hoc* tribunals such as the Iran–United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and tribunals in the field of investment protection,[176] will also need to be examined as the topic proceeds.

### 2. Regional courts

80. Regional courts have likewise not infrequently determined the existence or otherwise of rules of customary international law, usually in the particular context of interpreting and applying their own specific treaties.

81. In its Advisory Opinion of 2009 regarding the interpretation of article 55 of the American Convention on Human Rights, the Inter-American Court of Human Rights was called on to decide, *inter alia*, whether a procedural right to appoint judges *ad hoc* to the Court in contentious cases originating in individual petitions had the status of customary international law. Observing first the definition of international custom in article 38.1 (*b*) of the Statute of the International Court of Justice, the Court went on to cite several cases of ICJ and public international law scholarship:

> In this regard, the case law of the International Court of Justice, as well as the international doctrine, have indicated that this source of law consists of two formative elements. The first, objective in character, is the existence of a general practice created by the States, and performed constantly and uniformly (*usus* or *diuturnitas*). The second element, of a subjective character, refers to the States' conviction that said practice constitutes a legal norm (*opinio juris sive necessitatis*).[177]

82. The Court of Justice of the European Union and the European Court of Human Rights have also had occasion to apply customary international law from time to time.[178] For example, in its decision on admissibility in *Van Anraat v. The Netherlands*, the European Court of Human Rights, after referring extensively to *North Sea Continental Shelf* and *Military and Paramilitary Activities in and against Nicaragua*,[179] stated:

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[170] WTO Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 17.

[171] WTO Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p. 11 and footnote 17.

[172] WTO Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 123.

[173] *Korea—Measures Affecting Government Procurement* (footnote 169 above), para. 7.123; see also para. 7.126.

[174] *Ibid.*, para. 7.126, footnote 769 (referring to Court of Justice of the European Union case C-162/96, *Racke v. Hauptzollamt Mainz*—1998 ECR, I-3655, para. 59).

[175] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, para. 10 (referring to a previous ruling dated 15 July 1997).

[176] See also, for example, Cai, "International investment treaties and the formation, application and transformation of customary international law"; and Milano, "The investment arbitration between Italy and Cuba: The application of customary international law under scrutiny".

[177] Advisory Opinion OC-20/09 (29 September 2009), Series A No. 20, pp. 54–55, para. 48.

[178] See the presentations by Judge Malenovsky of the Court of Justice of the European Union in "Le juge et la coutume internationale: perspective de l'Union européenne et de la Cour de justice"; and Judge Ziemele of the European Court of Human Rights in "Customary international law in the case law of the European Court of Human Rights—The method".

[179] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Application No. 65389/09, decision on admissibility, 6 July 2010, paras. 35–36, 87–92.

It is possible for a treaty provision to become customary international law. For this, it is necessary that the provision concerned should, at all event potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law; that there be corresponding settled State practice; and that there be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio iuris sive necessitatis*).[180]

### 3. Domestic courts

83. The Special Rapporteur continues to seek materials concerning the approach of domestic courts to the identification of rules of customary international law. Such information would be useful at any stage, particularly before he prepares his second report, in early 2014. Some valuable information may be found in the extensive writing on the subject.[181]

84. While there may be much to learn from the approach of domestic courts, it should be borne in mind that each domestic court operates within the particular confines of its own domestic (constitutional) position. The extent and manner in which customary international law may be applied by the domestic courts is a function of internal law. Moreover, domestic judges are not necessarily experts or even trained in public international law; and domestic courts may be influenced by their own State's view of whether a particular rule of customary international law exists, and are anyway likely to (and perhaps should) adopt a cautious approach to developing the law.[182]

85. It might be worthwhile to refer at this stage to a number of well-known judgments of domestic courts that relate to the present topic. These suggest that, in general, domestic courts[183] may largely seek to follow ICJ's approach.

(*a*) Courts in the United Kingdom have sought to identify the rules of customary international law on many occasions. While they have tended to follow the approach of ICJ, the judgments do not always go into the matter in depth.[184] In a recent High Court case, the judge accepted (as did the Government) that the prohibition of torture was a rule of *jus cogens*, citing *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* to that effect, but could find no customary rule of international law that prohibited the imposition in domestic law of a rule of limitation in civil actions.[185] In so finding, Judge McCombe referred back to a passage in his earlier judgment in the same case, in which he had stated, "To establish a rule of customary international law (such as that for which the claimant contends), it needs to be shown that the relevant State practice is 'both extensive and virtually uniform' (*North Sea Continental Shelf Cases* (1969), *I.C.J. Reports* pp. 3, 44, paragraphs 74 and 77)."[186] In *R. v. Jones (Margaret)*, the House of Lords found that, by the end of the twentieth century, the crime of aggression was a crime under customary international law; in reaching this conclusion, Lord Bingham had regard to a wide range of materials ("the major milestones"),[187] including draft treaties, resolutions of international organizations, the work of the Commission, the 1986 judgment of ICJ in *Military and Paramilitary Activities in and against Nicaragua*, and the writings of Brownlie.[188]

(*b*) The Supreme Court of Singapore ruled in *Yong Vui Kong v. Public Prosecutor* (2010) that "there is a lack of extensive and virtually uniform State practice to support … [the] contention that CIL [(customary international law)] [presently] prohibits the MDP [(mandatory death penalty)] as an inhuman punishment".[189] Referring to the Statute of the International Court of Justice and several of the Court's judgments on the approach to ascertaining a rule of customary international law, the Court said, "Extensive and virtually uniform practice by all States … together with *opinio juris*, is what is needed for the rule in question to become a rule of CIL".[190] It further explained that judicial decisions and expert opinions may serve as "subsidiary means for determining the existence or otherwise of rules of CIL".[191]

(*c*) In *Winicjusz*, when determining whether there was in customary international law an exception to State

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[180] *Ibid.*, para. 88.

[181] See, e.g., Stirn, President of the Litigation (Judicial) Division of the State Council (France), "La place de la coutume internationale en droit public français"; Paulus, Judge, Federal Constitutional Court (Germany), "The judge and international custom" (see also *Non-State Actors and International La*w, vol. 4, No. 1 (2004)); and Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*.

[182] Lord Hoffman, in his speech in the House of Lords in the *Jones* and *Mitchell* cases, referred to academic comment suggesting that the Italian Supreme Court in *Ferrini* had "given priority to the values embodied in the prohibition of torture over the values and policies of the rules of State immunity", and continued: "if the case had been concerned with domestic law, [this] might have been regarded by some as 'activist' but would have been well within the judicial function ... But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other States." (*Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia); Mitchell and others v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] UKHL 26, at para. 63). Others, on the other hand, have suggested that domestic judges have an important role in the development of customary international law (Roberts, "Comparative international law? The role of national courts in creating and enforcing international law").

[183] Wildhaber and Breitenmoser, "The relationship between customary international law and municipal law in Western European countries", p. 163.

[184] For example, in *Khurts Bat v. The Investigating Judge of the German Federal Court*, a case concerning the customary international law on special missions, the Divisional Court considered it sufficient to note, "It was agreed [between the parties] that under rules of customary international law Mr. Khurts Bat was entitled to inviolability of the person and immunity from suit if he was travelling on a Special Mission sent by Mongolia to the United Kingdom with the prior consent of the United Kingdom": [2011] EWHC 2029 (Admin); All ER (D) 293; ILR 147 (2012), para. 22.

[185] *Mutua and Others v. Foreign and Commonwealth Office* [2012] EWHC 2678 (QB), paras. 154–159.

[186] *Mutua and Others v. Foreign and Commonwealth Office* [2011] EWHC 1913 (QB), para. 87.

[187] [2006] UKHL 16; [2007] 1 AC 136, para. 13.

[188] *Ibid.*, paras. 13–19. See also *Regina v. Immigration Officer at Prague Airport* [2004] UKHL 55, para. 23 (Lord Bingham); *Binyan Mohamed* [2009] 1 W.L.R. 2579, p. 164 (Lord Bingham).

[189] ILR, vol. 143, p. 418, para. 98. Referring in detail to an "extensive survey of the status of the death penalty worldwide", the Court explained that "although the majority of States in the international community do not impose the MDP for drug trafficking, this does not make the prohibition against the MDP a rule of CIL. Observance of a particular rule by a majority of States is not equivalent to extensive and virtually uniform practice by all States" (p. 417, para. 96).

[190] *Ibid.*, p. 418, para. 98.

[191] *Ibid.*, p. 417, para. 97.

immunity for tortuous acts committed by armed forces on the territory of the forum State, the Polish Supreme Court stated that the content of customary international law was to be determined according to article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice, and that this required establishing two conditions:

> (1) the widespread repetition by States of similar international acts over time (State practice) and (2) with a sense of legal obligation (*opinio juris*)... the relevant legal materials, which may be used in the above determination, include the provisions of the European convention on State immunity ("Basel Convention") and United Nations conventions, case law of international courts, decisions of national courts, foreign law and legal literature.[192]

Relying on voluminous information, the Court concluded that a rule of customary international law providing for exemption from State immunity in cases of serious violations of human rights (including in the course of armed conflicts) has not yet emerged as "this practice is by no means universal";[193] it moreover found, on the basis of some State practice, that such a new exception was possibly in the process of formation.

(*d*) In South Africa, the Constitutional Court in *Kaunda and Other v. President of the Republic of South Africa and Others* (2004) relied on a report of the Commission to conclude that "presently this is not the general practice of States" that diplomatic protection is recognized as a human right, and that no such rule of customary international law may thus be said to exist.[194] Judge Ngcobo added, in a separate opinion:

> 148. One of the greatest ironies of customary international law is that its recognition is dependent upon the practice of States evincing it. Yet at times States refuse to recognise the existence of a rule of customary international law on the basis that State practice is insufficient for a particular practice to ripen into a rule of customary international law. In so doing, the states deny the practice from ripening into a rule of customary international law.
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> 149. The practice of imposing a legal duty to exercise diplomatic protection for an injured national or a national threatened by an injury by a foreign State, upon the national's request, is a victim of this irony. Despite numerous countries which impose this legal duty in their constitutions, there is still a reluctance to recognise this practice as a rule of customary international law. It remains a matter of an exercise in the progressive development of international law.[195]

(*e*) The *Paquete Habana* case of 1900 remains the foundational United States Supreme Court case with regard to the types of materials that are relevant for conducting an analysis as to whether a rule of customary international law exists. In order to reach the conclusion in that case that "by an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war", the Court sought to "trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment".[196] It thus surveyed acts of Governments (such as orders, treaties and judgments), as well as "the works of jurists and commentators, who by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat ... for trustworthy evidence of what the law really is",[197] and made its determination following this "review of the precedents and authorities on the subject".[198]

(*f*) In El Salvador, the Supreme Court of Justice referred to the formation of customary international law in a 2007 constitutional case that dealt with the constitutionality of an article in the country's Labour Code (*Código de Trabajo*) in the light of the right to a minimum wage. When discussing the legal significance of an international declaration as opposed to an international treaty, the Court noted:

> International declarations perform an indirect normative function, in the sense that they propose a non-binding but desirable conduct. ... Declarations anticipate an *opinio juris* (a sense of obligation) which States must adhere to with a view to crystallizing an international custom in the medium or long term … international declarations, even if not binding, contribute significantly to the formation of binding sources of international law, whether by anticipating the binding character of a certain State practice, or by promoting the conclusion of a treaty based on certain recommendations [included in such declarations].[199]

(*g*) The Special Supreme Court of Greece has stated in *Margellos and Others v. Federal Republic of Germany* (2002):

> In determining the existence of such rules [i.e. generally accepted rules of international law] it is necessary to establish the existence of generalized practice in the international community [*sic*] acknowledging the acceptance that the rule has been formulated as a binding legal rule

referring in this context to article 38.1 of the Statute of the International Court of Justice.[200] It further noted that

> in determining the existence of such a rule, recourse may be had to appropriate evidence such as international conventions, the records and correspondence of international organizations, judgments of international and national tribunals, legislative texts by States, diplomatic correspondence, written legal opinions by legal advisers of international organizations and States, as well as codified texts of international organizations, international committees and institutes of international law. Such data should be examined both individually and as a whole.[201]

Taking into consideration information brought before it by the Hellenic Institute of International and Foreign Law, as well as judgments of the European Court of Human Rights and ICJ, international instruments including texts produced by the Commission, national case law and legislation, and writings of experts, the Court then found that the state of development of international law at that time afforded Germany State immunity in proceedings relating

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[192] *Winicjusz v. Federal Republic of Germany*, Supreme Court (Civil Chamber), case No. CSK 465/09, 29 October 2010, *Polish Yearbook of International Law*, 30 (2010), pp. 299–303.

[193] *Ibid.*, p. 303.

[194] ILR, vol. 136, *Kaunda and others v. The President of the Republic of South Africa and others* (4 August 2004), pp. 462 *et seq.*, paras. 25–29.

[195] *Ibid.*, p. 496.

[196] *Paquete Habana, United States Reports*, vol. 175, p. 686 (1900).

[197] *Ibid.*, p. 700.

[198] *Ibid.*, p. 708.

[199] Supreme Court of Justice, case No. 26-2006 (12 March 2007), pp. 14–15 (Part VI.2.A).

[200] *Margellos and Others v. Federal Republic of Germany*, Judgment No. 6/2002, 17 September 2002 (2007), ILR vol. 129, p. 528, para. 9 (the term "international community" does not accurately translate the original text; the proper translation should be "international legal order").

[201] *Ibid.*

to tortious liability arising from acts of the German armed forces (in this case, those allegedly committed in a Greek village in 1944).[202]

(*h*) The German Federal Constitutional Court, when called upon to decide in the *Argentine Necessity* case (2007) whether there was a "general rule of international law"[203] that entitled a State temporarily to refuse to meet private-law payment claims due towards private individuals by invoking State necessity declared because of inability to pay, stated first, "Whether a rule is one of customary international law, or whether it is a general legal principle, emerges from international law itself, which provides the criteria for the sources of international law".[204] It then declared that

> [i]nvocation of State necessity is recognised in customary international law in those legal relationships which are exclusively subject to international law; by contrast, there is no evidence for a State practice based on the necessary legal conviction (*opinio juris sive necessitatis*) to extend the legal justification for the invocation of State necessity to relationships under private law involving private creditors.[205]

Both propositions were supported by reference to national and international legal materials. These included the Commission's work on State responsibility (in particular art. 25 of the draft articles on State responsibility[206] that was described as "now generally recognised in legal literature and in the view of international courts and tribunals ... [as] constitut[ing] applicable customary international law"[207]), judgments of ICJ and other international tribunals, national case law and scholarly literature.[208] The Court made clear that sufficient (uniform) State practice must be identified in order to establish that a rule of customary international law indeed exists.[209]

### D. The work of other bodies

86. Like the Commission, the Institute of International Law (*Institut de droit international*) and the International Law Association, both founded in 1887, have each addressed the formation of customary international law in the course of their work on various topics. But like the Commission itself, given their respective functions, they have—with the notable exception of the Association's work between 1984 and 1986 and 2000 (see paras. 89–91 below)—not often had to face squarely the issues raised by this topic.

87. The Institute's purpose, as set out in its statutes, is "to promote the progress of international law".[210] Among the topics that have recently been considered by the Institute is one concerning problems arising from a succession of codification conventions, including "questions pertaining to the relationship between treaty and custom". *Conclusion 2 (Effect of Codification Provisions)* reads:

> A codification convention may contain provisions (hereinafter referred to as "codification provisions") which are declaratory of customary law, or which serve to crystallise rules of customary law, or which may contribute to the generation of new rules of customary law in accordance with the criteria laid down by the International Court of Justice.[211]

88. Another topic considered by the Institute concerned the elaboration of general multilateral conventions and of non-contractual instruments.[212] The conclusions are of considerable interest to the present topic as regards the "normative function or objective" of General Assembly resolutions.

89. The work of the International Law Association, between 1984/85 and 2000, culminated in the adoption in 2000 of the London Statement of Principles Applicable to the Formation of General Customary International Law (with commentary).[213] The Association's work, which consists of 33 principles with commentaries, has received both support and criticism, including at the time of its adoption in 2000.[214]

90. The Association's Committee had a distinguished composition. It was chaired successively by Mr. Zemanek (Austria) and, from 1993, Mr. Mendelson (United Kingdom); the latter had previously been Rapporteur. The first report of the Rapporteur (1986) set out a list of topics, which remains valuable, suggested an approach to "modes of custom-formation", and contained an appendix by Mr. Mendelson on "Formation of international law

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[202] *Ibid.*, pp. 529–533, paras. 12–15. According to the operative paragraph of the judgment: "In the present state of the development of international law, there continues to exist a generally accepted rule of international law according to which proceedings cannot be brought against a foreign State before the courts of another State for compensation for an alleged tort committed in the forum State in which the armed forces of the defendant State allegedly participated [the original adds "in any way"] either in a time of war or in a time of peace" (p. 533).

[203] ILR, vol. 138, p. 1. "General rules of international law" is a term used in art. 25 of the Basic Law of the Federal Republic of Germany, which encompasses customary international law and general principles of law.

[204] ILR, vol. 138, p. 10.

[205] *Ibid.*

[206] *Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76.

[207] ILR, vol. 138, p. 11.

[208] *Ibid.* For the finding that an "inspection of national case-law on the question of State necessity also fails for lack of agreement to suggest that the recognition of State necessity impacting on private-law relationships is established in customary law" (p. 17), the Court relied on an expert report which evaluated the practice of national courts on the matter, instead of conducting its own analysis.

[209] *Ibid.* Reference to the centrality of State practice is also found in the dissenting opinion of Judge Lubbe-Wolff ("Evidence from State practice, from which the plea of necessity's validity under customary law follows…" (p. 26)).

[210] Institute of International Law, *Yearbook 1877* and available from www.idi-iil.org. Article 1 of the Statute of the Institute provides in part that the purpose of the Institute is "to promote the progress of international law [*favoriser le progrès du droit international*] by striving to formulate the general principles of the subject, in such a way as to correspond to the legal conscience of the civilized world; by lending its cooperation in any serious endeavour for the gradual and progressive codification of international law; by seeking official endorsement of the principles recognized as in harmony with the needs of modern societies; ..." (English translation of original French).

[211] *Ibid.*, vol. 66, Part II, Session of Lisbon, 1995, p. 435, *Problems Arising from a Succession of Codification Conventions on a Particular Subject*, resolution adopted on 1 September 1995; see also Conclusions 10, 12 and 13, pp. 441 and 443, and the reports of the First Commission, Rapporteur Sir Ian Sinclair.

[212] *Ibid.*, vol. 62, Part II, Session of Cairo, 1987, *The Elaboration of General Multilateral Conventions and of Non-contractual Instruments Having a Normative Function or Objective*, resolution adopted on 17 September 1987; see also *ibid.*, vol. 61, Part I, Session of Helsinki, 1985, the reports of the Thirteenth Commission, Rapporteur Krzysztof Skubiszewski, pp. 29 *et seq.*.

[213] The London Statement of Principles (footnote 9 above); see *Report of the Sixty-ninth Conference, 2000*, pp. 39, 712–777. For the plenary debate, see pp. 922–926.

[214] See the Working Session of the Committee on 28 July 2000: *ibid.*, pp. 778–790.

and the observational standpoint".[215] The second report of the Rapporteur (1988) had an appendix on terminology, which included discussion of the expression "(general) customary international law".[216] The third and fourth reports dealt respectively with the subjective and the objective elements in customary international law.[217]

91. The Final Report of the Committee begins by mentioning "inherent serious difficulties in setting out rules on this subject". There then follow 33 principles (some subdivided) and associated commentary, forming the London Statement of Principles Applicable to the Formation of General Customary International Law.[218] The Statement was divided into five parts, entitled respectively: I–Definitions; II–The objective element (State practice); III–The subjective element; IV–The role of treaties in the formation of customary international law; and V–The role of resolutions of the UN General Assembly and of international conferences in the formation of customary international law. The matters covered in the Statement include use of terms; what types of acts constitute State practice; the "State" for the purpose of identifying State practice; the practice of intergovernmental organizations; density of practice; the subjective element (*opinio juris*); the role of treaties; and the role of General Assembly resolutions and resolutions of international conferences. The relevant principles and commentary included in the Statement of Principles, and reactions thereto, will be referred to by the Special Rapporteur, as appropriate, in future reports.

92. The ICRC project on customary international humanitarian law, which began in 1995, led to the publication, nearly a decade later and after widespread research and various consultations, of the study entitled *Customary International Humanitarian Law*.[219] One of its authors has explained that "the approach taken in the study to determine whether a rule of general customary international law exists was a classic one, set out by the International Court of Justice, in particular in the *North Sea Continental Shelf* cases", with relevant State practice selected and compiled, and then assessed together in light of the requirement of *opinio juris*.[220] The study has been much discussed;[221] its publication provoked some strong reactions, both private[222] and governmental,[223] some criticizing it for not actually identifying custom in accordance with its stated methodology.[224] It was robustly defended by the authors.[225] The Committee continues, through a partnership with the Red Cross of the United Kingdom, to update its database of relevant national practice from some ninety States.[226]

93. The American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States of 1987*[227] distinguishes between "Sources of international law" (Section 102) and "Evidence of international law" (Section 103). Section 102 (2) states that:

> Customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation.

Comments *b*, *c*, *d* and *e* to section 102 contain concise elaborations of the relevant basic propositions, as do reporters' notes 2 to 5.

### E. Writings

94. There is extensive writing on the formation and evidence of customary international law,[228] both monographs on the topic in general, as well as on particular aspects and articles. In addition, general textbooks on

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[215] *Report of the Sixty-Third Conference held at Warsaw* (footnote 37 above), p. 936.

[216] *Ibid.*, p. 949. See also the debate in the Working Session of the Committee on 26 August 1988, in which many spoke for or against including the word "general" in the title of the topic (p. 960).

[217] Third interim report of the Committee, *Report of the Sixty-seventh Conference held at Helsinki, Finland, 12 to 17 August 1996* (London, 1996), pp. 623–646; Fourth interim report of the Committee, *Report of the Sixty-eighth Conference held in Taipei, 24–30 May 1998* (London, 1998), pp. 321–335. The Fifth and Sixth interim reports were incorporated into the Final Report (*Report of the Sixty-ninth Conference held in London, 25–29th July 2000* (London, 2000), p. 712).

[218] See paragraph 7 and footnote 9 above.

[219] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*. See also paragraph 52 above.

[220] Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict"; see also the introduction to the study.

[221] Wilmshurst and Breau, *Perspectives on the ICRC Study on Customary International Humanitarian Law*; Maybee and Chakka (eds.), *Custom as a Source of International Humanitarian Law*; Tavernier and Henckaerts (eds.), *Droit international humanitaire coutumier: enjeux et défis contemporains*.

[222] See, e.g., Meron, "Revival of customary humanitarian law", pp. 833–834; Aldrich, "Customary international humanitarian law–An interpretation on behalf of the International Committee of the Red Cross"; Dinstein, "The ICRC customary international humanitarian law study"; Bothe, "Customary international humanitarian law: some reflections on the ICRC study"; MacLaren and Schwendimann, "An exercise in the development of international law: The new ICRC study on customary international humanitarian law"; Cryer, "Of custom, treaties, scholars and the gavel: The influence of the International Criminal Tribunals on the ICRC customary law study"; and Fleck, "Die IKRK-Gewohnheitsrechtsstudie: polarisierend oder konsensbildend?".

[223] See paragraphs 48–53 above.

[224] See, e.g., footnotes 100 and 101 above.

[225] Henckaerts, "Customary international humanitarian law—A rejoinder to Judge Aldrich"; "The ICRC customary international humanitarian law study—A rejoinder to Professor Dinstein"; and "Customary international humanitarian law—A response to US comments".

[226] See www.icrc.org/customary-ihl/eng/docs/Home.

[227] *Restatement of the Law Third: The Foreign Relations Law of the United States*, vol. 1, St. Paul (Minnesota), American Law Institute, 1987. See also Massey, "How the American Law Institute influences customary law: the reasonableness requirement of the restatement of foreign relations law".

[228] The Library at the United Nations Office at Geneva has prepared a helpful bibliography on customary international law, available from http://libraryresources.unog.ch/legal/ILC. The Special Rapporteur likewise intends to prepare a select bibliography, based initially on that contained in annex A to the Commission's 2011 Report (*Yearbook … 2011*, vol. II (Part Two)), to be added to and updated as the topic proceeds. Among the general textbooks with extensive bibliographies are Dailler, Forteau and Pellet, *Droit international public*, pp. 353–379; Diez de Velasco Vallejo, *Instituciones de derecho internacional público*, pp. 136–149; Clapham, *Brierly's Law of Nations*, pp. 57–63; Crawford, *Brownlie's Principles of Public International Law*, pp. 23–30; Shaw, *International Law*, pp. 72–92; Kuznetsov and Tuzmukhamedov, *International Law—A Russian Introduction*, pp. 70–79; Cassese, *International Law*, pp. 153–169; von Glahn and Taulbee, *Law Among Nations: An Introduction to Public International Law*, pp. 53–61; Sur, *International Law, Power, Security and Justice*, pp. 165–177; Conforti and Labella, *An Introduction to International Law*, pp. 31–51; Murphy, *Principles of International Law*, pp. 92–101; Verhoeven, *Droit international public*, pp. 318–346; Alland, *Droit international public*, pp. 268–297; Dupuy and Kerbrat, *Droit international public*, pp. 360–372; Carreau and Marrella, *Droit international*, pp. 301–324; Combacau and Sur, *Droit international public*, pp. 54–75.

public international law invariably deal with the topic, if only briefly. The aim of the present section of the report is simply to indicate the variety and richness of the writings in this field, without taking a position on the theories put forward.

95. It is interesting to note that various approaches have been proposed in the literature, since the time of classical authorities such as Suarez and Grotius, with regard to how rules of customary international law are generated and how they are to be identified. These have sometimes been labelled "traditional" and "modern" approaches, and they have often been considered to be in sharp opposition.

96. The "traditional" approach, reflected in article 38, paragraph 1 (*b*) of the Statute of the International Court of Justice, has been widely understood as requiring two components for the formation of a rule of customary international law: (*a*) general State practice and (*b*) acceptance of such practice as law. The former is sometimes referred to as the "objective" (material) element and concerns the consistency and uniformity of practice over time; the latter (also known as *opinio juris sive necessitatis*, "an opinion of law or necessity") is referred to as the "subjective" (psychological) element and relates to the motives behind such behaviour of States.[229] This approach, recognized as the "dominant position in the mainstream theory of customary international law",[230] regards each of the two elements as indispensable; at the same time, within this bipartite conception it seems to award primacy to State practice, in the sense that "custom begins with 'acts' that become a 'settled practice'; that practice may then give rise to the belief that it had become obligatory".[231] In other words, "we must look at what states actually do in their relations with one another, and attempt to understand why they do it, and in particular whether they recognize an obligation to adopt a certain course".[232] Indeed, this approach remains loyal to a classical understanding of customary law formation as an empirical, decentralized, and bottom-up process;[233] when situated on the international plane, customary

[229] See, e.g., Thirlway, "The sources of international law", p. 102 ("The traditional doctrine is that the mere fact of consistent international practice in a particular sense is not enough, in itself, to create a rule of law in the sense of the practice; an additional element is required. Thus classical international law sees customary rules as resulting from the combination of two elements: an established, widespread, and consistent practice on the part of States; and a psychological element known as the *opinio juris sive necessitatis* (opinion as to law or necessity), usually abbreviated to *opinio juris*"); Hudson, *The Permanent Court of International Justice, 1920–1942: A Treatise*, p. 609 ("The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time."); Guzman, *How International Law Works*, p. 184 ("The traditional definition of CIL is strictly doctrinal, in the sense that a particular norm is said to be a rule of CIL if it satisfies a two-part doctrinal test. The most commonly cited version of this definition is provided by article 38 of the Statute of the ICJ."); Conforti and Labella, *An Introduction to International Law*, p. 31; Sur, *International Law, Power, Security and Justice: Essays on International Law and Relations*, pp. 174; von Glahn and Taulbee, *Law Among Nations: An Introduction to Public International Law*, pp. 54–55; Rosenne, *Practice and Methods of International Law*, p. 55; Crawford, *Brownlie's Principles of Public International Law*, p. 23; Bederman, "Acquiescence, objection and the death of customary international law", p. 44; Stern, "Custom at the heart of international law", p. 91; and Boyle and Chinkin, *The Making of International Law*, p. 41.

[230] Voyiakis, "Customary international law and the place of normative considerations", p. 169; see also, for example, Danilenko, *Law-Making in the International Community*, p. 81 ("Although many aspects of custom formation in international law remain controversial, there is almost unanimous agreement that a legitimate customary law-making process requires the presence of two basic elements: practice and acceptance of this practice as law."); Iwasawa, *International Law, Human Rights, and Japanese Law: The impact of International Law on Japanese Law*, p. 35 ("In accordance with the view dominant in international law, Japanese courts maintain that both general practice of States and *opinio juris* are necessary for a rule to become customary international law."); Bernhardt, "Custom and treaty in the law of the sea", p. 265 ("Some legal writers have expressed the view that only practice is important, others have occasionally taken the position that 'instant law' can be created without former practice. But the prevailing view is that practice and *opinio iuris* remain the two essential elements of customary law."); Bradley and Gulati, "Withdrawing from international custom", p. 209 ("The standard definition of CIL is that it arises from the practices of nations followed out of a sense of legal obligation. Under this account, there are two elements to CIL… This is the conventional definition."); Simma and Alston, "The sources of human rights law..." (footnote 80 above), p. 98 (calling the traditional approach "the established concept"); Treves, "Customary international law", p. 939, para. 8 (referring to the traditional approach as the "prevailing view"); Kolb, "Selected problems in the theory of customary international law", p. 123 ("The dominant view still constructs custom around the safe havens of the two elements, being ready only to modulate somewhat their relation to one another and their way of operating.").

[231] Schachter, "New custom: power, *opinio juris* and contrary practice", p. 531 (describing the "generally accepted view of the relation of practice and *opinio juris*"). See also, for example, Simma and Alston, "The sources of human rights law..." (footnote 80 above), p. 88 ("According to the traditional understanding of international custom, the emphasis was clearly on the material, or objective, of its two elements, namely State *practice* … practice had priority over *opinio juris*; deeds were what counted, not just words."); Fitzmaurice, "The law and procedure of the International Court of Justice, 1951–54: general principles and sources of law", p. 68 ("It is believed to be a sound principle that, in the long run, it is only the actions of States that build up practice, just as it is only practice ('constant and uniform', as the Court has said) that constitutes a usage or custom, and builds up eventually a rule of customary international law."); Villiger, *Customary International Law and Treaties*, p. 16 ("State practice is the raw material of customary law."); Jennings and Watts, *Oppenheim's International Law*, p. 26 ("the formulation in the [International Court of Justice] Statute serves to emphasise that the substance of this source of international law is to be found in the practice of States."); D'Amato, "Trashing customary international law", p. 102; Wolfke, *Custom in Present International Law*, p. 53; Akehurst, "Custom as a source of international law", p. 53; Tunkin, "Remarks on the juridical nature of customary norms of international law", p. 421; Roberts, "Traditional and modern approaches to customary international law: a reconciliation", p. 758; Danilenko, "The theory of international customary law", pp. 19–20; and Petersen, "Customary law without custom?..." (footnote 80 above), p. 278. But see Kunz, "The nature of customary international law", p. 665 ("International custom is, therefore, a procedure for the creation of norms of general international law. It is international law which lays down the conditions under which the procedure of custom creates valid norms of general international law. These conditions are two: usage and *opinio juris*; they have equal importance. This is admitted overwhelmingly by the writers, and proved by the practice of states and of international tribunals and courts").

[232] Clapham, *Brierly's Law of Nations*, p. 57.

[233] See, e.g., Henkin, *How Nations Behave: Law and Foreign Policy*, p. 34 ("The process of making customary law is informal, haphazard, not deliberate, even partly unintentional and fortuitous … unstructured and slow."); Ted Stein discussing "Custom and treaties", in Cassese and Weiler, *Change and Stability in International Law-Making*, p. 12 (describing the classical process for generating universal rules of international law as "unwritten … unconscious … accreted, it was generated over time through the accumulation of discrete instances … always generated through bilateral exchanges … generated through processes that were not influences by the procedures of any established forum"); and D'Aspremont, *Formalism and the Sources of International Law*, p. 162 ("According to traditional views, customary international rules are identified on the basis of a bottom-up crystallization process that necessitates a concurring and constant behaviour of a significant amount of States accompanied by their belief (or intent) that such a process corresponds with an obligatory command of international law.").

international law is to be ascertained through inductive reasoning[234] that is both State-centred[235] and devoid of independent normative considerations. It is said that awarding legal force only to actual behaviours and expectations that enjoy a wide degree of acceptance within the international community assures the stability, reliability and legitimacy of customary international law.[236]

97. Some, however, have challenged the "traditional" approach, arguing that it is doctrinally incoherent and riddled with "inner mysteries"[237] that make it difficult, if not impossible, to apply in practice.[238] Other critics have stressed that customary international law so constructed "is of too slow growth to keep pace with the changing relations of the States which it endeavors to regulate",[239] as well as fundamentally inefficient in doing so.[240] It is further claimed that the "traditional" doctrine embodies a severe democratic deficit,[241] that its positivistic nature

[234] See, e.g., Condorelli, "Customary international law: The yesterday, today, and tomorrow of general international law", p. 148 ("These wise, though approximate and indicative, formulas, are seeking in essence to explain what 'induction' means: it is the operation that consists in gathering evidence to prove the social effect of the rules in question.").

[235] See, e.g., Thirlway, *International Customary Law and Codification: An examination of the continuing role of custom in the present period of codification of international law* p. 58 ("The substance of the practice requirement is that States have done, or abstained from doing, certain things in the international field."); Benson, "François Gény's doctrine of customary law", p. 268 ("Custom is now understood in terms of the process of its creation, and this process is explained from the wholly internal and fully autonomous standpoint of the States which themselves bring into existence and recognize as binding, authoritative customary rules."); Villiger, *Customary International Law and Treaties*, pp. 16–17 ("These instances of practice have to be attributable to States, for which reason the practice of international organizations or individuals is excluded."); Baker, "Legal recursivity and international law: rethinking the customary element", p. 5 ("Customary international law is said to depend upon the consent of nation States—and is thus, at least in the traditional understanding explained here, very State-centric."); and Weisburd, "Customary international law: the problem of treaties", p. 5.

[236] See, e.g., De Visscher, *Theory and Reality in Public International Law*, p. 161 ("What gives international custom its special value and its superiority over conventional institutions, is the fact that, developing by spontaneous practice, it reflects a deeply felt community of law. Hence the density and stability of its rules."); Simma and Alston, "The sources of human rights law..." (footnote 80 above), pp. 88–89 ("Rules of customary law thus firmly established through inductive reasoning based on deeds rather than words … had, and continue to have, several undoubted advantages. They are hard and solid; they have been carefully hammered out of the anvil of actual, tangible interaction among States; and they allow reasonably reliable predictions as to future State behaviour."); Thirlway, "The sources of international law", p. 76 ("Custom … grows slowly—though not always as slowly as heretofore—but it grows through the actual practice of States and therefore tends to reflect accurately the balance of their conflicting interests and to represent their considered intentions."); and Bederman, *Custom As a Source of Law*, p. 162.

[237] Jennings, "The identification of international law", pp. 4–6.

[238] See, e.g., Henkin, *International Law: Politics and Values*, p. 29 ("The definition is easy to state but not easy to interpret and apply, and it continues to raise difficult questions, some 'operational', some conceptual-jurisprudential."); Goldsmith and Posner, "Notes toward a theory of customary international law", p. 53 ("The standard definition of CIL … raises perennial, and largely unanswered, questions."); Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law*, pp. 130–131 ("One problem with the traditional bipartite conception of customary international law is that it involves the apparent chronological paradox that States creating new customary rules must believe that those rules already exist, and that their practice, therefore, *is* in accordance with law."); Guzman and Meyer, "Customary international law in the 21st century", p. 199 ("Traditional critics of CIL have pointed out that the definition of CIL is circular, that rules of CIL are vague and thus difficult to apply, and that we lack standards by which we can judge whether the two requirements for a rule of CIL have been met."); Kolb, "Selected problems in the theory of customary international law", pp. 137–141; and D'Amato, *The Concept of Custom in International Law*, pp. 7–10, 73–74.

[239] Fenwick, "The sources of international law", p. 397. See also, for example, van Hoof, *Rethinking the Sources of International Law*, p. 115 ("Customary international law simply is to[o] slow to provide the quick regulation required in the new areas which international law now has to cover."); De Visscher, "Reflections on the present prospects of international adjudication", p. 472 ("It cannot be denied that the traditional development of custom is ill suited to the present pace of international relations."); Kolb, "Selected problems in the theory of customary international law", pp. 124–125 (referring to the traditional approach when saying that "customary law is often too burdensome or simply not forthcoming at a given moment [when there is] an urgency of creating general norms of international law"); and Friedmann, *The Changing Structure of International Law*, pp. 121–124.

[240] See, e.g., Reisman, "The cult of custom in the late 20th century" (suggesting that custom is "an anachronism and an atavism" (p. 133), asking "[i]f purposive legislation is so important an instrument for clarifying and implementing policy in an industrial and science-based civilization such as ours, how can we dispense with it in the much more complicated and varied global civilization?" (p. 134), and concluding that "customary processes of lawmaking cannot deal with the enormous problems facing the world" (pp. 142–143)); McGinnis, "The comparative disadvantage of customary international law", pp. 11–12 (arguing that customary international law "is not well designed to maximize the welfare of people" because it is created by nations, rather than by people, and that it is "not likely to generate efficient norms even for nations" due to the heterogeneity of nations composing the international community); Estreicher, "Rethinking the binding effect of customary international law", pp. 9, 11 and 14 (arguing that "on purely functional grounds, the case for CIL in a Westphalian world is difficult to sustain", and that absent any significant incremental gains, customary international law's costs outweigh its benefits); Fenwick, "The sources of international law", p. 398 ("A further defect of custom as a source of international law is its inability to reorganize a system which is defective as a whole, or even to amend certain parts of it along progressive lines looking into the future."); Kontorovich, "Inefficient customs in international law", p. 921 ("International customs develop in a context lacking the features that direct the development of group norms towards efficiency."); Fon and Parisi, "International customary law and articulation theories: an economic analysis", p. 202 (explaining that "outcomes resulting from reliance on traditional customary norms may systematically fall short of what might be obtainable through articulated norms"); and Palmer, "New ways to make international environmental law", p. 266.

[241] Such arguments may relate to different aspects of the democratic process in different contexts (for example, international versus national); see, e.g., Wheatley, *The Democratic Legitimacy of International Law*, p. 150 ("Custom creates particular problems in terms of democratic legitimacy, as there is no requirement that a particular State consents to the emergence of a new customary norm, or that a majority of States participate in its formation, or that only democratic States participate, or that the practices of States accord with the wills of their respective peoples … Moreover, as customary norms are, by definition, not authoritatively written down, the task of identifying and interpreting, and by implication 'applying', customary obligations often falls to non-State actors, judges, academics, etc., with no requirement to take into account the attitude of the State against whom the norms are opposed."); Schachter, "New custom: power, *opinio juris* and contrary practice", p. 536 ("As a historical fact, the great body of customary international law was made by remarkably few States."); Yasuaki, "Is the International Court of Justice an emperor without clothes?", p. 20; McGinnis, "The comparative disadvantage of customary international law", p. 8 ("A glaring problem with customary international law … is that it has a democratic deficit built into its very definition."); and Dodge, "Customary international law and the question of legitimacy", p. 26 (focusing on the United States legal system but perhaps relevant elsewhere as well when arguing that "[e]ssentially, this legitimacy critique consists of two interrelated points: that the power to apply customary international law gives too much discretion to federal judges—discretion to smuggle into American law whatever '*they regard as* norms of international law'—and that customary international law is not made through a democratically accountable political system.").

does not allow the identification of customary international law to have due regard to the values of the international community, and, moreover, that it might make customary international law incommensurable with basic human rights.[242] Finally, some writers have gone as far as to claim that the "traditional" theory is mere fiction.[243]

98. It is against this backdrop that other approaches to customary international law, sometimes referred to as "modern", have sought to reinterpret the constitutive elements of customary international law and, consequently, to reframe it as a source of international law. Such deviations from the "traditional" doctrine were for some writers an intellectual attempt to "supply the missing theory of custom",[244] while for others a conscious effort "to align our conception of customary law-making with the increased urgency of the substantive concerns that international law needs to address";[245] in either case, suggestions were made to replace the strictly additive (two-element) model of custom formation with a single-element theory, mostly by de-emphasizing one of the two standard requirements or by displacing them altogether. Several writers have called for a reduced role for *opinio juris*, arguing that in most cases widespread and consistent State practice alone is sufficient for constructing customary international law.[246] Others, straying even further from the ordinary notion of customary law, have claimed the opposite—relaxing the practice requirement to a minimum and concentrating instead on the *opinio juris* element,[247] as manifested predominantly in statements made in international fora.[248] This latter approach, which stands at the core of "modern custom" as the term is presently understood, ultimately turns the ascertainment of "new customary international law" into a normative exercise rather than a strictly empirical one. Employing a deductive methodology,[249] it attempts to make customary international law a more rapid and flexible source of international law, one that is able to fulfil a

[242] See, e.g., Klabbers, "The curious condition of custom", p. 34 ("With respect to prescriptions of moral relevance (think in particular of human rights), the traditional concept of custom has lost plausibility."); Pellet, " 'Droits-de-l'hommisme' et droit international", pp. 171–172; Wouters and Ryngaert, "Impact on the process of the formation of customary international law", p. 119 ("The classical positivist approach may … pose serious difficulties for the legal protection and promotion of human rights."); Charlesworth, "Law-making and sources", p. 192 ("International custom in its traditional form gives priority to State consent as the source of the law over normative concepts."); Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective*, p. 72 (referring to the traditional approach to customary international law when saying: "This method of creation being archaic, however, has consequences, for customary law is limited in scope and cannot be used as a legal-political tool. Also, because the basis of customary law is usage, there are limits to the type of norms that can be created."); and Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, p. 41.

[243] See, e.g., Dunbar, "The myth of customary international law", p. 8 ("The myth is in assuming that universal State practice *ipso facto* creates law. Law can only be created by legislation or by the judgment of a court, or, in the case of international law, by a treaty."); Estreicher, "Rethinking the binding effect of customary international law", p. 8 (saying that the traditional account "is, of course, a legal fiction. Consent drawn from silence is a dubious form of consent."); and Kelly, "The twilight of customary international law" ("The premise of CIL is that nations, despite lacking a consensus on values, can nevertheless accept and thereby create binding legal norms without a formal process to determine acceptance. This premise is doubtful" (p. 460). "There is no methodology that will assure an accurate measure of the normative attitudes of States. The means currently in use reduce *opinio juris* to a mere fiction" (p. 469). "Moreover, the entire enterprise of using State practice to construct norms is suspect." (p. 472)).

[244] To borrow the words of D'Amato ("Trashing customary international law", p. 101). Some have suggested that it is the "loose" application of the traditional definition that led to "a new, modern definition [emerging] in the literature" (Chodosh, "Neither treaty not custom: The emergence of declarative international law", p. 88); see also Baker, "Legal recursivity…" (footnote 235 above).

[245] Voyiakis, "A theory of customary international law", p. 6; see also Orrego Vicuña, "Customary international law in a global community: Tailor made?" p. 38 ("It was soon discovered that if customary law could be taken to mean something different from what it had traditionally meant, this was a much easier way to attain the desired goals."); and Roberts, "Traditional and modern approaches to customary international law: a reconciliation", p. 766 ("Modern custom evinces a desire to create general international laws that can bind all States on important moral issues.").

[246] See, e.g., D'Amato, "Customary international law: A reformulation", p. 1 ("My work was considered radical by other scholars; with the passage of time I have reluctantly concluded that it may not have been radical enough. Instead of trying to work within the notion of *opinio juris*, I should have discarded it entirely."); Kopelmanas, "Custom as a means of the creation of international law" ("The first of these [two] conditions [referring to the material and psychological factors in the formation of custom] is in truth the substance of the question which we have put [what is the special process of development which produces custom] (p. 129) … we shall at the same time endeavour to examine the point whether international custom arises only from an activity which is exercised under the impression that it is required by law. There are some very good reasons for doubt on this point." (p. 130)); Kelsen, "Théorie du droit international coutumier", p. 263 (stating a position that he later abandoned, according to which "This theory that the acts constituting the custom must be executed with the intention to fulfill a legal obligation or to exercise a right ... is obviously false."); and Guggenheim, "Les deux éléments de la coutume en droit international", p. 280 ("It is impossible to prove the existence of this [subjective] element. It is therefore appropriate to waive the subjective element."); Mendelson, "The formation of customary international law", p. 289.

[247] See, e.g., Cheng, "Epilogue", p. 223 ("The main thing, therefore, is to recognise that usage (*consuetude*) is only evidential, and not constitutive, of what is commonly called 'international customary law', however else one may wish to label it."); Guzman, "Saving customary international law", p. 153 ("CIL is really about the *opinio juris* requirement and not the practice requirement … A rational choice approach, then, leaves no room for a State practice requirement other than as an evidentiary touchstone to reveal *opinio juris*. Practice can shed light on whether a particular norm is regarded as obligatory, but it does not by itself make it so."); Bernhardt, "Custom and treaty in the law of the sea", p. 266 ("I would even accept that in exceptional circumstances no practice is necessary if a certain rule according to which a certain behaviour is either necessary or prohibited has been universally approved. In so far I would accept the possibility of 'instant law'."); and Lepard, *Customary International Law: A New Theory with Practical Applications*.

[248] See, e.g., Cheng, "United Nations resolutions on outer space: 'instant' international customary law?", p. 37 ("There is no reason why an *opinio juris communis* may not grow up in a very short period of time among all or simply some Members of the United Nations with the result that a new rule of international customary law comes into being among them. And there is also no reason why they may not use an Assembly resolution to 'positivize' their new common *opinio juris*."); and Sohn, " 'Generally accepted' international rules", p. 1074.

[249] See also Lukashuk, "Customary norms in contemporary international law", p. 493 ("What these norms have in common with traditional customary norms consists of unwritten form and *opinio juris*. What distinguishes them is that they do not solidify an already existing practice, but are called upon to launch one. In comparison with norms of the first type, they attach greater relative weight to what ought to be than to what is."); Roberts, "Traditional and modern approaches to customary international law: a reconciliation", p. 763 ("Modern custom derives norms primarily from abstract statements of *opinio juris*—working from theory to practice."); Kolb, "Selected problems in the theory of customary international law", p. 126 ("This deductive custom is therefore something of a 'contra-factual' custom, a concept very far indeed from the classical conception of customary law."); and Simma and Alston, "The sources of human rights law..." (footnote 80 above), p. 89 ("The process of customary law-making is thus turned into a self-contained exercise in rhetoric. The approach now used is *deductive*.").

"utopian potential" and "compensate for the rigidity of treaty law",[250] particularly in the fields of human rights and humanitarian and environmental law.[251] Indeed, "[a] focus on *opinio juris* is appealing to those who want to expand the set of norms that are considered CIL. If one can ignore or downplay the practice requirement, it is possible to argue for the inclusion of any number of moral rights on the roster of CIL rules".[252] Such "conceptual stretching",[253] celebrated as the "new vitality of custom",[254] has also encouraged calls for opening the process of customary law creation to non-State actors, namely, international organizations and their agencies,[255] as well as individuals.[256]

99. The attempts "to revise or 'up-date' custom"[257] have met some fierce criticisms of their own, chiefly among them the claim that "modern custom" is, in fact, not customary international law at all.[258] Adherents of the "trad-

[250] Charlesworth, "The unbearable lightness of customary international law", p. 44. See also, for example, Scharf, "Seizing the 'Grotian moment': Accelerated formation of customary international law in times of fundamental change", pp. 450, 467–468 ("In periods of fundamental change—whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism—rapidly developing customary international law as crystallized in General Assembly resolutions may be necessary for international law to keep up with the pace of other developments (p. 450)… the 'Grotian Moment' minimizes the extent and duration of the State practice that is necessary during such transformative times, provided there is an especially clear and widespread expression of *opinio juris*." (pp. 467–468)); and Schachter, "New custom: power, *opinio juris* and contrary practice", p. 533 (depicting "new CIL" as a response to a demand "in the contemporary international milieu" of "governments [that] have felt the need for new law which, for one reason or another, could not be fully realized through multilateral treaties").

[251] See, e.g., Kammerhofer, "Orthodox generalists and political activists in international legal scholarship", p. 147 ("Because of the perceived incommensurability of what is regarded as traditional or orthodox methods of customary international lawmaking with the humanist goals espoused by the activist scholars, an influential part of human rights and humanitarian legal scholarship has developed a new approach to customary international law for these areas of international law over the past decade."); Wouters and Ryngaert, "Impact on the process of the formation of customary international law" ("It is often argued, especially by human rights–oriented lawyers, that the method of customary law formation in the field of human rights and international humanitarian law is structurally different from the traditional method of customary law formation in public international law" (p. 111). "Classical methods of law formation based on State consent and extensive and uniform State practice may be relaxed somewhat if 'the stakes are high' " (p. 129). "Put differently, State practice is selectively used to justify a customary norm that is not morally neutral" (p. 130).); Hunter, Salzman and Zaelke, *International Environmental Law and Policy*, pp. 312–313 ("As the number of international treaties, declarations and resolutions announcing principles of environmental protection has increased over time, scholars have begun to debate whether customary rules of international environmental law are emerging or have already emerged … These and prospective customary norms face a particular difficulty when subjected to the standard test of customary norms (i.e. consistent State practice and the existence of *opinio juris*) … Nevertheless, these principles are increasingly being recognized in judicial opinions and elsewhere as customary law, perhaps reflecting changing notions of how customary law is made."); Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law. The Precautionary Principle: International Environmental Law Between Exploitation and Protection*, p. 335; Bodansky, *The Art and Craft of International Environmental Law*, pp. 191–204; and Jennings, "Customary law and general principles of law as sources of space law", p. 151.

[252] Guzman, *How International Law Works*, p. 186. See also Simma and Alston, "The sources of human rights law..." (footnote 80 above), p. 83 ("There is a strong temptation to turn to customary law as the formal source which provides, in a relatively straight-forward fashion, the desired answers. In particular, if customary law can be constructed or approached in such a way as to supply the relatively comprehensive package of norms which are applicable to all States, then the debate over the sources of international human rights law can be resolved without much further ado. Given the fundamental importance of the human rights component of a just world order, the temptation to adapt or re-interpret the concept of customary law in such a way as to ensure that it provides the 'right' answers is strong, and at least to some, irresistible."); and Meron, "International law in the age of human rights", p. 377.

[253] Baker, "Legal recursivity…" (footnote 235 above), p. 31 (employing a term "coined by the social scientist Giovanni Sartori to describe the distortions that result when established concepts are introduced to new cases without the required accompanying adaption"); see also Kolb, "Selected problems in the theory of customary international law", p. 123 (referring to "increasing conceptual softness"); Henkin, *International Law: Politics and Values*, p. 37 ("The purposive creation of custom is a radical innovation, and indeed reflects a radical conception. Whereas law was made by treaty but grew by custom, now there is some tendency to treat custom as a means, alternative to treaty-making, for deliberate legislation. Using the concept of custom for that purpose brings with it the traditional definition, but now practice sometimes means activity designed to create the norm rather than to reflect it."); and Seibert-Fohr, "Modern concepts of customary international law as a manifestation of a value-based international order", p. 273 ("The relevance of customary international law ultimately depends on how strict the standards for the assumption of customary international law are applied.").

[254] Cassese, "General round-up", p. 165; see also Müllerson, "On the nature and scope of customary international law", p. 359.

[255] See, e.g., Gunning, "Modernizing customary international law: The challenge of human rights", pp. 212–213 ("In particular, by questioning the comprehensiveness of traditional formulations of national sovereignty, this Article will explore the prospect of permitting transnational and non-governmental groups to have a legal voice in the creation of custom."); Meijers, "On international customary law in the Netherlands" ("Like a rule of treaty law, a rule of international customary law is formed in two stages. During the first stage the subjects of international law in particular States, and—sometimes—international organisations, develop the rule. During the second stage the rule is transformed into a rule of law" (p. 80). "[These] two stages … often overlap" (p. 125).); and Arajärvi, "From State-centricism to where?: The formation of (customary) international law and non-State actors", p. 23 ("Non-State actors do shape the international law-making, not only indirectly by influencing States, but by having a direct bearing on the development of customary rules through their own actions and statements.").

[256] See, e.g., Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, pp. 342 and 346; Ochoa, "The individual and customary international law formation", p. 164; and Bederman, *Custom as a Source of Law*, pp. 162–163.

[257] As referred to by Simma and Alston, "The sources of human rights law..." (footnote 80 above), p. 83.

[258] See, e.g., Weil, "Towards relative normativity in international law?", p. 435 ("This is no mere acceleration of the custom-formation process, but a veritable revolution in the theory of custom."); Wolfke, "Some persistent controversies regarding customary international law", p. 2 ("At the outset … in particular, it should be stressed that international custom, like any custom, is based on a regularity of conduct. Customary international law not based on 'custom' (*consuetudo*) in the traditional and literal meaning of this word, would simply be a misnomer."); Jennings, "What is international law and how do we tell it when we see it?", p. 11 ("Perhaps it is time to face squarely the fact that the orthodox tests of custom—practice and *opinio juris*—are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek: much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory, it involves topical policy decisions, and it is often the focus of contention. Anything less like custom in the ordinary meaning of that term would be difficult to imagine."); van Hoof, *Rethinking the Sources of International Law*, p. 86 ("Customary law and instantaneousness are irreconcilable concepts. Furthermore, it is detrimental to the effective functioning of international law, as an ordering and regulating device, to water down the meaning of its sources to almost the vanishing point."); Georges Abi-Saab discussing "Custom and treaties", in Cassese and Weiler, *Change and Stability in International Law-Making*, p. 10 ("We are calling different things custom, we are keeping the name but *expanding the phenomenon* … In fact we have a new wine, but we are trying to put it in the

itional" approach have further stressed that promoting a "new species" of customary international law undermines the authoritative force and persuasiveness of custom as a source of international law,[259] as well as that of international law in its entirety.[260] Some have added that the "non-traditional" approaches are themselves analytically unstable,[261] and that they stand for a "dubious operation"[262] that can be said to suffer from a significant democratic deficit just as well.[263]

100. While some authors have portrayed the "traditional" and "non-traditional" approaches to customary international law as "a set of paired opposites",[264] others have sought to synthesize and reconcile them in an attempt to produce a common conception or an overall theory of custom.[265] Convincing as such attempts may be, the ongoing doctrinal disputes and the inherent difficulties associated with customary international law have prompted several international lawyers to proclaim it a "troubled concept",[266] an "essentially contested" one suffering at this time from an "identity crisis".[267] The lack of a shared notion of customary international law has moreover contributed to the criticism of customary international law as an uncertain law.[268] Some authors have even argued that

old bottle of custom. At some point this qualitative change will have to be taken into consideration, and we will have to recognize that we are no longer speaking of the same source, but that we are in the presence of a very new type of law-making."); Kelly, "The twilight of customary international law", p. 492 ("In redefining State practice and *opinio juris*, 'new CIL' theorists are attempting to create a new process of lawmaking rather than utilizing the methodology of customary law."); Kolb, "Selected problems in the theory of customary international law", p. 123 ("The heading 'custom' may have become too narrow and too misleading as applied to a series of phenomena of modern law-creation in international society, which are subdued under this heading only for lack of another—new—accepted basis of law-making outside of treaty law."); Kammerhofer, "Orthodox generalists and political activists in international legal scholarship" ("Activist scholars fudge the law to further goals which are not expressed as positive international law" (p. 152); "International legal scholarship as practiced in the current climate tends to 'give in' to external pressure in a way which falsifies our view of positive international law by importing external elements" (p. 157).); Petersen, "Customary law without custom?..." (footnote 80 above) ("By its very notion custom requires a *consuetudo*, the existence of State practice" (p. 282); "Customary law without custom is difficult to imagine" (p. 284).); Koskenniemi, "Introduction", p. xxi ("In practice, 'custom' has become a generic category for practically all binding non-treaty standards … 'Custom' seems both more legitimate in origin and more tangible in application—even if the various standards thus classified as 'custom' cannot easily be fitted within the standard theory about the emergence and ascertainment of customary law."); Weisburd, "Customary international law: the problem of treaties", p. 46 ("Assertions that State practice is legally irrelevant are, in effect, assertions that there is an easier way of creating international law than that of generating a genuine consensus among States. There is no easier way, and respect for truth demands that we acknowledge the fact."); Charney, "Universal international law", pp. 543 and 546 (referring to the recent "more structured method" of creating customary law when saying that this process "differs significantly from the traditional understanding of the customary lawmaking process as requiring general practice over time. It may thus be more accurate to call it *general* international law."); and Cheng, "Custom: the future of general State practice in a divided world", p. 548.

[259] See, e.g., Estreicher, "Rethinking the binding effect of customary international law", p. 15 ("As we move to an era of top-down, publicist-inspired, policy-laden, and virtually instantaneous CIL, the legitimacy of such automatic absorption [into national law] becomes especially problematic."); D'Amato, "Trashing customary international law"; and Jennings, "The identification of international law", p. 6.

[260] See, e.g., Chodosh, "Neither treaty nor custom..." (footnote 244 above), p. 99; van Hoof, *Rethinking the Sources of International Law*, p. 107; Kelly, "The twilight of customary international law", p. 540; Weil, "Towards relative normativity in international law?" p. 441 ("This relativization of normativity … may eventually disable international law from fulfilling what have always been its proper functions.").

[261] See, e.g., Postema, "Custom in international law: A normative practice account", pp. 281–282.

[262] Simma and Alston, "The sources of human rights law..." (footnote 80 above), p. 107; see also de Lupis, *The Concept of International Law* ("In this work … the notion of 'customary law' is dismissed as a nebulous fiction." (Preface). "It is only strange that so many writers still accept the vague contours and floating contents of the notion 'customary' law. For outside the realm of territorial claims by prescription it has no foundation or justification in modern public [i]nternational [l]aw. It has become the carpet under which any unidentified act or rule is swept, often with ensuing conviction that because the carpet now covers it, it must be valid 'law'." (p. 116)).

[263] See, e.g., Bederman, *Custom as a Source of Law*, p. 145 ("The key defect of modern custom is that in lauding ideal standards of State conduct, it has become detached from actual State practice. If legitimacy and transparency matter as metrics for customary international law … then the traditional view of CIL—even as imperfectly captured in Article 38 (1) (*b*)'s formulation—should continue to be embraced."); Orrego Vicuña, "Customary international law in a global community: Tailor made?", p. 37 (arguing that "modern" customary international law is "a new authoritarianism through the non rule of law"); Goldsmith and Posner, "Understanding the resemblance between modern and traditional customary international law", p. 667 (arguing that modern customary international law "lacks a proper pedigree in the consent of States. The content of the new CIL is vague. Moreover, the new CIL is invoked and employed opportunistically."); Chodosh, "Neither treaty nor custom..." (footnote 244 above), pp. 104–105 (depicting an undemocratic process since the few make rules for the many); Estreicher, "Rethinking the binding effect of customary international law", p. 7 (describing "modern" customary international law as an attempt by " 'highly qualified publicists of the various nations' … and other international law activists to expand the reach of customary law so as to help advance the particular political, ideological, or humanitarian aims of the writer"); and Kelly, "The twilight of customary international law", pp. 520–521 (arguing that new customary international law methodology "does not solve the 'democracy deficit'. While States may consent to general, abstract resolutions that are merely recommendations, they neither consent to binding norms, nor play a role in determination of which, if any, norms in a resolution are to be transformed into binding customary obligations … Democratic legitimacy requires either full participation or actual assent [and neither is the case].").

[264] Stein (footnote 233 above), p. 13; see also, for example, Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, p. 388; Beckett, *The End of Customary International Law? A Purposive Analysis of Structural Indeterminacy*, pp. 238–258; and Baker, "Legal recursivity…" (footnote 235 above), p. 10.

[265] See, e.g., Roberts, "Traditional and modern approaches to customary international law: A reconciliation", p. 767; Lukashuk, "Customary norms in contemporary international law"; Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, p. 100; Seibert-Fohr, "Modern concepts of customary international law as a manifestation of a value-based international order", pp. 272–277; Condorelli, "Customary international law: The yesterday, today, and tomorrow of general international law", p. 148; Tasioulas, "Customary international law and the quest for global justice", pp. 307 and 320; Goldsmith and Posner, "Understanding the resemblance...", p. 672; Voyiakis, "A theory of customary international law", pp. 15–16; D'Aspremont, *Formalism and the Sources of International Law*, p. 145; Kolb, "Selected problems in the theory of customary international law", p. 122; and Worster, "The inductive and deductive methods in customary international law analysis: Traditional and modern approaches".

[266] Postema, "Custom in international law..." (footnote 261 above), p. 279.

[267] Simma and Alston, "The sources of human rights law..." (footnote 80 above), p. 88. See also Wolfke, "Some persistent controversies regarding customary international law", p. 2; and Kammerhofer, "Uncertainty in the formal sources of international law: Customary international law and some of its problems", p. 551.

[268] Arguments relating to uncertainty generally refer either to the difficulty in determining whether a rule of customary international law had

(*Continued on next page.*)

"traditional" or "modern" customary international law remains a highly problematic, if not illegitimate, source of international law, which should perhaps be discarded altogether.[269]

101. Yet customary international law has also been widely recognized in the literature as "the principal construction material for general international law",[270] and persistently defended as having a prominent and undeniable role in international regulation.[271] Several authors stress that it is precisely its flexibility that makes it a valuable source of international law,[272] and suggest that difficulties in law-finding are not unique to customary international law.[273] Scholars continue to debate customary international law. Such debates will doubtless continue.[274]

(*Footnote 268 continued.*)

emerged or to the difficulty in defining precisely what its specific content is (or both). See, e.g., Kammerhofer, "Uncertainty in the formal sources of international law…", p. 536 ("We can neither adequately know the rules of custom-formation nor how those rules come about."); Chen, *An Introduction to Contemporary International Law*, p. 351; Guzman, "Saving customary international law", p. 128; Goldsmith and Posner, "Understanding the resemblance..."; Wolfke, *Custom in Present International Law*, p. xiii; Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties*, p. 63; and Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, p. 14.

[269] See, e.g., Goldsmith and Posner, "Understanding the resemblance between modern and traditional customary international law" ("The faulty promise is that CIL—either the traditional or the new—influences national behaviour. In our view, the new CIL is no less coherent or legitimate than the old" (pp. 640–641). "We deny that modern CIL differs from old CIL in an important way. The essential difference is content: old CIL focused on commercial and military relationships between States; modern CIL focuses on human rights … Modern CIL is mostly aspirational, just as old CIL was" (p. 672).); Boyle and Chinkin, *The Making of International Law*, p. 21 ("Despite assertions of 'instant' customary law, this mode of informal and unwritten lawmaking is inherently conservative and backward-looking because of its reliance upon existing State practice. Uncertainties about the existence and content of rules of customary law allow opportunistic claims lacking any content in State practice or *opinio juris*. Customary international law allows States to reject treaty regulation while claiming the benefits of those parts of an unratified treaty they perceive as desirable."); McGinnis, "The appropriate hierarchy of global multilateralism and customary international law: The example of the WTO", p. 284 (referring to customary international law as a body of law that could potentially unravel the careful compromises struck in multilateral treaties); and Kelly, "The twilight of customary international law" ("The substantive norms of both traditional CIL and 'new CIL' are non-empirical forms of CIL deduced from subjective principles" and as such "lack[] the authority of the international community" (p. 456). "Controversy is inevitable because the elements of CIL legal theory are empty vessels in which to pour one's own normative theory of international law.").

[270] Kuznetsov and Tuzmukhamedov, *International Law—A Russian Introduction*, p. 77.

[271] Vagts, "International relations looks at customary international law: A traditionalist's defence"; Sur, *International Law, Power, Security and Justice*, p. 167; Norman and Trachtman, "The customary international law game", p. 541; Swaine, "Rational custom", p. 562; Bokor-Szegő, remarks on the "Contemporary role of customary international law", in Heere, *Contemporary International Law Issues: Conflicts and Convergence, Proceedings of the Third Joint Conference*, p. 18; Dugard, *International Law: A South African Perspective*, p. 26; Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique*, p. 48; Bishop, "Sources of international law", pp. 220 and 230; Kunz, "The nature of customary international law", p. 665; Treves, "Customary international law", pp. 955–956; Perreau-Saussine and Murphy, "The character of customary law: An introduction", p. 8; Guzman and Meyer, "Customary international law in the 21st century", p. 197; Guzman, "Saving customary international law", pp. 116, 119–121 and 175; Bernhardt, "Custom and treaty in the law of the sea", p. 265; Seibert-Fohr, "Modern concepts of customary international law as a manifestation of a value-based international order", p. 271; Mendelson, "The formation of customary international law", p. 169; Schwarzenberger, "International *jus cogens*?" p. 476; and Orrego Vicuña, "Customary international law in a global community: Tailor made?" p. 38.

[272] See, e.g., Pearce, "Customary international law: Not merely fiction or myth", p. 125; Bederman, "Acquiescence, objection and the death of customary international law", pp. 42–43. Such a position was also voiced at the Commission's sixty-fourth session by Mr. Murase, who said that "Ambiguity was of the essence and, probably, the *raison d'être* of customary international law, which was useful because it was ambiguous" (*Yearbook … 2012*, vol. I, 3148th meeting).

[273] See, e.g., Brownlie, "To what extent are the traditional categories of *lex lata* and *lex ferenda* still viable?" p. 68 ("I think the main problem at the moment is the old one that law-finding is always difficult. Even when you have a treaty, it is necessary to find out what a particular text means; you may have a treaty which has been in existence for 20 years, but if it has not been much interpreted by courts the law-finding remains to be done. There is a curious tendency for people to think that if we can only find the right formula, the right rule, then the business of law-finding is suddenly going to be made more easy for us. I think that is rather unrealistic.").

[274] See, e.g., Klabbers, "The curious condition of custom", p. 37; Fidler, "Challenging the classical concept of custom: Perspectives on the future of customary international law", p. 199; and Kolb, "Selected problems in the theory of customary international law", p. 119.

## Chapter IV

## Future programme of work

102. In his second report, in 2014, the Special Rapporteur proposes to commence the discussion of the two elements of customary international law, State practice and *opinio juris*, and the relationship between them. Among the matters to be considered will be the effects of treaties on customary international law and the role of international organizations. The third report, in 2015, will continue this discussion in the light of progress with the topic, as well as address in more detail certain particular aspects, such as the "persistent objector" rule, and "special" or "regional" customary international law. The second and third reports will each propose a series of draft conclusions for consideration by the Commission. The Special Rapporteur aims to prepare a final report in 2016, with revised draft conclusions and commentaries taking account of the discussions in the Commission, the debates in the Sixth Committee and other reactions to the work as it progresses.

# FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

[Agenda item 8]

**Document A/CN.4/659**

## Elements in the previous work of the International Law Commission that could be particularly relevant to the topic

## Memorandum by the Secretariat

[*Original: English*]
[*14 March 2013*]

### CONTENTS



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### Multilateral instruments cited in the present report

| | *Source* |
|---|---|
| Hague Convention of 1899 (II) respecting the Laws and Customs of War on Land (The Hague, 29 July 1899) | J. B. Scott, ed.,*The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., New York, Oxford University Press, 1918, p. 100. |
| Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land (The Hague, 18 October 1907) | *Ibid.* |

| | *Source* |
|---|---|
| Agreement concerning prosecution and punishment of the major war criminals of the European Axis (London, 8 August 1945) | United Nations, *Treaty Series*, vol. 82, No. 251, p. 279. |
| Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948) | *Ibid.*, vol. 78, No. 1021, p. 277. |
| Convention on the Continental Shelf (Geneva, 29 April 1958) | *Ibid.*, vol. 499, No. 7302, p. 311. |
| Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) | *Ibid.*, vol. 1155, No. 18232, p. 331. |
| Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) | A/CONF.129/15. |


## Summary

This memorandum was prepared in response to a request made by the International Law Commission at its sixty-fourth session (2012). It endeavours to identify elements in the previous work of the Commission that could be particularly relevant to the topic "Formation and evidence of customary international law".

After addressing, in the introduction, a few preliminary issues regarding the Commission's mandate and its previous work on the topic entitled "Ways and means for making the evidence of customary international law more readily available", the memorandum turns to the Commission's approach to the identification of customary international law and the process of its formation by focusing on (*a*) the Commission's general approach; (*b*) State practice; (*c*) the so-called subjective element (*opinio juris sive necessitatis*); (*d*) the relevance of the practice of international organizations; and (*e*) the relevance of judicial pronouncements and writings of publicists.

The memorandum then provides an overview of the Commission's understanding of certain aspects of the operation of customary law within the international legal system. These aspects relate to the binding nature and characteristics of the rules of customary international law—including regional rules, rules establishing *erga omnes* obligations and rules of *jus cogens*—as well as to the relationship of customary international law with treaties and "general international law".


## Introduction

1. At its sixty-third session, in 2011, the International Law Commission decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work.[1] At its sixty-fourth session, in 2012, the Commission included the topic in its current programme of work and appointed Sir Michael Wood as Special Rapporteur.[2] Also at that session, the Commission requested that the Secretariat prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to the topic.[3] To fulfil that request, the Secretariat has engaged in a review of the Commission's work since 1949 with a view to identifying the aspects most relevant to customary international law. In this regard, the Secretariat has focused primarily on aspects of the Commission's work that are directly relevant to the understanding of the concept of customary international law, the manner in which customary rules emerge and ought to be identified, and the way in which customary law operates within the international legal system. Those aspects of the work of the Commission identified by the Secretariat as most relevant to the present topic are reflected herein in the form of observations and, where deemed appropriate, accompanying explanatory notes.

2. In developing this memorandum, the Secretariat drew guidance from the questions and issues identified as relevant to the topic in two preliminary documents prepared by Sir Michael,[4] and in the initial debate on the topic at the Commission's sixty-fourth session.[5] The memorandum is structured to reflect aspects of the Commission's work relating to the identification of customary international law and the process of its formation, and to the operation of customary law within the international legal system.

3. It is important to note at the outset that the observations presented below reflect a systematic review of only certain components of the Commission's work. Given the Commission's mandate and working methods, numerous components of its work—including reports of Special Rapporteurs and general debates in plenary—could be of potential relevance to the present memorandum and its topic. Yet, in order to finalize the memorandum in an expedient manner, the Secretariat has largely limited its review to the final version of drafts adopted by the Commission on the various topics that it has so far considered,

[1] *Yearbook … 2011*, vol. II (Part Two), p. 175, paras. 365–367. By its resolution 66/98 of 9 December 2012, the General Assembly took note of the inclusion of the topic in the Commission's long-term programme of work (para. 7).

[2] *Yearbook … 2012*, vol. II (Part Two), p. 11, para. 19.

[3] *Ibid.*, p. 69, para. 159.

[4] See *Yearbook … 2011*, vol. II (Part Two), annex I, as well as *Yearbook … 2012*, vol. II (Part One), document A/CN.4/653, p. 183.

[5] See *Yearbook … 2012*, vol. II (Part Two), paras. 169–202.

along with accompanying commentaries.[6] The final versions of such drafts and commentaries were thought best to reveal the Commission's collective approach to customary international law.

### A. Codification and progressive development

4. Before proceeding to the observations, it is useful to address briefly a few preliminary matters relating to the Commission's previous work on customary international law. First, a study of such work inevitably calls attention to the distinction between the Commission's work on "codification" and "progressive development".

5. With respect to codification, it is well understood that customary international law has played a significant role in the Commission's work. The statute of the Commission[7] defines "codification of international law" to mean "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine" (art. 15). Moreover, the Statute directs the Commission to codify international law by preparing drafts in the form of articles, together with a commentary containing an "adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine" (art. 20 (*a*)), together with conclusions defining, on the one hand, "the extent of agreement on each point in the practice of States and in doctrine" (art. 20 (*b*) (i)) and, on the other hand, "divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution" (art. 20 (*b*) (ii)).

6. The Commission's mandate, however, is not limited to the codification of existing international rules. The Commission is also tasked with the progressive development of international law, which is defined by article 15 of the statute of the Commission to mean "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".

7. Codification and progressive development were thus envisioned by the Statute as distinct concepts, though the drafters of the Statute recognized that the two concepts would not necessarily be mutually exclusive—the systematization of existing law may lead to the conclusion that a new rule should be suggested for adoption by States.[8] Also, the Commission has consistently avoided any overarching categorization of a particular topic as exclusively an exercise in codification or progressive development.[9] Moreover, the Commission has indicated that the "distinctions drawn in its statute between the two concepts have proved unworkable and could be eliminated in any review of the statute".[10]

8. On a number of occasions, in relation to the formulation of specific rules, the Commission has clearly distinguished between its work on the codification and its work on the progressive development of international law.[11] Yet, on many other occasions, the Commission has not indicated whether its contemplation of a particular rule represented an exercise in codification or progressive development.[12] Moreover, regardless of whether or not the Commission has identified its consideration of a particular rule as falling within either category, it has often not employed terms that would make its analysis plainly relevant to customary law. Thus, the Secretariat's approach has been to include in the present memorandum those

[6] The draft articles on the expulsion of aliens and commentaries thereto (*Yearbook … 2012*, vol. II (Part One), document A/CN.4/651), adopted by the Commission on first reading at its sixty-fourth session, in 2012, were also included in the review.

[7] General Assembly resolution 174 (II), of 21 November 1947.

[8] See the report of the Committee on the Progressive Development of International Law and its Codification, *Official Records of the General Assembly, Second Session, Sixth Committee*, annex 1, para. 7.

[9] See, for example, *Yearbook … 1978*, vol. II (Part Two), p. 16, para. 72 ("The Commission wishes to indicate that it considers that its work on most-favoured-nation clauses constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's statute. The articles it has formulated contain elements of both progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls."). See also *The Work of the International Law Commission*, 8th edition (United Nations publications, Sales No. E.12.V.2), vol. I, 2012, p. 47.

[10] *Yearbook … 1996*, vol. II (Part Two), p. 84, para. 147 (*a*). See also pp. 86–87, paras. 156–159, indicating that it is "too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions" (para. 156) and "thus the Commission has inevitably proceeded on the basis of a composite idea of 'codification and progressive development'" (para. 157).

[11] See, for example, *Yearbook … 1978*, vol. II (Part Two), p. 13, para. 54 ("The Commission found that the operation of the [most-favoured-nation] clause in the sphere of economic relations, with particular reference to developing countries, was not a matter that lent itself easily to codification of international law in the sense in which that term was used in the [Statute] because the requirements for that process, … namely, extensive State practice, precedents and doctrine, were not easily discernible."); para. (2) of the commentary to draft article 5 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 31 (indicating that State practice and doctrine are unclear, and thus the rule has been drafted in an exercise in progressive development of the law); para. (2) of the commentary to draft article 8 on diplomatic protection, *ibid.*, p. 36 ("Draft article 8, an exercise in progressive development of the law, departs from the traditional rule…"); and para. (3) of the commentary to draft article 19 on diplomatic protection, *ibid.*, p. 54 ("If customary international law has not yet reached this stage of development, then draft article 19, subparagraph (*a*), must be seen as an exercise in progressive development."); para. (1) of the commentary to guideline 1.2.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 56–57 (indicating that guideline 1.1.5 "appears to be an element of progressive development of international law, since there is no clear precedent in this regard"); para. (5) of the commentary to draft article 23 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two), p. 39 ("Consequently, paragraph 2 of draft article 23 constitutes progressive development in two respects…"); para. (1) of the commentary to draft article 27 on the expulsion of aliens, *ibid.*, p. 46 ("Draft article 27 … is progressive development of international law."); and para. (1) of the commentary to draft article 29 on the expulsion of aliens, *ibid.*, p. 47 ("Draft article 29 recognizes, as an exercise in progressive development and when certain conditions are met, that an alien who has had to leave the territory of a State owing to an unlawful expulsion has the right to re-enter the territory of the expelling State."). See also para. (5) of the general commentary on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), pp. 46–47 ("The fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter.").

[12] Indeed, the Commission has even stated that it did not consider it necessary to identify the legal status of a particular rule; see, for example, para. (8) of the commentary to draft article 68 on the law of the sea, *Yearbook … 1956*, vol. II, p. 298 ("The Commission does not deem it necessary to expatiate on the question of the nature and legal basis of the sovereign rights attributed to the coastal State [over the continental shelf] … All these considerations of general utility provide a sufficient basis for the principle of the sovereign rights of the coastal State as now formulated by the Commission.").

elements of the Commission's work that appear to constitute an effort to ascertain or assess the possible existence or emergence of a rule of customary international law.

### B. Ways and means for making the evidence of customary international law more readily available

9. The topic "Formation and evidence of customary international law" is not the first occasion on which the Commission has addressed a topic concerned directly with the evidence of customary international law. Following its second session, and on the basis of a working paper prepared by Mr. Manley O. Hudson on the subject,[13] the Commission submitted a report in 1950 to the General Assembly on the topic entitled "Ways and means for making the evidence of customary international law more readily available".[14] That report was in direct response to article 24 of the Commission's statute.[15]

10. The Commission's implementation of article 24 was, to a significant extent, conceptually distinct from the topic under consideration here. Concerned primarily with the availability and accessibility of materials relevant to the evidence of customary law, the report of the Commission identified existing collections of texts and international legal materials and suggested that the Secretariat prepare certain publications to increase the availability of evidence of potential relevance to international custom.[16]

11. The Commission's report did, however, also briefly consider the scope of customary international law.[17] Of particular relevance to the topic presently under consideration, the Commission suggested, *inter alia*, that the conventional formulation of international law by certain States is not infrequently relied upon to establish the existence of customary law, and that "evidence of the practice of States is to be sought in a variety of materials".[18] Those conclusions and other salient aspects of the Commission's analysis will be revisited as part of the observations provided below.

[13] *Yearbook … 1950*, vol. II, document A/CN.4/16 and Add.1, p. 24.

[14] *Ibid.*, pp. 367–374, paras. 24–94.

[15] Art. 24 of the statute of the Commission provides that "The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter."

[16] *Yearbook … 1950*, vol. II, pp. 368–374.

[17] *Ibid.*, pp. 367–368, paras. 28–32.

[18] *Ibid.*, p. 368, para. 31.

## Chapter I

## The identification of customary international law and the process of its formation

12. The present chapter elaborates observations relating to the Commission's approach to the identification of the rules of customary international law and the process leading to their formation. The chapter begins with observations on the Commission's general approach to the identification of customary rules, and continues with observations relating to State practice, the so-called subjective element (*opinio juris sive necessitatis*) and the relevance of the practice of international organizations and judicial pronouncements and writings of publicists.

### A. General approach

#### *Observation 1*

To identify the existence of a rule of customary international law, the Commission has frequently engaged in a survey of all available evidence of the general practice of States, as well as their attitudes or positions, often in conjunction with the decisions of international courts and tribunals, and the writings of jurists.[19]

13. The commentary to draft article 5 on the law of the non-navigational uses of international watercourses exemplifies the Commission's approach:

> A survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses—including treaty provisions, positions taken by States in tribunals, statements of law prepared by intergovernmental

[19] In so doing, the Commission has relied upon a variety of materials, an illustrative list of which is provided in sections B and C of the present chapter. See also, for example, the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 211–214: upon review of a variety of materials, the Commission concluded, at paragraph (18), that "a newly independent State is not, *ipso jure*, bound to inherit its predecessor's treaties". On some occasions, considerations of logic or fairness have also been relied upon by the Commission to identify certain rules; see, for example, para. (2) of the commentary to draft article 36 on the representation of States in their relations with international organizations, *Yearbook … 1971*, vol. II (Part One), p. 308 (assessment of relevant practice corroborated by an analogy between the privileges and immunities of diplomatic agents and those of permanent representatives, as well as their respective family members and staff); and para. (2) of the commentary to draft article 39 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 110 ("Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. *It is also consistent with fairness as between the responsible State and the victim of the breach**."). In certain cases, recourse to analogy would appear to have resulted from the Commission's determination of a scarcity of available practice; see, for example, the following observations made in para. (2) of the general commentary to the draft articles on the responsibility of international organizations dealing with circumstances precluding wrongfulness, *Yearbook … 2011*, vol. II (Part Two), p. 70 ("Also with regard to circumstances precluding wrongfulness, available practice relating to international organizations is limited. Moreover, certain circumstances are unlikely to occur in relation to some, or even most, international organizations. However, there would be little reason for holding that circumstances precluding wrongfulness of the conduct of States could not be relevant also for international organizations: that, for instance, only States could invoke *force majeure*. This does not imply that there should be a presumption that the conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States.").

and non-governmental bodies, the views of learned commentators and decisions of municipal courts in cognate cases—reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law.[20]

14. The above example usefully illustrates that the Commission has often not clearly distinguished in its commentaries between the materials relied upon to identify the general practice of States and those relied upon to determine the attitudes or positions of States in regard to a rule.[21] It is also useful to note that the Commission has recognized that the various sources referred to in the identification of rules of customary international law are not of the same legal value.[22]

15. On other occasions, however, the Commission has concluded that a rule was supported by State practice without including in the commentaries evidence of a systematic survey.[23]

## B. State practice

16. In its identification of rules of customary international law, the Commission has recognized that State practice plays a prominent role.[24] This section seeks to provide an overview of the manner in which State practice has been characterized and assessed by the Commission, as well as the materials relied upon by the Commission in its analysis.

### 1. The Commission's characterization of State practice

*Observation 2*

The uniformity of State practice has been regarded by the Commission as a key consideration in the identification of a rule of customary international law.

17. On several occasions, the Commission has found that the requisite uniformity of State practice was present to allow for the identification of a rule of customary international law.[25] Conversely, on some occasions, a lack of uniformity has been regarded as precluding the existence of a rule of customary international law.[26]

[20] Para. (10) of the commentary to draft article 5, *Yearbook … 1994*, vol. II (Part Two), p. 98. See also paras. (3)–(6) of the commentary to draft article 7 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), pp. 45–46 (relying on a review of State practice, international jurisprudence and the writings of jurists to find that a rule is established); paras. (12)–(14) of the commentary to draft article 10 on the responsibility of States for internationally wrongful acts, *ibid.*, pp. 51–52 ("Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10."); paras. (24)–(25) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 40 (determining that the rule formulated in the draft article found precedent in a survey of sources which included judicial decisions, national legislation and treaty practice); paras. (10)–(18) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 199–201 (engaging in a review of State practice, boundary disputes and treaty practice to ascertain the existence of a general rule); paras.(2)–(4) of the commentary to draft article 15 on the succession of States in respect of treaties, *ibid.*, pp. 211–214 (reviewing State practice, legal opinion of the Secretariat, practice of depositaries and writings of jurists to establish a general rule); paras. (1) and (8) of the commentary to draft article 49 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 246–247 (relying on the Charter of the United Nations and practice of the United Nations, as well as the opinion of a great majority of international lawyers, in discussing a customary rule); and para. (2) of the commentary to draft article 25 on the law of treaties, *ibid.*, p. 213 ("State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the… rule which is formulated in the present article.").

[21] For a more detailed examination of the Commission's treatment of the general practice of States and the attitudes or positions of States *vis-à-vis* a rule, see sections B and C of the present chapter, below. See also para. (13) of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 52–53 (concluding that "the rules enunciated … are supported by State practice, both judicial, legislative and governmental, as well as by multilateral and bilateral treaties", without engaging in separate analysis in the commentary regarding the practice and attitude of States); paras. (11)–(21) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), pp. 33–35 (providing demonstrative examples and concluding that a rule is grounded in State practice, judicial decisions and legal theory, without distinguishing between materials relied upon to reach its conclusion with respect to State practice, attitudes or positions).

[22] See para. (24) of the commentary to draft article 5 on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 100 ("The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all the sources referred to are not of the same legal value. However, the survey does provide an indication of the wide-ranging and consistent support for the rules contained in article 5.").

[23] See, for example, para. (1) of the commentary to draft article 22 on the law of the sea, *Yearbook … 1956*, vol. II, p. 276 (stating simply that rules "followed the preponderant practice of States", without any further elaboration in the commentary); commentary to draft article 32 on the law of the sea, *ibid.*, p. 280 (concluding that the principle on the immunity of warships "embodied in paragraph 1 is generally accepted in international law", without providing a survey of evidence); and paras. (1) and (2) of the commentary to draft article 16 on consular relations, *Yearbook … 1961*, vol. II, p. 103 (concluding that "according to a very widespread practice, career consuls have precedence over honorary consuls", without referring to any sources in the commentary). It should be mentioned, however, that in some of those instances in which there is no evidence of a systematic survey in the Commission's commentaries, indications of such a survey may well appear in Special Rapporteurs' reports or in Secretariat studies.

[24] It should be noted, however, that the Commission has found that the mere absence of practice did not necessarily preclude the existence of a right or entitlement under general customary international law; see para. (2) of the commentary to draft article 57 on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), p. 96 ("In fact, practice does not offer examples of countermeasures taken by non-injured States or international organizations against a responsible international organization. On the other hand, in the context of the rarity of cases in which countermeasures against an international organization could have been taken by a non-injured State or international organization, the absence of practice relating to countermeasures cannot lead to the conclusion that countermeasures by non-injured States or international organizations would be inadmissible.").

[25] See para. (1) of the commentary to draft article 9 on consular relations, *Yearbook … 1961*, vol. II, p. 99 ("At present, the practice of States, as reflected in their domestic law and in international conventions, shows a sufficient degree of uniformity in the use of the four classes set out in article 9 to enable the classes of heads of consular posts to be codified."); and paras. (1)–(2) of the commentary to draft article 16 on consular relations, *ibid.*, p. 103 ("There would appear to be, as far the Commission has been able to ascertain, a number of uniform practices, which the present article attempts to codify. It would seem that, according to a very widespread practice, career consuls have precedence over honorary consuls."). See also paras. (8) and (23) of the commentary to guideline 4.5.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 299 and 302 ("The nullity of an impermissible reservation is in no way a matter of *lex ferenda*; it is solidly established in State practice … State practice is extensive—and essentially homogeneous—and is not limited to a few specific States.").

[26] See, for example, para. (4) of the commentary to draft article 35 on special missions, *Yearbook … 1967*, vol. II, p. 363 ("The Commission noted however, that [consumer] goods are subject to complicated

(*Continued on next page.*)

*Observation 3*

The generality of State practice has also been regarded by the Commission as a key consideration in the identification of a rule of customary international law.

18. On several occasions, the Commission has found that the requisite generality of State practice was present to allow for the identification of a rule of customary international law.[27] Conversely, the lack of generality of State practice has been regarded as precluding the existence of a rule of customary international law.[28] On certain occasions, however, with respect to the identification of rules governing situations that had arisen in a limited number of cases, such as the law on State succession, the Commission has relied heavily upon the practice of the States involved in those cases in order to identify or formulate a general rule.[29]

19. In other instances, the Commission has found that the speciality of State conduct or of a particular circumstance undermined its probative value for the purpose of identifying a rule of customary international law.[30]

*Observation 4*

The Commission has employed diverse terminology when determining whether State practice satisfies the requirements of uniformity or generality.

(*Footnote 268 continued.*)

customs regulations which vary from State to State and that there does not appear to be any universal legal rule on the subject."); para. (2) of the commentary to draft article 17 on diplomatic intercourse and immunities, *Yearbook … 1958*, vol. II, p. 94 ("Usage differs from country to country … It is not possible to lay down a hard-and-fast rule."); para. (2) of the commentary to draft article 36 on diplomatic intercourse and immunities, *ibid.*, p. 101 ("It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of mission, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of States in deciding which members of the staff of a mission shall enjoy privileges and immunities … In these circumstances it cannot be claimed that there is a rule of international law on the subject, apart from that already mentioned."); draft article 3, para. 1, on the law of the sea, *Yearbook … 1956*, vol. II, p. 265 ("The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea."); para. (2) of the commentary to draft article 4 on the law of the sea, *ibid.*, p. 267 ("The traditional expression 'low-water mark' may have different meanings; there is no uniform standard by which States in practice determine this line."); para. (18) of the commentary to draft article 14 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 41 ("The practice of States relating to currency is not uniform, although it is a firm principle that the privilege of issue belongs to the successor State …"); paras. (8)–(9) of the commentary to draft article 11 on consular relations, *Yearbook … 1961*, vol. II, p. 101 (indicating that the "universally recognized" right of a receiving State to refuse the *exequatur* is implicitly recognized in the article, but noting that "in view of the varying and contradictory practice of States, it is not possible to say that there is a rule requiring States to give the reasons for their decisions in such a case."); para. (1) of the commentary to draft article 27 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two), p. 46 ("The Commission considers that State practice in the matter is not sufficiently uniform or convergent to form the basis, in existing law, of a rule of general international law providing for the suspensive effect of an appeal against an expulsion decision."); and para. (1) of the commentary to draft article 29 on the expulsion of aliens, *ibid.*, p. 47 ("Although recognition of such a right—on a variety of conditions—may be discerned in the legislation of some States and even at the international level, practice does not appear to converge enough for it to be possible to affirm the existence, in positive law, of a right to readmission, as an individual right of an alien who has been unlawfully expelled.").

[27] See, for example, para. (1) of the commentary to draft article 3 on consular relations, *Yearbook … 1961*, vol. II, p. 94 ("The rule laid down in the present article corresponds to the general practice according to which diplomatic missions exercise consular functions."); para. (1) of the commentary to draft article 49 on consular relations, *ibid.*, p. 121 (indicating that evidence of "a very widespread practice… may be regarded as evidence of an international custom…"); paras. (8) and (23) of the commentary to guideline 4.5.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 299 and 302 ("The nullity of an impermissible reservation is in no way a matter of *lex ferenda*; it is solidly established in State practice … State practice is extensive—and essentially homogeneous—and is not limited to a few specific States."); para. (1) of the commentary to draft article 32 on diplomatic intercourse and immunities, *Yearbook … 1958*, vol. II, p. 100 ("In all countries diplomatic agents enjoy exemption from certain dues and taxes; and although the degree of exemption varies from country to country, it may be regarded as a rule of international law that such exemptions exists, subject to certain exceptions."); para. (1) of the commentary to draft article 22 on the law of the sea, *Yearbook … 1956*, vol. II, p. 276 ("It considered that these rules followed the preponderant practice of States and it therefore formulated article 22 accordingly."); and para. 105 of the commentary to Principle IV of the principles of international law which were recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, *Yearbook … 1950*, vol. II, document A/1316, p. 375 (indicating that a principle is "found in varying degrees in the criminal law of most nations").

[28] See paras. (3) and (6) of the commentary to draft article 54 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), pp. 137 and 139 ("Practice on this subject is limited and rather embryonic … As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States."); para. (13) of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 53 (stating that practice found in common-law systems should not be regarded as a "universally applicable practice"); and para. (4) of the commentary to guideline 2.6.10 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 163 ("State practice regarding the confirmation of objections is sparse and inconsistent.").

[29] See para. (18) of the commentary to draft article 9 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 193 (identifying a rule of general scope on the basis of the practice of certain newly independent States); and para. 26 of the commentary to draft article 32 on the succession of States in respect of treaties, *ibid.*, p. 258 (relying on the limited practice of a few unified States to formulate a general rule); see also paras. (4)–(6) of the commentary to draft article 5 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), pp. 24–25 (relying on limited international tribunal practice to reaffirm an "existing rule of international law"); and paras. (1)–(3) of the commentary to draft article 6 of the draft Code of crimes, *ibid.*, p. 25 (relying on limited national and international jurisprudence to confirm a principle).

[30] See para. (7) of the commentary to draft article 21 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 231 ("But the cases of the former British Dominions were very unusual owing both to the circumstances of their emergence to independence and to their special relation to the British crown at the time in question. Accordingly, no general conclusion should be drawn from these cases…"); para. (7) of the commentary to draft article 29 on the succession of States in respect of treaties, *ibid.*, p. 250 (indicating that the circumstances of a federation were "somewhat special" and thus "not thought to be a useful precedent from which to draw any general conclusions"); para. (11) of the commentary to draft article 34 on the succession of States in respect of treaties, *ibid.*, p. 262 ("The facts concerning that extremely ephemeral federation are thought to be too special for it constitute a precedent from which to derive any general rule."); para. (4) of the commentary to draft article 8 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 25 (stating that "no generally applicable criteria … can be deduced from", *inter alia*, "two General Assembly resolutions, which were adopted in pursuance of a treaty and related exclusively to special situations."); and para. (13) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *ibid.*, p. 33 (omitting two cases as "not sufficiently illustrative" as their application of a general principle was "due to other causes of a peculiar and specific kind").

20. Such terminology included "uniformity" or "uniform practice",[31] "general practice",[32] "widespread practice",[33] a rule "widely observed in practice",[34] "well-established and generalized practice",[35] "well-established practice",[36] "clearly established" practice,[37] "solidly established" practice,[38] "established practice",[39] "settled practice",[40] "preponderant practice of States",[41] or the "weight of evidence of State practice".[42]

*Observation 5*

Where there was a unifying thread or theme[43] underlying international practice, a certain variability in practice has often not precluded the Commission from identifying a rule of customary international law.[44]

21. For instance, in the commentary to draft article 34 on the succession of States in respect of treaties, the Commission concluded that

> although some discrepancies might be found in State practice, still that practice was sufficiently consistent to support the formulation of a rule which, with the necessary qualifications, would provide that treaties in force at the date of the dissolution should remain in force *ipso jure* with respect to each State emerging from the dissolution.[45]

22. Similarly, in its commentary to draft article 32 on diplomatic intercourse and immunities, the Commission noted that, "although the degree of exemption [from certain duties and taxes] varies from country to country, it may be regarded as a rule of international law that such exemptions exist, subject to certain exceptions".[46]

*Observation 6*

The consistency of State practice over time has occasionally been invoked by the Commission as a relevant, though not necessarily decisive, consideration in the formation or evidence of customary international law.[47]

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[31] See para. (1) of the commentary to draft article 9 on consular relations, *Yearbook … 1961*, vol. II, p. 99 (referring to the "degree of uniformity" in State practice); para. (2) of the commentary to draft article 36 on diplomatic intercourse and immunities, *Yearbook … 1958*, vol. II, p. 101 ("But beyond this there is no uniformity in the practice of States…"); para. (2) of the commentary to draft article 3 on the law of the sea, *Yearbook … 1956*, vol. II, p. 265 ("…international practice was not uniform…"); and para. (7) of the commentary to draft article 3 on the law of the sea, *ibid.*, p. 266 ("… international practice was far from uniform").

[32] See para. (1) of the commentary to draft article 3 on consular relations, *Yearbook … 1961*, vol. II, p. 94; para. (6) of the commentary to draft article 22 on the succession of States in respect to treaties, *Yearbook … 1974*, vol. II (Part One), p. 234; and para. (2) of the commentary to draft article 52 on the law of treaties, *Yearbook … 1966*, vol. II, p. 250.

[33] See para. (1) of the commentary to draft article 49, *Yearbook …1961*, vol. II, p. 121; para. (2) of the commentary to draft article 16, *ibid.*, p. 103; and para. (2) of the commentary to draft article 41 on consular relations, *ibid.*, p. 115.

[34] See para. (2) of the commentary to guideline 2.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 112.

[35] See para. (1) of the commentary to draft article 8 on the representation of States in their relations with international organizations, *Yearbook … 1971*, vol. II (Part One), p. 291.

[36] See, for example, para. (3) of the commentary to guideline 1.8 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 89; para. (12) of the commentary to guideline 3.1.5.3 on reservations to treaties, *ibid.*, p. 223; and para. (4) of the commentary to draft article 50 on the representation of States in their relations with international organizations, *Yearbook … 1971*, vol. II (Part One), p. 315 ("well-established practice").

[37] See para. (12) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 33.

[38] See para. (8) of the commentary to guideline 4.5.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 299.

[39] See para. (1) of the commentary to draft article 21 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 61.

[40] See para. (8) of the commentary to draft article 19 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 55 ("Although there is some support … in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice").

[41] See para. (1) of the commentary to draft article 22 on the law of the sea, *Yearbook … 1956*, vol. II, p. 276.

[42] See para. (17) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 201 (referencing "the weight of the evidence of State practice" in support of excepting boundary treaties from the fundamental change of circumstances rule).

[43] See para. (11) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 98, indicating that, although the language and approaches of international agreements reflecting the doctrine of equitable utilization—which was characterized by the Commission as a "general rule of law"—"vary considerably, *their unifying theme** is the recognition of rights of the parties to the use and benefits of the international watercourse or watercourses in question that are equal in principle and correlative in their application".

[44] On the Commission's general approach to the requirement of uniformity of State practice, see observation 2 above.

[45] Para. (25) of the commentary to draft article 34 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 265.

[46] Para. (1) of the commentary to draft article 32 on diplomatic intercourse and immunities, *Yearbook … 1958*, vol. II, p. 100. See also para. (3) of the commentary to draft article 29 on the law of the sea, *Yearbook … 1956*, vol. II, p. 279 ("Existing practice in the various States is too divergent to be governed by the few criteria adopted by the Commission … The Commission accordingly thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag … [T]he majority of the Commission preferred a vague criterion to no criterion at all."); para. (8) of the commentary to draft article 30 on consular relations, *Yearbook … 1961*, vol. II, pp. 109–110 (affirming the inviolability of the consular premises, noting in particular its recognition in numerous consular conventions, despite "certain exceptions to the rule of inviolability" found in some conventions); para. (3) of the commentary to draft article 13 on the law of treaties, *Yearbook … 1966*, vol. II, p. 201 (commenting that the *Right of Passage* case may indicate "the possibility that difficult problems may arise under the rule in special circumstances", but that "the existing rule appears to be well-settled"); and paras. (2)–(3) of the commentary to draft article 11 on the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 34 ("Notwithstanding the diversity of procedural and evidentiary rules that govern judicial proceedings in various jurisdictions", every court or tribunal must comply with the "minimum international standard of due process").

[47] See, for example, para. (18) of the commentary to draft article 5 on consular relations, *Yearbook … 1961*, vol. II, p. 98 ("Paragraph (*j*) confirms a long-established practice whereby consuls ensure the service on the persons concerned."); paras. (4) and (6) of the commentary to draft article 5 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), pp. 24–25 (determining that the article reaffirms an "existing rule of international law" and indicating that "the defence of superior orders has been consistently excluded in the relevant legal instruments adopted since the Charter of the Nürnberg Tribunal."); para. (4) of the commentary to draft article 7 of the draft Code of crimes against the peace and security of mankind, *ibid.*, p. 27 ("The official position of an individual has been consistently excluded as a possible defence to crimes under

(*Continued on next page.*)

### 2. Materials relied upon by the Commission in assessing State practice

*Observation 7*

The Commission has relied upon a variety of materials in assessing State practice for the purpose of identifying a rule of customary international law.

23. In its work, the Commission appears to have followed the approach originally envisaged in its 1950 report to the General Assembly on ways and means for making the evidence of customary international law more readily available.[48] A non-exhaustive list of materials upon which the Commission has relied as elements of State practice includes internal law,[49] municipal court decisions,[50] practice of the executive branch,[51] diplomatic practice[52] and treaty practice.[53]

24. Furthermore, the Commission has relied upon other materials as secondary sources of information regarding State practice. These materials include, in particular,

(*Footnote 47 continued.*)

international law in the relevant instruments adopted since the Charter of the Nürnberg Tribunal."); and para. (26) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (which was referred to by the Commission in its commentary to the corresponding article 5 of the final version of the draft articles on the topic as "still generally applicable", see *Yearbook … 1991*, vol. II (Part Two), pp. 22–23); *Yearbook … 1980*, vol. II (Part Two), pp. 147–148 ("It should be observed … that the rule of State immunity, which was formulated in the early nineteenth century and was widely accepted in common law countries as well as in a large number of civil law countries in Europe in that century, was later adopted as a general rule of customary international law solidly rooted in the current practice of States. Thus the rule of State immunity continues to be applied, to a lesser or greater extent, in the practice of the countries whose case law in the nineteenth century has already been examined … Its application seems to be consistently followed in other countries."). See also *a contrario*, para. (3) of the commentary to draft article 54 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 137 ("Practice on this subject is limited and rather embryonic.").

[48] See *Yearbook … 1950*, vol. II, p. 368, para. 31 ("Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to 'documents concerning State practice' (*documents établissant la pratique des Etats*) supplies no criteria for judging the nature of such 'documents'. Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations."). In that report, the Commission provided the following non-exhaustive list of the types of materials that are of potential relevance to the evidence of customary international law: (*a*) texts of international instruments; (*b*) decisions of international courts; (*c*) decisions of national courts; (*d*) national legislation; (*e*) diplomatic correspondence; (*f*) opinions of national legal advisers; and (*g*) practice of international organizations (*ibid.*, pp. 368–372, paras. 33–78). Notably, the Commission indicated that "national legislation" is "employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies. No form of regulatory disposition effected by a public authority is excluded" (*ibid.*, p. 370, para. 60, in subsection on "national legislation"). In addition, the Commission noted that "the decisions of the national courts of a State are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law" (*ibid.*, para. 54). The Commission declined, however, to assess "the relative value of national court decisions as compared with other types of evidence of customary international law" (*ibid.*).

[49] See, for example, para. (19) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 38–39 (engaging in a survey of national legislation); para. (8) of the commentary to draft article 19 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 55 ("Although there is some support … in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice."); para. (13) and footnote 164 of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 52–53 (indicating that rules are supported by State practice, including legislative practice); and paras. (40)–(48) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above), *Yearbook … 1980*, vol. II (Part Two), pp. 152–153 (indicating that "national legislation constitutes an important element in the overall concept of State practice" and engaging in a review of relevant internal laws).

[50] See paras. (13)–(18) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 36–38 (survey of national judicial practice); para. (13) and footnote 164 of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *ibid.*, pp. 52–53 (indicating that rules are supported by State practice, including judicial practice); para. (7) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above), *Yearbook … 1980*, vol. II (Part Two), p. 143 ("The general rule of international law regarding State immunity has developed principally from the judicial practice of States. Municipal courts have been primarily responsible for the growth and progressive development of a body of customary rules governing the relations of nations in this particular connection."); and para. (3) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 257 (referring to the practice of municipal courts).

[51] See para. (39) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above), *Yearbook … 1980*, vol. II (Part Two), pp. 151–152 ("The views of the Government, expressed through its political branch, are highly relevant and indicative of the general trends in the practice of States … The lead taken by the Government may be decisive in bringing about desirable legal developments through forceful assertion of its position or through the intermediary of the legislature or by way of governmental acceptance of principle contained in an international convention. Conversely, the Government is clearly responsible for its decision to assert a claim of State immunity in respect of itself and its property, or to consent to the exercise of jurisdiction by the court of another State or to waive its sovereign immunity in a given case."); and para. (13) of the commentary to draft article 16 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), pp. 52–53 (indicating that rules enunciated in the article are supported by State practice, including governmental practice).

[52] See paras. (14)–(17) of the commentary to draft article 8 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 185–186 (considering the diplomatic positions, exchanges and practice of States to ascertain whether a general rule exists); and paras. (11)–(17) of the commentary to draft article 12 on the succession of States in respect of treaties, *ibid.*, pp. 199–201 (analysing diplomatic exchanges and positions in boundary disputes as evidence of State practice on the question of whether boundary settlements are affected by a succession of States). See also *Yearbook … 1950*, vol. II, p. 371, para. 71 ("The diplomatic correspondence between Governments must supply abundant evidence of customary international law.").

[53] See paras. (20)–(21) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 39 (indicating that the "accumulation of such bilateral treaty practices could combine to corroborate the evidence of the existence of a general practice of States in support of" certain exceptions to State immunity); paras. (14)–(18) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 213–214 (considering devolution agreements as evidence of State practice for the purpose of ascertaining the existence of a general rule); para. (1) of the commentary to draft article 15 and para. (5) of the commentary to draft article 19 on consular relations, *Yearbook … 1961*, vol. II, pp. 103 and 105 (citing consular conventions as evidence of practice of States); and paras. (1) and (3) of the commentary to draft article 28 on consular relations, *ibid.*, p. 108 (indicating that the rule is confirmed by numerous consular conventions).

Government comments,[54] publications of international organizations[55] and non-governmental organizations,[56] executive branch publications[57] and international judicial decisions and the writings of jurists.[58]

25. The Commission has also noted the difficulty of identifying and assessing relevant instances of State practice with respect to a particular legal issue.[59]

### C. The so-called subjective element (*opinio juris sive necessitatis*)

26. In addition to State practice, the Commission has frequently referred in its work to what is often defined as the subjective element of customary international law.[60] This section seeks to provide an overview of the manner in which this element has been characterized and assessed by the Commission, as well as the materials relied upon by the Commission in its analysis.

#### 1. The Commission's characterization of the subjective element

*Observation 8*

The Commission has often characterized the subjective element as a sense among States of the existence or non-existence of an obligatory rule.[61] While on many occasions the Commission has specifically relied upon a rule's obligatory character,[62] in certain instances the Commission referred to States' recognition of the necessity of a rule.[63]

*Observation 9*

The position of States *vis-à-vis* a possible rule of customary international law has often been characterized

[54] The Commission and its special rapporteurs routinely rely on comments received from Governments as one of the main sources of information regarding State practice. Indications of such reliance can be found in certain commentaries; see, for example, para. (1) of the commentary to draft article 56 on consular relations, *Yearbook … 1961*, vol. II, p. 124 ("A study of consular regulations has shown, and the comments of governments have confirmed, that some States permit their career consular officials to carry on private gainful occupation… It was in light of this practice that the Commission … adopted this article."); and para. (5) of the commentary to draft article 7 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 26 ("Express reference to absence of consent as a condition *sine qua non* of the application of State immunity is borne out in the practice of States. Some of the answers to the questionnaire circulated to Member States clearly illustrate this link between the absence of consent and the permissible exercise of jurisdiction.").

[55] See, for example, para. (1) of the commentary to draft article 23 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 76 (citing a study of State practice on *force majeure* prepared by the Secretariat); para. (16) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 36 (citing State practice of Egypt found in a United Nations publication); para. (27) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 203 (citing the Nile Waters Agreement of 1929 and other bilateral agreements reproduced in a United Nations publication); and para. (4) of the commentary to draft article 19 on the succession of States in respect of treaties, *ibid.*, p. 223 (citing a United Nations publication in support of a proposition regarding the practice of successor States).

[56] See, for example, paras. (10) and (12) of the commentary to draft article 9 on the succession of States in respect of treaties (citing International Law Association materials); para. (7) of the commentary to draft article 23 and footnote 392 therein (citing a report of the International Law Association) and para. (17) of the commentary to draft articles 30 and 31 (citing a report of the Nigerian Institute for International Affairs), *Yearbook … 1974*, vol. II (Part One), pp. 191–192, 237–238 and 256, respectively.

[57] See, for example, para. (2) of the commentary to draft article 24 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), pp. 78–79 (citing diplomatic exchanges reproduced in a publication of the Government of the United States of America); para. (3) of the commentary to draft article 32 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 94 (citing State practice found in the *British and Foreign State Papers, 1919*, vol. 112); and para. (4) of the commentary to draft article 14 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 208–209 (referring to treaty practice found in a publication of the Government of the United Kingdom).

[58] See section E below.

[59] See para. (4) of the commentary to the annex to the draft articles on the effects of armed conflicts on treaties (concerning the indicative list of treaties, referred to in article 7, the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), *Yearbook … 2011*, vol. II (Part Two) ("The likelihood of a substantial flow of information from States, indicating evidence of State practice, is small. Moreover, the identification of relevant State practice is, in this sphere, unusually difficult.").

[60] See, for example, para. (8) of the commentary to guideline 2.2.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 109 (relying on practice and *opinio necessitatis juris* to support the rule that reservations formulated at signature need to be confirmed while expressing consent to be bound); and para. (18) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above); *Yearbook … 1980*, vol. II (Part Two), p. 145 (referring to the *opinio juris* underlying State practice on jurisdictional immunity).

[61] The phrase "the existence or non-existence of an obligatory rule" should be read with the understanding that rules of customary international law may be both permissive (recognizing States' rights or discretion) and restrictive (imposing obligations on States). Examples of explicit reference by the Commission to a permissive rule include the commentary to draft article 67 on consular relations, *Yearbook … 1961*, vol. II, p. 127 (rule according to which each State is free to decide whether it will appoint or receive honorary consular officials); para. (11) of the commentary to draft article 7 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 28 ("Customary international law or international usage recognizes the exercisability of jurisdiction by the court against another State which has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent."); paras. (7) and (12)–(17) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 212–214 (evidence of State practice supports the traditional view that a newly independent State is not under any general obligation to take over the treaties of its predecessor; see in particular para. (12): "Here the notion of succession seems to have manifested itself in the recognition of a new State's *right* to become a party without at the same time seeking to impose upon it an *obligation* to do so.").

[62] See paras. (3)–(5) and (9) of the commentary to draft articles 27 ("General rule of interpretation") and 28 ("Supplementary means of interpretation") on the law of treaties, *Yearbook … 1966*, vol. II, pp. 218–220, in particular para. (4) ("recourse to many of these principles is discretionary rather than obligatory") and para. (9) ("… But these elements are all of an obligatory legal character"); and para. (8) of the commentary to draft article 19 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 55 ("Nor is there any sense of *obligation** on the part of States to limit their freedom of disposal of compensation awards.").

[63] See, for example, para. (6) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 258 ("The acceptance of the [*rebus sic stantibus*] doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties"); and para. (9) of the commentary to draft article 20 on the law of non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 120.

by the Commission as "general recognition" or "general acceptance" of the rule. The Commission, however, has also used other formulations, such as "belief" or "attitude" of States with regard to the existence or content of a given rule.

27. In its work, the Commission has, on several occasions, alluded to the so-called subjective element of customary international law by indicating that a rule was "generally (or widely) recognized"[64] or "generally accepted".[65] In considering the notion of "general acceptance", the Commission explained its understanding of the dynamics of claims and acceptances that had led to the emergence of a particular rule of customary international law.[66] In certain instances, the Commission has referred to the subjective element by employing different terminology, such as the "belief"[67] or "attitude"[68] of States regarding the existence or content of a rule.

*Observation 10*

The Commission has, on some occasions, distinguished between the subjective element of a rule of customary international law and other considerations that might animate State conduct or positions.

28. In particular, the Commission found on some occasions that States' conduct or positions were animated by considerations other than the recognition or acceptance of, or belief in, the existence of a legal rule. Such other considerations identified by the Commission include courtesy,[69] political expediency, will or compromise,[70] precaution-

[64] See, for example, para. (1) of the commentary to draft article 30 on the law of treaties, *Yearbook … 1966*, vol. II, p. 226 (indicating the existence of "abundant evidence of the recognition of the rule in State practice and in the decisions of international tribunals, as well as in the writings of jurists"); para. (4) of the commentary to draft article 39 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 110 ("The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature and in State practice."); para. (2) of the general commentary on countermeasures, *ibid.*, p. 128 ("It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances."); and para. (2) of the commentary to draft article 51, *ibid.*, p. 134 ("Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence.").

[65] See, for example, para. (1) of the commentary to draft article 15 on the law of treaties, *Yearbook … 1966*, vol. II, p. 202 (obligation … "generally accepted"); para. (3) of the commentary to draft article 1 on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook … 1972*, vol. II, p. 313 (indicating that the extension to cabinet officers of the principle of special protection at all times and in all circumstances when in a foreign State "could not be based on any broadly accepted rule of international law…"); para. (35) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 206 ("general acceptance", together with the "strong indications of a belief"); and para. (28) of the commentary to guideline 4.5.1 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 303 ("general agreement" of States, courts and treaty bodies relied upon in support of a rule stating that invalid reservations produce no legal effect).

[66] See para. (2) of the commentary to guiding principle 9 applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook … 2006*, vol. II (Part Two), p. 165: "The 1945 Truman Proclamation, by which the United States of America aimed to impose obligations on other States or, at least, to limit their rights on the American continental shelf, was not strictly speaking accepted by other States. All the same, as the Court has stressed, 'this regime [of the continental shelf] furnishes an example of a legal theory derived from a particular source that has secured a general following. [*North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969*, p. 53, para. 100.] In fact, the other States responded to the Truman Proclamation with analogous claims and declarations [See the case of Mexico, *Yearbook … 2005*, vol. II (Part One), document A/CN.4/557, p. 132, para. 132] and, shortly thereafter, the content of the Proclamation was taken up in article 2 of the 1958 Geneva Convention on the Continental Shelf. It could therefore be said to have been generally accepted and it marked a point of departure for a customary process leading, in a very short time, to a new norm of international law. ICJ remarked in that context: 'The Truman Proclamation however, soon came to be regarded as a starting point of the positive law on the subject, and the chief doctrine it enunciated … came to prevail over all others, being now reflected in article 2 of the 1958 Geneva Convention on the Continental Shelf' [*North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969*, para. 47]".

[67] See para. (35) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 206 (alluding to "strong indications of a belief" along with "general acceptance").

[68] See para. (4) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 257 ("The most illuminating indications as to the attitude of States regarding the principle [of *rebus sic stantibus*] are perhaps statements submitted to the Court.").

[69] See para. (1) of the commentary to Part II of the draft articles on special missions, *Yearbook … 1967*, vol. II, p. 358 ("Before the Second World War, the question whether the facilities, privileges and immunities of special missions have a basis in law or whether they are accorded merely *as a matter of courtesy** was discussed in the literature and raised in practice. Since the War, the view that there is a *legal basis** has prevailed. It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members."). See also para. (2) of the commentary to the annex to the draft articles on the representation of States in their relations with international organizations ("matter of courtesy"; *Yearbook … 1971*, vol. II (Part One), p. 335).

[70] See paras. (1), (8), (9) and (20) of the commentary to draft article 25 on the succession of State in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), pp. 54–56 and 59–60 (in particular, "(1) … political solutions that reflected relationships of strength between victors and vanquished rather than equitable solutions", p. 54; and "(8) … solutions … based on a 'given power relationship' ", p. 55–56); para. (36) of the commentary to draft article 35, *ibid.*, p. 90 (role played by "political considerations or considerations of expediency"; "There is a strong presumption that that is not a context in which States express their free consent or are inclined to yield to the demands of justice, of equity, or even of law."); and para. (63) of the commentary to draft article 36 on the same subject, *ibid.*, p. 104 ("State practice shows conflicting principles, solutions based on compromise with no explicit recognition of any principles."); and paras. (4)–(15) of the commentary to draft article 23 on the succession of States in respect of treaties, particularly paras. (8), (12) and (15), *Yearbook … 1974*, vol. II (Part One), pp. 238–240 (instances of succession to bilateral treaties regarded by the Commission as having an "essentially voluntary character" [para. (12)]; the Commission did not believe that continuity of treaties derives "from a customary legal rule rather than the will of the States concerned" [para. (8)]). But see paras. (17)–(18) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above), suggesting that consent does not undermine a customary rule which is supported by usage and *opinio juris* ("The principle of State immunity, which was later to become widely accepted in the practice of States, was clearly stated by Chief Justice Marshall: 'This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.' … In this classic statement of the rule of State immunity, ... *the granting of jurisdictional immunity was based on the consent of the territorial State as tested by common usage and confirmed by the* opinio juris *underlying that usage**." *Yearbook … 1980*, vol. II (Part Two), p. 145, paras. 17–18).

ary measures,[71] expressions of intent[72] and aspirations or preferences.[73]

*Observation 11*

On some occasions, the Commission appears to have ascribed importance to the absence of opposition to a rule in the practice of States.[74]

2. Materials relied upon by the Commission in assessing the subjective element

*Observation 12*

The Commission has relied upon a variety of materials in assessing the subjective element for the purpose of identifying a rule of customary international law.

29. A non-exhaustive list of such materials includes positions of States before international organizations (including written comments and responses to questionnaires)[75] or international conferences;[76] pronouncements by municipal courts;[77] statements before international courts and tribunals;[78] stipulations in arbitration agreements;[79] diplomatic practice and notes;[80] a State's actual conduct (as

[71] See para. (4) of the commentary to guideline 2.6.10 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 163–164 (considering that confirmations of objections in such cases as found in State practice "are precautionary measures that are by no means dictated by a sense of legal obligation (*opinio juris*)").

[72] See para. (7) of the commentary to draft article 30 on the most-favoured-nation clauses, *Yearbook … 1978*, vol. II (Part Two), p. 73 ("While all these developments may show that there might be a tendency among States to promote the trade of developing countries through 'differential treatment', the conclusion of the Commission is that this tendency has not yet crystallized sufficiently to permit it to be embodied in a clear legal rule that could find its place among the general rules on the functioning and application of the most-favoured-nation clause. *All the texts partially quoted above are substantially expressions of intent rather than obligatory rules**.")

[73] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook … 2006*, vol. II (Part Two), pp. 72–73, paras. 4–5 (referring to principle 22 of the Stockholm Declaration and principle 13 of the Rio Declaration, the Commission noted: "While the principles in these Declarations are not intended to give rise to legally binding obligations, they demonstrate aspirations and preferences of the international community.").

[74] See, for example, para. (32) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above): "The preceding survey of the judicial practice of common law jurisdictions and civil law systems in the nineteenth century and of other countries in the contemporary period indicates a uniformity in the acceptance of the rule of State immunity. While it would be neither possible nor desirable to review the current case law of all countries, which might uncover some discrepancies in historical developments and actual application of the principle, … *it should be observed that, for countries having few or no reported judicial decisions on the subject, there is no indication that the concept of State immunity has been or will be rejected**. The conclusion seems warranted that, in the general practice of States as evidence of customary law, there is little doubt that a general rule of State immunity has been firmly established as a norm of customary international law" (*Yearbook … 1980*, vol. II (Part Two), p. 149). See also para. (2) of the commentary to draft article 13 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 46: "This exception [from immunity where a State owns, possesses or uses property], *which has not encountered any serious opposition in the judicial and governmental practice of States**, is formulated in language which has to satisfy the differing views of Governments."

[75] See, for example, para. (5) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 258 (comments in political organs of the United Nations taken as statements of position regarding the acceptance of a rule of international law); para. (4) of the commentary to draft article 16 on consular relations, *Yearbook … 1961*, vol. II, p. 103 (referring to government comments to the Commission's draft articles); and paras. (19) and (21) of the commentary to guideline 4.5.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 310–311 (referring to the views expressed in the Sixth Committee of the General Assembly and in written comments received from Governments as indicating lack of agreement on the approach to be taken regarding the validity of the consent to be bound expressed by the author of an invalid reservation).

[76] See, for example, para. (10) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 199 (referring to the attitude of States during the United Nations Conference on the Law of Treaties); para. (17) of the commentary to the same draft article, *ibid.*, p. 201 (referring, *inter alia*, to "the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which established a boundary"); and para. (3) of the commentary to draft article 8 on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 159 (referring, *inter alia*, to "declarations and resolutions adopted by intergovernmental organizations, conferences and meetings").

[77] See, for example, para. (18) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 34 ("Courts and other jurisdictions also seem to endorse unreservedly the principle of the devolution of public property in general, and *a fortiori* of State property, and therefore of immovable property. This is true, in the first place, of national courts."); and para. (3) of the commentary to draft article 57 on the law of treaties, *Yearbook … 1966*, vol. II, p. 254 ("Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty, and they have not found it necessary to examine the conditions for the application of the principle at all closely."). See, however, para. (20) of the commentary to the annex to the draft articles on the effects of armed conflicts on treaties (concerning the indicative list of treaties, referred to in article 7, the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), *Yearbook … 2011*, vol. II (Part Two) ("In this particular context the decisions of municipal courts must be regarded as a problematic source. In the first place, such courts may depend upon guidance from the executive. Secondly, municipal courts may rely on policy elements not directly related to the principles of international law. Nonetheless, it can be said that the case law of domestic courts is not inimical to the principle of survival.").

[78] See para. (7) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 198 (referring to statements before ICJ regarding succession in respect of a boundary settlement and of treaty provisions ancillary to such settlement); and para. (4) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 257 (indicating that "The most illuminating indications as to the attitude of States regarding the principle [of *rebus sic stantibus*] are perhaps statements submitted to the Court in the cases where the doctrine has been invoked", and referring to the positions of States in several cases before the Permanent Court of International Justice); paras. (3) *et seq.* of the commentary to draft article 62 on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two) (referring to the positions expressed by States in contentious cases in support of the view that States members of an international organization cannot generally be regarded as internationally responsible for internationally wrongful acts of the organization).

[79] See para. (4) of the commentary to draft article 13 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 58 (common stipulation in arbitration agreements as confirmation of a "generally recognized principle").

[80] See para. (3) of the commentary to draft article 10 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 50 ("Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to

(*Continued on next page.*)

opposed to its stated positions);[81] a State's treaty practice;[82] multilateral treaty practice;[83] as well as a variety of international instruments.[84]

(*Footnote 80 continued.*)

the State."); para. (17) of the commentary to draft article 8 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 186 (citing correspondence between States); paras. (14) and (21) of the commentary to draft article 12 on the succession of States in respect of treaties, *ibid.*, pp. 200 and 202 (referring to diplomatic notes).

[81] It has occurred that the Commission, in determining the legal position of a State, has relied upon its actual conduct even where that conduct conflicted with the State's asserted position with respect to a given rule; see para. (13) of the commentary to draft article 5 on the law of non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), pp. 98–99 ("A review of the manner in which States have resolved actual controversies pertaining to the non-navigational uses of international watercourses reveals a general acceptance of the entitlement of every watercourse State to utilize and benefit from an international watercourse in a reasonable and equitable manner. While some States have, on occasion, asserted the doctrine of absolute sovereignty, these same States have generally resolved the controversies in the context of which such assertions were made by entering into agreements that actually apportioned the water or recognized the rights of other watercourse States.").

[82] See para. (20) of the commentary to draft article 10 on the jurisdictional immunities of States and their property, *Yearbook … 1991*, vol. II (Part Two), p. 39 ("The attitude or views of a Government can be gathered from its established treaty practice … Thus the treaty practice of the Soviet Union amply demonstrates its willingness to have commercial relations carried on by State enterprises … regulated by competent territorial authorities."). See also para. (1) of the commentary to draft article 15 on consular relations, *Yearbook … 1961*, vol. II, p. 103 (referring, *inter alia*, to "a very large number of consular conventions"), as well para. (5) of the commentary to draft article 19 and para. (1) of the commentary to draft article 28 on the same topic (also referring to consular conventions); paras. (3)–(11) of the commentary to draft article 8 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 183–184 (considering whether devolution agreements "are effective in bringing about a succession to or continuance of the predecessor State's treaties", and "the evidence which they may contain of the views of States concerning the customary law governing succession of States in respect of treaties"); paras. (14)–(18) of the commentary to draft article 15 on the succession of States in respect of treaties, *ibid.*, pp. 213–214 (considering devolution agreements as evidence of State practice for the purpose of ascertaining the existence of a general rule "in regard to a newly independent State's *obligation* to inherit treaties" and finding that States have not "in their practice acted on the basis that they are in general bound to [a predecessor's] treaties").

[83] See, for example, paras. (1) and (5) of the commentary to draft article 49 on the law of treaties, *Yearbook … 1966*, vol. II, p. 246 (referring to the prohibition of the use of force as laid down in the Charter of the United Nations); para. (51) of the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above); *Yearbook … 1980*, vol. II (Part Two), p. 154 ("The current treaty practice of States indicates the application of provisions of several conventions of a universal character dealing with some special aspects of State immunity."); para. (5) of the commentary to article 11 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 34 (recognition of fair trial guarantees in numerous treaties).

[84] At times, the Commission appears to have inferred the general recognition or acceptance of a rule from certain international instruments other than treaties, including, for instance, resolutions and declarations by international organizations. See, for example, para. (3) of the commentary to draft article 8 on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 159 (mentioning, *inter alia*, that the principle of the obligation to notify other States of a risk of significant harm "is embodied in a number of international agreements, … declarations and resolutions adopted by intergovernmental organizations, conferences and meetings."); and para. (16) of the commentary to article 2 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 22 (indicating, *inter alia*, that the principle of international criminal responsibility for incitement was recognized in the Charter of the Nuremberg Tribunal); paras. (1)–(3) of the commentary to article 6, *ibid.*, p. 25 (recognition of the principle of command responsibility in treaties and in the statutes of international criminal tribunals); para. (4) of the commentary to article 6, pp. 25–26 (express recognition, in the statutes of international criminal tribunals, of the absence of a defence based on the official position of the offender); and para. (5) of the commentary to article 14, pp. 39–40 (referring to various instruments which do not recognize any defences to those crimes).

## D. Relevance of the practice of international organizations

*Observation 13*

Under certain circumstances, the practice of international organizations has been relied upon by the Commission to identify the existence of a rule of customary international law. Such reliance has related to a variety of aspects of the practice of international organizations, such as their external relations, the exercise of their functions, as well as positions adopted by their organs with respect to specific situations or general matters of international relations.[85]

*Observation 14*

On some occasions, the Commission has referred to the possibility of the practice of an international organization developing into a custom specific to that organization. Such customs may relate to various aspects

[85] See, for example, paras. (7)–(8) of the commentary to draft article 41 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), pp. 114–115 ("(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990 … (8) As regards the denial by a State of the right of self-determination of peoples, … The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia and the Bantustans in South Africa."); para. (3) of the commentary to draft article 8 on the prevention of transboundary harm from hazardous activities, *ibid.*, p. 159 (indicating that the obligation to notify other States of the risk of significant harm is recognized in "declarations adopted by intergovernmental organizations, conferences and meetings"); para. (2) of the commentary to draft article 17 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 44 (indicating that the General Assembly had affirmed that crimes against humanity and genocide constituted crimes under international law, and had adopted the Convention on the Prevention and Punishment of the Crime of Genocide); paras. (1)–(14) of the commentary to draft article 4 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 177–180 (referring to the practice of numerous international organizations, including the United Nations and certain specialized agencies); paras. (12)–(13) of the commentary to draft article 8, *ibid.*, pp. 184–185 (citing the practice of the Secretary-General of the United Nations as depositary of multilateral treaties) and para. (3) of the commentary to draft article 16 (on the same subject), *ibid.*, p. 215; para. (2) of the commentary to draft article 24 on the representation of States in their relations with international organizations, *Yearbook … 1971*, vol. II (Part One), p. 301 ("The replies of the United Nations and the specialized agencies indicate that the exemption provided for in this article is generally recognized."); para. (1) of the commentary to draft article 49 on the law of treaties, *Yearbook … 1966*, vol. II, p. 246 ("The clear-cut prohibition of the threat or use of force in Article 2 (4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law."); and para. 112 of the commentary to principle VI of the principles of international law recognized in the charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, *Yearbook … 1950*, vol. II, document A/1316, part. II, p. 376 (referencing a declaration concerning wars of aggression adopted by the Assembly of the League of Nations). See also paragraph 78 of the report of the Commission on the work of its second session, *ibid.*, p. 372 ("Records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations.")

of the organization's functions or activities, e.g. the treaty-making power of an international organization or the rules applicable to treaties adopted within the organization.[86]

### E. Relevance of judicial pronouncements and writings of publicists

30. As previously indicated,[87] the Commission has on many occasions considered judicial pronouncements and writing of publicists in its analysis of customary international law.[88] As described below, the Commission has relied upon these materials in various ways.

*Observation 15*

The Commission has, on some occasions, relied upon decisions of international courts or tribunals as authoritatively expressing the status of a rule of customary international law.[89]

*Observation 16*

Furthermore, the Commission has often relied upon judicial pronouncements as a consideration in support of the existence or non-existence of a rule of customary international law.

31. Where the Commission itself undertook an analysis for the purpose of identifying the existence of a rule of customary international law, judicial recognition has often constituted a relevant, if not decisive, consideration in support of the existence of the rule. Such recognition was found in decisions of international courts and tribunals as well as in arbitral awards.[90]

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[86] See para. (14) of the commentary to draft article 7 on the law of treaties between States and international organizations or between international organizations, *Yearbook … 1982*, vol. II (Part Two), p. 27 (referring to the development of a practice into a "rule of the organization" recognizing the competence of the head of the Secretariat to express the consent of the organization to be bound by a treaty, without reference to another organ of the organization; also pointing out that "[i]t is the acquiescence of ['all the other organs of the organization that might have been entitled to claim the competence and did not do so'] which constitutes the practice"); paras. (11)–(13) of the commentary to draft article 4 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 180 (evoking, in general, the possibility that the internal practice of an international organization may give rise to organization-specific customary rules); and para. (2) of the commentary to draft article 22 on the succession of States in respect of treaties, *ibid.*, p. 233 (indicating that the International Labour Organization has a particular customary practice with respect to the date from which a newly independent State is regarded as bound to labour conventions).

[87] See observation 1 above.

[88] Of potential general relevance to this section is the following comment made by the Commission in paragraph 30 of its report on ways and means for making the evidence of customary international law more readily available:

> Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the Court, by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts."

(*Yearbook … 1950*, vol. II, p. 368, para. 30).

[89] For example, on the question of straight baselines, the Commission interpreted the ICJ judgment in the *Fisheries* case between the United Kingdom and Norway "as expressing the law in force" and "accordingly drafted the article on the basis of [the] judgment" (paras. (1)–(4) of the commentary to draft article 5 on the law of the sea, *Yearbook … 1956*, vol. II, pp. 267–268). See also paras. (3)–(5) of the commentary to draft article 24 (*ibid.*, p. 277) (relying on the judgment of the Court in the *Corfu Channel* case as expressing the customary rule in force with regard to innocent passage through international straits connecting two parts of the high seas) and para. (2) of the commentary to draft article 23 on the law of treaties, *Yearbook … 1966*, vol. II, p. 211 (stating that "there is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*" and referring to decisions of ICJ, PCIJ and arbitral tribunals).

[90] See, for example, *Yearbook … 2001*, vol. II (Part Two), para. (14) of the commentary to draft article 25 on the responsibility of States for internationally wrongful acts, p. 83 ("On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25."); para. (6) of the commentary to draft article 41, *ibid.*, p. 114 (quoting the *Military and Paramilitary Activities in and against Nicaragua* case and indicating that "the existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of [the] International Court of Justice"); and para. (2) of the commentary to draft article 51, *ibid.*, p. 134 (referring, *inter alia*, to the *Naulilaa* case concerning the requirement of proportionality for taking countermeasures); para. (4) of the commentary to draft articles 16 and 17 on the law of treaties, *Yearbook … 1966*, vol. II, *ibid.*, pp. 203–204 (referring to the ICJ pronouncement in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case that "The principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law."); paras. (14)–(15) of the commentary to draft article 27, *ibid.*, pp. 221–222 (relying on the jurisprudence of international courts and tribunals to ascertain established rules of treaty interpretation); and para. (8) of the commentary to draft article 29, *ibid.*, pp. 225–226 (analysing whether or not PCIJ, in its *Mavrommatis Palestine Concessions* case, intended to lay down a general rule regarding treaty interpretation in cases of divergence between authentic texts); para. (4) of the commentary to draft article 8 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 25 (referring to several decisions by international courts and tribunals, including the Franco-Italian Conciliation Commission's pronouncement that "customary international law has not established any autonomous criterion for determining what constitutes State property"); para. (19) of the commentary to draft article 13 on the succession of States in respect of State property, archives and debts, *ibid.*, p. 34 ("Decisions of international jurisdictions confirm this rule."); paras. (3)–(8) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 197–199 (citing numerous decisions of international courts in its analysis of the question of territorial treaties, and indicating that a PCIJ pronouncement "is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates."); para. (18) of the commentary to draft article 3 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 94 ("The existence of the principle of law requiring consultations among States in dealing with fresh water resources is explicitly supported by the arbitral award in the *Lake Lanoux* case."); para. (3) of the commentary to draft article 17 of the draft Code of crimes against the peace and security of Mankind, *Yearbook … 1996*, vol. II (Part Two), p. 44 ("The principles underlying the [Genocide] Convention have been recognized by [the] International Court of Justice as binding on States even without any conventional obligation."); para. (6) of the commentary to draft article 18 of the draft Code of crimes against the peace and security of mankind, *ibid.*, p. 48 ("The absence of any requirement of an international armed conflict as a prerequisite for crimes against humanity was also confirmed by the International Tribunal for the Former Yugoslavia."); and para. (1) of the commentary to draft article 3 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two), p. 20 ("The right to expel has been recognized in particular in a number of arbitral awards and decisions of claims commissions and in various decisions of regional courts and commissions."). See also, generally, *Yearbook … 1950*, vol. II, pp. 369–370, paras. 42–51 (reviewing the availability of publications containing decisions and awards of international courts and tribunals in a section entitled "Evidence of customary international law").

*Observation 17*

At times, the Commission has also relied upon decisions of international courts or tribunals, including arbitral awards, as secondary sources for the purpose of identifying relevant State practice.[91]

*Observation 18*

The writings and opinions of jurists have often been considered by the Commission in the identification of rules of customary international law.

32. In its consideration of the writings and opinions of jurists for the purpose of identifying a rule of customary international law, the Commission has, at times, undertaken an overall assessment of the weight of opinion in support of a particular rule.[92] Such an assessment appears to have been based on both quantitative and qualitative aspects.[93]

33. On other occasions, the Commission has relied on the writings of jurists as secondary sources of State practice.[94]

[91] See para. (23) of the commentary to draft articles 16 and 17 on the law of treaties, *Yearbook … 1966*, vol. II, p. 208 ("That the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted; for the [ICJ] itself in *Reservations to the Genocide Convention* case spoke of 'very great allowance' being made in international practice for 'tacit assent to reservations'."); para. (10) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 98 (including "decisions of international courts and tribunals" in its "survey of all available evidence of the general practice of States, accepted as law"). See also para. (4) of the commentary to draft article 39 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 110 (relying on the *Delagoa Bay Railway* and the *S.S. "Wimbledon"* cases as evidence of "State practice" with respect to "the relevance of the injured State's contribution to the damage in determining the appropriate reparation").

[92] See, for example, para. (2) of the commentary to draft articles 11 and 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 197 ("The weight of opinion amongst modern writers supports the traditional doctrine … In general, however the diversity of the opinions of writers makes it difficult to find in them clear guidance as to what extent and upon what precise basis international law recognizes that treaties of a territorial character constitute a special category for the purposes of the law applicable to succession of States.").

[93] See *Yearbook … 1966*, vol. II, para. (8) of the commentary to draft article 49 on the law of treaties, p. 247 ("The great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4… authoritatively declares the modern customary law regarding the threat or use of force."), para. (2) of the commentary to draft article 53, *ibid.*, pp. 250–251 ("Some jurists … take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties. A number of other jurists, however, take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties."); para. (1) of the commentary to draft article 57, *ibid.*, pp. 253–254 ("The great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party"); para. (1) of the commentary to draft article 59, *ibid.*, p. 257 ("Almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which this article is concerned…"); para. (9) of the commentary to draft article 17 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 46 ("The foregoing rule conforms to the opinions of publicists, who generally take the view that…"); para. (3) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 211 ("The majority of writers take the view, supported by State practice, …"); para. (15) of the commentary to draft article 15 on the succession of States in respect of treaties, *ibid.*, p. 213 ("Considerable support can be found among writers and in State practice for the view that general international law does impose an obligation…"); and para. (1) of the commentary to draft article 3 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two), p. 20 ("[The right to expel] is uncontested in practice as well as in case law and the legal writings."). See also para. (10) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 98 (referring in general terms to "the views of learned commentators"); and paras. (3)–(5) of the commentary to draft article 32 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 228–229 (finding that the division of opinion among jurists "was primarily of a doctrinal character" and "would be likely to produce different results only in very exceptional circumstances").

[94] See, for example, para. (3) of the commentary to draft article 32 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 94 (citing an example of relevant State practice found in an article by R. L. Buell in the *Political Science Quarterly*, vol. 37 (1922), p. 620); para. (3) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 211 (citing *The Law of Treaties*, by A. D. McNair (Oxford, Clarendon Press, 1961), quoting a statement by the United Kingdom on Finland's position *vis-à-vis* its predecessor's treaties); para. (2) of the commentary to draft article 18 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 52 (citing writings of jurists in support of the proposition that "there is support in the practice of States, in judicial decisions and in the writings of publicists, for the position that the State of nationality … may seek redress for members of the crew of the ship who do not have its nationality"); and para. (10) of the commentary to draft article 5 on the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 98 (including "the views of learned commentators" in "[a] survey of all available evidence of the general practice of States, accepted as law").

## Chapter II

# Operation of customary international law in the international legal system

34. This chapter includes observations regarding the Commission's apparent understanding of the binding nature and characteristics of the rules of customary international law, and of the relationship of customary international law with other international legal rules.

### A. Binding nature and characteristics of the rules of customary international law

*Observation 19*

The Commission has consistently referred to customary international law as a set of rules generally binding on subjects of international law.[95] On several occasions, the Commission has opposed such rules to

[95] See, for example, paras. (1)–(4) of the commentary to draft article 34 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 230–231 (excerpts reproduced in footnote 121 below) and para. (30) of the commentary to draft article 12 and para. (8) of the commentary to draft article 15 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 204 and 212, respectively. See also footnote 130 below. In its Guide to Practice on Reservations to Treaties, the Commission has alluded to the so-called theory of the "persistent objector", according to which a rule of customary international law would not be opposable to a State that has persistently objected to the rule during its formation; see para. (7) of the commentary to guideline 3.1.5.3

treaty rules, which, by definition, only bind the parties to the treaty.[96]

*Observation 20*

Reference was made in the work of the Commission to the possible existence of rules of regional customary international law.[97] In this regard, the question of whether a regional customary law rule would be binding on a State that has not specifically adopted or accepted it was also alluded to.[98] Furthermore, the Commission has referred to the possible existence of special rules, including customary rules or historic rights, governing the delimitation of certain maritime areas[99] or establishing a specific territorial, fluvial or maritime regime.[100]

*Observation 21*

The Commission has, on certain occasions, referred to the existence of rules of customary international law that are regarded as giving rise to so-called "*erga omnes* obligations".[101]

*Observation 22*

The Commission has, on various occasions, referred to the existence of rules of customary international law[102] that, by reason of their subject matter, are of a non-derogable character (peremptory norms/*jus cogens*).

35. The Commission has indicated that "the concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine".[103] Examples of peremptory norms presented by the Commission as generally recognized as such include the prohibition of aggression;[104] the prohibitions against slavery and the slave trade, genocide, racial discrimination and apartheid;[105] as well as the prohibition against torture and the obligation to respect the right of self-determination.[106] The Commission emphasized, however, the non-exhaustive character of any such list.[107]

36. It should be recalled that the Commission, in its draft articles on the law of treaties, proposed several provisions relating to *jus cogens*.[108] The Commission has, on multiple occasions, asserted that a treaty rule that conflicts

on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), pp. 221–222. In so doing, the Commission appears to have excluded the operation of any such theory with respect to rules of *jus cogens*; see para. (19) of the same commentary, *ibid.*, p. 224.

[96] See, for example, paras. (1)–(4) of the commentary to draft article 34 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 230–231; para. (2) of the commentary to draft article 5 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 181 (referring to "obligations to which [a State] would be subject under international law independently of the treaty"); para. (30) of the commentary to draft article 12 on the succession of States in respect of treaties, *ibid.*, p. 204 ("While recognizing that an objective regime may arise from such a treaty, [the Commission] took the view that the objective regime resulted rather from the execution of the treaty and the grafting upon the treaty of an international custom."); and para. (7) of the commentary to guideline 3.1.5.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 221 ("Customary rules are binding on States, independently of their expression of consent to a treaty rule."). See, however, section B below concerning the relationship between treaty rules and customary international law.

[97] See the report of the Study Group of the International Law Commission on fragmentation of international law, A/CN.4/L.682 and Add.1 and Corr.1 (available from the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)), paras. 213–215.

[98] *Ibid.*, para. 213 ("A separate, much more difficult case is the one where it is alleged that a regional rule (either on the basis of treaty practice or custom) is binding on a State even when the State has not specifically adopted or accepted it. This is the claim dealt with (albeit inconclusively) by the International Court of Justice in the *Asylum* (1950) and *Haya de la Torre* (1951) cases.").

[99] See para. (6) of the commentary to draft article 12 on the law of the sea, *Yearbook … 1956*, vol. II, p. 271 (acknowledging the possible existence of "special rules" and alluding to the possibility of "differences in customary law" in the field of maritime delimitation). See also para. (4) of the commentary to draft article 3, *ibid.*, p. 266 ("A claim to a territorial sea not exceeding twelve miles in breadth could be sustained *erga omnes*, by any State, if based on historic rights.").

[100] See para. (1) of the commentary to draft article 34 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 230–231 ("The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom."). See also para. (8) of the commentary to draft article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), pp. 198–199 (referring to the case made in the *Right of passage* case (*I.C.J. Reports 1960*, p. 6) for the proposition that a territorial right of passage may exist as a local or bilateral custom).

[101] See, in particular, para. (9) of the commentary to draft article 48 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 127 ("While taking up the essence of this statement [the dictum of ICJ in the *Barcelona Traction* case concerning obligations *erga omnes*], the articles avoid use of the term 'obligations *erga omnes*', which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to 'the outlawing of acts of aggression, and of genocide' and to 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'. In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list."). See also the commentary to draft article 49 on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), pp. 89–91.

[102] Article 53 of the Vienna Convention on the Law of Treaties defines a *jus cogens* rule as a "peremptory norm of *general international law*". The Commission has indicated, in para. (14) of its commentary to guideline 3.1.5.3 on reservations to treaties, that a peremptory norm of general international law "is, in almost all cases, customary in nature" (*Yearbook … 2011*, vol. II (Part Three), p. 223), while also acknowledging that "the wording of article 53 of the 1969 and 1986 Vienna Conventions does not exclude the possibility that a treaty rule may, by itself, be a peremptory norm" (*ibid.*, footnote 1709).

[103] Para. (2) of the commentary to draft article 40 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 112.

[104] *Ibid.*, para. (4) of the commentary to draft article 40.

[105] *Ibid.*

[106] *Ibid.*, p. 113, para. (5).

[107] *Ibid.*, para. (6). In the same passage, the Commission also recalls the possibility that new peremptory norms may come into existence as contemplated in article 64 of the 1969 Vienna Convention.

[108] See draft articles 41, paras. 5; 50; 61; and 67 on the law of treaties and commentaries thereto; *Yearbook … 1966*, vol. II, pp. 238–239, 247–249, 261 and 266–267, respectively.

with *jus cogens* is (or becomes) invalid.[109] Furthermore, the Commission has recognized that the peremptory character of a rule of customary international law also affects the operation of certain secondary rules relating to the responsibility for internationally wrongful acts.[110]

*Observation 23*

The Commission has indicated that peremptory norms are formed as a result of a process of widespread acceptance and recognition of such norms as peremptory by the international community as a whole.[111]

*Observation 24*

While stating that a rule of *jus cogens* "can be modified only by a subsequent norm of general international law having the same character",[112] the Commission has indicated that, at the present time, a modification of a rule of *jus cogens* would most probably be effected through a general multilateral treaty.[113]

## B. Relationship of customary international law with treaties

37. The question of the relationship of customary international law with treaties was addressed in general terms in draft article 34 on the law of treaties, which provided as follows:

*Article 34. Rules in a treaty becoming binding through international custom*

Nothing in articles 30 to 33 [provisions relating to treaties and third States] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.[114]

38. The commentary to that draft article contained, *inter alia*, the following observations:

(1) The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom, rules of land warfare, the agreements for the neutralization of Switzerland, and various treaties regarding international riverways and maritime waterways. So too a codifying convention purporting to state existing rules of customary law may come to be regarded as the generally accepted formulation of the customary rules in question even by States not parties to the Convention.

(2) In none of these cases, however, can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law. In short, for these States the source of the binding force of the rules is custom, not the treaty. For this reason the Commission did not think that this process should be included in the draft articles as a case of a treaty having legal effects for third States. It did not, therefore, formulate any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. On the other hand, having regard to the importance of the process and to the nature of the provisions in articles 30 to 33, it decided to include in the present article a general reservation stating that nothing in those articles precludes treaty rules from becoming binding on non-parties as customary rules of international law.[115]

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[109] See *Yearbook … 1966*, vol. II, draft article 50 on the law of treaties and commentary thereto, pp. 247 *et seq.* (Draft article 50 reads: "A treaty is void if its conflicts with a peremptory norm of general international law…"); see also para. (8) of the commentary to draft article 41, *ibid.*, p. 239; and para. (1) of the commentary to draft article 61, *ibid.*, p. 261 ("Manifestly, if a new rule of that character—a new rule of *jus cogens*—emerges, its effect must be to render void not only future but existing treaties."). As regards the consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law, see draft article 67 on the law of treaties and commentary thereto (*ibid.*, pp. 266–267). Similarly, the Commission has stated, in guiding principle 8 applicable to unilateral declarations of States capable of creating legal obligations, that "A unilateral declaration which is in conflict with a peremptory norm of general international law is void" (*Yearbook … 2006*, vol. II (Part Two), p. 165).

[110] See draft articles 26 (with regard to *jus cogens* in relation to circumstances precluding wrongfulness), 40 and 41 (content of the international responsibility in the case of serious breaches of obligations under peremptory norms of general international law) and 50 (obligations not affected by countermeasures) on the responsibility of States for internationally wrongful acts, and commentaries thereto, *Yearbook … 2001*, vol. II (Part Two), pp. 84–85, 112–116 and 131–134. See also draft articles 26, 41, 42 and 53 on the responsibility of international organizations, and commentaries thereto, *Yearbook … 2011*, vol. II (Part Two), pp. 75, 82, 83–84 and 94.

[111] Regarding this substantive requirement of general acceptance and recognition, see, in particular, para. (7) of the commentary to draft article 12 on the responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), p. 56 ("Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community."). See also, on this point, *ibid.*, para. (5) of the commentary to draft article 26 on the responsibility of States for internationally wrongful acts, p. 85; and para. (6) of the commentary to draft article 40, p. 113 (referring to the formation of new peremptory norms through the process of acceptance and recognition by the international community of States as a whole). It should be noted that, while draft article 50 on the law of treaties (*Yearbook … 1966*, vol. II, p. 247) and draft article 53 on the law of treaties between States and international organizations or between international organizations (*Yearbook … 1982*, vol. II (Part Two), p. 56) refer in this context to "the international community of States as a whole", the draft articles on the responsibility of States for internationally wrongful acts (draft articles 25, 33, 42 and 48, pp. 28–30, para. 76, *Yearbook … 2001*, vol. II (Part Two)) and the draft articles on the responsibility of international organizations (draft articles 25, 33, 43 and 49; *Yearbook … 2011*, vol. II (Part Two), pp. 42–44) refer more generally to "the international community as a whole".

[112] See, in this regard, draft article 50 *in fine* on the law of treaties (*Yearbook … 1966*, vol. II, p. 247) as well as draft article 53 *in fine* on the law of treaties between States and international organizations or between international organizations (*Yearbook … 1982*, vol. II (Part Two), p. 56). This phrase was included in article 53 of the 1969 and 1986 Vienna Conventions. On the "strength" of *jus cogens* norms, see also para. (3) of the commentary to guideline 4.4.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 162 ("Doubtless the rules of *jus cogens* will continue to evolve, but it seems unlikely that a reservation can contribute to destabilizing a norm presenting such a degree of binding force.").

[113] See, on this point, para. (4) of the commentary to draft article 50 on the law of treaties, *Yearbook … 1966*, vol. II, p. 248: "It would be clearly wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As a modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty, the Commission thought it desirable to indicate that such a treaty would fall outside the scope of the article."

[114] *Ibid.*, p. 182.

[115] *Ibid.*, pp. 230–231.

39. The substance of draft article 34 was subsequently retained in article 38 of the 1969 Vienna Convention on the Law of Treaties, where the words "recognized as such" were added to qualify the rule of customary international law referred to in the provision.[116] Article 38 on the law of treaties between States and international organizations or between international organizations, adopted by the Commission in 1982, which later became article 38 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,[117] reiterated this provision, including the additional phrase introduced at the 1969 United Nations Conference on the Law of Treaties.[118]

40. In considering the various topics on its agenda, the Commission has addressed a number of aspects regarding the relationship of customary international law with treaties, as summarized in the following observations:

*Observation 25*

Recognizing that a treaty may codify existing rules of customary international law,[119] the Commission has often referred to treaties as possible evidence of the existence of a customary rule.[120]

*Observation 26*

While indicating that a treaty does not itself bind third States,[121] the Commission has, on several occasions, recognized that treaties may contribute to the crystallization[122] or development[123] of a rule of customary international law. The Commission, however, has found that the frequent enunciation of a provision in international treaties did not necessarily indicate that the provision had developed into a rule of customary international law.[124]

*Observation 27*

The Commission has alluded to the possibility that the emergence of a new rule of customary international law may modify a treaty, depending on the particular circumstances and the intentions of the parties to the treaty.[125]

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[116] This additional phrase was introduced on the basis of an amendment by the Syrian Arab Republic; see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), p. 155, paras. 311–312.

[117] This Convention is not yet in force.

[118] *Yearbook … 1982*, vol. II (Part Two), pp. 47–48.

[119] See, in general terms, *Yearbook … 1950*, vol. II, p. 368, para. 29 ("Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law.").

[120] See sections B and C of chapter I, above, concerning treaties as evidence of State practice and/or *opinio juris*. However, the Commission has also pointed to a divergence between a conventional regime and the applicable customary international law; see para. (8) of the commentary to article 8 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 29 (referring to the crime of genocide as "a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention and therefore not subject to the restriction contained therein [namely in its article 6, which restricts national court jurisdiction for genocide to the State in whose territory the crime occurred]").

[121] See paras. (1) to (4) of the commentary to draft article 34 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 230–231, in particular, para. (1) ("*The role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States is well recognized**. A treaty concluded between certain States may formulate a rule, or establish a territorial, fluvial or maritime regime, which afterwards comes to be generally accepted by other States and becomes binding upon other States by way of custom … *So too a codifying convention may come to be regarded as the generally accepted formulation of the customary rules** in question even by States not parties to the convention.") and para. (2) ("*In none of these cases, however, can it properly be said that the treaty itself has legal effects for third States. They are cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law**. In short, for these States the source of the binding force of the rules is custom, not the treaty."). This point was addressed in similar terms in para. (30) of the commentary to draft article 12 on the succession of States in respect of treaties and in para. (8) of the commentary to draft article 15 on that same topic; see *Yearbook … 1974*, vol. II (Part One), pp. 204 and 212, respectively.

[122] See para. (11) of the commentary to guideline 3.1.5.3 on reservations to treaties, *Yearbook … 2011*, vol. II (Part Three), p. 223 ("A 'codification convention' often crystallizes as rules of general international law rules which did not have that status at the time of its adoption.").

[123] See, for example, para. (34) of the commentary to draft article 12 on the succession of Stateis in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 205 (referring to a right of free passage through the Suez Canal "whether by virtue of the treaty or of the customary regime which developed from it"); and para. (3) of the commentary to draft article 18 on the law of transboundary aquifers, *Yearbook … 2008*, vol. II (Part Two), p. 43 ("[The 'Martens clause'], which was originally inserted in the preamble of the Hague Conventions ... of 1899 and 1907 and has subsequently been included in a number of conventions and protocols, now has the status of general international law."). As an illustration of the possible impact of the adoption of a conventional rule on the Commission's views on a legal matter, see para. (5) of the commentary to draft article 11 on special missions, *Yearbook … 1967*, vol. II, p. 353 ("A rule frequently observed in practice is that the receiving State must ensure the possibility of [the local] recruitment [of staff required for special missions], which is often essential for the performance of the special mission's functions. In 1960 the Commission inclined to the view that this rule conferred a genuine privilege on the special mission. *In the light of the two Vienna Conventions, however, the Commission changed its opinion and in 1965 adopted the principle stated in article 10, paragraph 2 of this draft** [stating that 'Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.']").

[124] See para. (3) of the commentary to draft article 7 on most-favoured-nation clauses, *Yearbook … 1978*, vol. II (Part Two), p. 25 ("Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law. Hence it is widely held that only treaties are the foundation of most-favoured-nation treatment.").

[125] See para. (3) of the commentary to draft article 38 on the law of treaties, *Yearbook … 1966*, vol. II, p. 236 ("As to the case of modification through the emergence of a new rule of customary law, [the Commission] concluded that the question would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties."). This comment was made in relation to the Commission's explanation of its decision to remove, in the final version of the draft article, a subparagraph that appeared in draft article 68 of the 1964 draft and provided that "[a] treaty may be modified … (ii) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties". For the commentary to the latter provision, see *Yearbook … 1964*, vol. II, p. 198, para. (3). As is well known, the proposed draft article 38 was not retained by the 1969 United Nations Conference on the Law of Treaties.

*Observation 28*

The Commission has recognized that, with the exception of *jus cogens* norms,[126] States may depart from rules of customary international law through the conclusion of bilateral or multilateral agreements.[127] At the same time, the Commission has emphasized that a treaty, except where it provides otherwise, must be interpreted and applied in the light of existing rules of international law, including customary law.[128]

## C. Relationship of customary international law with "general international law"

*Observation 29*

In certain instances, the Commission has employed the phrase "general international law" to refer, in a generic manner, to rules of international law other than treaty rules.[129] Also, on some occasions, the Commission appears to have used "general international law" and "customary international law" interchangeably.[130] The phrase "general international law" has also been used by the Commission as an umbrella term that includes both customary international law and general principles.[131]

*Observation 30*

On some occasions, the Commission has referred to general principles of law—possibly within the meaning of article 38, paragraph (1) (*c*), of the Statute of the International Court of Justice[132]—or to so-called general principles of international law.[133] The Commission has also indicated that such general principles may inform the international regulation of

[126] See section A of the present chapter, above.

[127] See, for example, para. (15) of the commentary to draft article 17 on the succession of States in respect of State property, archives and debts, *Yearbook … 1981*, vol. II (Part Two), p. 47 ("It is obviously within the discretion of States to conclude treaties making exceptions to a principle."); and para. (2) of the commentary to draft article 30 on the law of the sea, *Yearbook … 1956*, vol. II, p. 279 (alluding to the possibility of treaty-based policing rights being granted to warships in respect of foreign ships, thus departing from customary international law).

[128] See, for example, para. (3) of the commentary to draft article 60 on the law of the sea, *Yearbook … 1956*, vol. II, p. 293 ("The existing rule of customary law by which nationals of other States are at liberty to engage in such fishing on the same footing as the nationals of the coastal States should continue to apply. The exercise of other kinds of fishing in such areas must not be hindered except to the extent strictly necessary for the protection of the fisheries contemplated by the present article.") and para. (1) of the commentary to draft article 24 on the law of treaties, *Yearbook … 1966*, vol. II, p. 211 (referring to the "general rule … that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms").

[129] See, for example, para. (2) of the commentary to draft article 30 on the law of the sea, *Yearbook … 1956*, vol. II, p. 279 (indicating that the regulations contained in treaties granting certain policing rights to warships in respect of foreign ships could not yet be regarded as part of "general international law"); the comment made by the Commission with respect to the provisions of the preamble of the Model rules on arbitral procedure, *Yearbook … 1958*, vol. II, p. 86, para. 24 (those provisions … "govern it as principles of general international law rather than as deriving from the agreement of the parties"); draft article 1 (*b*) on the prevention or punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook … 1972*, vol. II, p. 312 ("'Internationally protected person' means ... [a]ny official of either a State or an international organization who is entitled, *pursuant to general international law or an international agreement**, to special protection."); para. (8) of the commentary to draft article 1, *ibid.*, p. 314 ("The expression 'general international law' is used to supplement the reference to 'an international agreement'…"); para. (3) of the commentary to draft article 18 on the law of transboundary aquifers, *Yearbook … 2008*, vol. II (Part Two), p. 43 (the "Martens clause"—see footnote 123 above); para. (2) of the commentary to draft article 10 on the effects of armed conflicts on treaties, *Yearbook … 2011*, vol. II (Part Two); para. (4) of the commentary to draft article 14 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two) ("It goes without saying that the expelling State is required, in respect of an alien subject to expulsion, to meet all the obligations incumbent upon it concerning the protection of human rights, both by virtue of international conventions to which it is a party and by virtue of general international law."); and, similarly, the commentary to draft article 25 on the expulsion of aliens, *Yearbook … 2012*, vol. II (Part Two).

[130] See, for example, the commentary to draft article 49 on the law of treaties, *Yearbook … 1966*, vol. II, pp. 246–247 ("(1) The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2 (4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law… (5)… *The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are today of universal application** … (8) … As pointed out in paragraph (1) above, the invalidity of a treaty procured by illegal threat or use of force is a principle which is *lex lata … [T]he great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force**.").

[131] See the explanations contained in the report of the Study Group of the International Law Commission on fragmentation of international law, document A/CN.4/L.682 and Add.1 and Corr.1 (available from the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)), para. 194 (2) (*a*) ("*General international law (that is, general custom and general principles of law*)* fulfils gaps in the special regime and provides interpretative direction for its operation."); and para. 493 (3) (" 'General international law' clearly refers to general customary law as well as 'general principles of law recognized by civilized nations' under article 38 (1) (*c*) of the Statute of the International Court of Justice. But it might also refer to principles of international law proper and to analogies from domestic laws, especially principles of the legal process (*audiatur et altera pars, in dubio mitius*, estoppel and so on). In the practice of international tribunals, including the Appellate Body of the WTO or the European and Inter-American Courts of Human Rights reference is constantly made to various kinds of 'principles' sometimes drawn from domestic law, sometimes from international practice but often in a way that leaves their authority unspecified.").

[132] See, for example, para. (4) of the commentary to draft article 59 on the law of treaties, *Yearbook … 1966*, vol. II, p. 257 (principle of *rebus sic stantibus*); para. (1) of the commentary to draft article 7 on the nationality of natural persons in relation to the succession of States, *Yearbook …1999*, vol. II (Part Two), p. 30 ("The Commission recognizes that one of the general principles of law is the principle of non-retroactivity of legislation."); and para. (3) of the commentary to article 14 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 39 (explaining that "the possible defences to crimes covered by the Code [are] those defences that are well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law"). For additional examples, see footnote 134 below.

[133] See, for example, *Yearbook … 1949*, p. 290, para. 52 (explaining that the articles of the draft declaration on the rights and duties of states enunciate "general principles of international law"); para. (8) of the commentary to article 68 on the law of the sea, *Yearbook … 1956*, vol. II, p. 298 ("[The principle of the sovereign rights of the coastal State], which is based on general principles corresponding to the present needs of the international community, is in no way incompatible with the principle of the freedom of the seas."). See also the following two footnotes.

particular subjects[134] or even the international legal system as a whole.[135]

*Observation 31*

Furthermore, in the work of the Commission, the phrase "general international law" was also used to refer to general rules of international law as opposed to rules pertaining to specific fields which include, *inter alia*, human rights law, environmental law, the law of the sea, etc.[136]

[134] Both general principles of law and general principles of international law have been referred to in this context. As regards general principles of law, see, in particular, para. (1) of the commentary to draft article 7 on the nationality of natural persons in relation to the succession of States, *Yearbook … 1999*, vol. II (Part Two), p. 30 (referring to non-retroactivity of legislation as a general principle of law that has "an important role to play" as regards nationality issues); article 14 of the draft Code of crimes against the peace and security of mankind, *Yearbook … 1996*, vol. II (Part Two), p. 39 ("The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime."); para. (1) of the commentary to draft article 3 on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 153 ("Article 3 is based on the fundamental principle *sic utere tuo ut alienum non laedas*, which is reflected in principle 21 of the Stockholm Declaration."). Concerning general principles of international law, see, in particular, para. (8) of the commentary to draft article 3 on the law of the sea, *Yearbook … 1956*, vol. II, p. 266 ("It follows from the foregoing that the Commission came out clearly against claims to extend the territorial sea to a breadth which, in its view, jeopardizes the principle that has governed maritime law since Grotius, namely, the freedom of the high seas."); para. (1) of the commentary to draft article 27 on the law of the sea, *ibid.*, p. 278 ("The principle generally accepted in international law that the high seas are open to all nations governs the whole regulation of the subject."); the commentary to the provisional version of draft article 6 on the jurisdictional immunities of States and their property (see footnote 47 above); *Yearbook … 1980*, vol. II (Part Two), p. 144, para. (12) ("That rationale of sovereign immunity appears to rest on a number of basic principles, such as common agreement or usage, international comity or courtesy, the independence, sovereignty and dignity of every sovereign authority, representing a progressive development from the attributes of personal sovereigns to the theory of equality and sovereignty of States and the principle of consent."); and *ibid.*, p. 156, para. (55) (discussing the "rational bases of State immunity" and referring to "the sovereignty, independence, equality and dignity of States" as notions that "seem to coalesce, together constituting a firm international legal basis for State immunity").

[135] See, in this regard, the following observation made by the Commission concerning the draft declaration on the rights and duties of States: "In conclusion it will be observed that the rights and duties set forth in the draft Declaration are formulated in general terms, without restriction or exception, as befits a declaration of basic right and duties. *The articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules**. Article 14 of the draft Declaration is a recognition of this fact. It is, indeed, a global provision which dominates the whole draft and, in the view of the Commission, it appropriately serves as a key to other provisions of the draft Declaration in proclaiming "the supremacy of international law" (*Yearbook … 1949*, p. 290, para. 52). See also para. (2) of the commentary to draft article 4 on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 156 (referring to the principle of good faith as covering "the entire structure of international relations" (citing R. Rosenstock, "The declaration of principles of international law concerning friendly relations: a survey", AJIL, vol. 65 (1971), p. 734)); as well as the observations made by the Commission with regard to the most-favoured-nation clause and the principle of non-discrimination, *Yearbook … 1978*, vol. II (Part Two), p. 11, para. 48 ("The Commission recognized several years ago that the rule of non-discrimination 'is a general rule which follows from the equality of States', and that non-discrimination is 'a general rule inherent in the sovereign equality of States'…"); and *ibid.*, p. 12, para. 50 (referring to "the obvious rule that, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature").

[136] See, in particular, the report of the Study Group of the International Law Commission on fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), p. 176, para. 243 ("The fragmentation of the international social world receives legal significance as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such highly specialized forms of knowledge as 'investment law' or 'international refugee law', etc.—each possessing their own principles and institutions."). See also *ibid.*, p. 179, para. 251, subpara. (10), footnote 976 ("There is no accepted definition of 'general international law'. For the purposes of these conclusions, however, it is sufficient to define what is 'general' by reference to its logical counterpart, what is 'special'.").

# CHECKLIST OF DOCUMENTS OF THE SIXTY-FIFTH SESSION

| *Document* | *Title* | *Observations and references* |
|---|---|---|
| A/CN.4/656 | Provisional agenda for the sixty-fifth session | Mimeographed. For agenda as adopted, see *Yearbook … 2013*, vol. II (Part Two). |
| A/CN.4/657 | Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session | Mimeographed. |
| A/CN.4/658 | Provisional application of treaties, memorandum by the Secretariat | Reproduced in the present volume. |
| A/CN.4/659 | Formation and evidence of customary international law: Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, memorandum by the Secretariat | *Idem.* |
| A/CN.4/660 | First report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur | *Idem.* |
| A/CN.4/661 | Second report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur | *Idem.* |
| A/CN.4/662 | Sixth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur | *Idem.* |
| A/CN.4/663 | First report on formation and evidence of customary international law, by Sir Michael Wood, Special Rapporteur | *Idem.* |
| A/CN.4/664 | First report on the provisional application of treaties, by Mr. Juan Manuel Gómez Robledo, Special Rapporteur | *Idem.* |
| A/CN.4/L.813 | Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Text of draft conclusions 1–5 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission | Mimeographed. |
| A/CN.4/L.814 | Immunity of State officials from foreign criminal jurisdiction: Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission | *Idem.* |
| A/CN.4/L.815 | Protection of persons in the event of disasters: Texts and titles of draft articles 5 *ter* and 16, provisionally adopted by the Drafting Committee on 17 July 2013 | *Idem.* |
| A/CN.4/L.816 | Draft report of the International Law Commission on the work of its sixty-fifth session—chapter I (Organization of the session) | *Idem.* See the adopted text in *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10). The final text appears in *Yearbook … 2013*, vol. II (Part Two). |
| A/CN.4/L.817 | *Idem*, chapter II (Summary of the work of the Commission at its sixty-fifth session) | *Idem.* |
| A/CN.4/L.818 | *Idem*, chapter III (Specific issues on which comments would be of particular interest to the Commission) | *Idem.* |
| A/CN.4/L.819 and Add.1–3 | *Idem*, chapter IV (Subsequent agreements and subsequent practice in relation to the interpretation of treaties) | *Idem.* |
| A/CN.4/L.820 and Add.1–3 | *Idem*, chapter V (Immunity of State officials from foreign criminal jurisdiction) | *Idem.* |
| A/CN.4/L.821 and Add.1–2 | *Idem*, chapter VI (Protection of persons in the event of disasters) | *Idem.* |
| A/CN.4/L.822 and Add.1 | *Idem*, chapter VII (Formation and evidence of customary international law) | *Idem.* |
| A/CN.4/L.823 | *Idem*, chapter VIII (Provisional application of treaties) | *Idem.* |

| *Document* | *Title* | *Observations and references* |
|---|---|---|
| A/CN.4/L.824 | *Idem*, chapter IX (Protection of the environment in relation to armed conflicts) | *Idem.* |
| A/CN.4/L.825 | *Idem*, chapter X (The obligation to extradite or prosecute (*aut dedere aut judicare*)) | *Idem.* |
| A/CN.4/L.826 | *Idem*, chapter XI (The most-favoured-nation clause) | *Idem.* |
| A/CN.4/L.827 and Add.1 | *Idem*, chapter XII (Other decisions and conclusions of the Commission) | *Idem.* |
| A/CN.4/L.828 | Report of the Study Group on the most-favoured-nation clause | Mimeographed. |
| A/CN.4/L.829 | Report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) | *Idem.* See the adopted text in *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10). The final text appears in *Yearbook … 2013*, vol. II (Part Two). |
| A/CN.4/L.830 | Report of the Planning Group | *Idem.* |
| A/CN.4/SR.3159–A/CN.4/SR.3197 | Provisional summary records of the 3159th to 3197th meetings | *Idem.* The final text appears in *Yearbook … 2013*, vol. I. |

ISBN 978-92-1-133871-3

Printed at United Nations, Geneva – 1808427 **(E)** – November 2019 – 543