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YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2014

Volume II
Part One

Documents of the sixty-sixth session

UNITED NATIONS

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NOTE

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References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook …*, followed by the year (for example, *Yearbook … 2013*).

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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ABBREVIATIONS

ECE	United Nations Economic Commission for Europe
EU	European Union
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
ILO	International Labour Organization
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
NAFTA	North American Free Trade Agreement
OAU	Organization of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
OECD	Organization for Economic Cooperation and Development
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
WHO	World Health Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

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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).
I.C.J. Pleadings	International Court of Justice, *Pleadings, Oral Arguments, Documents*
I.C.J. Reports	International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*
ILM	*International Legal Materials* (Washington, D.C.)
ILR	*International Legal Reports* (Cambridge)
KAV	Kavass Series
P.C.I.J., Series A	Permanent Court of International Justice, *Collection of Judgments* (Nos. 1–24: up to and including 1930)
P.C.I.J., Series A/B	Permanent Court of International Justice, *Collection of Judgments, Orders and Advisory Opinions* (Nos. 40–80: beginning in 1931)
P.C.I.J., Series B	Permanent Court of International Justice, *Collection of Advisory Opinions* (Nos. 1–18: up to and including 1930)
P.C.I.J., Series C	Permanent Court of International Justice, *Pleadings, Oral Arguments, Documents* (Nos. 52–88: beginning in 1931)
RGDIP	*Revue générale de droit international public* (Paris)
TIAS	*Treaties and Other International Acts Series* (Washington, D.C.)
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**.

EXPULSION OF ALIENS

[Agenda item 2]

DOCUMENT A/CN.4/670

Ninth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur*

[*Original: French*]
[*25 March 2014*]

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* The Special Rapporteur would like to thank the secretariat of the International Law Commission, and Mr. David Nanopoulos in particular, for the summary of the comments and observations received from States presented in the note entitled "Expulsion of aliens: analyses of comments and observations on the draft articles adopted on first reading", which helped him immensely in his work.

Multilateral instruments cited in the present report

	Source
Convention fixing the Rules to be observed for the Granting of Asylum (Havana, 20 February 1928)	League of Nations, *Treaty Series*, vol. CXXXII, No. 3046, p. 323.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	*Ibid.*, vol. 606, No. 8791, p. 267.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	*Ibid.*, vol. 360, No. 5158, p. 117.
International Covenant on Civil and Political Rights (New York, 19 December 1966)	*Ibid.*, vol. 999, No. 14668, p. 171.
Organization of African Unity Convention governing the specific aspects of refugee problems in Africa (Addis Ababa, 10 September 1969)	*Ibid.*, vol. 1001, No. 14691, p. 45.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid.*, vol. 1144, No. 17955, p. 123.

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Introduction

1. At its sixty-fourth session in 2012, the International Law Commission adopted on first reading the text of the draft articles on the expulsion of aliens and the commentaries thereto.[1] The draft articles were discussed extensively during consideration of the report of the Commission on the work of its sixty-fourth session in the Sixth Committee of the General Assembly in November 2012. During the discussions, States expressed widely divergent views on the topic, some continuing to reiterate the positions they had always expressed since the Sixth Committee approved the topic of the expulsion of aliens for inclusion in the Commission's programme of work.

2. In paragraph 43 of its report, the Commission noted that, at its 3155th meeting, on 31 July 2012, it decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments

[1] *Yearbook … 2012*, vol. II (Part Two), para. 46.

and observations be submitted to the Secretary-General by 1 January 2014.[2]

[2] *Ibid*., para. 43.

3. A number of Governments transmitted their comments and observations to the Secretary-General. The Special Rapporteur will first examine those comments and observations before presenting his final observations.

Chapter I

Comments and observations received from States

4. Several Governments spoke on the topic "Expulsion of aliens" during the discussions in the Sixth Committee at the sixty-seventh session of the General Assembly in November 2012.[3] Some later sent written comments and observations, which were forwarded to the Special Rapporteur through the secretariat of the Commission.[4] While some States only made a few general comments, others made article-by-article comments and observations, sometimes accompanied by suggested amendments to specific draft articles and even drafting proposals. These general comments and observations on the topic will be presented first, before those dealing with the draft articles themselves are considered.

A. General comments and observations on the topic

5. Generally speaking, considering both the comments and observations made during the discussions in the Sixth Committee in 2012 and those made subsequently in writing, it appears that States have rather contradictory opinions on the topic. Some States doubt whether the topic is suitable for codification. For example, the Nordic countries

> remained unconvinced of the usefulness of the Commission's efforts to identify general rules of international law on the expulsion of aliens, since it was an area of law covered by detailed regional rules.[5]

For one State, "[t]he topic was problematic and raised many difficult and complex issues which intruded directly into the domestic sphere of States."[6] Another State pointed out that, despite the efforts made by the Commission to take into consideration the concerns expressed by States,

> it continued to regard the topic as controversial and had doubts as to whether the draft articles would provide a good basis for a future convention and whether a balance could be found between the mere repetition of State practice and the introduction of a new regime with high human rights standards.[7]

For another State, codification of the topic would raise

> numerous methodological questions, including the extent of its reliance on diverse and specific national and regional jurisprudence and the methods for determining the relevant general rules of international law. … doubts remained as to the basis or need for *lex lata* codification. Equally controversial was the question of whether treatment *de lege ferenda*, as suggested by the Special Rapporteur regarding the current formulation of the provisions on readmission and appeal procedures, was suitable.[8]

6. While the Special Rapporteur is not insensitive to this legitimate observation regarding methodology, such an observation cannot be used to justify the argument that it is impossible or inappropriate for the Commission to consider this topic. If such an argument were to prevail, then all the work of progressive development and codification undertaken by the Commission since its inception would have to be called into question. Indeed, in considering the topic "Expulsion of aliens", the Special Rapporteur did not adopt any new or different approach from the one employed in the past to consider other topics in the Commission's agenda.

7. While the above-mentioned States expressed reservations, other States showed strong support for the topic and the set of draft articles adopted by the Commission on first reading, without prejudice to their comments and observations on any specific draft article. For example, one State felt that "the topic of expulsion of aliens could, with appropriate modifications, be considered ripe for codification".[9] Another State

> welcomed the changes made since the previous session to the draft articles on expulsion of aliens, which reflected the Commission's efforts to achieve a balance between the regulatory power of expelling States and the legitimate rights of aliens subject to expulsion, while at the same time leaving States some room for manoeuvre in enforcing their domestic legislation.[10]

Another State also said that it "felt that the draft articles represented a positive contribution to the codification and progressive development of international law on the topic".[11]

[3] The Governments of the following 36 Member States spoke: Australia, Austria, Belarus, Canada, Chile, China, Congo, Cuba, Czech Republic, Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), El Salvador, France, Germany, Greece, Hungary, India, Indonesia, Iraq, Iran (Islamic Republic of), Israel, Malaysia, Mexico, Netherlands, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Singapore, South Africa, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland and Zambia. The European Union also made comments on the topic.

[4] Together with those of the European Union, the Special Rapporteur received comments and observations from the following 11 States by 31 January 2014: Australia, Austria, Belgium, Canada, Czech Republic, El Salvador, Germany, Morocco, Netherlands, Republic of Korea and United Kingdom.

[5] Denmark (on behalf of the Nordic countries), *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 45.

[6] United Kingdom, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 67. See also the observations of the United Kingdom in document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A.

[7] Hungary, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20, para. 50). It should be noted, however, that "[the Hungarian] delegation welcomed the Special Rapporteur's attention to the Return Directive of the European Union (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals), which had harmonized the minimum standards on the matter established under the national laws of more than 30 European States" (*ibid.*).

[8] Israel, *ibid.*, para. 35.

[9] Poland, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 72.

[10] China, *ibid.*, para. 53.

[11] Mexico, *ibid*., para. 17.

B. Comments, observations and suggestions on the draft articles

8. A number of States made a few general comments before the article-by-article review.

1. General observations

9. On the structure of the draft articles and the balance between the rights at issue, a State said that "the draft articles should achieve a better balance between the rights of aliens and the sovereign rights of the State".[12] As if in response, another State said that it was

> satisfied with the structure of the draft articles on expulsion of aliens, which reflected the Commission's efforts to reconcile the right of States to expel aliens and the limits imposed on that right by international law.[13]

Another State noted that it

> was particularly pleased that the text had been organized in a more logical manner, setting out the basic substantive rules governing the expulsion of aliens and the rights and due process guarantees to which aliens subject to expulsion were entitled. It also welcomed the incorporation of the principles of legality and due process, which were fundamental to protecting the human rights of aliens subject to expulsion. Also to be commended were the cross-cutting mention of such human rights norms as the right to life, the prohibition of torture and the obligation not to discriminate and the specific recognition of the rights of vulnerable persons, refugees and stateless persons, in keeping with the international conventions regarding them. Importantly, the draft articles in their current form clearly distinguished between expulsion of aliens and extradition, thus resolving the confusion that had existed in earlier versions.[14]

In the same vein, another State said that:

> The draft articles on the topic were comprehensive and captured most of the substantive and procedural aspects of the issue of expulsion, including State obligations, such as the obligation of non-refoulement and the obligation to respect the human rights of individuals under expulsion. They also identified the most important and widely recognized rights of aliens subject to expulsion, along with relevant prohibitions placed upon States by international law.[15]

10. Some States expressed doubts about the nature of the rules contained in the draft articles, sometimes suggesting that the draft articles essentially represented progressive development rather than codification.[16] In that connection, one State called for caution in generalizing rules set out in regional or subregional treaties and mechanisms which, in its view, "could not necessarily be taken to be representative of State practice or *opinio juris*".[17] For that State,

> some of the draft articles went beyond both customary and treaty law (*lex lata*) … The Commission tended to overvalue the practice of treaty bodies, such as the Human Rights Committee, in identifying rules, sometimes at the price of overriding the very rule that the treaty in question had meant to establish.[18]

11. On that point, the Special Rapporteur notes that, insofar as there is no recognized rule or method in international law for establishing *opinio juris*, it appears rather difficult to say that a rule arising from general practice does not constitute a customary rule. Only a judge can separate the parties in case of dispute in that regard. Perhaps the outcome of the Commission's ongoing work on custom may help in the future, but that has not happened yet. In any event, that some of the draft articles amount to progressive development of international law on the expulsion of aliens should not come as a surprise, neither in the light of the Commission's statute, nor in that of its settled practice.

12. One State expressed concern that the various human rights recognized in the draft articles

> arose from different international instruments and conventions which might not have received universal acceptance, a situation that could complicate the future application of the draft articles since a State could not be bound by obligations established under treaties or agreements to which it was not a party.[19]

13. To address this concern, suffice it to recall that a State is never bound by obligations established in an international legal instrument to which it has not acceded.

14. More radically, another State

> encourage[d] the Commission to include a clear statement at the beginning of the draft articles that the articles neither codify existing international law nor reinterpret long-standing and well-understood treaties.[20]

15. In the opinion of the Special Rapporteur, there is no need for such a statement. It would simply be inconsistent with the content of the draft articles, which contain not only provisions reflecting the progressive development of international law on the topic of the expulsion of aliens, but also a considerable number of provisions reflecting the codification of a well-established State practice that has been settled since the second half of the nineteenth century, supplemented by extensive case law. Here, once again, the Commission did nothing new; it simply operated in line with its practice.

16. Some States felt that the word "aliens" in the title of the draft articles had a negative connotation, since it distracted attention from the fact that human beings were involved.[21] One State noted that it was for that reason that its legislation was amended to refer instead to "migrants" or "foreign nationals".[22] While this observation, which is sometimes tied to the painful history of a certain type of political regime, is understandably valid, it seems pointless to dwell on this matter, which did not give rise to much debate, notwithstanding the statements made by these two States. Indeed, the matter had been raised within the Commission prior to the adoption of the draft articles on first reading, but it never gained traction.

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[12] Thailand, *ibid*., para. 38.

[13] Poland, *ibid*., para. 70.

[14] Mexico, *ibid*., para. 17.

[15] Greece, *ibid*., 22nd meeting (A/C.6/67/SR.22), para. 24.

[16] See, *inter alia*, Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A; Republic of Korea, *ibid*; and Netherlands, *ibid*. and *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 25.

[17] Islamic Republic of Iran, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 7.

[18] *Ibid.*

[19] Indonesia, *ibid*., para. 26.

[20] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A, para. 1.

[21] Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 89; and South Africa, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 79.

[22] South Africa, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 79.

17. Another State recommended a change in terminology by replacing the words "lawful/unlawful" with the expression "regular/irregular immigration status", and the word "alien" with the expression "alien person" throughout the draft articles.[23] The use of the word "alien" has already been addressed. As for the expression "regular/irregular immigration status", it is not only very vague, but also goes well beyond the scope of this topic by making reference to the phenomenon of migration. The terms "regular/irregular" are also very vague, since there is no basis for affirming in absolute terms that the regularity of a situation necessarily entails its legality.

18. States also expressed a wide variety of views on various aspects of the topic or related thereto. While some criticized the use of regional law in an effort to determine trends in international practice on the topic of the expulsion of aliens,[24] others were pleased that European law on the topic had been taken into consideration.[25] One State suggested that, given their important role in determining the State of destination, readmission agreements should be included in the draft articles.[26] Another State felt that the draft articles, specifically draft articles 11, 12, 30 and 32, should be further elaborated with regard to the protection of the property of expelled aliens.[27] Yet another State

> deem[ed] it appropriate to incorporate an express provision on the right to health of detained persons subject to expulsion. … an inalienable right of every person, which guarantees the enjoyment of the highest attainable standard of physical, mental and social well-being.[28]

19. While the Special Rapporteur cannot deny the merit of these suggestions, he must point out the following: regional law is part of international law and cannot be set aside, especially since the Commission has always referred to it in its work; the issue of readmission agreements was duly considered by the Special Rapporteur in his seventh report[29] and was mentioned in the commentary to draft article 29, but it cannot be the subject of a draft article, because it pertains to the direct—bilateral—relations between States; the issue of protection of the property of an alien subject to expulsion is addressed appropriately in respect of matters pertaining to the general rules of international law on the topic, without prejudice to those pertaining to the domestic laws of States; the Commission discussed the issue of the right to health of an alien subject to expulsion following the fifth report[30] of the Special Rapporteur without finding any basis in international law for greater protection than that set forth currently in the draft articles. In this regard, it is worth recalling that the mandate given to the Commission was not to develop a new instrument for the protection of human rights, but to consider the expulsion of aliens with its attendant legal implications, including in positive international human rights law.

20. One State said that it "object[ed] to any suggestion" that the declaration on the human rights of individuals who are not nationals of the country in which they live[31] "represent[ed] customary international law".[32] The State also wished to know whether the expression "general international law", used, *inter alia*, in the commentaries to the draft articles, "include[d] customary international law and treaty law".[33]

21. The Special Rapporteur can only take note of that State's objection to the customary value of the declaration in question. As for the scope of the expression "general international law", it is worth recalling that it is commonly associated with customary law and is therefore distinct from treaty law. Based on this conception, only customary law can generate obligations *erga omnes*. For example, in the *North Sea Continental Shelf* cases, the International Court of Justice referred to "general or customary law rules and obligations", such as those:

> which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.[34]

That said, the Court's jurisprudence is not always clear as to what "general international law" entails. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, the Court used the expression on several occasions interchangeably with the expression "customary international law",[35] while distinguishing it from treaty law.[36] By contrast, in the *Military and Paramilitary Activities in and against Nicaragua* case, the Court referred to the "principles of customary and general international law"[37] as if these were two separate notions. Given this lack of clarity, the Special Rapporteur used the expression "general international law" in its broad sense, as captured in contemporary literature,[38] following Dionisio Anzilotti. According to Georges Abi-Saab, for example, based on an analysis of the judgment rendered in the *North Sea Continental Shelf* cases mentioned above, this expression does not refer to custom alone—supported subsequently and incidentally by general principles of law—as some of the Court's formulations might suggest; there is no reason for it not to include universal treaties, which have a "fundamentally norm-creating character" and could be "regarded as forming the basis of a general rule of law".[39]

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[23] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A, paras. 1–2.

[24] See, *inter alia*, statements by the United States in the Sixth Committee.

[25] Hungary, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 50.

[26] Greece, *ibid*., 22nd meeting (A/C.6/67/SR.22), para. 25.

[27] Republic of Korea, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 120.

[28] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A, para. 3.

[29] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/642.

[30] *Yearbook … 2009*, vol. II (Part One), document A/CN.4/611.

[31] General Assembly resolution 40/144 of 13 December 1985.

[32] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. A, para. 3.

[33] *Ibid.*, para. 2.

[34] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at para. 63.

[35] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, especially at paras. 110–112, 114, 191 and 230.

[36] *Ibid.*, para. 19.

[37] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at para. 73.

[38] See, *inter alia*, Abi-Saab, "Cours général de droit international public", especially pp. 197–203; and Buzzini, "La théorie des sources face au droit international général", p. 582. See also Kamto, "La volonté de l'État en droit international", pp. 345–349.

[39] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at para. 72.

2. Comments and suggestions received from States, draft article by draft article

Article 1. Scope

22. Some States deemed it inappropriate to include in the scope of the draft articles both aliens lawfully present in a State's territory and those unlawfully present, on the grounds that the rights accorded to each group with regard to expulsion were too divergent.[40] Since the legal status of the two categories of aliens was different, the expulsion regime applicable to them should also be different.[41] Another State asserted unequivocally that aliens who were present unlawfully in a State's territory should be excluded from the scope of the draft articles.[42] However, according to other States, the draft articles "should cover both aliens who were present lawfully in the territory of a State and those who were present unlawfully".[43] More specifically, while recognizing the merit in considering both categories of aliens,[44] some States were of the view that "more clarity was needed with regard to differentiating the rights and obligations of foreign nationals who were lawfully present from those of foreign nationals who were unlawfully present. For the most part the human rights and procedural rights should be the same."[45] They were also concerned that an approach combining the two categories of aliens "at times leads to a mischaracterization of the distinction between these two categories of alien under international law".[46]

23. In the view of the Special Rapporteur, draft articles on expulsion of aliens that covered the expulsion of only those aliens "lawfully" in the territory of the expelling State would be of extremely limited interest since they would leave outside their scope the largest category of persons affected by expulsion, namely those who require the most attention under the legal regime of expulsion, in view of their status within the expelling State. Furthermore, most States that commented on this point were in general agreement that there is merit in considering the expulsion of both categories of aliens, and the concerns expressed were not generally accompanied by specific proposals. It should be recalled, lastly, that the Commission rightly considers that no distinction should be made between the human rights of an alien who is lawfully in a State's territory and those of an alien who is unlawfully present in the territory, since in both cases the alien in question is a human being whose rights must be protected without discrimination of any kind. For that reason, the draft articles seek to make some distinctions with regard to certain procedural rights, but not with regard to substantive human rights.

Article 2. Use of terms

24. In the view of some States, draft article 2 presented a comprehensive definition of "expulsion".[47] Other States requested clarification of certain elements or the addition of other elements that had not been included in the definition. One State considered that

> [e]xtending the definition of the term to encompass a State's conduct and not merely a formal act … was unclear and inappropriate; State conduct was not relevant to the matter of expulsion and should not be included as a self-sufficient element in the definition of the term.[48]

Along the same lines, another State therefore recommended that the phrase "or conduct consisting of an action or omission" should be "removed", because "[i]t would, in particular, contradict draft article 4, which refers to a decision reached in accordance with the law".[49]

25. The observation appears *prima facie* to be well founded. However, it should be recalled, first, that expulsion as conduct consisting of an action or omission attributable to a State is accepted in case law, as indicated in the commentary to draft article 2. Second, the argument that the phrase contradicted draft article 4 cannot prevail: were that to be the case, expulsion as conduct attributable to a State would constitute a violation of law from a procedural point of view, yet would continue to trigger all the legal consequences of a formal expulsion. It should be noted that some States supported the inclusion of conduct attributable to a State in the definition of "expulsion",[50] although a number of precisions or clarifications were requested. For example, one State felt that the term "omission" should be clarified.[51] The Special Rapporteur believes that this term is well established in international law, including in the law on responsibility for internationally wrongful acts, and that there is therefore no need to define it again, since the term is used here with the same meaning. Another State "wishe[d] to emphasize that the scope of 'conduct attributable to a State' should incorporate the same threshold for attribution as described in the draft articles on responsibility of States for internationally wrongful acts".[52] The Special Rapporteur has no objection to this clarification, because it is appropriate that the conduct of a State should be assessed on the basis of the Commission's work on State responsibility. However, he cannot agree with the proposal to delete the term "refugee" at the end of draft article 2, subparagraph (*a*), since that would modify the scope of the draft articles. Lastly, one State considered that the definitions of "collective

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[40] Germany, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 100, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 1.

[41] Russian Federation, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 33.

[42] Iraq, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 21.

[43] Indonesia, *ibid*., para. 25.

[44] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 1.

[45] South Africa, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 79.

[46] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 1.

[47] Chile, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 7; and Denmark (on behalf of the Nordic countries), 18th meeting (A/C.6/67/SR.18), para. 46.

[48] France, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 98.

[49] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 2; see also the amendment proposed by the United Kingdom to remove the same phrase (*ibid*.).

[50] Germany, *ibid*.; and Canada, *ibid*.

[51] Germany, *ibid*.

[52] Canada, *ibid*.

expulsion" in draft article 10, paragraph 1, and "disguised expulsion" in draft article 11, paragraph 2, should have been included in draft article 2.[53] This proposal cannot be accepted, because the definitions in draft article 2 relate to recurrent terms that apply generally to all the draft articles, whereas those mentioned in the proposal relate to specific cases addressed only in the draft articles in which they are currently found.

Article 3. Right of expulsion

26. Some States were pleased with draft article 3, finding that it "accurately reflected the state of law on the subject".[54] One State proposed that the second sentence of draft article 3 should be amended as follows: "A State may only expel an alien in accordance with its international legal obligations".[55] Such wording is much too vague and does not make clear which of the State's international obligations are in question. Like any international legal instrument, draft articles—which in themselves cannot be imposed on States—have a specific purpose and cannot refer to all obligations under international law.

Article 4. Requirement for conformity with law

27. One State "fully supported the content of draft article 4 (Requirement for conformity with law) as it ensured legal certainty for aliens, regardless of their immigration status".[56] That State's proposal to add "by the State" after the word "decision" seems redundant, since it goes without saying that an expulsion decision can only be taken by a State. Another State, in its observations on draft article 4, indicated that "the draft article should more specifically refer to immigration acts of in-country enforcement".[57] Such a reference would be outside the scope of the draft articles, which in no way address the manner in which States deal with immigration issues in their territories.

Article 5. Grounds for expulsion

28. One State found the wording of draft article 5 to be "unsatisfactory, as it might be read as excluding the unlawful presence of an alien as an authorized ground for expulsion".[58] Such a risk hardly exists, given that paragraph 2 of draft article 5 is worded in such a way that it may authorize expulsion for violation of legislation on the entry and residence of aliens; "the unlawful presence of an alien" would necessarily be contrary to that legislation and would therefore constitute a ground for expulsion. Another State felt that "the draft article should establish the right of the State of nationality and the State of destination of persons subject to expulsion to request additional information about the grounds for expulsion".[59] Such a right is not part of positive international law and State practice provides no indication that it would be recognized. In any event, the grounds for expulsion are not limited to public order and national security, as one State claimed,[60] and the Commission has not sought to draw up an exhaustive list of grounds, as might be suggested by the observations of another State.[61] The Special Rapporteur understands the proposal that "'its obligations under' should be added before 'international law' in order to prevent any ambiguity or competing interpretations of 'contrary to international law'".[62] However, since it goes without saying that, in the international order, a State is never bound other than by its obligations under international law, such a clarification could simply be made in the commentary to draft article 5 if it were deemed necessary. One State suggested limiting the scope of draft article 5, paragraph 3, to "those otherwise lawfully present".[63] However, another State suggested removing the last part of the paragraph, which states that the grounds for expulsion shall be assessed taking into account "the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question".[64] The first proposal is not in line with the approach to the topic adopted by the Commission, which was approved by States in the Sixth Committee, while the second ignores established case law in this area. The Special Rapporteur has no objection to the request that "the commentary to draft article 5 should specify that the grounds for expulsion should be considered at the time of the decision rather than at the time of removal",[65] and suggests that the Commission consider that request favourably.

Article 6. Prohibition of the expulsion of refugees

29. One State indicated that it "did not recognize refugee status, as [it] was not a party to the Convention relating to the Status of Refugees or the Protocol relating to the Status of Refugees".[66] That point can only be noted. Another State indicated that "draft articles 6 and 7, which dealt with refugees and stateless persons respectively, should mention the concept of asylum, since it was relevant to many persons, particularly in [South America]".[67] The Commission had excluded the concept of asylum from the scope of the topic of the expulsion of aliens, because it falls under a legal regime that is much too specific and difficult to incorporate into this topic. It is also a highly political concept, since the grounds for granting asylum depend mainly on the assessment of the applicant's political situation and/or the nature of the relations between the State of refuge and the asylum seeker's State of origin. As the International Court of Justice recalled in its judgment of 13 June 1951 in the *Haya de la Torre Case*,

[53] Congo, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 46.

[54] France, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 97; see also India, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 17.

[55] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 3.

[56] El Salvador, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 44.

[57] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft articles 2 and 4).

[58] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 98.

[59] Belarus, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 106.

[60] Romania, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 86.

[61] Islamic Republic of Iran, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 9.

[62] *Ibid.*

[63] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 5.

[64] Canada, *ibid*., para. 1.

[65] *Ibid*., para. 2.

[66] Malaysia, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 108.

[67] Peru, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 90.

diplomatic asylum, according to the Convention fixing the Rules to be observed for the Granting of Asylum, is "a provisional measure for the temporary protection of political offenders".[68] The various courses by which the asylum may be terminated "are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate";[69] and they lead "to decisions inspired by considerations of convenience or of simple political expediency".[70] Given these circumstances, it would clearly be risky to engage in codification of such a topic.

30. *Paragraph 1*. One State suggested that draft article 6, paragraph 1, should take account of the exceptions contained in article 1, paragraph F, of the Convention relating to the Status of Refugees and that the provisions in question should be incorporated into draft article 6 "in the form of a proviso".[71] Another State indicated that the draft article should

> allow the expulsion of aliens—including individuals recognized by other countries as refugees under the Convention relating to the Status of Refugees—who are found to have committed gross or systematic human rights violations, war crimes or crimes against humanity.[72]

In response to these suggestions, it should be pointed out that the Commission did not wish to repeat, in the context of the draft articles, all the rules relating to the expulsion of refugees and stateless persons, not only because the legal regimes applying to these categories of persons are already embodied in international legal instruments—which it would seem pointless to reproduce *in extenso* here—but also because some of the said instruments have been enhanced at the regional level. It is for that reason that the draft articles, while they set out the broad principles relevant to the issue, contain a type of "without prejudice" clause, spelled out in draft article 8 as follows: "other rules on the expulsion of refugees and stateless persons provided for by law". Furthermore, the commentary to draft article 6 indicates that

> any individual who does not correspond to the definition of refugee within the meaning of the relevant legal instruments is ineligible to enjoy the protection recognized in draft article 6 and can be expelled on grounds other than those stipulated in paragraph 1, including on the sole ground of the unlawfulness of his or her presence in the territory of the expelling State. From that standpoint, paragraph 2 should be interpreted as being without prejudice to the right of a State to expel, for reasons other than those mentioned in draft article 6, an alien whose application for refugee status is manifestly abusive.[73]

However, in order to take into full account the concerns expressed through the suggestions described above, the Special Rapporteur proposes that the commentary to draft article 6 be amended to specify that draft article 6 should be read in conjunction with draft article 8, taking into account, *inter alia*, the provisions of article 1, paragraph F, of the Convention relating to the Status of Refugees.

31. *Paragraph 2*. Some States took issue with paragraph 2 of draft article 6 on the grounds that "it appeared to represent progressive development rather than codification".[74] One State commented that

> [it] significantly extend[ed] the obligations under article 13 of the International Covenant on Civil and Political Rights and article 32 of the Convention relating to the Status of Refugees, which apply only to aliens lawfully in the territory of the State.[75]

Another State said that

> [i]t would be preferable to adhere to the regime established in the Convention relating to the Status of Refugees and either to delete paragraph 2 of the draft article or, if it was kept, to replace "shall" with "may", leaving the question of whether to accord the two categories of refugees the same treatment to the expelling State's discretion.[76]

32. Concerning the observation that paragraph 2 appeared to represent progressive development rather than codification, the commentary to that paragraph is quite clear. Also, adopting the proposal to adhere to the regime established in the Convention relating to the Status of Refugees would ignore the subsequent practice of States in this regard, which is consistent with the provisions of paragraph 2. Lastly, the replacement of "shall" with "may" in this paragraph would create a right rather than an obligation and thereby render the provision in question irrelevant, since States do not require such a norm to extend the provisions of paragraph 1 to the case envisaged in paragraph 2.

33. One proposed amendment suggested that "paragraph 2 should … refer to 'alien', rather than 'refugee'".[77] As explained in the commentary to paragraph 2 of draft article 6, this proposal cannot be accepted, because

> paragraph 2 concerned only individuals who, while not enjoying the status of refugee in the State in question, did meet the definition of "refugee" within the meaning of the 1951 Convention [relating to the Status of Refugees] or, in some cases, other relevant instruments, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and should therefore be regarded as refugees under international law.[78]

Another proposed amendment suggested a negative formulation of paragraph 2, which would specify that paragraph 1 "shall not apply to any refugee … who has applied for recognition of refugee status for the sole purpose of making such an application, while that application is still pending".[79] Such a formulation would limit considerably the scope of the provision in question and would be far removed from the spirit of the current wording of paragraph 2.

34. *Paragraph 3*. One State "[agreed] with the formulation in draft article 6, paragraph 3".[80] However, another

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[68] *Haya de la Torre Case, Judgment, I.C.J. Reports 1951*, p. 71, at p. 80.

[69] *Ibid.*, p. 79.

[70] *Ibid*., p. 81.

[71] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 6.

[72] Canada, *ibid*., para. 4.

[73] *Yearbook … 2012*, vol. II (Part Two), para. 46, para. (4) of the commentary to draft article 6.

[74] Romania, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 86.

[75] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 6.

[76] Islamic Republic of Iran, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 10.

[77] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 6.

[78] *Yearbook … 2012*, vol. II (Part Two), para. 46, para. (4) of the commentary to draft article 6.

[79] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 6.

[80] Canada, *ibid*., para. 3 of the comments to draft article 6.

State deemed it inconsistent with article 22, paragraph 8, of the American Convention on Human Rights, as well as with draft articles 23 and 24.[81] The Special Rapporteur does not see how this could be so, nor does he think it advisable to refer explicitly to draft articles 23 and 24 in draft article 6 itself, as some States have suggested,[82] rather than in the commentary thereto, as is currently the case. After all, the draft articles form a whole whose elements are all intertwined.

Article 7. Prohibition of the expulsion of stateless persons

35. One State felt that draft article 7 should mention the concept of asylum, and also include "a safeguard clause of the type set out in draft article 6, paragraph 2 … so that stateless persons who were unlawfully present when they first entered a State had an opportunity to regularize their situation".[83] The arguments made in response to the comments on draft article 6 are equally applicable to the suggestion that the concept of asylum should be mentioned in the draft article. Since the status of stateless persons and that of refugees are determined under different conditions and based on different procedures, the protection accorded in draft article 6, at the end of paragraph 2, should not be automatically applied to stateless persons.

36. Another State considered draft article 7 unnecessary, as the commentary to draft article 2 states that the definition of the term "alien" includes stateless persons.[84] Suffice it to recall that an explanation contained in the commentary cannot replace a normative statement. As to the fact that this State found odd the use of the term "lawfully" on the grounds that "[o]nce an individual is subject to an expulsion, they are no longer lawfully in the country; expulsions must be according to law".[85] Once again, suffice it to recall that the possibility of expelling "a stateless person lawfully in the country" is covered under article 31, paragraph 1, of the Convention relating to the Status of Stateless Persons.

Article 8. Other rules specific to the expulsion of refugees and stateless persons

37. According to one community of States, draft article 8 should make it clear that the other rules on the expulsion of refugees and stateless persons covered by this draft article were those that were more favourable to the person subject to expulsion.[86] The Special Rapporteur is of the view that such a clarification could be made in the commentary to that draft article.

Article 9. Deprivation of nationality for the sole purpose of expulsion

38. One State regretted "the disappearance from the draft articles of the principle whereby a State could not expel its own nationals"; yet "the prohibition on deprivation of nationality for the purpose of expulsion would be negated if the expelling State was no longer prohibited from expelling its nationals". According to the State, there was an "inconsistency" there that should be corrected.[87] The Special Rapporteur did his utmost to convince the Commission and the States of the value of a provision in the draft article to recall this principle, but he was unsuccessful, because both the Commission and the States rightfully considered—on a formal level—that such a provision fell outside the topic "Expulsion of aliens". Given that draft article 9 addresses this concern only very implicitly and in a somewhat imperfect manner, the Special Rapporteur wonders whether the principle of prohibition of expulsion by a State of its own nationals could not be recalled in the commentary to this draft article. The proposed amendment to add to the current wording of draft article 9 the phrase "albeit that the grounds for deprivation may also be grounds for expulsion in their own right"[88] seems unnecessary, since any expulsion is legally valid as long as it is carried out in conformity with law and in compliance with the State's international obligations.

Article 10. Prohibition of collective expulsion

39. Without opposing draft article 10, one group of States requested that the commentary should clarify whether the draft article represented progressive development of international law on the expulsion of aliens.[89] One State was of the view that it did not represent customary law, and recommended that the Commission should "exercise caution in its codification in the draft articles".[90] Overall, however, draft article 10 had the support of the majority of States that expressed views on it. According to one State, the current wording of the draft article "accurately reflected the state of law on the subject";[91] another one saw in it "a general rule applicable to all aliens",[92] even suggesting that a specific group such as migrant workers[93] did not need to be mentioned explicitly; another said that it was "pleased" that draft article 10 "did not provide for any exceptions to the prohibition on collective expulsion".[94]

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[81] Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 90.

[82] Denmark (on behalf of the Nordic countries), *ibid*., para. 48; and Iraq, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 22.

[83] Peru, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 90.

[84] Canada (document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 7.

[85] *Ibid.*, para. 2.

[86] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 58; and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 11 and 12.

[87] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 101; see also Morocco, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 1.

[88] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 9.

[89] Denmark (on behalf of the Nordic countries), *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 47.

[90] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 10.

[91] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 97.

[92] Germany, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 100; and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 10.

[93] *Ibid.*; and the Republic of Korea says that it "would be desirable to delete this paragraph" (document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 10.

[94] Switzerland, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 74.

40. Three States proposed amendments to draft article 10. One State proposed reintroducing in paragraph 1 the definition of the term "expulsion".[95] This proposal is pointless, as the term "expulsion" is already defined in draft article 2. The same State requested that the word "concomitantly",[96] used in paragraph 3, should be replaced by "simultaneously", but the two words are synonyms. It also preferred that the paragraph should include the following wording: "provided that the expulsion takes place in accordance with law and on the basis of individual procedure".[97] This phrasing is less precise than the current wording, which is, moreover, based on international jurisprudence. Lastly, the State in question suggested that paragraph 4 should end with the words "armed conflict", and that the phrase "involving the expelling State"[98] should be deleted. Such an amendment cannot be accepted, for it would give far too broad a scope to this paragraph, which does not cover all armed conflict of any type, but only an armed conflict involving the expelling State. A second State proposed an amendment to paragraph 3[99] that in no way improves the current language of the paragraph. A third State proposed the following amendment to paragraph 2: "The collective expulsion of aliens, including migrant workers, is prohibited save in accordance with paragraph 3."[100] The proposed addition of "save in accordance with paragraph 3", if accepted, would make the latter say something that it does not say, namely that collective expulsion would be permitted in certain cases or under certain conditions, whereas, as another State referred to above recalled, paragraph 2 is in fact a general rule.

Article 11. Prohibition of disguised expulsion

41. Apart from one State, which reiterated its position that "expulsions can only be effected through formal governmental acts",[101] the States that expressed views on the draft article generally welcomed it.[102] However, one State noted that it was "unclear,"[103] in particular with regard to its scope; for another, the definition of disguised expulsion left room for "an overly broad interpretation".[104] Like the amendments proposed by some States,[105] these observations are based on national concerns—concerns that may well be valid—and not on international law, or, more specifically, on international jurisprudence, as is the case of the current draft article 11. Lastly, one State requested that: "The commentary to draft article 11 should state that disguised expulsion was not only unlawful but could also entail the international responsibility of the expelling State".[106] Such a statement would be unnecessary since it is recognized that any internationally wrongful act by a State—and disguised expulsion is such an act—entails the State's international responsibility.

Article 12. Prohibition of expulsion for purposes of confiscation of assets

42. Among the States that expressed views on this draft article, one stated that

> [w]hile its underlying aim—namely, to prohibit States from expelling aliens in order to confiscate their property—was justified and deserved support, it could prove difficult in practice to determine a State's intentions. Moreover, there might be situations in which, under the laws of the State in question, offences committed by an alien might be punishable by both expulsion and confiscation of assets. In such cases, non-application of legal provisions on confiscation merely because a person was also subject to expulsion would hardly be justified, since the alien would thus enjoy a more privileged situation than citizens of the State.[107]

The Special Rapporteur is of the view that determining the intention of a State is no more difficult here than in other situations; in law, the intentionality of an act or conduct is always determined following a consideration of the facts rather than a psychological investigation. As for the second observation, it does not fit into the scenario of an "expulsion for purposes of confiscation", as it involves cases that are prescribed expressly by law.

Article 13. Prohibition of resort to expulsion in order to circumvent an extradition procedure

43. Some States maintained their previously held position that "issues relating to extradition should be excluded from the draft articles",[108] or that draft article 13, which one State found "vague", "should be deleted or limited to cases of legal immigrants".[109] However, many States supported the draft article,[110] finding its provisions "convincing"[111] or that it "was an improvement over the text discussed during the previous session".[112] The pro-

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[95] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 7 of the comments on draft article 10.

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

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

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

[99] Republic of Korea, *ibid*., para. 1 of the comments on draft article 10.

[100] United Kingdom, *ibid.*, para. 2.

[101] Austria, *ibid*., comments on draft article 11.

[102] Belarus, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 108; Germany, *ibid*., para. 101 and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 11; Iraq, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 23; Romania, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 87.

[103] Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 11.

[104] Germany, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 101, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 11; see also Netherlands, *ibid*.

[105] See those of the Republic of Korea and United Kingdom, *ibid*.

[106] Belarus, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 109.

[107] Russian Federation, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 33.

[108] Poland, *ibid.*, para. 70.

[109] Czech Republic, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 13, and *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 123.

[110] India, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 18; Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60; see also Canada (document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 13; and Chile, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 7.

[111] India, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 18.

[112] Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60.

posal by one State to amend the draft article by adding the phrase "in the absence of a legitimate immigration purpose"[113] would change the nature of the draft article, because this phrase would introduce an exemption that is not allowed based on the current formulation of the draft article. As the Commission showed in its commentary to the draft article, it not only relied on case law on the subject, but also drafted the provision in such a way that it did not constitute an obstacle to a lawful expulsion.

Article 14. Obligation to respect the human dignity and human rights of aliens subject to expulsion

44. Without opposing the draft article, one State felt that the "overarching principles already inherent in the law" set out therein were framed as "substantive obligations", "their precise content might be difficult to articulate".[114] For the same reasons, another State found paragraph 1 of the draft article to be "redundant".[115] Suffice it to recall here that, as shown in the commentary and as indicated by one State that supported the draft article, the "current wording … accurately reflected the state of law on the subject".[116] As for the amendments proposed by two States, they are clearly contradictory: one suggested that paragraph 2 should state that "all human rights of the person subject to expulsion shall be respected, including those set out in the present draft articles",[117] while, for opposite reasons, the other State recommended the removal of the phrase "including those set out in the present draft articles" in paragraph 2 of draft article 14.[118] At this juncture, the Special Rapporteur will simply refer to the commentary to draft article 11.

Article 15. Obligation not to discriminate

45. While it "support[ed] the objective of eliminating unlawful discrimination", one State "ha[d] significant concerns with this draft article, which [wa]s contrary to [its] existing domestic legislation and [its] practice".[119] By contrast, another State considered that draft article 15 helped to prevent "expulsion for xenophobic and discriminatory purposes" and "therefore welcomed the inclusion of draft article 15".[120] Indeed, like all the other provisions concerning the human rights of aliens subject to expulsion, this draft article does not introduce anything that does not already exist in positive international law. The only amendment to the draft article proposed by one State[121] does not add anything new, nor does it improve the draft.

Article 16. Vulnerable persons

46. Answers to the observations made by a few States and one community of States[122] on this draft article can be found in the commentary to the draft article, while the language-related issues raised by one State[123] will be addressed by the language group within the Drafting Committee.

Article 17. Obligation to protect the right to life of an alien subject to expulsion

47. One State found this provision "redundant",[124] while another, although it would not request its removal,

> would not agree to an extended interpretation of this draft article, which would essentially provide an unqualified commitment to provide free health services to illegal migrants or an acceptance that illegal migrants with serious health problems can rely on their continued need for medical treatment as a basis for remaining in [the country] in violation of [its] immigration laws.[125]

These observations, which have no bearing on the relevance of the draft article, can only be noted.

Article 18. Prohibition of torture or cruel, inhuman or degrading treatment or punishment

48. Only one State made an observation on draft article 18, but the observation was not clear, because it is difficult to see how the wording of the draft article "might lead to the conclusion that human rights other than those mentioned here do not apply".[126]

Article 19. Detention conditions of an alien subject to expulsion

49. One State clearly supported draft article 19, considering that its current wording "accurately reflected the state of law on the subject".[127] Another State found that it addressed the concerns of countries "in which expulsion was sometimes applied as an additional penalty to an alien convicted of a criminal offence".[128] Various States[129]

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[113] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 13.

[114] Australia, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 3.

[115] Netherlands, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 26, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 14.

[116] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 97.

[117] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 4 of the comments on draft article 14.

[118] Canada, *ibid*.

[119] United Kingdom, *ibid*., para. 2 of the comments on draft article 15.

[120] Cuba, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 40.

[121] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 15.

[122] Morocco, *ibid.*, comments on draft article 16; and European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 60, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 14.

[123] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 16.

[124] Austria, *ibid.*, comments on draft article 17.

[125] United Kingdom, *ibid*.

[126] Austria, *ibid*., comments on draft article 18.

[127] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 97.

[128] China, *ibid*., para. 53.

[129] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19; Congo, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 46; El Salvador, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 45; Germany, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 102, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19; Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19; Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 91; and Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19.

made other comments that were aimed mainly at maintaining their national practices or normative preferences, without considering the state of or major trends in international law on the topic.

50. Various amendments to the draft article were also proposed. Once again, most of them expressed normative preferences[130] much more than positions based on the rules of positive international law or trends confirmed by practice. One State proposed inserting into paragraph 2 (*a*), the phrase "in all the circumstances".[131] The Special Rapporteur suggests that this idea be taken up instead in the commentary. The same State suggested that the phrase "or a person authorized to exercise such power in law, subject to judicial review"[132] be added to the end of paragraph 2 (*b*). In the opinion of the Special Rapporteur, it goes without saying that a "person who may perform a judicial function" can only do so under the law; nonetheless, if it were indispensable to add such clarification, he would have no objection to adding the phrase "under the law" at the end of paragraph 2 (*b*). In that connection, the phrase "subject to judicial review" seems redundant, since any jurisdictional authority—be it that of a court or that of an empowered body—is in principle subject to review through the appropriate appeals procedures.

51. One community of States proposed substantial amendments.[133] The first concerned the title of the draft article which, in the view of those States, should be: "Detention of an alien subject to expulsion" rather than "Detention conditions of an alien subject to expulsion". To the extent that the scope of draft article 19 extends beyond detention conditions *stricto sensu*, the Special Rapporteur is not opposed to the adoption of the suggestion as presented. The second proposed amendment was to draft a new paragraph 1, which would read:

> "Detention may only be used if it is necessary to prepare and/or carry out the expulsion process, in particular where there is a risk of absconding or where the alien avoids or hampers expulsion. Detention may only be imposed if less coercive measures cannot be applied effectively in a specific case."

Based on this amendment, the current paragraph 1 (*b*) would be deleted and the current paragraph 2 (*b*) would be amended by adding the phrase "or by an administrative authority, whose decision is subjected to an effective judicial review". While this proposal is seductive in its spirit, it might be exceedingly difficult for the expelling State to implement, because, for each detention case, the State would have to prove that the detention was necessary in order to prepare or carry out the expulsion process, especially where "there is a risk of absconding or where the alien avoids or hampers expulsion". In the opinion of the Special Rapporteur, it is better to allow the State to determine whether or not the alien subject to expulsion should be held in detention for this purpose, without having to fulfil an obligation in that regard.

52. The same community of States proposed the addition of a draft article 19 *bis*, entitled "Conditions of detention of aliens subject to expulsion",[134] setting out a series of rights that the alien subject to expulsion should enjoy. Those States forget, however, that those rights are derived from European practice; they are clearly not enshrined in positive law and State practice on the topic is so varied and contradictory that it is difficult to discern a trend that may underpin progressive development of the law on this matter. It is hard to find a basis for the rule whereby "[a]liens detained pending expulsion should normally be accommodated in facilities specifically designated for that purpose", which should be "clean and … offer[…] sufficient living space for the numbers involved" (para. 1); or the detainee's right to have access to "doctors [and] non-governmental organizations" (para. 3); the right of children to "education" and "a right to engage in play and recreational activities appropriate to their age" (para. 6); or the right of separated children to "be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age" (para. 6).

Article 20. Obligation to respect the right to family life

53. A clear answer to both the question of whether draft article 20 amounts to codification or progressive development of law[135] and the recommendation by one State that the draft article be amended "to better reflect the rights and obligations contained in universal instruments"[136] can be found in the commentary to the draft article. The call for caution by one State[137] in respect of the draft article and the request by another State[138] that it be rejected are based on national considerations and not on arguments from positive international law or trends confirmed by practice. The same is true for the proposed amendment by one State to replace the phrase "on the basis of a fair balance between the interests of the State and those of the alien in question" with:

> "where necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[139]

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[130] Belgium, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 19; Canada, *ibid*.; El Salvador, *ibid*.; and Netherlands, *ibid*.

[131] United Kingdom, *ibid*., para. 4.

[132] *Ibid.*

[133] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 61, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 18.

[134] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 62, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 18.

[135] Denmark (on behalf of the Nordic countries), *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 47.

[136] Australia, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 20.

[137] Canada, *ibid*.

[138] Malaysia, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 109.

[139] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 7 of the comments on draft article 20.

It was also proposed that, for the sake of coherence, draft article 20 should come before draft article 19. In the opinion of the Special Rapporteur, the two draft articles may be placed in any order without affecting the coherence of the set of draft articles.

Article 21. Departure to the State of destination

54. Some States[140] expressed clear support for draft article 21. Others, while approving it, expressed various points of view or preferences that did not amount to proposed amendments.[141] However, one State[142] rejected the draft article outright, even as an exercise in progressive development of law, finding that it raised "significant concerns" for national political reasons. Indeed, it wished "to preserve the flexibility to enforce removal with the restrictions that it imposes to ensure such individuals could not lawfully return [to the country]".[143] This wish is noted. Nonetheless, the fact that the State in question "does not consider that there is a clear basis for this draft article in existing international law"[144] does not mean that the draft article has no basis in that legal order, as the Commission showed in its commentary to the draft article. The proposed amendment to the draft article to prefer[145] or "to promote voluntary departure more clearly"[146] not only seems to lose sight of the wording of paragraph 1, but would also have the draft article do things that are incumbent on States, since each State can act in this area based on its domestic policy and law.

Article 22. State of destination of aliens subject to expulsion

55. Draft article 22 was deemed "useful and legally correct" by one group of States.[147] A number of other States also made comments about the draft article, although none of them was substantial or likely to call into question the draft article. For example, it was suggested that the provisions of the draft article should be "explicitly subject to the conditions set forth in draft articles 6 …, 23 … and 24".[148] This suggestion is redundant because, as stated previously in response to a similar observation, the draft articles represent a whole and must be interpreted as such. Some States also criticized draft article 22 for not "refer[ring] to the financial implications of transportation or specify[ing] which party would bear the cost of expulsion",[149] forgetting that there are domestic practices on the subject and that, in any event, the draft articles could not govern these types of issues, which fall under the purview of each State. A suggestion was also made to delete the expression "where appropriate", in paragraph 1, with regard to the choice of State of destination, because the alien's request should "always be taken into consideration".[150] This ignores practice that shows that the expulsion process may be paralyzed if the alien's choice or request should be the overriding consideration in all circumstances. It was also argued that the consent of the State of destination should always be required:[151] such a requirement could, in certain cases, constitute a veritable roadblock to expulsion. The suggestion that the commentary should make clear "that paragraph 2 does not establish a legal obligation to admit an alien"[152] is already reflected therein, as this position had already been expressed within the Commission during consideration of the draft articles on first reading. Lastly, the amendment proposed by one community of States to add in paragraph 1 the terms "and readmitted by" after "expelled to" and before "his or her State of nationality"[153] does not appear suitable, because the obligation to admit—and hence to readmit—is contained in article 12, paragraph 4, of the International Covenant on Civil and Political Rights, which states that "No one shall be arbitrarily deprived of the right to enter his own country". Furthermore, the commentary to paragraph 1 of draft article 22 recalls that the State of nationality "has an obligation to receive [its] alien under international law".[154]

Article 23. Obligation not to expel an alien to a State where his or her life or freedom would be threatened

56. States that made comments on this draft article expressed widely divergent views without any dominant position emerging. One State called for restraint in extending the *non-refoulement* obligation to expelled aliens;[155] while another criticized an extended definition of States that did not apply the death penalty, which "might unnecessarily restrict the State's right of expulsion".[156] Other States felt that the rules set out in paragraph 1[157] and paragraph 2[158] had no basis in international law; yet another said that this rule constitutes progressive development of

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[140] Hungary, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 51; Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60; Russian Federation, *ibid*., para. 34; see also Australia, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 3, which nonetheless prefers the provision to only "serve as a guide for domestic laws and policies".

[141] Greece, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22), para. 25; and Peru, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 92.

[142] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 21.

[143] *Ibid.*

[144] *Ibid*.

[145] Netherlands, *ibid*.

[146] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 63, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 21.

[147] Denmark (on behalf of the Nordic countries), *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 46.

[148] South Africa, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 80.

[149] Peru, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 93.

[150] South Africa, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 80.

[151] South Africa, *ibid.*; see also Cuba, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 41.

[152] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 22.

[153] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 64.

[154] *Yearbook … 2012*, vol. II (Part Two), para. 46.

[155] Australia, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 2, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 23.

[156] Republic of Korea, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 121.

[157] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 23.

[158] Singapore, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 104.

law;[159] and one group of States proposed its deletion.[160] One State, on the other hand, felt that the draft article's wording "was not sufficient to safeguard the life of the expelled person, as the State in question might not abide by the assurance given", and that the "draft article should aim to establish an international obligation and responsibility for failure to fulfil that obligation".[161] Another community of States, which was not opposed to draft article 23, simply suggested that paragraph 2 thereof should be rendered more precise "so as to avoid the impression that expulsions to countries exercising the death penalty were generally banned".[162] However, one member State of that community recommended that paragraph 1 of draft article 23 should be harmonized with draft article 6.[163] The Special Rapporteur proposes that the Drafting Committee look into the harmonization of the two draft articles.

57. One proposed amendment recommended adding to the end of paragraph 1 the following phrase:

> "unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".[164]

This amendment would obliterate the protection accorded by paragraph 1, which does not entail any general prohibition of expulsion, even in the cases listed, because the State may always expel someone even in this case, albeit only to a State where there is no risk that the alien would be subjected to one of the grounds listed. Moreover, most of the concerns expressed by States in respect of draft article 23 have been discussed extensively in the Commission and have been addressed in the commentary.

Article 24. Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

58. Some States clearly supported draft article 24,[165] one State finding that it was an improvement over the previous version,[166] and another suggesting that consideration should be given to the possibility of applying the provision to persons or groups acting in a private capacity.[167] One State, on the other hand, opposed the extension of the *non-refoulement* obligation to situations where there was a real risk of "degrading" treatment, because it would amount to an excessively broad interpretation of that obligation.[168] The commentary to draft article 24 explains the reasons and legal basis of this extension. Lastly, one State noted that there was a difference in wording between draft article 24 and draft article 6, in that unlike draft article 6, draft article 24 assumed the existence of "substantial grounds for believing"; the State wondered whether there was any reason for that difference.[169] As in the case of draft article 23, the Special Rapporteur proposes that the Drafting Committee look into the coherence of these two draft articles.

Article 26. Procedural rights of aliens subject to expulsion

59. While a number of States made comments critical of the fact that some of the provisions of draft article 26 were not enshrined in international law and that other provisions represented progressive development more than anything else, it is striking to note that most of the observations and proposed amendments to the procedural rights contained in this draft article were *de lege ferenda*. For example, one community of States proposed that the draft article should be amended to specify that the right to receive notice referred to "written notice", and to add therein the right to receive "information about the available legal remedies".[170] Another State proposed adding the following to the end of paragraph 1 (*d*): ", including the option to request a provisional measure in the form of an injunction preventing the alien's expulsion pending the outcome of the proceedings".[171] None of those States provided a basis in international law for their criticisms or proposed amendments. For another State, the draft article should make clear that the list of procedural rights of aliens subject to expulsion in paragraph 1 "should be understood to be the minimum rights to which an alien was entitled".[172] Such a formulation would have no legal basis; however, the idea that these rights are without prejudice to other similar rights is contained in paragraph 2 of the draft article. While States were quick to recall that the admission of aliens fell under the exclusive sovereignty of the State and that the legal regime for the expulsion of aliens should not be an obstacle for the expulsion of migrants who are unlawfully present in the territory of the State, it is striking that some States found it "unacceptable that an alien unlawfully present in a State for six months—a period fixed arbitrarily—should not enjoy any procedural rights".[173] While agreeing that "the expel-

[159] China, *ibid.*, para. 54.

[160] Denmark (on behalf of the Nordic countries), *ibid*., 18th meeting (A/C.6/67/SR.18), para. 50.

[161] Peru, *ibid*., para. 94.

[162] European Union, *ibid*., para. 65, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), para. 24.

[163] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 101.

[164] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of comments on draft article 23.

[165] Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 95; Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60; and Spain, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 115.

[166] Portugal, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 60.

[167] Spain, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 115.

[168] Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 24.

[169] Austria, *ibid.*

[170] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 66, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 25–29.

[171] Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 26.

[172] Chile, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 9.

[173] France, *ibid.*, para. 99. See in that same vein, Canada, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 26; and Switzerland, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 76. See also Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 2 of the comments on draft article 26.

ling State should respect certain minimum procedural rights regardless of the alien's situation",[174] it should be explained that, in the opinion of the Commission, an alien who has been unlawfully present in the territory of a State for less than six months does not fall under the expulsion regime, but under that of admission or non-admission.

60. Some comments and observations of States were more reflective of domestic preferences than positive international law or even trends derived from practice, as exemplified by the request to delete paragraph 1 (*f*) on the ground that "the provision of an interpreter free of charge would imply far-reaching budgetary consequences",[175] and the proposed stipulation that a person "must be permitted to be represented before a competent authority in all cases but that there is no right to be so represented".[176] The comments of some States[177] regarding the consular rights of an alien subject to expulsion were not convincing, as the concerns expressed in that regard had been duly taken into consideration in the commentary to paragraph 3 of draft article 26. This was indeed acknowledged by one State,[178] which would have preferred to see those concerns reflected in the draft article itself.

61. One State suggested that, in draft article 26, a structural distinction should be made between procedural rights "relating to the administrative phase of expulsion and those relating to the judicial phase".[179] While that suggestion is seductive from a theoretical standpoint, in practice, the administrative and judicial phases are not always clearly distinguishable. An act in the administrative phase could give rise to a judicial procedure, without prejudice to the recourses that the alien subject to expulsion may have on the merits, including the ground for expulsion. Another State suggested that the commentary to paragraph 1 (*c*), of this draft article, which is devoted to the right to be heard by a competent person, should be clarified to indicate that that right referred to "the ability to present arguments during written or oral proceedings before or after a decision is taken".[180] The Special Rapporteur is not opposed to the introduction of such a clarification in the commentary as indicated. It should also be noted, in the commentary to paragraph 1 (*a*), that the notice of the expulsion decision must be in writing, in order to allay the concerns expressed by some States[181] on this point.

Article 27. Suspensive effect of an appeal against an expulsion decision

62. Some States rejected outright the provisions of draft article 27 and requested its deletion.[182] The grounds for this rejection are quite varied: "could unduly limit State sovereignty";[183] "would make it virtually impossible to remove aliens";[184] one community of States said that the suspensive effect was not contemplated in its legal order and that the recognition of such an effect "could be seen as an incentive to abuse appeal procedures";[185] and another State found that it "was also unacceptable because it constituted progressive development without a minimum basis in uniform or convergent State practice".[186] Other States also expressed their dissatisfaction with the draft article, but in a more qualified manner. For example, they felt that the suspensive effect "could not be allowed systematically" and that it "could not apply in certain highly sensitive situations, especially where expulsion was justified on grounds of national security";[187] that "[t]o extend a requirement for suspensive effect to all appeals against expulsion decisions is disproportionate";[188] that "the complexity of the issue and the disparities between the regulations and practices of different States gave rise to doubts as to whether there was a sufficient legal basis for retaining the draft article";[189] and that "domestic legal practice in the matter varied, and [that] the question should therefore be treated with caution; State practice should be studied carefully and a general assessment of the legal character of the proposed norm undertaken".[190] In short, the common argument is that State practice in this area is insufficient.[191]

63. In response to these rejections of the draft article or some of the reservations that it has generated, suffice it to recall that the Commission made it very clear in its commentary that the suspensive effect of an appeal lodged against an expulsion decision by an alien lawfully present in the territory of the expelling State is progressive development of the law on the topic.

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[174] France, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 99.

[175] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 1 of the comments on draft article 26.

[176] United Kingdom, *ibid*., para. 6.

[177] Austria, *ibid*.; Cuba, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 41; and Peru, *ibid.*, 18th meeting (A/C.6/67/SR.18), para. 96.

[178] Austria, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 82.

[179] France, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 99.

[180] Belgium, document A/CN.4/699 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 26.

[181] Austria, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 82; European Union, *ibid*., para. 66, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 25–29; and Spain, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6.67/SR.18), para. 114.

[182] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 67, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 30–32; Islamic Republic of Iran, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 11; Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 27; and Republic of Korea, *ibid*.

[183] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 27.

[184] Netherlands, *ibid.*

[185] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 67, and written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs), paras. 30–32; see in the same vein, Netherlands, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 27.

[186] Islamic Republic of Iran, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 11.

[187] France, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 100.

[188] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 3 of the comments on draft article 27.

[189] Spain, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 113.

[190] Poland, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 71.

[191] India, *ibid*., 20th meeting (A/C.6/67/SR.20), para. 18.

64. For the other States that expressed an opinion on draft article 27, the suspensive effect is a principle for which exceptions should be contemplated: for example, in order to respect the principle of *non-refoulement*,[192] or "for appeals lodged by aliens who could reasonably invoke a risk to their life or liberty or a risk of ill-treatment in the State of destination",[193] or "if public order or safety are at risk".[194] In short, it was felt that the draft article should "be amended to include certain exceptions, provided that such exceptions respected every person's right to an effective remedy".[195]

65. The other observations concerned issues which various States would have liked to see in the draft article: clarification on the suspensive effect before an international court;[196] possibility of a third party lodging an appeal on behalf of an alien subject to expulsion;[197] or granting the benefit of the suspensive effect of an appeal only to aliens lawfully present in the territory of the expelling State.[198] As the Commission indicated in its commentary to this draft article, it did not go as far as some States would have liked, or as far as the practice of some States could have suggested; it confined itself to what appeared to be reasonable as an exercise in the progressive development of international law, having regard to current trends in international law and to some national laws.

66. Two amendments were proposed. The first was to add to the end of draft article 27 the following phrase: "where execution of the decision could cause irreparable harm or harm that would not be easily redressed by the final decision".[199] This proposal could be examined closely by the Commission; in this case, the Special Rapporteur is of the opinion that the text to be considered should stop after "irreparable harm". The second proposed amendment was designed to mitigate the legal force of the rule of the suspensive effect by stating that an appeal lodged against an expulsion decision "may suspend an expulsion decision, as provided by law".[200] Such an amendment would strip the rule of any international impact by reducing the draft article to a mere clause referring strictly to international law.

Article 29. Readmission to the expelling State

67. One State found the wording of draft article 29 too broad, as it included "a 'right of return' in every case in which it is established by a competent authority that the expulsion was unlawful".[201] But as the content of the commentary to this draft article shows, this "right of return" is circumscribed by a plethora of conditions and strict limitations. Another State noted that, in international law, an alien whose expulsion has been deemed unlawful has no right of admission,[202] something which the Commission was well aware of, since it indicated clearly in its commentary to the draft article that this is an exercise in progressive development of international law. The same response applies to the State that felt that State practice in this area—as in that covered by draft article 27—was insufficient,[203] because had there been sufficient or clearly established practice, the issue would have been one of codification rather than progressive development. In a rather puzzling move, one State recommended that the application of draft article 29 should be limited "to aliens lawfully present in the territory of the State in question",[204] but also that the draft article should be deleted on the grounds that "[i]t is the sovereign right of a State whether to allow expelled aliens to be readmitted to its territory, even if it is established by a competent authority that the expulsion was unlawful".[205] The Special Rapporteur recalls that States are compelled to comply with their international obligations. As for limiting the application of the draft article to aliens legally present in the territory of the expelling State, this is precisely what is indicated in paragraph (2) of the commentary to the draft article. Lastly, one proposed amendment suggested that, in paragraph 1, the words "by a competent authority" should be followed by "of that State".[206] Such a suggestion would drastically limit the authorities concerned, thereby violating the spirit of the provision, which includes international courts among the competent authorities on the topic, as pointed out in the commentary to the draft article.

Article 30. Protection of the property of an alien subject to expulsion

68. Three States made observations on this draft article: one clearly supported it;[207] another requested that, even though the commentary explains the purpose of the draft article, the "draft article itself should reflect this purpose";[208] while another State proposed an amendment to insert into the draft article the phrase "to ensure that aliens subject to expulsion are not arbitrarily deprived of their lawfully held personal property" in place of the current formulation "to protect the property of an alien subject to expulsion", which is more concise and broader in scope.[209] Neither suggestion is acceptable.

Article 31. Responsibility of States in cases of unlawful expulsion

69. Among the four States that made comments concerning draft article 31, two found it redundant,[210] one

[192] Austria, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 83; and Switzerland, *ibid*., para. 77.

[193] Switzerland, *ibid*.

[194] Austria, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 27.

[195] Germany, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 103.

[196] Belarus, *ibid*., para. 110.

[197] Chile, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 9.

[198] Romania, *ibid*., para. 88.

[199] El Salvador, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, para. 8 of the comments on draft article 27.

[200] Canada, *ibid*.

[201] Germany, *ibid*., comments on draft article 29.

[202] Canada, *ibid*.

[203] India, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 18.

[204] Republic of Korea, *ibid*., 18th meeting (A/C.6/67/SR.18), para. 119.

[205] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 29.

[206] Netherlands, *ibid.*

[207] Morocco, *ibid*., comments on draft article 30.

[208] Canada, *ibid*.

[209] United Kingdom, *ibid*., para. 3.

[210] Austria, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 84,

supported it without reservation,[211] and one approved it "[t]o the extent that any of the draft articles represent existing international legal obligations".[212] Note has been taken of these different positions, which have no bearing on the rule set forth in the draft article and whose existence in positive international law is uncontested.

Article 32. Diplomatic protection

70. As in the case of draft article 31, some States found the draft article on diplomatic protection redundant, or unnecessary, in the context of the draft articles on the expulsion of aliens.[213] However, one State clearly supported the draft article.[214] Another State did not oppose it, but suggested that it should be reformulated to indicate that "[t]he exercise of diplomatic protection in respect of an alien subject to expulsion would necessarily be dependent on an existing right of the relevant State to exercise diplomatic protection in respect of the subject."[215] Such a formulation would be redundant, because it cannot be otherwise. Another State noted that "it was important to consider a provision on the settlement of disputes arising from the interpretation and implementation of the draft article and to emphasize in that regard the role of the International Court of Justice".[216] Such a clause on dispute settlement appears redundant—indeed irrelevant—in the specific context of the present draft articles.

and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 31; South Africa, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 81.

[211] Poland, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 71.

[212] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 31.

[213] Austria, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 84 and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 32; Germany, *ibid.*; Hungary, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 51; and South Africa, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 81.

[214] Poland, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 71.

[215] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. C, comments on draft article 32.

[216] Peru, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 97.

Chapter II

Final remarks of the Special Rapporteur

71. Several States expressed a position as to the final form of the outcome of the work of the Commission on the expulsion of aliens. A few States clearly supported the form of a convention,[217] while another suggested the form of a "declaration of general principles or a framework convention".[218] By contrast, other States favoured the form of a non-binding document, which could be a set of guidelines,[219] guidelines or (guiding) principles,[220] guiding (framework) principles,[221] a "general framework of principles",[222] "best practices or policy guidelines",[223] "guidelines or best practices"[224] or "guidance".[225] A few States felt that the final form of the Commission's work on the topic should be determined at a later stage,[226] even though one of them expressed a preference for "[w]ell-established guidelines reflecting the best practices of States".[227] This novel terminology is particularly inventive in diminishing the scope of the final outcome of the Commission's work on this important and sensitive topic in our globalized world, yet it does not lack merit. Nonetheless, it should not cause the Commission or even States to shift attention away from what is a crucial reality of contemporary international society, where financial flows are limitless and no effort is spared to encourage the movement of goods, yet where physical or legal barriers are being erected to hamper and even stop the movement of people.

72. The Commission works for the States. That is why it values their opinions and positions on its work and does its utmost to take them into consideration. Nonetheless, it should be borne in mind that the Commission is also a body of experts in international law whose mission is stated quite clearly in article 1, paragraph 1, of its statute: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."

73. It is therefore in this light that the work that the Commission submits to the General Assembly should be

[217] Belarus, *ibid.*, para. 111; Congo, *ibid.*, 20th meeting (A/C.6/67/SR.20), para. 48; and Peru, *ibid.*, 18th meeting (A/C.6/67/SR.18), para. 98.

[218] Republic of Korea, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B.

[219] Islamic Republic of Iran, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 11; Romania, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 88; and Thailand, *ibid.*, para. 38.

[220] Australia, *ibid.*, 20th meeting (A/C.6/67/SR.20), para. 4; Canada, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 16; Czech Republic, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B; Denmark (on behalf of the Nordic countries), *ibid.*, 18th meeting (A/C.6/67/SR.18), para. 51; Germany, *ibid.*, para. 99, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B; and Spain, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 116.

[221] European Union, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th meeting (A/C.6/67/SR.18), para. 68; and Singapore, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 105.

[222] Portugal, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 60.

[223] Netherlands, *ibid.*, para. 28, and document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B.

[224] Greece, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 22nd meeting (A/C.6/67/SR.22), para. 26.

[225] United Kingdom, document A/CN.4/669 and Add.1 (reproduced in the present volume), sect. B.

[226] Israel, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th meeting (A/C.6/67/SR.20), para. 37; and Malaysia, *ibid.*, 19th meeting (A/C.6/67/SR.19), para. 108.

[227] Israel, *ibid.*, 20th meeting (A/C.6/67/SR.20), para. 37.

assessed. Regrettably, many of the observations that States made in respect of the draft articles adopted by the Commission on first reading give the impression that they did not read the commentaries to the draft articles, which address clearly and comprehensively almost all of the often legitimate concerns raised by the States. The Special Rapporteur would like to draw attention to the importance of the commentaries, which are an essential means of interpreting the various draft articles and an indispensable methodological tool for understanding the Commission's approach and verifying the legal basis of each draft article.

74. Very few topics in the Commission's agenda have such a solid grounding in international law as does the expulsion of aliens. State practice on various aspects of the topic has been evolving since the end of the nineteenth century and a number of international treaties contain provisions relating to various aspects of the topic. Much of the case law that served as the basis for codifying the responsibility of States for internationally wrongful acts, on the one hand, and diplomatic protection, on the other, concern cases involving the expulsion of aliens. More recently, the International Court of Justice issued a judgment on 30 November 2010, in the *Diallo* case, reaffirming this jurisprudential foundation and clarifying the positive law on various points.[228]

75. That some Governments would have reservations about the topic for their own national reasons is understandable. Nonetheless, that cannot be used as grounds for insinuating—indeed affirming—that the draft articles have no basis in international law. Several States stressed that the draft articles must be based on State practice. This opinion is widely shared within the Commission, which has always based its work on State practice while retaining the option, when necessary, to engage in the progressive development of international law. In its consideration of the present topic, the Commission made it clear that some provisions of the draft articles amounted to progressive development rather than codification *stricto sensu*, all things that are fully in keeping with its mission, as recalled above.

76. The draft articles adopted on first reading are based on a balance between the right of States, whose sovereignty over the admission and expulsion of aliens is reaffirmed in the draft articles, and the rights of aliens subject to expulsion, who are accorded greater protection in the draft articles based essentially on international law and the dominant trends in the practice of a number of States. In the opinion of the Special Rapporteur, it is highly desirable to maintain this balance—which was achieved following lengthy discussions within the Commission—and to take into account the convergent views expressed by States on various aspects of the topic. In this connection, the Commission can be pleased with the positive assessment made of its work by an eminent representative of contemporary doctrine in international law, who wrote that

> The draft articles on expulsion of aliens have succeeded in setting out the relevant legal regime with all its implications in a sober and well-balanced manner. The [Commission] has neither adopted a purely conservative approach, nor has it brushed aside all the traditional elements of States sovereignty. On the whole, the Draft is permeated by a spirit of enlightened modernism which takes the rule of law and human rights seriously, without placing them ahead of any other consideration of public interest. Accordingly, its chances of getting the final mark of approval from the international community can be deemed to be extremely good.[229]

77. In any event, the Special Rapporteur would like the Commission to complete its work on the topic by adopting the draft articles on the expulsion of aliens on second reading, subject to any amendments it proposes to make to the draft articles, including to the commentaries thereto, following comments and observations received from States. In this connection, far be it from the Special Rapporteur to prejudge the form that the General Assembly would want to give to the draft articles. The States have the last word on this topic, as they do on the final outcome of any work submitted by the Commission. Accordingly, as a representative of one State noted during the discussion in the Sixth Committee, in November 2012, it is better to "leave all options open",[230] although the Special Rapporteur has a preference for the form of a convention.

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[228] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639.

[229] Tomuschat, "Expulsion of aliens: the International Law Commission draft articles", p. 662.

[230] Singapore, *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 105.

EXPULSION OF ALIENS

[Agenda item 2]

DOCUMENT A/CN.4/669 and Add.1

Comments and observations received from Governments

[*Original: English, French, Russian and Spanish*]
[*21 March and 1 October 2014*]

CONTENTS

Multilateral instruments cited in the present document

	Source
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 22 November 1984)	*Ibid.*, vol. 1525, No. 2889, p. 195.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	*Ibid.*, vol. 189, No. 2545, p. 137.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	*Ibid.*, vol. 360, No. 5158, p. 117.
European Convention on Establishment (with Protocol) (Paris, 13 December 1955)	*Ibid.*, vol. 529, No. 7660, p. 141.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, No. 8638, p. 261.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.*, vol. 999, No. 14668, p. 171.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	*Ibid.*, vol. 993, No. 14531, p. 3.
OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969)	*Ibid.*, vol. 1001, No. 14691, p. 45.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid.*, vol. 1144, No. 17955, p. 123.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	*Ibid.*, vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Ibid.*, vol. 1465, No. 24841, p. 85.
Convention on the Rights of the Child (New York, 20 November 1989)	*Ibid.*, vol. 1577, No. 27531, p. 3.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990)	*Ibid.*, vol. 2220, No. 39481, p. 3.
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw, 16 May 2005)	*Ibid.*, vol. 2569, No. 45796, p. 91.
Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	*Ibid.*, vol. 2515, No. 44910, p. 3.
Arab Convention on Combating Money-Laundering and the Financing of Terrorism (Cairo, 21 December 2010)	Algeria, *Journal Officiel*, No. 55, 23 September 2014 (in French).

Introduction

1. At its sixty-fourth session (2012), the International Law Commission adopted, on first reading, the draft articles on the expulsion of aliens.[1] Moreover, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014. The Secretary-General circulated a note dated 18 October

[1] See *Yearbook … 2012*, vol. II (Part Two), paras. 41–45. For the draft articles and the commentaries thereto, see, *ibid.*, para. 46.

2012 transmitting the draft articles with commentaries thereto to Governments, as well as a reminder note dated 22 April 2013. In paragraph 6 of its resolution 67/92 of 14 December 2012, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles and commentaries thereto.

2. As at 12 June 2014, written replies had been received from Australia (21 January 2014), Austria (13 January 2014), Belgium (17 December 2013), Canada (8 January 2014), Cuba (7 March 2014), Czech Republic (31 December 2013), Denmark (on behalf of the Nordic countries) (12 June 2014), El Salvador (20 December 2013), Germany (30 December 2013), Morocco (8 January 2014), Netherlands (20 January 2014), Republic of Korea (20 January 2014), Russian Federation (9 April 2014), United Kingdom of Great Britain and Northern Ireland (8 January 2014) and United States of America (7 March 2014). The comments and observations received from those Governments are reproduced below, organized thematically, starting with general comments and continuing with comments on specific draft articles.

Comments and observations received from Governments

A. General comments

Australia

1. To the extent that the draft articles are declarative of existing rules of international law in respect of the expulsion of aliens, Australia considers that the work of the Commission in consolidating the international law in this area will usefully serve as a guide for States in implementing international obligations as well as for the development of domestic law and policies.

2. For its part, Australia is committed to providing a legal system that is predictable, transparent and respectful of human rights and dignity in its treatment of aliens. Australia commends the inclusion of draft articles that reflect these principles. In this regard, Australia welcomes in particular draft article 14, paragraph 1, on the treatment of aliens with humanity and with respect for human dignity, and draft article 21, paragraph 1, which promotes the voluntary departure of aliens subject to expulsion.

3. In some respects, however, Australia considers that the draft articles advance new principles that do not reflect the current state of international law or the practice of States.

4. Accordingly, Australia would suggest that the Commission exercise restraint in conflating existing principles and expanding established concepts in new directions. In circumstances where the draft articles draw on existing provisions in other treaties, Australia recommends that the Commission reflect, as precisely as possible, previously agreed language.

Canada

1. The legal status and purpose of the draft articles merits clarification. Given existing and inconsistent State practice, precedent and doctrine in this area, Canada does not view the draft articles as either a progressive development or a formulation and systematization of rules of international law. Canada encourages the Commission to include a clear statement at the beginning of the draft articles that the articles neither codify existing international law nor reinterpret long-standing and well-understood treaties.

2. Several references are made to obligations under "general international law". These references should clarify whether this term includes customary international law and treaty law.

3. Several references to the declaration on the human rights of individuals who are not nationals of the country in which they live[1] appear in the commentary to these draft articles. Canada objects to any suggestion that this declaration represents customary international law.

[1] General Assembly resolution 40/144 of 13 December 1985.

Cuba

1. Cuba wishes to reiterate the usefulness of codifying the human rights of persons who have been or are being expelled, provided that such codification is guided by the principle of comprehensive protection of the human rights of the person who has been or is being expelled, and does not infringe on the sovereignty of States.

2. Broadly speaking, Cuba recommends including a draft article that provides for the State of destination to be notified before an expulsion is carried out. In this regard, Cuba considers it appropriate to include in the draft articles a reference to the right of persons who have been or are being expelled to communicate with representatives of the relevant consulate.

3. Protection of the human rights of persons who have been or are being expelled cannot constitute a limit on the exercise of the right of a State to carry out expulsions.

4. Cuban criminal law provides for the expulsion of aliens as one of the additional sanctions that the sanctioning tribunal can impose on individuals, in accordance with article 28, paragraph 3 (*i*), of the Criminal Code (Law No. 62 of 29 December 1987, as amended by Law No. 87 of 16 February 1999). Article 46, paragraph 1, of the Code provides that the punishment of expulsion may be applied to an alien when a competent tribunal finds that the nature of the offence, the circumstances of its commission, or the personal character of the defendant indicate that his or her continued presence in the Republic would be harmful. It further provides that the expulsion of aliens may be imposed as an additional measure once the principal sanction has been completed and grants the Ministry of Justice the discretion of ordering the expulsion of the sanctioned alien prior to the completion of the primary sanction, in which case the criminal culpability of the guilty person is annulled.

Denmark (on behalf of the Nordic countries)

1. Denmark notes that in general the draft articles contain a useful description of the challenges in the area of expulsion of aliens and of the different relevant bodies of international and regional laws and practices.

2. Furthermore, Denmark reiterates that any convention on expulsion of aliens would only be of interest if it is based on, and clearly states, the basic principle that States must readmit their own nationals who do not have a legal residence in another country. The Nordic countries therefore strongly support the European Union comment[1] on draft article 22, paragraph 1, which suggests adding "and readmitted by" to clarify the obligations of receiving States to readmit their own nationals. An alternative option could be to add a new separate article stating the obligations of receiving States.

3. Furthermore, for the Nordic countries it is a key principle that the draft articles do not apply to extradition.

4. It is the view of Denmark that there is a need to clarify the terminology in the draft articles. It is necessary to have clear and consistent language throughout the draft articles.

5. The draft articles have been drafted so as to apply to the expulsion of an alien by a State and in the commentary it is stated that the term "expulsion" is used because it is sufficiently broad and covers any phase of the expulsion process.

6. However, the definition contained in draft article 2, subparagraph (*a*), only seems to relate to the expulsion decision and not the subsequent implementation of this decision involving voluntary or forced return. The Nordic countries therefore suggest that the term "expulsion" is used for the decision to expel an alien. As for the subsequent forcible implementation of this decision, it is suggested that the term "removal" is used. This is the term consistently used in the European Union return directive,[2] in which it means the enforcement of the obligation to return, namely the physical transportation out of the member State. The current draft articles seem to use different terms for this phase, as the use of, for example, "return", "departure" and "forcible implementation of an expulsion decision" in draft articles 6 and 21 shows.

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

[2] Directive 2008/115/EC of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals (*Official Journal of the European Union*, L 348, 24 December 2008, pp. 98–107).

El Salvador

1. With regard to the terminology used, El Salvador recommends that the terms "lawful/unlawful" be replaced by "regular/irregular immigration status", to reflect the progress achieved by international human rights law. There is now no question that all persons—irrespective of nationality, race, religion or any other status—are free and equal in dignity and rights, which implies that there are no "unlawful" individuals but rather persons whose immigration status may become regular or irregular in accordance with the domestic law of each State.

2. Similarly, the term "alien" should be changed to "alien person" in all the draft articles in order to achieve consistency in the use of inclusive language. That, for example, was the language used in the Convention on the Rights of Persons with Disabilities, in which "persons with disabilities" was the preferred term.

3. As for substantive additions to the draft articles, El Salvador deems it appropriate to incorporate an express provision on the right to health of detained persons subject to expulsion. The right to health has been widely recognized as an inalienable right of every person, which guarantees the enjoyment of the highest attainable standard of physical, mental and social well-being.

4. The right to health acquires a special connotation in the context of detention since, owing to the restrictions on mobility intrinsic in such a measure, individual efforts to attain such well-being are either out of the realm of possibility or fraught with complexity. It is therefore essential in such cases that the State fulfil its obligation to respect and guarantee the right to health, deriving from its obligations under international law.

5. In order to fulfil that requirement, it is not sufficient for State actors to refrain from violating a detained person's right to health; what is called for instead is a proactive approach to ensuring that person's full well-being through the adoption of various types of measures.

6. Equally important are special measures for the purpose of meeting the particular health needs of persons deprived of liberty who belong to vulnerable or high-risk groups, including older persons; women; boys and girls; persons with disabilities; persons with HIV/AIDS or tuberculosis; persons with a terminal illness who require specialized medical treatment; and women deprived of liberty who are in need of reproductive health care.

7. In view of the foregoing, and since mere negligence by the State would result *per se* in a serious violation of the right to health, this right should be incorporated in the draft articles with the wide scope currently accorded to the right to health.

8. Lastly, in the context of the principle of *non-refoulement*, El Salvador recommends the addition of an express provision on the prohibition of expulsion of persons granted asylum or asylum seekers to territories in which their life, integrity or personal freedom is at risk, since—as will be discussed below—this principle has transcended the sphere of refugee status to become part of the general corpus of human rights principles.

9. The foregoing is also necessary in view of the confusing terminology that many countries use to define "asylum" and "refugee". As a result, drafting an express provision would serve to ensure that protection is not denied to persons who, having been persecuted in their States of origin, might not be identified as refugees solely because of issues related to terminology.

Netherlands

The commentary on the draft articles shows that consideration has been given to current State practice. In some cases, the Commission concludes that practice varies from State to State and regards this as a reason not to include a provision on the matter in question. In other cases, the Commission concludes that, although there is insufficient State practice to warrant referring to an existing rule of international law, a provision should nevertheless be included for the progressive development of international law. The Netherlands would urge that this approach be reconsidered. The Netherlands believes that there is no scope for progressive development of international law in this area, precisely because so much of the law in this area has already been codified and because of the politically sensitive nature of this subject in many countries.

Republic of Korea

1. With respect to State sovereignty and the human rights of aliens, the draft articles greatly respect the human rights of aliens and seek a balance between State sovereignty and the human rights of aliens subject to expulsion. However, some articles limit State sovereignty to an unreasonable extent.

2. With respect to the principles of international law, domestic law and international practices, it is noteworthy that the present draft articles include progressive provisions for the gradual development of international law, reflecting the decisions or opinions of local courts on human rights. However, some draft articles seem to go beyond the purview of multilateral treaties, general principles of international law, domestic law and international practices in their operation. For instance, draft articles 6 (Prohibition of the expulsion of refugees), 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened) and 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment) were drafted based on the Convention relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the draft articles expand the range of persons covered, while reducing the grounds for limitation, thus practically exceeding the scope of application of the above-mentioned conventions.

Russian Federation

1. As for general approaches to the topic, certain questions are raised by the concept inherent in the draft articles according to which the expulsion regime is proposed to extend equally to aliens residing in the territory of the State both lawfully and unlawfully. In our understanding, the legal nature of their stay in the territory of the State differs.

2. For example, aliens residing in the territory of the State on lawful grounds enjoy a greater degree of protection primarily in terms of procedural safeguards made available to them in the context of expulsion. That conclusion is supported by relevant universal and regional treaties,[1] according to which certain guarantees in the sphere of expulsion are extended to "lawful" aliens. As an example, the Russian Federation draws attention to article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, from the name and text of which it follows that the procedural safeguards relating to expulsion that are formalized in it apply solely to a clearly defined group of aliens—persons lawfully residing in the territory of a given State.

3. A similar approach with regard to "unlawful" aliens is not found in international law—the safeguards made available to them in this sphere are of a general nature and essentially boil down to an aspect of the protection of human rights (respect for family life in the context of expulsion, impermissibility of expulsion to a State in which the person could be subjected to persecution on the grounds of race, religion, or other affiliation, to torture or inhumane treatment, etc.).

4. The specifics given above, it would seem, could be reflected in the draft articles with an eye to performing a clearer demarcation in the legal situation of "lawful" and "unlawful" aliens residing in the territory of a State, primarily in the context of the procedural safeguards enumerated in draft article 26.

5. Based on the text of the draft articles, as well as on the commentary, one can conclude that the term "competent authority" is generally used to include both the judicial and administrative bodies of authority of the expelling State. The Russian Federation feels such an approach reflects the current international and intra-State practices in this matter.

6. In that connection, it would seem proper to explicitly specify such an understanding of the term "competent authority" in the articles or in the commentary regarding it, so as to avoid different readings.

7. For example, the International Court of Justice, in a judgment in the *Ahmadou Sadio Diallo* case,[2] having analysed the pertinent provisions of the law of the Democratic Republic of the Congo, found no discrepancies between the administrative rules prevailing in that country for decisions to expel (upon the decision of the President or Prime Minister of the Democratic Republic of the Congo, without a court hearing on the matter) and the norms of international law.

8. In addition to that, article 1 of the above-mentioned Protocol No. 7 clearly stipulates the right of the person being expelled "to be represented … before the competent authority or a person or persons designated by that authority". According to the explanatory report on Protocol No. 7, the competent body may be judicial or administrative.[3] Moreover, it is acceptable for the law of the State making the expulsion to establish different procedures for that and to designate different authorities for it.[4]

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[1] For example, the Convention relating to the Status of Refugees, art. 32; the International Covenant on Civil and Political Rights, art. 13; the European Convention on Establishment, art. 3; and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1.

[2] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639.

[3] Council of Europe, *Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Strasbourg, 1984), para. 13.3.

[4] Under Russian law, for example, there exist both judicial (administrative expulsion) and non-judicial (deportation) procedures for expelling aliens.

United Kingdom

The issue of expulsion of aliens is mainly governed by national laws, subject to respect for a limited number of relevant rules of international law. The latter derive from a number of disparate sources, and different States will have different international obligations concerning the expulsion of aliens in accordance with the relevant multilateral agreements to which they are party. The United Kingdom considers the management and control of immigration across its borders should be a matter for individual States. There is a need to balance wider international obligations with the primacy of the State and the protection of its domestic population. States should and must act in the national interest. The United Kingdom, therefore, does not consider that international law on this topic is sufficiently developed and coherent for it to be codified by the Commission. Moreover, in the light of the numerous political and legal sensitivities and difficulties that surround these issues, this is an area in which the Commission should be cautious about making suggestions for the progressive development of the law.

United States

1. The United States has a number of general concerns with the draft articles. First, the draft articles do not seek merely to codify existing law, but instead are an effort by the Commission to progressively develop international law on several significant issues. Key aspects of the draft articles, such as their expansion of *non-refoulement* protections, deviate significantly from the provisions of widely adhered to human rights treaties and from national laws and jurisprudence. While there are a few instances in which the commentary recognizes that aspects of the draft articles reflect progressive development, these are insufficient and leave the incorrect impression that all the other provisions within the draft articles reflect codification. The draft articles even risk generating confusion with respect to existing rules of law by combining in the same provision elements from existing rules with elements that reflect proposals for progressive development of the law.

2. Second, although there are elements within these draft articles to which the United States would not object, or might even support, it does not believe that, viewed as whole, they currently strike a proper balance in dealing with the competing interests in this field, especially to the extent they advocate certain protections for individuals that unduly restrain States' prerogative and responsibility to control admission to and unlawful presence in their territories.

3. Third, the United States remain sceptical of the wisdom and utility of seeking to augment in this manner well-settled, universal rules of law that exist in broadly ratified human rights conventions. Those existing conventions, including the various conventions containing *non-refoulement* provisions, already provide the legal basis for achieving key objectives of these draft articles. Problems of mistreatment of persons in this area largely arise not from the lack of legal instruments, but the failure to abide by those instruments, a problem that these draft articles do not and cannot solve.

B. Final form of the draft articles

Australia

Australia notes that there is a significant existing body of international law on the expulsion of aliens, which will continue to grow as movement across borders becomes ever more commonplace. The international law in this area is also complemented by a broad range of domestic legal and policy decisions that more properly fall within the sovereign regulation of States. Accordingly, Australia considers that the work of the Commission will be most valuable where it assists States to implement their obligations. Australia therefore suggests that the draft articles would be most appropriate as a set of principles or guidelines representing international best practice, rather than as any sort of binding instrument. In this manner, the work of the Commission will usefully contribute to the consolidation of laws and practices in this area.

Czech Republic

The Czech Republic would prefer that these draft articles be accepted as legally non-binding guidelines.

Denmark (on behalf of the Nordic countries)

The Nordic countries have in recent years commented on this topic in the Committee and have with consistency argued that the topic of expulsion of aliens does not lend itself to incorporation into a convention. Expulsion of aliens is an area of law with significant and detailed regional rules, and it is therefore our view that the ongoing work in the Commission should rather focus on transforming the draft articles into framework principles or general guidelines.

Germany

The final outcome of this topic is of utmost importance to Germany. Germany continues to agree with those members of the Commission who have repeatedly expressed doubts as to whether this topic may be suitable for incorporation into a convention. This topic is not one for developing rules *de lege ferenda*. It is governed by a large number of national rules and regulations. As regards international law, human rights instruments address the subject and contain relevant guarantees for the protection of the individual in case of expulsion. Germany does not see a need for further codification. Instead, Germany supports the idea of drawing up draft guidelines or principles enunciating best practices. The current draft articles seem to support this approach as they contain a number of best practices rather than only currently existing legal obligations.

Netherlands

The Netherlands would like to reiterate its concern that the Commission should not design a new human rights instrument; these draft articles should reflect accepted principles of international law and the detail and nuance of these principles. The Netherlands support the reformulation of these articles into "best practices" or "policy guidelines". However, it opposes their codification into a treaty.

Republic of Korea

While a State should respect the basic principles of human rights in decisions on expulsion, it can also exercise its discretion in the relevant determination, taking into account its national interests and policies. In this sense, rather than codifying the draft articles into treaties, it would make better sense to adopt the final outcome as a declaration of general principles or a framework convention.

United Kingdom

The United Kingdom does not believe that the outcome of the work of the Commission on this topic should be presented in the form of draft articles, but rather should at the most take the form of guidance to States, albeit in an altered form. Guidance has a potential role to play in setting out the high-level principles for how States should respond and act in terms of the expulsion of migrants within the context of established international law (to which they are party). However, it must allow for domestic primacy, reflecting the disparate approaches and unique challenges individual States face.

United States

The United States does not believe that this project should ultimately take the form of draft articles. Given that several multilateral treaties already exist in this field, the United States questions how much support would exist for negotiating a new convention based on these draft articles. Therefore, the United States recommends that the Commission consider converting these draft articles into another more appropriate form, such as principles or guidelines. If these do remain as draft articles, the United States strongly recommends that the commentary include a clear statement at the outset that they substantially reflect proposals for progressive development of the law and should not, as a whole, be relied upon as codification of existing law.

C. Specific comments on the draft articles

Part One

GENERAL PROVISIONS

Article 1. Scope

Australia

Australia notes that, as drafted, a number of the draft articles potentially extend existing or create new international law obligations. In this regard, Australia notes the decision of the Commission to address both aliens lawfully and unlawfully present in the territory of the expelling State. While Australia considers that there is merit in considering both categories of alien in the draft articles, Australia is concerned that this approach at times leads to a mischaracterization of the distinction between these two categories of alien under international law.

Germany

Germany would like to reaffirm its conviction that the scope of the draft articles set out in draft article 1 is too broad. To include both groups of aliens—those who are legally and those who are illegally present in a State's territory—in the general scope of the draft articles and to make a distinction only in a couple of instances does not seem appropriate. The rights accorded to both groups differ too much with regard to expulsion.

Morocco

1. Draft article 1 focuses on aliens who are lawfully or unlawfully present in the territory of a State and are subject to expulsion. Nationals are therefore excluded from its scope. The draft articles identify eight cases of prohibited expulsion, including deprivation of nationality for the sole purpose of expulsion. According to draft article 9, "a State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her". This provision addresses the specific situation in which the State would deprive a national of his or her nationality for the purpose of expelling him or her.

2. The Commission was careful to clarify that the issue of the expulsion by a State of its own nationals had not been envisaged when this scenario was included among the cases of prohibited expulsions, because it fell outside the scope of the draft articles. In this regard, Morocco recalls that, just as the act of deprivation of nationality is inherently linked to the status of nationals and is specific to the State, both the act and process of expulsion cannot be considered in isolation from the status of the persons to whom they apply: if nationals, as subjects of expulsion, have been excluded from the scope of the draft articles, why would they be so excluded only from the specific perspective of deprivation of nationality? Although the consequence thereof may be related to the topic under consideration, the inclusion of this scenario creates ambiguity as to the scope *ratione personae* of the draft articles.

Russian Federation

See the comment made above under general comments.

United Kingdom

The United Kingdom suggests that the text and scope defined in draft article 1 would benefit from amendment and some clarification. As presently drafted, the scope of the draft articles encompasses all aliens, whether in the United Kingdom lawfully or unlawfully. The United Kingdom recognizes that all aliens within its territory have a right to respect for their human rights and that States have a responsibility to weigh the interests of the individual and the State by means of fair and balanced processes. Nevertheless, the United Kingdom considers that it is reasonable to apply different approaches and safeguards to those with differing immigration status.

United States

The United States welcomes the inclusion of draft article 1, paragraph 2.

Article 2. Use of terms

Austria

An expulsion can only be effected through a formal governmental act. Therefore, Austria does not agree with

the current definition of the term "expulsion" as contained in draft article 2 and subsequently further elaborated in draft article 11. The words "or conduct consisting of an action or omission" have to be removed. It would, in particular, contradict draft article 4, which refers to a decision reached in accordance with the law.

Canada

1. Canada would remove refugees from the definition of "expulsion" in draft article 2, subparagraph (*a*). As drafted, it remains unclear whether "refugee" in this context is meant to apply to "protected persons", "refugee claimants" or others. The definition of "expulsion" in the draft articles needs to be clarified as multiple interpretations are possible with varying potential implications.

2. Canada wishes to clarify the meaning of "expulsion" in draft article 2, subparagraph (*a*), which is defined as "a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State". Canada understands this definition to thus include expulsion by the State and expulsion attributable to the State in accordance with the principles of State responsibility. Canada wishes to emphasize that the scope of "conduct attributable to a State" should incorporate the same threshold for attribution as described in the articles on responsibility of States for internationally wrongful acts.[1]

[1] *Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76.

Cuba

Cuba recommends that draft article 2, paragraph (*b*), make reference to citizenship rather than nationality, given that citizenship is what links an individual politically and legally to a State. Cuba understands that nationality is an attribute that defines each individual's lifelong peculiarities based on culture, idiosyncrasies and traditions. In this connection, Cuba suggests changing the word "nationality" to "citizenship" throughout the draft articles.

Denmark (on behalf of the Nordic countries)

See the comment made above under general comments.

Germany

1. In its previous statements, Germany emphasized that the term "expulsion" covers two distinct issues and that the general use of the term in the current reports and debates of the Commission could lead to misunderstandings. Hence, Germany welcomes the respective clarification in draft article 2, subparagraph (*a*), according to which the term "expulsion", as it is used in the draft articles, covers only the State's right to expel—that is, to oblige an alien to leave the country, which has to be distinguished from a State's right to deport an alien—that is, to force him or her to leave the country.

2. However, Germany would like to reiterate its proposal that the expression "omission" in draft article 2, subparagraph (*a*), should be specified in order to more narrowly describe its scope of application.

Republic of Korea

1. Draft article 2 regards the non-admission of a refugee as a sort of expulsion, while the Convention relating to the Status of Refugees, a standard treaty for the protection of refugees, does not consider it to be expulsion. The same is true of a domestic law (Refugee Act)[1] of the Republic of Korea.

2. The draft articles do not specify the scope of "law" and "international law". This may result in an unexpected limitation on State sovereignty. If the draft articles state "law", it should specify whether it is "international law", "domestic law", or both. Similarly, if it states "international law", it should be narrowed down to binding rules for the State concerned. In order to avoid any unnecessary confusion, it is worth considering defining "law" and "international law" in draft article 2.

3. The Convention relating to the Status of Refugees, while concerned with the obligations of a State to protect refugees when they reside in its territory, does not consider the non-admission of refugees to be an expulsion. Likewise, the non-admission of refugees is not deemed as an expulsion under the Refugee Act of Korea. In this context, it should be noted that a State has the sovereign power to allow admission of aliens into its territory. Refugees are no exception. They also belong to the category of aliens that are subject to admission by a State.

[1] Law No. 11298 of 10 February 2012, which entered into force on 1 July 2013.

United Kingdom

1. The United Kingdom considers the text and scope of draft article 2, subparagraph (*a*), to refer to persons seeking entry from outside of the State and to exclude persons who are refused entry at the border. The draft article should more specifically refer to immigration acts of in-country enforcement. As presently drafted, the draft article refers to all State acts and omissions to compel aliens to leave (including those already recognized as being lawfully present). This, therefore, could be considered to apply to the whole of the immigration system; the United Kingdom system of immigration is premised on tackling illegal immigration. The Government of the United Kingdom works across departments and disciplines, ensuring illegal migration does not impact negatively on available services and benefits that are more rightly reserved for those legitimately in the country who have made a contribution. As presently constructed, the draft article takes as a starting point that those illegally present in a country need a positive act to be removable. The view of the United Kingdom is that this could potentially extend to a requirement to regularize an illegal migrant's status, i.e. confer on them a legal status, prior to the State being able to take any activity to enforce removal of the individual because failure to so do incentivizes departure.

2. The United Kingdom suggests the following amendment to the text of draft article 2, subparagraph (*a*):

> " 'expulsion' means a formal decision of a State by which an alien is compelled to leave the territory of

that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;".

United States

1. The United States has significant concerns with the language in draft article 2, subparagraph (*a*), which defines expulsion to include "conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State". This language, as the commentary notes, is directly related to the concept of "disguised expulsion" addressed in draft article 11. The concerns of the United States with the Commission's treatment of "disguised expulsion" are more fully addressed below in its comments to draft article 11. However, the United States notes here that the language of draft article 2, subparagraph (*a*), is inconsistent with the language of draft article 11 in numerous respects, thus creating ambiguity as to whether it is intended to cover, and thereby prohibit, an even broader range of conduct.

2. For example, the text of draft article 11 includes the criterion—underscored in the commentary as the "decisive factor"—that the State must have the "intention of provoking the departure of aliens from its territory" for such actions or omissions to constitute "disguised expulsion". However, draft article 2, subparagraph (*a*), lacks any such intentionality requirement, which creates ambiguity as to whether draft article 2, subparagraph (*a*), is intended, or could be read, to cover a wider range of "actions or omissions" as constituting an expulsion. The plain text of draft article 2, subparagraph (*a*), might suggest that a State could be held indirectly responsible for certain conduct by private actors who compel an alien to leave the country, regardless of the State's intention. Moreover, as noted below, draft article 2, subparagraph (*a*), uses the phrase "compelled to leave" whereas draft article 11 speaks of "forcible departure", leaving open whether there is a difference between these two concepts. Consistent with its comments on draft article 11, the United States believes the words "or conduct consisting of an action or omission, attributable to a State" in draft article 2, subparagraph (*a*), should be deleted and replaced with "by a State".

3. In addition, this definition suggests that "expulsion" would include "non-admission" of a refugee. The meaning of the term "non-admission", as used in draft article 2, subparagraph (*a*), is somewhat unclear and, to the knowledge of the United States, that term is not a key operative term in any international legal instrument. In reading the commentary, the Commission appears to be referring to the concept of "return", which is used in article 33 of the 1951 Convention relating to the Status of Refugees, as well as article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In these instruments, "return" has a meaning distinct from expulsion; to wit, the United States Supreme Court, in *Sale v. Haitian Centers Council, Inc.*,[1] interpreting article 33, paragraph 1, of the Convention relating to the Status of Refugees, stated that " 'return' means a defensive act of resistance or exclusion at a border". Accordingly, it is inapt to suggest that "non-admission" of a refugee would constitute an expulsion. If a refugee is denied admission at a port of entry and removed, that act would constitute a "return" for *non-refoulement* purposes. The United States also understands, based on the phrase "compelled to leave the territory of that State" in draft article 2, subparagraph (*a*), that these draft articles have no application to any immigration-related procedures conducted outside a State's territory. For these reasons, the United States suggests that the entire phrase "or the non-admission of an alien, other than a refugee" be replaced by "or the return of an alien".

4. Furthermore, although the *non-refoulement* obligations in the Convention relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also separately prohibit the return of an alien entitled to protection, these draft articles deal solely with expulsion. As discussed below in the comments of the United States to draft article 6, the United States similarly believes that the reference to "return (*refouler*)" should be deleted from draft article 6, paragraph 3; while draft article 6, paragraph 3, is drawn from article 33 of the Convention relating to the Status of Refugees, the reference to "return (*refouler*)" goes beyond the scope of these draft articles.

5. The United States welcomes in draft article 2, subparagraph (*a*), the exclusion from "expulsion" of extradition and of surrender to an international criminal court or tribunal.

Article 3. Right of expulsion

Canada

The commentary to draft article 3 suggests legal force by stating that, "the right of expulsion is regulated by the present draft articles and by other applicable rules of international law". Canada would replace this statement with, "A State may only expel an alien in accordance with its international legal obligations".

Cuba

With regard to the right of expulsion set forth in draft article 3, Cuba considers it necessary to refer to respect for domestic law and the maintenance of each State's public security.

Republic of Korea

See the comment made above under general comments.

United States

1. Draft article 3 appears to indicate that States are expected to comply with the purported requirements of these draft articles "and" the requirements of other applicable rules, even if these draft articles are not consistent with existing international treaties. One obvious example of this tension is that these draft articles do not explicitly provide for derogation in times of emergency, whereas many international treaties relating to this topic do provide

[1] *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), pp. 182–183.

for such derogation, for example, article 4, paragraph 1, of the International Covenant on Civil and Political Rights. Furthermore, article 13 of the Covenant states that:

> An alien lawfully in the territory of a State Party … shall, *except where compelling reasons of national security otherwise require*,* be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority.

Draft article 3 leaves unclear whether derogation is permitted, since according to this draft article both sets of rules are applicable.

2. At the same time, the commentary indicates that derogation is permitted, meaning that the "other applicable rules" supersede these draft articles, at least in that respect. Draft article 8 also addresses this issue, but only in a narrower context. To avoid confusion, draft article 3 should be rewritten, using the language from draft article 8 but in a more comprehensive manner, so as to read:

> "A State has the right to expel an alien from its territory. The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other applicable rules of international law on the expulsion of aliens, in particular those relating to human rights."

Article 4. Requirement for conformity with law

El Salvador

1. Draft article 4 is fundamental to the draft articles as a whole, since it requires that any expulsion be carried out within the framework of the law; however, some drafting changes are needed to strengthen its content.

2. First of all, the heading of the article is unclear in Spanish, as the phrase "*obligación de conformidad con la ley*" does not indicate what precisely must be in conformity with law. El Salvador therefore suggests indicating clearly that any act carried out during the expulsion process must comply with this requirement.

3. Second, this article must identify the State as the sole entity authorized to take expulsion decisions. As indicated in the Commission's commentary on draft article 4, the fundamental condition for exercising the expulsion of an alien is the adoption of an expulsion decision by the expelling State in accordance with the law. It is precisely this requirement that has the effect of prohibiting the State from engaging in conduct that would compel an alien person to leave its territory without formal notification and without any procedures.

4. In view of the foregoing, El Salvador proposes the following wording:

> "*Article 4. Requirement [to act] in conformity with law*
>
> "An alien may be expelled in pursuance of a decision reached by the State in accordance with law."

Russian Federation

1. The Russian Federation supports the requirement stipulated in draft article 4 on the permissibility of expelling an alien solely on the basis of a decision made in accordance with the law. At the same time, it notes the following legal position set forth by the International Court of Justice in its judgment in the *Ahmadou Sadio Diallo* case: "it is clear that while 'accordance with the law' as thus defined is a necessary condition for compliance with the above-mentioned provisions, *it is not the sufficient condition**".[1] Developing that idea, the Court later said:

> First, the applicable domestic law must itself be *compatible with the other requirements of the Covenant and the African Charter*;* second, *an expulsion must not be arbitrary in nature*,* since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights.[2]

2. Thus, in the opinion of the Court, the law of the State on whose grounds the judgment to expel an alien is being handed down must meet certain criteria: (*a*) it must comply with the norms of international law that are applicable with respect to the State (in the *Ahmadou Sadio Diallo* case, those norms were the above-mentioned International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights); and (*b*) it must provide sufficient safeguards against arbitrary treatment on the part of the authorities.

3. In the view of the Russian Federation, however, the above legal position of the International Court of Justice does not find proper reflection in the comments on the draft articles. Overall, its analysis, primarily in the context of the obligation specified by draft article 4, could be of interest to the Commission (its results could later be reflected in the comments). For its part, within the framework of the question, the Russian Federation has directed attention to the practice of the European Court of Human Rights, in the context of which the phrase "in accordance with the law" has been given a detailed interpretation.

4. For example, in its case law, the European Court of Human Rights proceeds from the fact that the expression "in accordance with the law" used in the text of the Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols to it not only requires that certain measures undertaken by the State against a person be based on the rules of the law, but also presumes "quality of the law" (in that sense, the practice of the European Court of Human Rights is consonant with the above legal position of the International Court of Justice in the *Ahmadou Sadio Diallo* case). Thus, in the case of *Khlyustov v. Russia*, the European Court of Human Rights, referring to its case law,[3] said:

> the expression "in accordance with the law" not only requires that the impugned measures should have some basis in domestic law, but also refers to the quality of the law in question. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.[4]

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[1] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 663, para. 65.

[2] *Ibid.*

[3] See the cases *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, Series A no. 30, paras. 47–49; and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, ECHR 2012, paras. 140–141.

[4] *Khlyustov v. Russia*, no. 28975/05, 11 July 2013, para. 68.

5. Apart from that, in its practice, the European Court of Human Rights proceeds from the fact that "quality of the law" presumes that it must specify limits on broad interpretation when it is applied, as well as the possibility of the review of prior decisions in one form or another.[5]

[5] *Malone v. the United Kingdom*, 2 August 1984, Series A no. 82, para. 67.

United Kingdom

The United Kingdom reiterates the same concerns with regard to this draft article as are set out above in its comments on draft article 2.

Article 5. Grounds for expulsion

Australia

Australia is concerned that the draft articles do not pay sufficient heed to national security concerns. For example, draft article 5, paragraph 1, could usefully benefit from a national security limitation to the requirement that States provide grounds for any expulsion decision.

Canada

1. Canada suggests that draft article 5, paragraph 3, state only: "The grounds for expulsion shall be assessed in good faith and reasonably". Expulsion decisions are based on different processes depending on context (for example, tourist visa, permanent resident application or refugee claimant). Many expulsion decisions are administrative in nature (such as the routine refusal to extend a tourist visa) and quite legitimately would not take into account the gravity of the facts or the conduct of the alien in question.

2. Regarding the process of expulsion decisions, Canada requests that the commentary to draft article 5 specify that the grounds for expulsion be considered at the time of the decision rather than at the time of removal.

El Salvador

1. As indicated by the Commission, the grounds for expulsion must be expressly provided for by law, although each State is responsible for identifying specific grounds in accordance with its internal law.

2. In this regard, El Salvador believes that it is not necessary for the draft articles to set out grounds for expulsion, particularly as some of those grounds may not be contemplated in the legislation of certain States, or may have a different scope within the context of expulsion procedures.

3. Furthermore, it questions the usefulness of identifying national security and public order as grounds for expulsion, as both are indeterminate legal concepts. This difficulty was even recognized by the Special Rapporteur when he wrote:

> The next challenge is to determine exactly what is covered by the two principal grounds for expulsion, that is, public order and public security. This is all the more difficult in that the threat to public order and public security is assessed by individual States, in this case, expelling States, and that these two concepts are constantly evolving. The two concepts have been incorporated in most legal systems without a specific meaning, much less a determinable content.[1]

4. In view of the foregoing, El Salvador recommends that paragraphs 1, 3 and 4 of draft article 5 be retained but that the final phrase of paragraph 2 referring to "national security" and "public order" be deleted, thereby establishing only the obligation that the grounds for expulsion must be provided for by law, as follows:

> "2. A State may only expel an alien on a ground that is provided for by law."

[1] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2, p. 154, para. 77.

Republic of Korea

See the comment made above under general comments.

United Kingdom

1. The United Kingdom suggests amending draft article 5. The concern lies with the specific reference in the draft article to "national security and public order" and the proximity of the threat, namely, "the current nature of the threat to which the facts give rise". The article as drafted implies limiting the grounds of expulsion, which the United Kingdom would be unable to accept. The United Kingdom suggests an amended draft article that does not fetter the power of authorities, deleting: "including, in particular, national security and public order".

2. The United Kingdom suggests amending paragraph 3 as follows:

> "The ground for expulsion for those otherwise lawfully present shall be assessed in good faith and reasonably, taking into account the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question."

3. The United Kingdom is currently legislating to remove the need for stand-alone removal decisions for illegal migrants. The position of the United Kingdom is that illegal migrants should presume that they will be removed unless they make an application to regularize their stay. Under the new process, when an illegal migrant is served with a single removal and decision to refuse leave to remain, it will state the reason for the refusal and removal, that is, that they are present in the United Kingdom illegally.

United States

1. The United States understands that draft article 5 permits the expulsion of an alien on any ground that is provided for by law, including the routine removal of a person for violation of United States immigration law.

2. In draft article 5, paragraph 3, the clauses after the word "circumstances" are unnecessary and somewhat misleading to the extent the proceeding clause already directs that all circumstances be considered. In particular,

the clause "the current nature of the threat", even though preceded by "where relevant", might imply that there should be a "threat" of some nature to support a valid ground for expulsion. The United States recommends ending the sentence after "question" or, alternatively, inserting the words "in particular" after "including" and inserting the words "or other conditions" after "threat" to broaden the applicability of this clause.

3. In draft article 5, paragraph 4, the words "its obligations under" should be inserted before "international law" to prevent any ambiguity as to the meaning of "contrary to international law". This would be consistent with draft article 25, which appropriately uses the phrase "its obligations under international law".

Part Two

CASES OF PROHIBITED EXPULSION

Article 6. Prohibition of the expulsion of refugees

Australia

Australia notes, in draft article 6, paragraph 2, the prohibition of the expulsion of unlawfully present aliens while their application for refugee status is being considered. This significantly extends the obligations under article 13 of the International Covenant on Civil and Political Rights and article 32 of the Convention relating to the Status of Refugees, which apply only to aliens lawfully in the territory of the State.

Canada

1. Draft article 6, paragraph 2, refers to a "refugee … who has applied for recognition of refugee status". For greater clarity, if the intention of the draft articles is to safeguard against the expulsion of a person whose refugee status determination application is pending, then paragraph 2 should therefore refer to "alien", rather than "refugee".

2. Canada recommends that draft articles 6, 23 (right to life) and 24 (prohibition of expulsion to torture) be grouped and reworked to better reflect existing norms of international law. The prohibition of the expulsion of aliens to States in which they may suffer torture or cruel, inhuman or degrading treatment is addressed in draft article 6, paragraph 3, and draft articles 23 and 24, with an important distinction. Draft article 6, paragraph 3, allows for expulsion in such circumstances if there are reasonable grounds for regarding the person as a danger to the security of the asylum country or the person is convicted of a serious crime, posing a danger to the community of the asylum country. Conversely, draft articles 23 and 24 provide an unconditional prohibition against *refoulement* in cases where torture or cruel, inhuman or degrading treatment is possible.

3. Canada agrees with the formulation in draft article 6, paragraph 3, in respect of the expulsion of refugees when there is no risk of death or torture.

4. Canada wishes to make a comparison between draft article 5, paragraph 2, and draft article 6, paragraph 1. The former limits the expulsion of aliens to grounds provided for by law, including national security and public order, while the latter provides national security and public order as the only permissible grounds for the expulsion of refugees. Canada would also allow the expulsion of aliens—including individuals recognized by other countries as refugees under the Convention relating to the Status of Refugees—who are found to have committed gross or systematic human rights violations, war crimes or crimes against humanity. As the commentary notes, draft article 6, paragraph 2, is derived not from the Convention relating to the Status of Refugees but from the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Canada prefers to see the paragraphs of draft article 6 remain consistent with the Convention relating to the Status of Refugees, noting that expulsion under draft article 6, paragraph 1, cannot be limited to national security and public order.

Denmark (on behalf of the Nordic countries)

1. It is important to retain the possibility to carry out an expulsion decision in certain cases even though an appeal has been lodged, for example, when an application for asylum is manifestly unfounded.

2. A mandatory suspension of all expulsion decisions until a final decision has been made on the appeal (and not only until a court or tribunal has decided whether the appeal should have suspensive effect) would give rise to an increased risk of abuse and undermine the legitimacy of the asylum systems of the European Union member States, since all third-country nationals who have applied for asylum in a member State are regarded as staying lawfully on the territory of that member State until a negative decision on their application, or a decision ending their right of stay as an asylum seeker, has entered into force.[1]

3. See also the comment made above under general comments.

[1] See the ninth preambular paragraph of Directive 2008/115/EC of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals (*Official Journal of the European Union*, L 348, 24 December 2008, pp. 98–107).

El Salvador

1. It is observed that draft article 6, paragraph 3, has its equivalent in article 33 of the Convention relating to the Status of Refugees, which recognizes the prohibition of expulsion and return (*refoulement*), but which, at the same time, provides for exceptions when the refugee is regarded as a danger to the security of the country or, having been convicted of a particularly serious crime, constitutes a danger to the community.

2. El Salvador is of the view that while this article represented a major stride in the protection of refugees in the twentieth century, the principle of *non-refoulement* has continued to evolve and has become a peremptory norm of international law.[1]

3. The foregoing implies that exceptions to this principle, established 60 years ago, should not be duplicated in a current draft of international scope without taking into consideration the significant progress achieved in this respect and, in particular, the existence of other international instruments that have expanded the protection of refugees.

4. In the inter-American context, for example, article 22, paragraph 8, of the American Convention on Human Rights stipulates that

> [i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

5. Similarly, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment introduces a clear restriction on all types of return (*refoulement*) by indicating, in its article 3, that

> [n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6. This means that, in cases of torture, there are no exceptions to the prohibition on return (*refoulement*), which is reaffirmed even in cases where a crime has been committed, since the draft article expressly refers to the concept of extradition without diminishing the protection of the person and without in any way limiting the scope of the principle of *non-refoulement*.

7. This has been corroborated by the Special Rapporteur on torture, who has repeatedly recommended to States that

> [n]ational legislation and practice should reflect the principle enunciated in article 3 of the Convention against Torture, namely the prohibition on the return (*refoulement*), expulsion or extradition of a person to another State "where there are substantial grounds for believing that he would be in danger of being subjected to torture". The principle of *non-refoulement* must be upheld in all circumstances, irrespective of whether the individual concerned has committed crimes and the seriousness and nature of those crimes.[2]

8. At the national level, taking into account these international instruments, the Act on the Determination of Refugee Status[3] of El Salvador provides, in its article 46, that:

> Refugees may not be expelled or returned to another country, whether or not it is their country of origin, where their right to life, personal integrity, freedom and safety is at risk of being violated on account of their race or ethnicity, gender, religion or creed, nationality, membership of a certain social group, their political opinions, widespread violence, external aggression, internal conflicts, large-scale human rights abuses or any other circumstances that may have disturbed the public order.
>
> In no case shall a refugee be transferred to a third country against his or her will, even where there has been an expulsion decision by the Commission [for the Determination of the Condition of Refugees]. In such case, the Commission shall allow a period of one month for his or her admission to another country to be arranged in coordination with the Office of the United Nations High Commissioner for Refugees.

9. In view of the foregoing, El Salvador recommends that the Commission take into consideration the undeniable evolution of the principle of *non-refoulement* and its nature as a peremptory norm of international law. It therefore suggests that exceptions to that principle should be deleted from the draft article, since specifying them in isolation from other human rights treaties could amount to a setback for refugee rights.

10. Furthermore, if protection under this draft article applies to both refugees and asylum seekers irrespective of their immigration status, El Salvador believes that it is not necessary to divide the prohibition of expulsion into two paragraphs.

11. In particular, draft article 6 as currently worded is incomplete, as paragraph 1 is about refugees who are in the territory and whose immigration status is regular; while paragraph 2 is about applicants for refugee status whose immigration status is irregular. This would seem to make regular immigration status conditional on the granting of refugee status, which could distort its function. Nor does it cover all the possibilities that arise in practice; for example, there could also be applicants for refugee status whose immigration status is regular.

12. Lastly, in view of the foregoing, El Salvador wishes to propose the following wording to draft article 6:

> "1. The State shall not expel a person who is a refugee or is applying for refugee status while that person's application is pending, save on grounds of national security or public order.
>
> "2. Paragraph 1 shall apply irrespective of whether the immigration status of the refugee or applicant for refugee status is regular or irregular.
>
> "3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life, personal integrity or freedom would be in danger on account of his or her race, religion, gender, nationality, political or other opinion, membership of a particular group or other social status."

Republic of Korea

1. Even though a person can be regarded as a refugee under article 1, paragraph A, of the Convention relating to the Status of Refugees, he or she can still be expelled under article l, paragraph F (that is, where there are serious reasons for considering that he or she has committed a crime against peace). Such provisions could be incorporated into the present text in the form of a proviso.

2. A State's obligation in draft article 6, paragraph 1, need not extend to those who have applied for recognition of refugee status on the basis of false claims. Draft article 6, paragraph 2, thus could be revised as such:

> "Paragraph 1 shall not apply to any refugee unlawfully present in the territory of the State who has applied for recognition of refugee status for the sole purpose of making such an application, while that application is still pending."

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[1] Cartagena Declaration on Refugees (22 November 1984), fifth conclusion: "To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*" (Geneva, UNHCR, 2006).

[2] E/CN.4/2003/68, para. 26 (*o*).

[3] El Salvador, *Diario Oficial*, vol. 356, No. 148, 14 August 2002.

3. See also the comment made above under general comments.

United States

1. Unlike draft article 6, paragraph 1, which restates article 32, paragraph 1, of the Convention relating to the Status of Refugees, draft article 6, paragraph 2, has no basis in the Convention, and its exact purpose is difficult to understand as drafted because it applies to a "refugee" whose status as a refugee is still pending. The commentary's explanation of this provision is not satisfactory, as it states that the provision only applies to individuals who actually meet the definition of a "refugee" under international law; however, the provision is premised on the fact that the individual's refugee status is still in question. At the same time, any revision or expansion of this provision would need to account for existing State practice and address concerns about abuse due to manifestly unmeritorious applications. The United States generally stays removal of aliens who have applied for asylum or withholding of removal at least until those claims have been administratively adjudicated; however, there are certain limited exceptions, see, for example, the agreement between Canada and the United States on safe third countries.[1] Accordingly, the United States recommends that this provision be revised to address these concerns or else deleted.

2. As discussed above in our comments to draft article 2, the United States believes that the words "or return (*refouler*)" should be deleted from draft article 6, paragraph 3. While draft article 6, paragraph 3, is drawn from article 33 of the Convention relating to the Status of Refugees, the reference to "return" goes beyond the scope of these draft articles, which is otherwise strictly focused on expulsion. There is no clear reason why "return" should be included in this provision but not in draft article 24, given that article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also extends to "returns". The United States would recommend deleting "return (*refouler*)" from draft article 6, as well as leaving "return" out of draft article 24.

[1] Agreement between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Washington, D.C., 5 December 2002), TIAS 04-1229.

Article 7. Prohibition of the expulsion of stateless persons

Canada

1. The definition of "alien" includes stateless persons, according to the commentary to draft article 2. Draft article 7, which distinctly regards stateless persons, is thus unnecessary unless the draft articles advocate separate, additional protection for stateless persons.

2. Canada has difficulties with draft article 7, which limits the grounds for expulsion of lawfully present stateless persons to national security and public order. The use of "lawfully" in this context is odd. Once an individual is subject to an expulsion, they are no longer lawfully in the country; expulsions must be according to law. If "lawfully" is removed, the grounds are too narrow. Canada does not understand its obligations in respect of statelessness to include limitations on the removal of stateless persons that are more limited that those faced by persons with a nationality.

Cuba

Draft article 7 stipulates that a stateless person may only be expelled on grounds of national security or public order, although to ensure that it is consistent with draft article 5, paragraph 2, which relates to aliens, the grounds for expulsion should also include any ground that is provided for under the domestic law of the expelling State.

United States

The United States does not regard draft article 7 as reflecting settled law. Draft article 7 is based on article 31, paragraph 1, of the Convention relating to the Status of Stateless Persons. At present, fewer than 80 States are parties to that Convention, and the practice of many non-parties does not conform to article 31, paragraph 1. For example, the United States, a non-party, recognizes no such prohibition in its law. A stateless person who is in violation of United States immigration laws is subject to removal even in the absence of grounds of national security or public order. Such removal may often be impracticable, but the United States may seek to pursue removal of the stateless person to the person's country of last habitual residence or other appropriate country in accordance with United States law.

Article 8. Other rules specific to the expulsion of refugees and stateless persons

El Salvador

1. Draft article 8 is an extremely useful "without prejudice" clause serving to clarify that the draft articles do not affect the obligatory nature of other rules of international law in this regard.

2. El Salvador nonetheless believes that this clause does not replace the concerns set out above with regard to the principle of *non-refoulement* of refugees, and the corresponding need for the draft articles to reflect its evolution with the aim of ensuring that States provide adequate protection to this vulnerable group.

Republic of Korea

See the comment made above under general comments.

United States

If draft article 3 is modified as the United States recommends above, then this draft article may be deleted. If draft article 3 is not so modified, then draft article 8 should be similarly broadened to read:

> "The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other applicable rules of international law on the expulsion of aliens, in particular those relating to human rights."

Article 9. Deprivation of nationality for the sole purpose of expulsion

United Kingdom

1. Draft article 9 would benefit from further clarification. The United Kingdom will use deprivation either to address a fraud or to protect the public, albeit that the grounds for deprivation may also be grounds for expulsion in their own right.

2. The United Kingdom suggests the following amendment to the text of the draft article:

> "A State shall not make its national an alien, by deprivation of nationality for the sole purpose of expelling him or her, albeit that the grounds for deprivation, prescribed by law, may also be grounds for expulsion in their own right."

United States

The United States understands that draft article 9 is not directed at a situation where an individual voluntarily and intentionally relinquishes his or her nationality, and believes it would be useful to indicate as much in the commentary, perhaps in paragraph (3).

Article 10. Prohibition of collective expulsion

Australia

Australia also notes that other draft articles, such as the prohibition of collective expulsion under draft article 10, codify rights in universal instruments (the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families) to which Australia is not a party. Given the limited extent of receiving-State support for this Convention, Australia does not consider that it represents customary international law and would recommend the International Law Commission exercise caution in its codification in the draft articles.

El Salvador

1. Draft article 10, paragraph 1, defines "collective expulsion" as "expulsion of aliens as a group". In this case, it might not be accurate to use a term characterizing aliens as a single group in every situation.

2. The difficulties that could arise from construing it in this way are obvious, since draft article 10 must not only prohibit the expulsion of aliens as a single group but also the arbitrary selection of small groups of alien persons for purposes of expulsion without an individual decision procedure in accordance with law.

3. As for paragraph 3, it clarifies that members of a group of aliens can be "concomitantly" expelled on the basis of a reasonable and objective examination of the particular case of each individual member of the group. This paragraph is no doubt referring to the provisions of various human rights instruments; however, some drafting changes are necessary to make its content understandable.

4. First, the term "concomitantly" should be replaced by "simultaneously", which more effectively conveys the idea that the expulsion is taking place at the same time but consists of a number of distinct operations based on separate examinations.

5. Second, although paragraph 3 provides that the examination should be carried out in accordance with the particular situation of each person, more precise language is necessary to indicate that the examination must be individual and must be carried out as part of a process established by law.

6. Furthermore, paragraph 4 must refer only to the rules applicable in the event of armed conflict. It is particularly problematic to specify "involving the expelling State" as a requirement, since it would also be relevant to identify the other State involved in the conflict. El Salvador therefore suggests using more general language with the aim of ensuring that this paragraph truly functions as a "without prejudice" clause.

7. In conclusion, it recommends the following wording for draft article 10:

> "1. For the purposes of the present draft articles, collective expulsion means any act by which a group of alien persons is compelled to leave the territory of a State.
>
> "2. The collective expulsion of alien persons, including migrant workers and members of their families, is prohibited.
>
> "3. A State may expel simultaneously the members of a group of aliens, provided that the expulsion takes place in accordance with law and on the basis of individual procedure.
>
> "4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict."

Germany

Draft article 10, paragraph 2, states the prohibition of collective expulsion of aliens. Taking into account that as a general rule it applies to all aliens regardless of which group they belong to, in our view it is dispensable to mention explicitly one specific group (migrant workers).

Republic of Korea

1. The definition of "collective expulsion" in this draft article may be interpreted to include the expulsion where individuals are expelled as a group even after a reasonable and objective examination of each particular case, solely because they are expelled together with other aliens on board the same aircraft or ship. Such a case should be distinguished from collective expulsion contemplated in draft article 10. As such, the draft article could be revised to contain a proviso: "It shall not be deemed as collective expulsion, if a State expels aliens after a reasonable and objective examination of the particular case of each individual alien of the group".

2. While the purpose of the paragraph 2 is to protect the rights of migrant workers and their families, it unduly limits the sovereignty of the territorial State. It should also be noted that, as at January 2014, only 47 countries had ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In this context, it would be desirable to delete this paragraph.

United Kingdom

1. The United Kingdom suggests amendments to the text of this draft article. The United Kingdom fully agrees that mass expulsion should be prohibited, but domestic legislation specifically allows the deportation/removal of family members. The human rights of each person liable to expulsion are considered individually.

2. The United Kingdom proposes the following amendment to paragraph 2:

> "The collective expulsion of aliens, including migrant workers, is prohibited save in accordance with paragraph 3."

United States

1. Although neither draft article 10, nor the commentary, defines the term "group", the United States understands the draft article to refer to a situation in which more than one alien is being expelled without an individualized assessment of whether each such alien merits expulsion. As such, so long as each alien within a group receives an individualized assessment, the expulsion may go forward, even if it results in the expulsion of several or a group of aliens at once.

2. Furthermore, the United States understands that, pursuant to draft article 2, subparagraph (*a*), these draft articles do not address a decision by a State not to admit, or to deny entry to, aliens of a certain nationality or country of origin.

3. The United States appreciates that the express identification of "migrant workers and members of their families" in draft article 10, paragraph 2, is likely intended to highlight the vulnerability of that particular group. However, given that there are many different kinds of groups that might fall within the scope of these draft articles, all of whom presumably are entitled to the same protection, the United States suggests deleting the words "including migrant workers and members of their families" to avoid any adverse implication for other groups.

4. The phrase "reasonable and objective examination," while not *per se* objectionable, introduces a standard that does not appear anywhere else in the draft articles. Given that draft article 5, paragraph 3, already sets forth similar principles applicable to the examination of any expulsion case, the Commission should consider cross-referencing that draft article, such that the phrase would read:

> "and on the basis of an examination of the particular case of each individual member of the group consistent with the standards reflected in draft article 5, paragraph 3."

Article 11. Prohibition of disguised expulsion

Austria

Referring back to its comments on draft article 2, Austria is of the opinion that expulsions can only be effected through formal governmental acts. Draft article 11 has to be modified to reflect this understanding.

Canada

1. Draft article 11 states that

> disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, including where the State *supports or tolerates** acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory.

2. Framed as such, draft article 11 suggests a lower threshold for State responsibility where the conduct of private actors is not attributable to the State and does not amount to a breach of an international obligation. Since draft articles 2 and 11 both regard attributable expulsion, these provisions should incorporate the same threshold for attribution described in the articles on responsibility of States for internationally wrongful acts.[1]

[1] *Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76.

Germany

1. Germany has previously stated that in its view the scope of draft article 11 is imprecise as, in particular, the definition of "disguised expulsion" in its paragraph 2 could leave room for an overly broad interpretation. Therefore, Germany welcomes the clarification in draft article 11, paragraph 2.

2. However, it would like to reiterate its proposal that a further clarification be included in draft article 11, stipulating that acts that States undertake in accordance with their national laws and that are reasonable cannot be interpreted as actions leading to a disguised expulsion.

Netherlands

With regard to draft article 11 concerning the prohibition of disguised expulsion, the Netherlands considers that the current text is unclear about the scope of this draft article and urges the Commission not to incorporate it as currently drafted. Moreover, the draft article is not in line with the Dutch principle of linking benefit entitlements to residence status. This principle was introduced in the Netherlands by the Benefit Entitlement (Residence Status) Act[1] (*Koppelingswet*), which specifies that aliens who are not lawfully resident in the Netherlands cannot claim benefits or assistance. The idea behind the Act is that general aliens policy should aim to discourage illegal residence in the Netherlands and that Dutch authorities must avoid facilitating illegal aliens by enabling them to obtain social security benefits and assistance. The principle of linking benefit entitlements to residence status is of the utmost importance to the Netherlands.

[1] Adopted on 26 March 1998.

Republic of Korea

The definition of disguised expulsion lacks clarity, and thus overly limits a State's right with regard to expulsion. Adding a proviso would give more clarity to this provision, such as: "It shall not be deemed as disguised expulsion if a State exercises its right to expel aliens in accordance with its domestic law and if the exercise of the right is reasonable."

United Kingdom

1. The United Kingdom has significant concerns with this draft article and does not agree with it in its current form. The United Kingdom could accept amended terms should the draft article refer specifically to activity against those aliens lawfully present in the United Kingdom. The United Kingdom is concerned that this provision could extend to certain activity undertaken to support illegal aliens being removed, for example, support with reintegration arrangements for those who do not submit an appeal. Similarly, the use of detention, a key tool where we are seeking to establish an individual's identity or for public protection measures, could be considered "indirect actions or omissions". The draft article also potentially conflicts with existing and planned legislation intended to deny illegal migrants access to employment, State benefits, social housing, driving licences and financial services that is designed to deter illegal migration, promote voluntary departure by those otherwise inclined to overstay illegally, and ensure that public resources are allocated fairly only to those with a lawful entitlement to live in the country. The United Kingdom also has concern that this draft article directly contravenes the activity it has taken in respect of those subject to criminal investigation whose assets have been frozen pending conclusion of investigations. Similarly, the United Kingdom places restrictions on the activities of certain high-risk individuals, such as restricted leave and, independently of the individual's immigration status, terrorism prevention and investigation measures.

2. The United Kingdom suggests the following amendment to the text of the draft article:

> "1. Any form of arbitrary disguised expulsion of an alien is prohibited.
>
> "2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, where the State supports or tolerates unlawful acts committed by its nationals or other persons with the intention of provoking the departure of aliens from its territory.
>
> "3. A State's actions or omissions are not considered arbitrary to the extent that they relate to provisions set out in domestic law in the legitimate interests of immigration control/expelling those aliens unlawfully present."

United States

1. As noted above, the United States has significant concerns about the concept of "disguised expulsion" as expressed in draft article 11. The United States believes that the nature and contours of "disguised expulsion" have not been sufficiently addressed and defined through existing State practice or jurisprudence for this issue to be codified as in this draft article. To the extent this draft article instead reflects a proposal for progressive development of the law, its text is unacceptably broad and ambiguous.

2. The commentary cites as its primary authority the jurisprudence of the Iran–United States Claims Tribunal and the Eritrea–Ethiopia Claims Commission. As the commentary itself recognizes, there must be a "particularly high threshold" for establishing an instance of disguised expulsion, and indeed, this jurisprudence is very limited to the extent that few cases of disguised expulsion have been established. As such, important questions regarding the various elements necessary to recognize a case of disguised expulsion have yet to be thoroughly addressed by States or international tribunals.

3. The United States believes that draft article 11, even read with the commentary, suffers from numerous flaws in the light of this lack of clarity and consensus. For example, by using the phrase "actions or omissions," as in draft article 2, subparagraph (*a*), this draft article appears to be drawing on principles of State responsibility. See article 2 of the articles on responsibility of States for internationally wrongful acts.[1] However, because the draft article would impute State responsibility based on the actions of that State's nationals or other persons, it raises the question, especially in the context of "omissions", of what international obligations a State would have with respect to its nationals or other persons in the context of expulsions of aliens. Moreover, draft article 11 does not include a requirement of attribution to the State, although this element does appear in draft article 2, subparagraph (*a*), and in the commentary. In addition, the term "tolerates" is clearly overly broad in the light of the aforementioned "high threshold"; it could lead to claims of State responsibility for a wide range of actions by third parties over which it has little or no means of control. The text also does not sufficiently clarify that the critical element of intentionality applies to the State rather than to "its nationals or other persons". Finally, as noted above, this draft article uses the term "forcible departure" whereas draft article 2, subparagraph (*a*), uses the different phrase "compelled to leave".

4. Especially given the potential implications for State responsibility and a State's obligations *vis-à-vis* the conduct of its nationals, other persons and even subnational governmental entities, a definitive articulation of the concept of "disguised expulsion" would need to be carefully and thoroughly considered by States before it could be accepted as a generally applicable rule of international law. Accordingly, the United States recommends that this draft article be deleted.

[1] *Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76.

Article 12. Prohibition of expulsion for purposes of confiscation of assets

Russian Federation

1. Certain doubts remain with regard to draft article 12.

2. First, although the idea itself that underlies it deserves support, one cannot help but note that evaluating the goals and intentions of States can, in practice, be a very complex task. Also, in the view of the Russian Federation, there may very well be situations in which the acts committed by a person in a given State, when taken together, will, under the law of that State, result in both expulsion and confiscation as separate penalties. The failure to apply the provisions on confiscation solely on the grounds that the person is also subject to expulsion would hardly be justified. In such a case, the aliens could be in a more privileged position than nationals of the State, against whom confiscation would still be applied for the same acts.

3. Second, the current language of draft article 12 would seem to require more nuance.

4. On one hand, the prohibition called for here should perhaps extend only to actions that lead to the wrongful deprivation of an alien's property. This approach finds reflection in the commentary, in which it is correctly pointed out that "draft article 12 sets out the prohibition of confiscatory expulsions … with the aim of unlawfully depriving an alien of his or her assets". At the same time, it follows from the existing language of that draft article that the prohibition of the expulsion is absolute, that is, it also extends to cases in which expulsion and confiscation are necessary in the interests of national security or public order, when the confiscation involves unlawfully acquired property, etc.

5. On the other hand, this draft article must ensure an adequate level of protection of the property rights of aliens being expelled, inasmuch as the language used in this draft article—"confiscation of assets"—raises some questions (the term "собственность" ("property"), by the way, is used in the translation of the draft articles into Russian instead of the term "активы" ("assets"); that, in all likelihood, also requires correction). Although the language, as far as one can tell, was borrowed from article 9 of the declaration on the human rights of individuals who are not nationals of the country in which they live,[1] it does not, in textual terms, cover the actions of the State that are not directly related to the confiscation itself, but nonetheless does lead to a restriction of certain property rights of an alien who is being expelled.

6. In that context, the Russian Federation once again calls attention to the *Ahmadou Sadio Diallo* case,[2] within the framework of which Guinea filed claims against the Democratic Republic of the Congo in connection with, among other things, the fact that the expulsion violated the rights of Mr. Diallo to control and manage the commercial companies Africom-Zaire and Africontainers-Zaire and, as a result, caused injury to the companies and to Mr. Diallo himself as their owner. In other words, the wrongful, in the opinion of Guinea, actions of the Democratic Republic of the Congo were not directly associated with the "confiscation of property" ("assets") in the sense of draft article 12. That claim of the Guinea party was ultimately denied by the International Court of Justice, because it found no grounds to assert that the expulsion *per se* created actual impediments to Mr. Diallo's management from abroad of the companies belonging to him. At the same time, in our understanding, it follows from the logic of that judgment that if the expulsion, for one reason or other, were to have created such impediments, the matter at hand would involve a violation of its international obligations by the Democratic Republic of the Congo.

7. The European Court of Human Rights, for its part, has more than once enunciated a complex legal position in its judgments.[3]

8. Based on the above, the Russian Federation feels that the final language of draft article 12 should find a balance between the interests of the State, on the one hand, and the interests associated with the protection of the property rights of aliens being expelled, on the other. In addition, the Russian Federation is proceeding from the fact that draft article 12 needs to be scrutinized in conjunction with draft article 30, which makes provision for guarantees of the protection of the property interests of aliens in the expelling State, including on the basis of the understanding that, in a globalized world, the fact that an alien finds himself outside a State need not be regarded as an impediment to his exercise of his property rights in that State.

[1] General Assembly resolution 40/144 of 13 December 1985.

[2] *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), *Merits, Judgment, I.C.J. Reports 2010*, p. 639.

[3] See, for example, the cases of *Kopecký v. Slovakia* [GC], no. 44912/98, ECHR 2004-IX, para. 35, and *Slivenko v. Latvia* [GC], no. 48321/99, ECHR 2003-X, para. 121.

Article 13. Prohibition of the resort to expulsion in order to circumvent an extradition procedure

Canada

Draft article 13 regards the use of expulsion to "circumvent" extradition procedures. Canada is concerned that the word "circumvent" does not adequately capture the improper purpose or bad faith standard suggested by this provision. That is, States cannot use deportation procedures for the sole purpose of avoiding an extradition process where there is not otherwise a legitimate immigration purpose. Canada would prefer the following wording: "A State shall not resort to expulsion in the absence of a legitimate immigration purpose solely to avoid extradition."

Czech Republic

1. The Czech Republic would like to express concerns about draft article 13, which pertains to the prohibition of expulsion in order to circumvent an extradition procedure. Although the Czech Republic does not employ such practices, it is our position, supported by the standing decisions of the European Court of Human Rights, that, where the person subject to extradition proceedings is also an illegal immigrant, it should be the State's internal affair to decide the means employed in resolving the issue of illegal immigration.

2. Furthermore, the Czech Republic considers the wording of draft article 13 vague. It is unclear which phases

of the extradition procedure are included under the term "ongoing", as the beginning of the procedure differs in each State's legislation. It may, therefore, begin at the very instant of taking an alien into custody, at the moment of delivery of an extradition request or, as in the common law legal system, by issuing the "authority to proceed". Due to variances across legal systems, uncertainty remains.

United States

1. The United States believes that this draft article suffers from a lack of clarity on the exact harm that it seeks to prevent, especially in the light of the prerogative of States to use a range of legal mechanisms to facilitate the transfer of an individual to another State where he or she is sought for criminal proceedings.

2. First, the United States, for purposes of analysis, assumes that the use of the term "ongoing" means this provision would not be applicable to situations where an extradition request has not been made, nor to situations after an extradition request has been denied or otherwise resolved. However, the Commission does not provide the basis for its assertion in paragraph (1) of the commentary regarding the parameters of "ongoing", and the United States questions whether there is an international consensus on this issue. At the very least, the title of the draft article should include the word "ongoing" to mirror the draft article's text.

3. More importantly, it is fundamentally unclear what conduct the Commission would view as constituting "circumvention" of an extradition procedure. As reflected in the commentary, a State might legitimately use a wide range of legal bases, including national security or immigration law violations, to justify the transfer of an individual sought by another State for criminal proceedings. Especially in the light of increasing transnational criminal activity, the United States believes that it would be essential to establish an acceptably precise meaning of the concept of "circumvention" so as not to stifle or impede cooperation between and among States in this area. Ultimately, a rule on this issue would need to be clearer about the harm it is intended to prevent, and take into account more fully States' practices in this area.

4. The United States suggests that this draft article be revised to reflect these concerns or else be deleted.

Part Three

PROTECTION OF THE RIGHTS OF ALIENS SUBJECT TO EXPULSION

Chapter I

GENERAL PROVISIONS

Article 14. Obligation to respect the human dignity and human rights of aliens subject to expulsion

Canada

The draft articles cannot "set out" human rights since they do not constitute a human rights agreement. Thus, Canada recommends the removal of the phrase "including those set out in the present draft articles" in draft article 14, paragraph 2.

El Salvador

1. Paragraph 1 of draft article 14 is extremely relevant within the draft articles, as it seeks to strengthen their content by enunciating various principles relating to human dignity, such as the principles of humanity, legality and due process, which should prevail at all stages of expulsion—including its execution—and not only in the decision-making stage.

2. The wording of paragraph 2, for its part, must be sufficiently categorical, something which the use of "are entitled to" in this provision does not accomplish. This phrase would merely imply the granting of a prerogative, and not an already existing and inescapable obligation of all States, namely, respect for and a guarantee of every person's human rights.

3. Accordingly, El Salvador proposes substituting the phrase with one that more strongly conveys an obligation and reflects the broad recognition that the centrality of human rights has now acquired.

4. El Salvador proposes the following wording:

> "1. All alien persons subject to expulsion shall be treated in accordance with the principles of legality, due process and humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.
>
> "2. All human rights of the person subject to expulsion shall be respected, including those set out in the present draft articles."

Netherlands

The first paragraph of draft article 14 refers to respect for the inherent dignity of the person as a separate human right. However, there is no clear definition of the substance of this right. The second paragraph of this draft article, which calls for respect for human rights in general, would afford adequate protection; it therefore renders the first paragraph redundant. Furthermore, including both draft article 14, paragraph 1, and draft article 18 could incorrectly suggest that the former is of added value. A further extension of the prohibition of torture or of cruel, inhuman or degrading treatment, as set out in draft article 18, would be unacceptable to us.

United Kingdom

1. The United Kingdom has no comments on this draft article at this stage.

2. However, the United Kingdom has noted the comments of the European Union and the proposed changes to draft article 14.[1] The United Kingdom actively encourages

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

voluntary departure, but opposes having any set period for such departure. Time allowed will be considered on an individual case-by-case basis, for example, the United Kingdom has published policy on not enforcing departure when children are in the run up to important examinations.

United States

The phrase "subject to expulsion", used in this draft article and throughout Part Three, is vague as to whether it only covers aliens who are actually in the process of being expelled, or all aliens who lack lawful immigration status or who otherwise could potentially be placed in removal proceedings. Based on the context of this section, and earlier versions of these draft articles, it appears that the former meaning is the one intended; however, the meaning of this phrase should be clarified in the commentary.

Article 15. Obligation not to discriminate

Canada

Canada recommends that the grounds for discrimination listed in draft article 15 include sexual orientation.

Denmark (on behalf of the Nordic countries)

The Nordic countries fully support the European Union comment[1] on the inclusion of sexual orientation in draft article 15.

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

El Salvador

1. Since draft article 15 guarantees a human right, it should not begin by recognizing a right of the State, as that could lead to misinterpretations.

2. In addition, the language of paragraph 2 must be more specific and more binding, as it has been widely recognized in international law that non-discrimination is a *jus cogens* principle that applies to all human rights.

3. Hence, the Inter-American Court of Human Rights, in its advisory opinion on the juridical condition and rights of undocumented migrants, states that:

> The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.[1]

[1] Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 of 17 September 2003 on the juridical condition and rights of undocumented migrants, requested by the United Mexican States*, Series A, No. 18, para. 100.

4. In view of the foregoing, El Salvador proposes the following wording:

> "1. The State shall not carry out any expulsion of alien persons on discriminatory grounds, in particular on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.
>
> "2. Any person subject to expulsion shall enjoy his or her human rights without discrimination."

Netherlands

With respect to draft article 15, paragraph 1, the Netherlands suggests to include "sexual orientation" as a separate non-discrimination ground, as was previously proposed by the European Union.[1] Alternatively, the explanatory text of this paragraph should emphasize that this aspect is covered by the ground "sex" as it is interpreted by the Human Rights Committee.

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

United Kingdom

1. The United Kingdom does not agree with this draft article.

2. The United Kingdom supports the objective of eliminating unlawful discrimination, but has significant concerns with this draft article, which is contrary to existing domestic legislation and practice. The United Kingdom Equality Act 2010, Schedule 3, paragraph 17, permits discrimination on nationality, ethnic or national origins for immigration functions, where a relevant authorization is in place. The United Kingdom must be able to prioritize enforcement action against groups illegally in the country who present a particular threat to our immigration system, including directing immigration enforcement resources towards particular groups at different times on the basis of intelligence or statistical information highlighting risks to our immigration controls.

United States

1. The United States understands that, pursuant to draft article 2, subparagraph (*a*), these draft articles do not address a decision by a State not to admit, or to deny entry to, aliens on the basis of, for example, nationality.

2. With respect to aliens who are present in the territory of a State, the breadth of draft article 15 is not supported by existing treaties that address expulsion or *non-refoulement*. While the general principle of non-discrimination does exist in human rights law, the principle is only applied to certain types of conduct by a State, not to all State conduct, and the commentary does not establish that, under existing international law, this principle applies in particular to State conduct with respect to expulsion of aliens.

3. Moreover, draft article 15 is clearly at tension with draft article 3, which recognizes the broad right of a State to expel an alien for any number of reasons. For example, draft article 15 would appear to prohibit a State

from expelling enemy aliens in time of war, since doing so would be discrimination based on nationality, even though draft article 10, paragraph 4, appears to permit such expulsion. More broadly, United States immigration law and policy—which it believes to be consistent with similar approaches by other States—permits nationality-based classifications, so long as a rational basis exists for the classification (see, for example, *Kandamar v. Gonzales*, 464 F.3d 65, 72–74 (1st Cir. 2006); and *Narenji and others v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979)).

4. Even the prohibition of discrimination based on "property" is problematic. For example, under United States law, certain inadmissibility grounds in the United States Code, Title 8, paragraph 1182 (*a*), such as the public charge ground, require the Government to consider an alien's assets, resources and financial status in making an admissibility determination. In addition, United States law allows for admission of alien entrepreneurs on "conditional" permanent resident status, but these aliens may be removed for failure to meet the conditions of their status, including the investment of specified amounts of capital (*ibid*., paragraph 1186b (*b*)). The prohibition under draft article 15 of discrimination based on "status" is especially problematic, given that the decision to remove an alien and the amount of process and range of potential relief from removal afforded during the expulsion process very much depend on, for example, whether the alien has been admitted to the United States or is a lawful permanent resident. These draft articles themselves discriminate among aliens on the basis of their "status", according lesser rights in some instances to aliens who are unlawfully present in the territory of a State.

5. Finally, especially in the light of the statement in paragraph (2) of the commentary that this provision applies "both [to] the decision to expel or not to expel", this draft article risks severely undermining a State's prerogative—and need, in the light of limited resources—to exercise discretion as to which expulsion cases to pursue or not to pursue. Such exercises of discretion frequently involve one or more of the factors listed in this draft article, especially given the potential breadth of the term "other status".

6. The United States believes that this draft article is not grounded in existing international law or practice, is poorly conceived as a form of progressive development and therefore should be deleted. If it is retained, the draft article should be focused on a particular aspect of the expulsion process where discrimination is to be avoided, such as in the accordance of procedural rights reflected in draft article 26.

Article 16. Vulnerable persons

Cuba

1. With regard to draft article 16, the concepts of "children" and "older persons" need to be defined, as these terms are imprecise and ambiguous, given that in neither case is a range of ages provided that could serve as a basis for evaluating the vulnerability of such persons.

2. Cuba is of the view that the protection of pregnant women provided under draft article 16 should be extended to all women and to girls, and should cover the entire expulsion process. Cuba proposes the following wording for paragraph 1: "Boys and girls, women, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall …". Paragraph 2 of draft article 16 should also include a reference to girl children.

El Salvador

1. In paragraph 1, the Spanish term "*personas de edad*" is not accurate, as it could refer to any age, that is, to any of the phases into which human life is divided. In view of this problem, El Salvador proposes using the term "*los adultos mayores*" to clarify the scope of this provision.

2. Similarly, the wording of paragraph 2 regarding the best interests of the child is confusing in the Spanish version, stemming from problems in the translation of the Convention on the Rights of the Child. Therefore, El Salvador recommends using the expression "*se atenderá primordialmente al interés superior del niño*" in the Spanish text of paragraph 2.

Morocco

Draft article 16 lists the persons who fall into this category, namely children, pregnant women, older persons and persons with disabilities. Although it shows foresight by extending this protection to "other vulnerable persons"—provided that they "shall be considered as such"—the draft article raises the question of who can be considered to be a vulnerable person and according to what criteria.

United States

The United States does provide extraordinary protection and care for children in removal proceedings, especially unaccompanied alien children (see, for example, United States Code, Title 8, paragraph 1158 (*a*) (2) (E) and (b) (3) (C) (asylum-initial jurisdiction), and paragraph 1232 (enhancing efforts to combat the trafficking of children); see also the Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children.[1] At the same time, in matters related to expulsion, United States law does not compel primacy of the child's "best interests". As such, the United States suggests that the term "primary" be replaced by "significant", or else that the words "a primary consideration" be replaced by "given due consideration".

[1] United States, Department of Justice, Executive Office for Immigration Review, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (22 May 2007).

Chapter II

PROTECTION REQUIRED IN THE EXPELLING STATE

Article 17. Obligation to protect the right to life of an alien subject to expulsion

Austria

This provision seems redundant since the duty to protect the life of an alien already results from human rights obligations.

United Kingdom

The United Kingdom has no comment on this draft article at this stage. However, the United Kingdom would not agree to an extended interpretation of this draft article, which would essentially provide an unqualified commitment to provide free health services to illegal migrants or an acceptance that illegal migrants with serious health problems can rely on their continued need for medical treatment as a basis for remaining in the United Kingdom in violation of its immigration laws.

United States

Given the location of draft article 17 in chapter II of Part Three, the United States understands that this draft article is focused on the protection of the alien while he or she is in the expelling State, whereas issues relating to the treatment of the alien in the State of destination are addressed in chapter III of Part Three.

Article 18. Prohibition of torture or cruel, inhuman or degrading treatment or punishment

Austria

Draft article 18 might lead to the conclusion that human rights other than those mentioned here do not apply.

Article 19. Detention conditions of an alien subject to expulsion

Austria

In draft article 19, paragraph 3 (*b*), the wording should be made clearer in order to reflect the view expressed in the commentary that detention is lawful as long as there is a reasonable perspective towards the possibility of an expulsion, for example, during the period of examination of the alien's nationality or the issuing of travel documents for the alien.

Belgium

1. Belgium proposes that the phrase "or a person authorized to exercise judicial power" be amended to read "or a person authorized to exercise judicial or administrative power".

2. Article 7, paragraphs 4 and 5, of the Law of 15 December 1980 on Access to the Territory, Stay and Establishment Therein, and Expulsion Therefrom, of Aliens provides that the minister or his representative may extend the detention of an alien. Such a decision shall be subject to appeal before the *Chambre du Conseil* (pre-trial court) (in accordance with article 72 of the Act).

Canada

1. In draft article 19, Canada is concerned about the obligation to detain aliens subject to expulsion separately from incarcerated persons, except under "exceptional circumstances". As separation of these two groups is occasionally unfeasible, Canada would prefer that draft article 19, paragraph 1 (*b*), stipulate, "*When possible*,* an alien subject to expulsion should be detained separately from persons sentenced to penalties involving deprivation of liberty."

2. Canada agrees that the duration of detention should not be unrestricted or excessive. For greater certainty, Canada suggests that draft article 19, paragraph 2 (*a*), prohibit "indefinite" detention rather than "excessive" detention. Similarly, detention review should be conducted at defined or prescribed intervals, rather than restricted to "regular" intervals. Canada prefers that draft article 19, paragraph 3 (*a*), reflect this language.

3. Furthermore, draft article 19, paragraph 2 (*b*), should not restrict detention decisions to courts only. Administrative decision makers have the power to extend the duration of detention under Canadian legislation. Thus, such decisions are not exclusively taken by a "court or person authorized to exercise judicial power". Canada suggests that draft article 19, paragraph 2 (*b*), include "judicial *or quasi-judicial** decision-making power".

Cuba

Draft article 19, paragraph 1 (*b*), states that an alien subject to expulsion shall, save in exceptional circumstances, be detained separately from persons sentenced to penalties involving deprivation of liberty. In this connection, Cuba believes that they should not only be separated from convicted criminals, but also from people who are held in custody as a precautionary measure for alleged crimes.

Denmark (on behalf of the Nordic countries)

1. The Nordic countries support the comments of the European Union[1] on draft article 19.

2. In addition, as for the separation of aliens subject to expulsion from persons sentenced to penalties involving the deprivation of liberty, the Nordic countries hold the view that it should be possible to detain aliens, who are expelled because of crime and who have served a prison sentence, in the prison where they have served their sentence.

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

El Salvador

1. El Salvador continues to note with great concern that draft article 19 seems to accept the detention of the person subject to expulsion as a general rule, and not an exceptional measure, which, in practice, could have the effect of encouraging acts that violate such basic human rights as liberty, integrity and the presumption of innocence.

2. In this context, it should be recalled that international human rights treaties, as well as the domestic legislation of most States, establish the obligation to guarantee

every person the enjoyment of his or her right to liberty.[1] The draft articles should therefore apply this norm with a view to preventing any arbitrary detention of aliens,[2] both during the conventional expulsion procedure and with respect to any practice that potentially or materially threatens the alien's movement, which could occur, for example, in transit and identification facilities, detention centres and various types of internment facilities.

3. Particularly enlightening in this connection is the resolution on principles and best practices on the protection of persons deprived of liberty in the Americas[3] adopted by the Inter-American Commission on Human Rights, which recognizes the fundamental right of all persons deprived of liberty to humane treatment, and to have their dignity, as well as their life and their physical, mental and moral integrity, respected and ensured.

4. The resolution in question construes deprivation of liberty as

> [a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offences. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as … centres for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty.[4]

5. Nor does El Salvador see any reason whatsoever for the Commission's decision to include rights such as life, personal integrity, the right to family life or the right of equality in the draft articles while manifestly excluding recognition of the personal liberty of a person subject to expulsion, despite the fact that it constitutes a fundamental right in such processes.

6. In view of the foregoing, El Salvador suggests the addition of a first paragraph expressly indicating that liberty must be regarded as a general rule and that detention is a strictly exceptional and provisional measure, as set out below:

> "1. (*a*) The expelling State shall respect and guarantee the personal liberty of the person subject to expulsion. Detention shall be applicable only in accordance with the principles of exceptionality and provisionality.
>
> "(*b*) The detention of an alien person subject to expulsion shall not be punitive in nature.
>
> "(*c*) When an alien person subject to expulsion is provisionally detained, that person shall be detained separately from persons sentenced to penalties involving deprivation of liberty.
>
> "2. (*a*) The duration of the detention shall not be unrestricted. It shall be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.
>
> "(*b*) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power and within a specified period of time.
>
> "3. (*a*) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law. The person detained subject to expulsion shall be entitled to request a review of the detention measure at any time during the process.
>
> "(*b*) Detention shall end when the expulsion cannot be carried out, except where the reasons are attributable to the person subject to expulsion."

Germany

Draft article 19, paragraph 1 (*b*), prescribes the detention conditions of an alien subject to expulsion. In the view of Germany, the commentary should generalize the requirement that aliens should be detained separately from criminal detainees and should not prescribe concrete measures to attain that goal. In particular, the term "separate section" as used in paragraph (3) of the commentary might be difficult to apply in practice.

Netherlands

1. With regard to paragraph 1 (*a*), the Netherlands notes that within its territories the detention of aliens subject to expulsion is not punitive in nature. However, in cases in which all administrative measures (including detention) with a view to preparing and carrying out removal have failed and the alien still remains on the territory of the Netherlands without justified grounds, the case law of the Court of Justice of the European Union allows punitive measures to be taken.[1] Punitive measures ought to remain possible as a last resort for exerting pressure and as such

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[1] Thus, article 9, paragraph 1, of the International Covenant on Civil and Political Rights states that: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The American Convention on Human Rights, for its part, reiterates that right at the regional level, by stating, in its article 7, that: "1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."

[2] In this regard, see General Comment No. 21 (art. 10) of the Human Rights Committee, para. 4, which states: "Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, B.

[3] Approved by the Inter-American Commission on Human Rights at its 131st regular session, held on 3–14 March 2008.

[4] General provision.

[1] Case C-329/11, *Alexandre Achughbabian v. Préfet du Val-de-Marne*, judgment of the Court of Justice (Grand Chamber) of 6 December 2011, *Official Journal of the European Union*, No. C 32 (4 February 2012), p. 12.

they do not infringe human rights, provided that they are applied proportionately. The current drafting does not take this sufficiently into account.

2. Regarding draft article 19, paragraph 2 (*b*), the Netherlands suggests adding "or by an administrative authority, whose decision is subjected to an effective judicial review" to the end of this draft article, as was also proposed by the European Union.[2] This addition is essential to States such as the Netherlands, in which aliens law falls completely within the sphere of administrative law.

3. The Netherlands objects to paragraph 3 (*a*) because it is too detailed to be complied with in the diverse legal systems of the different countries. For instance, in the Netherlands, the detention of aliens is reviewed after the imposition of the detention order and six months thereafter, and at the request of the alien. It is sufficient if the alien has the possibility of having his or her detention reviewed regularly by an independent court. Furthermore, the Netherlands is concerned about paragraph 3 (*b*) of this draft article. The phrase "except where the reasons are attributable to the alien concerned" seems to indicate that detention could last indefinitely. It also appears that the alien is being held for failure to comply with an order in order to compel him or her to cooperate with the expulsion. Further elaboration is needed with a view to providing legal protection for the alien.

[2] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

Republic of Korea

Under the Immigration Control Act of the Republic of Korea, an extension to detention is decided by the heads of immigration offices or branch offices or by the heads of custody facilities for foreigners. In this respect, the scope of persons authorized to decide on the expulsion of aliens should be expanded to include those persons.

United Kingdom

1. The United Kingdom has significant concerns with this draft article and suggests amendments.

2. Draft article 19, paragraph 1 (*a*), is acceptable to the United Kingdom. However, draft article 19, paragraph 1 (*b*), is unacceptable to the United Kingdom in its entirety. Those time-served foreign national offenders who are to remain in prison as immigration detainees at the end of their sentence are, although treated as unconvicted (i.e. remand) prisoners, held in the same prison accommodation as prisoners serving sentences. There will be no separation between the two categories within the particular prison. The same position would also apply to immigration detainees transferred from immigration removal centres to prisons for security/control reasons.

3. Similarly, draft article 19, paragraphs (2) (*a*) and (*b*), in their current form are not acceptable to the United Kingdom for the following reasons. The United Kingdom does not accept that international law imposes a set maximum time limit or fixed period of authorization for detention. The United Kingdom also considers that the proposed prohibition of "detention of excessive duration" is unacceptably vague. The period of detention is still subject to strict restrictions in law, namely the United Kingdom common law and article 5 of the European Convention on Human Rights. The practice in the United Kingdom is to maintain detention while there is a realistic prospect of return and within a reasonable period of time, although the latter will depend on all the circumstances of the case, for example, the threat posed and risk of absconding by the individual concerned and, in some instances, seeking assurances from other States as to the position of the individual on return. The proposed introduction of judicial authority to authorize continued detention is unacceptable and out of step with domestic legislation, which is compliant with article 5 of the European Convention on Human Rights and is operated in line with established legal principles. The key is that administrative detention is prescribed by law and subject to judicial review.

4. The United Kingdom proposes that the draft article be amended as follows:

> "(2) (*a*) The duration of the detention shall not be arbitrary. It shall be limited only for such period of time as is reasonable in all the circumstances for the expulsion to be carried out, as prescribed by law.
>
> "(*b*) The extension of the duration of the detention may be decided upon only by a court, or a person authorized to exercise such power in law, subject to judicial review."

5. While draft article 19, paragraph 3 (*a*), is acceptable to the United Kingdom, it considers that it is necessary to amend draft article 19, paragraph 3 (*b*), to bring the wording of this subparagraph into line with draft article 19, paragraph 2 (*a*), as follows:

> "(*b*) Subject to paragraph 2, detention shall end when the expulsion cannot be carried out within a reasonable period of time, except where the reasons for delay are attributable to the alien concerned."

United States

1. The United States believes that the standards in draft article 19 are generally reasonable, although it would propose some modifications. As a general matter, the United States is committed to safe, humane and appropriate detention of individuals when their detention is necessary for reasons relating to their removal from the United States. The Department of Homeland Security is charged with managing the detention of aliens (other than unaccompanied alien children) who are subject to expulsion, including the conditions of detention, access to legal representation, and safe and secure operations across its detention facilities nationwide. If an alien, through the administrative process, is found to be in violation of the immigration laws of the United States and subject to a final removal order, he or she may be detained until removed, which generally should occur within 90 days of the final completion of the administrative process. See United States Code, Title 8, paragraph 1231 (*a*) (l) (A) and (2). Post-order detention of such aliens for 180 days, however, is presumptively reasonable.[1]

[1] *Zadvydas v. Davis et al., United States Reports*, vol. 533 (2001), p. 701.

2. In draft article 19, paragraph 1 (*a*), the words "for this reason alone" should be inserted after "not" to account for aliens subject to expulsion who are concurrently being incarcerated punitively as criminals.

3. The United States finds the language of draft article 19, paragraph 1 (*b*), unclear, namely whether it is intended to preclude aliens subject to immigration detention from being detained in criminal detention facilities, or to require separation of non-criminal aliens and criminal aliens in an immigration detention facility. The commentary states that aliens may be detained in criminal facilities and that non-criminal aliens subject to expulsion may be detained in the same facility as criminal aliens subject to expulsion. This provision should be revised to be more specifically tailored to the harm that it is seeking to prevent and make clear that aliens detained for the purpose of removal, whether criminal aliens or non-criminal aliens, may be detained in the same facilities as individuals detained under the criminal laws of the State.

4. With respect to draft article 19, paragraph 2 (*b*), not all extensions of immigration detention need to be decided by a judicial authority, especially if they are short term. Under United States law, for example, the Executive Office for Immigration Review in the Department of Justice reviews custody determinations in certain situations, such as for persons who are not subject to mandatory detention (see United States Code, Title 8, paragraph 1226; and Code of Federal Regulations, Title 8, paragraph 1003.19). Accordingly, the United States recommends either changing "judicial" to "such", or else replacing the phrase "may be decided upon only" with "must be reviewable by." If necessary, an additional sentence might be added along the lines of: "Prolonged detention after the alien has been ordered removed shall be subject to judicial review."

5. United States law permits continued detention of removable aliens in "special circumstances" (for example, highly contagious disease, terrorism or other security concerns, special danger to the public) (see Code of Federal Regulations, Title 8, paragraph 241.14; and United States Code, Title 8, paragraph 1226a). Accordingly, the United States urges that in draft article 19, paragraphs 1 (*b*) and 2 (*a*), the word "generally" be inserted after "shall" and in paragraph 3 (*b*), the clause "or is necessary on grounds of national security or public order" be inserted at the end of this provision.

Article 20. Obligation to respect the right to family life

Australia

Australia notes that a number of the draft articles are taken from regional instruments rather than universal instruments. For example, the obligation to respect the right to family life in draft article 20 uses the language of the European Convention on Human Rights rather than "arbitrary or unlawful interference" with family under article 17 of the International Covenant on Civil and Political Rights. Australia recommends that the draft articles be amended to better reflect the rights and obligations contained in universal instruments. This would enable greater clarity of international law.

Canada

Canada respects the importance of the family unit, as enshrined in its commitments under the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. However, the "right to family life" as articulated in draft article 20 merits clarification. Canada maintains that a State may expel an alien in situations that would interfere with the right to the protection of family life. Further, Canada notes that this is an unsettled area of law. Caution should be taken not to overstate the limitation on the right of States to remove aliens. The prohibition of interference with family life, "on the basis of a fair balance between the interests of the State and the alien", gives undue deference to the alien's right. This draft article should reflect the entitlement of a State to expel aliens who are serious criminals or who pose a serious risk to public safety or national security.

Cuba

Cuba believes that what is meant by "family life" in draft article 20 should be defined, given the impact that this expression has on the application of the draft article.

El Salvador

1. Draft article 20, paragraph 2, establishes two cumulative conditions on which the State may interfere with the right to family life of a person subject to expulsion, namely: (*a*) that the restriction is provided for by law; and (*b*) that a fair balance is maintained between the interests of the State and those of the alien in question.

2. El Salvador objects to the framing of the second requirement, since the requirement set out in the convention on which it is based has been considerably telescoped. It should be pointed out that article 8, paragraph 2, of the European Convention on Human Rights cites not only the balance of interests between the State and the alien but also what is necessary in a democratic society and other relevant considerations, as set out below:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

3. With regard to the content of this article, the European Court of Human Rights has analysed, from a jurisprudence perspective, the validity of the restriction of the right in respect of three requirements: whether the interference was in accordance with the law, whether it was motivated by a legitimate aim and whether it was necessary in a democratic society.[1]

[1] *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX, paras. 40–41: in that case, the applicant, an Algerian citizen, was married to a Swiss citizen. Thus, the refusal to renew the applicant's residence permit in Switzerland interfered with the applicant's right to respect for his family life within the meaning of article 8, paragraph 1, of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of article 8, paragraph 2. It is therefore necessary to determine whether it was "in accordance with the law", motivated by one or more of the legitimate aims set out in that paragraph, and "necessary in a democratic society".

4. Thus, in comparing the provisions of the European Convention on Human Rights with the wording of the draft articles on expulsion, it becomes apparent that the scope of the latter is overly narrow with regard to the requirements for permitting a restriction of the right to family life.

5. Another factor to be taken into consideration is that the jurisprudence of the European Court of Human Rights has addressed only the conflict of interests in those cases where the person subject to expulsion has committed a crime, as in the cases of *Boughanemi*,[2] *Bouchelkia*,[3] *Boujlifa*[4] and *Ezzouhdi*[5] *v. France*. It was in that context that the Court stated it would consider, among other things, the nature and seriousness of the offence committed by the applicant, the duration of the applicant's stay in the country, the time that had elapsed since the commission of the offence, and whether the spouse knew about the commission of the offence.[6]

6. Analysing the fairness of this balance in respect of all aliens as a general rule would therefore invite criticism. Furthermore, considering that most aliens subject to an expulsion procedure have not committed any crime whatsoever, it is extremely important for the Commission to clarify that, in cases of mere administrative violations of immigration regulations, requiring a balance between family life and security as an interest of the State would be inappropriate, provided that such individuals do not constitute a threat to the public order.

7. In view of the foregoing, El Salvador suggests rethinking the basis for the phrasing in question, in accordance with the jurisprudence of the human rights courts, as follows:

> "1. The expelling State shall respect the right to family life of an alien person subject to expulsion.
>
> "2. The expelling State shall not interfere with the exercise of the right to family life except where provided by law and where necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[2] *Boughanemi v. France,* 24 April 1996, *Reports of Judgments and Decisions* 1996-II.

[3] *Bouchelkia v. France,* 29 January 1997, *ibid.,* 1997-I.

[4] *Boujlifa v. France,* 21 October 1997, *ibid.,* 1997-VI.

[5] *Ezzouhdi v. France,* no. 47160/99, 13 February 2001.

[6] *Boultif v. Switzerland* (see footnote 1 above), para. 48.

Republic of Korea

The definitions of "family" and "right to family life" in this draft article are unclear, which may lead to the invalidation of a State's decision on expulsion. As such, it would be better to provide definitions for these terms.

United States

1. As a threshold matter, the United States does not believe that draft article 20 properly belongs in chapter II of Part Three, given that the title of the chapter and the substance of the other draft articles in this chapter address standards related to the treatment of an alien subject to expulsion rather than standards related to the grounds of expulsion. Draft article 20, however, by its plain text and as noted in the commentary, addresses the right to family life as it relates both to the treatment of an alien subject to expulsion and to the grounds of expulsion. This dual purpose risks conceptually blurring the scope of the other draft articles in chapter II of Part Three, which is of particular concern to the United States with respect to draft article 17, in accordance with our comments above. Accordingly, draft article 20 would be more appropriately placed after draft article 15 in chapter I of Part Three.

2. Turning to the substance, an alien's family ties both inside and outside the United States are factors that are routinely considered by the United States in determining an alien's eligibility for discretionary immigration relief (see United States Code, Title 8, paragraphs 1158 (asylum), 1229*b* (cancellation of removal), 1182 (h) (waiver of inadmissibility) and 1255 (adjustment of status to lawful permanent resident). United States immigration authorities also often give due consideration to family life in the exercise of prosecutorial discretion on a case-by-case basis. Yet, consideration of family unity does not always outweigh other factors in a particular case. For example, the United States may remove an alien who commits an aggravated felony in the United States regardless of his or her family ties (see, for example, *Payne-Barahona v. Gonzales*, 474 F.3d 1 (1st Cir. 2007); and *Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2d Cir. 2005)).

3. Draft article 20, paragraph 1, reads as though the right to family life is absolute in the context of an expulsion, such that it is the paramount factor. Yet paragraph (1) of the commentary to draft article 20 indicates that the support in the legislation and case law of States is not so absolute, and instead only supports "the need to take into account family considerations as a limiting factor in the expulsion of aliens". Consequently, draft article 20, paragraph 1, should be brought into line with the legislation and case law indicated in the commentary, by replacing "respect" with "give due consideration to".

4. Similarly, draft article 20, paragraph 2, should be deleted as it just largely restates the general principle of draft article 20, paragraph 1, but with more specificity, while introducing a principle of "fair balance" that is neither sufficiently grounded in existing law and practice, nor desirable as a matter of progressive development. Again, United States immigration law requires consideration of family ties in many circumstances but does not require a court or other decision maker to "balance" those ties against the interests of the State. Especially if edited as the United States suggests, draft article 20, paragraph 1, would sufficiently express the relevant standard on this topic, making draft article 20, paragraph 2, superfluous.

Chapter III

PROTECTION IN RELATION TO THE STATE OF DESTINATION

Article 21. Departure to the State of destination

Denmark (on behalf of the Nordic countries)

1. The Nordic countries find that voluntary return is to be preferred over forced removals and thus should be

promoted and facilitated. At the same time it is important to reserve the possibility to enforce an obligation to return if it is deemed necessary.

2. See also the comment made above under general comments.

Netherlands

1. The Netherlands supports the idea of encouraging voluntary departure. It is therefore proposed that paragraph 3 of draft article 21 be replaced with the following:

> "Where there are no reasons to believe that this would undermine the purpose of an expulsion procedure, voluntary departure should be preferred over forced return and a reasonable period for voluntary departure should be granted."

2. This proposed amendment accords with the first part of the European Union's proposal.[1] It is important that the possibility be held open of not setting a time limit for departure in some cases, for instance where a previous period time limit had been disregarded.

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

United Kingdom

The United Kingdom has significant concerns as regards this draft article. To adopt the terms of this draft article would seriously undermine the approach of the United Kingdom to high risk individuals. In certain cases, for example, those who pose a threat to national security, the United Kingdom would wish to preserve the flexibility to enforce removal with the restrictions that it imposes to ensure that such individuals could not lawfully return to the United Kingdom. This flexibility would be lost if the United Kingdom were required to facilitate voluntary departure. The United Kingdom does not consider that there is a clear basis for this draft article in existing international law, and could not support a proposal for progressive development in this respect.

United States

Draft article 21, paragraph 1, provides that an "expelling State shall take *appropriate** measures to facilitate the voluntary departure of an alien subject to expulsion". United States law provides appropriate measures to facilitate the voluntary departure of aliens in administrative removal procedures (see, for example, United States Code, Title 8, paragraphs 1225 (*a*) (4) (withdrawal of application for admission) and 1229c (voluntary departure). However, the United States reads "appropriate measures" as allowing reasonable limitations on the availability of such discretionary relief. In other words, there will be circumstances where voluntary departure is not appropriate and expulsion measures must be forcibly implemented, as recognized in draft article 21, paragraph 2.

Article 22. State of destination of aliens subject to expulsion

Austria

Austria does not have any objection to the wording of this draft article; however, it should be made clear in the commentary that paragraph 2 does not establish a legal obligation to admit an alien. Such an obligation could only be established through bilateral or multilateral agreements.

Cuba

Reference is made in draft article 22 to possible destinations for the expelled alien, but paragraph 2 states that the alien "may be expelled to any State where he or she has a right of entry or stay". This matter does not need to be included in that paragraph, as it is covered in paragraph 1, which refers to "any State willing to accept him or her at the request of the expelling State, or, where appropriate, of the alien in question". Indeed, even if a State has granted an alien permission to enter or stay in its territory, it is not obliged to accept the alien again if it invokes the grounds of public order or security.

Denmark (on behalf of the Nordic countries)

See the comment made above under general comments.

Netherlands

In this draft article, the emphasis lies on the rights of aliens who return (either voluntarily or by force) and on the obligations of the expelling State. However, it is also important for receiving States to admit these aliens. As proposed by the European Union,[1] the Netherlands therefore suggests to add the words "and readmitted by" to paragraph 1 of draft article 22. Consideration could also be given to adding a separate article on the obligations of receiving States with respect to readmission.

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

United States

1. The United States believes that draft article 22, paragraph 1, appropriately focuses on the State of nationality as the primary destination country, or alternatively another State willing to accept the alien, including upon request of the alien concerned. However, in addressing other options, draft article 22, paragraph 2, fails to recognize the possibility of expelling an alien to a State of prior residence, or the State where he or she was born. Such possibilities are contemplated in the commentary to draft article 22, paragraph 2, and in the laws of many States (see, for example, United States Code, Title 8, paragraph 1231 (*b*) (2) (E), but do not appear in the text of draft article 22, paragraph 2, itself. Moreover, depending on the circumstances, the alien may have closer family or financial ties to one State than to others, or may face a greater hardship in travelling to one State than to others, and the expelling State should have the discretion in any given case to take such factors into account. Consequently, draft article 22, paragraph 2, should be revised to read:

> "An alien also may be expelled to any State where he or she has a right of entry or stay, where he or she resided or was born, or, where applicable, to the State from where he or she entered the expelling State."

2. In addition, it is important in this context to limit the ability of successor States to bar the return of aliens born in States that no longer exist, or in territories over which sovereignty has changed since the alien departed. United States immigration law accounts for these scenarios by permitting removal to "[t]he country that had sovereignty over the alien's birthplace when the alien was born" or to "[t]he country in which the alien's birthplace is located when the alien is ordered removed" (see United States Code, Title 8, paragraph 1231 (*b*) (2) (E) (v) and (vi), respectively). The United States suggests inserting language to this effect in the text of draft article 22 or else clarifying the application of the draft article to these scenarios within the commentary.

3. Finally, the commentary to draft article 22 should note that an expelling State retains the right to deny an alien's request to be expelled to a particular State when the expelling State decides that sending the alien to the designated State is prejudicial to the expelling State's interests. This important principle is codified in United States immigration law (see United States Code, Title 8, paragraph 1231 (*b*) (2) (C) (iv).

Article 23. Obligation not to expel an alien to a State where his or her life or freedom would be threatened

Australia

Draft article 23 as currently drafted extends the *non-refoulement* obligation in the Convention relating to the Status of Refugees to any person whose life or freedom is threatened on any prohibited ground, even if they are not refugees within the meaning of that Convention, and also extends existing *non-refoulement* obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. Australia notes the Commission's explanation that it considered "there is no valid reason why the list of discriminatory grounds in draft article 23 should be no less broad in scope than the list contained in draft article 15". Given the very different policy contexts for the two draft articles (specifically, *non-refoulement* and discrimination, which are two distinct concepts in international law), Australia is of the view that it would be helpful if the Commission could further clarify these issues.

Canada

1. Draft article 23, paragraph 1, would prevent expulsion to a State where the alien's freedom would be threatened. This understanding of the current scope of international law is not shared by Canada. States may expel an alien to another State in which he or she will be in detention. States parties to the Convention relating to the Status of Refugees may not expel an alien to a State in which he or she would be persecuted on grounds named in that Convention. More generally, States may not expel an alien to a State in which there is a foreseeable real and personal risk of being subjected to torture or other similarly serious violations of human rights. A State that retains the death penalty may expel to another State that imposes the death penalty.

2. See also the comment under draft article 6.

Denmark (on behalf of the Nordic countries)

1. The Nordic countries support the European Union comment[1] on draft article 23, paragraph 2, and further hold the opinion that sexual orientation should be included in draft article 23, paragraph 1, in line with the suggestion to include sexual orientation in draft article 15.

2. Furthermore, draft article 23, paragraph 1, should be more aligned with article 33 of the Convention relating to the Status of Refugees, in order to exclude cases where, for example, there is a threat against a person's freedom because of a crime that has been committed (which is not related to the grounds for persecution in the Convention).

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

Netherlands

The Netherlands supports the possibility of allowing expulsion to go ahead where diplomatic assurances have been given that the death penalty will not be carried out. The Netherlands supports the European Union's additions[1] to the draft in this connection.

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

Republic of Korea

1. Refugees are those who need to be specially protected by the international community based on their status. Despite the need for special protection, in comparison with draft article 6, paragraph 3, draft article 23 gives more protection to aliens who are not refugees. Draft article 23, paragraph 1, should thus include the same qualification as draft article 6, paragraph 3, namely:

> "unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

2. See also the comment made above under general comments.

United Kingdom

1. The United Kingdom has concerns regarding draft article 23, paragraph 1. As currently drafted, the text broadly reflects article 33, paragraph 1, of the Convention relating to the Status of Refugees, which protects those who have refugee status but does apply to all aliens and as such would be a development. The United Kingdom considers that the draft article would benefit from clarity on the level of threat that would prohibit expulsion and suggests that the risk to life be separated from the risk to freedom.

2. The United Kingdom suggests the following amendment to draft article 23, paragraph 1:

> "No alien shall be expelled to a State where there would be a real risk to his or her life, for example on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law."

United States

1. Draft article 23 purports to recognize what would be a dramatic expansion of the *non-refoulement* provisions in existing human rights treaties, in a manner that discards the language carefully crafted by States for those regimes. As such, this draft article should be deleted or at least significantly redrafted.

2. According to paragraph (1) of the commentary to draft article 23, paragraph 1, purports to correspond "to the content of article 33 of the Convention relating to the Status of Refugees of 28 July 1951, which establishes the prohibition of return (*refoulement*)". Yet draft article 23, paragraph 1, dramatically departs from the text of article 33 of the Convention relating to the Status of Refugees, as well as the settled and widely adhered-to State practice associated with article 33 over the past 60 years.

3. Article 33, paragraph 1, of the Convention prohibits expulsion of a refugee "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". By contrast, draft article 23, paragraph 1, would expand the provision to prevent expulsion where life or freedom is threatened on any ground, "such as" the additional categories of colour, sex, language, non-political opinion, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law. Moreover, the category of "membership of a particular social group" was also not expressly included; to the extent that "social origin" is intended as a replacement it does not clearly have the same meaning.

4. The commentary provides no basis in national legislation, national case law, international case law, or treaty law for such changes. In fact, most national laws on expulsion, deportation or removal focus on five enumerated groups of individuals who fear persecution or have suffered persecution, specifically on account of race, religion, nationality, membership of a particular social group, or political opinion (see, for example, United States Code, Title 8, paragraphs 1101 (*a*) (42) (A), 1158 (*b*) (l) (A) and 123l (*b*) (3) (A). The only explanation provided in the commentary is that article 2, paragraph 1, of the International Covenant on Civil and Political Rights contains such categories, with the implication that article 2, paragraph 1, applies to a State's obligations under article 13 of the Covenant with respect to expulsion. Yet, while these non-discrimination principles may be relevant to the treatment of aliens within a State and the process afforded aliens during expulsion proceedings, they would not all be relevant in determining whether *non-refoulement* obligations would preclude expulsion.

5. Another significant departure from settled and widely adhered-to State practice concerns the selective incorporation of the *non-refoulement*-related provisions in the Convention relating to the Status of Refugees. Draft article 23, paragraph 1, does not "correspond" to the content of article 33 of the Convention since it does not incorporate the substance of article 33, paragraph 2, which reads:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

6. Similarly, the draft article does not account for the exclusion grounds contained in article l (F) of the Convention. The commentary provides no explanation for why these provisions, which have fully operated as a part of State practice in the field of refugee law for the past 60 years, should be discarded.

7. The United States recommends that draft article 23, paragraph 1, be deleted or else redrafted to follow the language of article 33 of the Convention relating to the Status of Refugees.

8. The United States also has concerns regarding draft article 23, paragraph 2, which would purport to recognize another significant *non-refoulement* obligation that does not currently exist under international law. The commentary does not sufficiently establish that the core principle underpinning this provision is grounded in existing jurisprudence and State practice, other than by citing a single Human Rights Committee decision on an individual communication. There are principled reasons to question the Committee's conclusion that a State that has voluntarily abolished the death penalty when not obligated to do so under international law nonetheless thereby assumes an international legal obligation not to expel an alien to a State that has lawfully sentenced that alien to death. Moreover, as the commentary admits, draft article 23, paragraph 2, goes further than even this limited precedent by: (*a*) expanding this principle to States that have not even formally abolished the death penalty; and (*b*) expanding the *non-refoulement* obligation to circumstances in which the individual has not yet been sentenced to death. Such extensions only further erode the grounding of draft article 23, paragraph 2, in law or principle.

9. While this provision would not restrict the right, prerogative or authority of the United States to expel aliens, it has serious concerns regarding the adverse impact that such a proposed restriction would have on international cooperation with respect to law enforcement and criminal justice.

Article 24. Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Austria

The wording of this provision differs from draft article 6 insofar as it requires "substantial grounds for believing", which is not the case in draft article 6. Austria wonders whether there is any reason for this difference.

Canada

1. Canada agrees with the obligation not to expel an alien to a State in which there is a real risk of torture as described in draft article 24, as this is also contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, Canada does not agree with the expanded scope of draft article 24, in particular the inclusion of "degrading" treatment. This term is an overbroad interpretation of the obligation of *non-refoulement* implicit in article 7 of the International Covenant on Civil and Political Rights. It fails to capture the essence of *non-refoulement*, which is the obligation not to return someone to a situation where they may face serious violations of human rights, such as torture.

2. See also the comment under draft article 6.

Cuba

Cuba considers that draft article 24 should include an obligation to demonstrate "real risk", as the expression "where there are substantial grounds", as stipulated in the draft article, is inadequate and is liable to subjective interpretation.

Republic of Korea

See the comment made above under general comments.

United States

1. The United States has no objection to the aspect of draft article 24 pertaining to torture to the extent that this restates the *non-refoulement* obligation in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that a person shall not be expelled "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". The United States understands that phrase to mean "if it is more likely than not" that such person would be tortured.

2. Draft article 24, however, would purport to expand the *non-refoulement* obligation found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment so as to prevent expulsion of aliens in danger of "cruel, inhuman or degrading treatment or punishment". The primary justification for this expansion is the jurisprudence of the European Court of Human Rights and a recommendation of the Committee on the Elimination of Racial Discrimination. These examples and some isolated instances of State practice are not a sufficient basis for presenting this draft article as codification of existing law; it clearly reflects a move towards progressive development.

3. One important substantive issue that the commentary does not address is why this new *non-refoulement* obligation should not permit any exceptions or limitations. The existing *non-refoulement* obligation in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not allow such exceptions, which corresponds with the peremptory prohibition against torture. Cruel, inhuman or degrading treatment or punishment, however, does not rise to the level of torture and is not treated equally under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Yet neither the draft article nor the commentary considers whether a *non-refoulement* obligation with respect to cruel, inhuman or degrading treatment or punishment should permit exceptions on, for example, national security or criminal grounds, as is the case with respect to the *non-refoulement* obligation in the Convention relating to the Status of Refugees. As the memorandum by the Secretariat notes,[1] where States have adopted domestic laws that protect aliens against expulsion to States where they would be at risk of mistreatment, these laws frequently contain exceptions, for example, where the alien has committed certain types of criminal acts, threatens the interests of the expelling State, threatens that State's *ordre public* or national security, or has violated international law.

4. Recognizing an unconditional *non-refoulement* obligation with respect to cruel, inhuman or degrading treatment or punishment would raise additional issues not fully explored or addressed by the commentary. For example, uncertainty regarding what actions are encompassed by cruel, inhuman or degrading treatment or punishment would complicate States' efforts to meet effectively this *non-refoulement* obligation. An unconditional *non-refoulement* obligation with respect to cruel, inhuman or degrading treatment or punishment could be used to support arguments against expelling any alien to a given country based on general conditions there, such as poor prison conditions. Moreover, whereas torture as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment necessarily involves State action, cruel, inhuman or degrading treatment or punishment does not. Thus, States seeking to comply with this obligation would need to consider the likelihood that anyone at all in the country to which the person would be sent—regardless of their affiliation with the State—would take action against that individual that could be considered cruel, inhuman or degrading treatment or punishment.

5. The United States believes that such a new *non-refoulement* obligation with respect to cruel, inhuman or degrading treatment or punishment would need to be carefully and thoroughly considered by States before it could be accepted as a generally applicable rule of international law. Accordingly, the United States recommends deleting this provision or else revising it to mirror the language of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[1] A/CN.4/565 (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. 574.

Part Four

SPECIFIC PROCEDURAL RULES

Article 26. Procedural rights of aliens subject to expulsion

Australia

Draft article 26 extends a range of procedural rights to aliens who are unlawfully in the territory of a State party

for more than six months. Some of these procedural rights lack a foundation in international law and significantly extend the obligation under article 13 of the International Covenant on Civil and Political Rights, placing a heavy burden on host States, particularly developing and least developed countries. The approach of the draft articles in this context also departs from the existing distinction in international law between persons who are lawfully and unlawfully in a State's territory.

Austria

1. Regarding paragraph 1 (*f*), the provision of an interpreter free of charge would imply far-reaching budgetary consequences. This paragraph should be deleted. Paragraph 3 on consular assistance to aliens subject to expulsion, which reflects article 36 of the Vienna Convention on Consular Relations, has to be read in the light of the latter provision as interpreted by the International Court of Justice. Unfortunately, the important clarification by the Court that article 36, paragraph 1 (*b*), of the Convention obliges the detaining State to inform the competent consular post upon request by the detainee and to inform the detainee of his or her right in that respect, is only reflected in paragraph (10) of the commentary, but still not in the draft article itself.

2. Regarding paragraph 4, the six months envisaged are too short to cover certain difficult cases and should be extended.

Belgium

Belgium proposes that the following should be inserted into the commentary: "It should be made clear that the right to be heard means the ability to present arguments during written or oral proceedings, either before or after a decision is taken."

Canada

Canada has noted the proposal to limit certain procedural rights to aliens unlawfully in a State's territory for less than six months, as described in draft article 26, paragraph 4. Canada is not aware of any basis in international law that would support such a temporal limitation.

Denmark (on behalf of the Nordic countries)

1. The Nordic countries also hold the view expressed by the European Union[1] that the right to receive a legal notice of the expulsion decision should entail a right to receive a written decision and a right to receive information about the legal remedies available.

2. As to the limitation set out in paragraph 4, allowing States to exclude from the scope of the procedural rights aliens who have been unlawfully present for less than six months, the Nordic countries hold the view that this risks undermining the minimum standards set out in the draft articles. The Nordic countries therefore support the drafting suggested by the European Union.

3. Furthermore, the Nordic countries wish to clarify that the right to be represented before the competent authority should not entail an obligation on the States to provide free legal assistance to all aliens subject to expulsion.

4. See also the comment made above under draft article 6.

El Salvador

1. Draft article 26 is key to the draft articles, as procedural guarantees are at the very core of any criminal or administrative expulsion procedure, irrespective of a person's immigration status.

2. This is because the guarantees as a whole are recognized as the appropriate normative link to ensure the effectiveness of subjective rights and, more generally, of the axiological principles that the rules uphold. In this regard, the guarantees are not merely a matter of legalism or formalism but rather of fundamental rights—including life, liberty, integrity and equality—which represent the values that are the foundation and justification of the existence of the State and their enjoyment by all constitutes the very foundation of democracy.

3. With respect to the content of draft article 26, El Salvador notes with concern that, despite the recognition given to a significant set of guarantees that aliens subject to expulsion are entitled to enjoy, paragraph 4 still contains a reference to the application of other legislation "concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months".

4. This would be contrary to international human rights law, as it would invalidate the guarantees enunciated in the draft article and exclude from their enjoyment aliens with an irregular immigration status who had entered the territory of a State less than six months earlier.

5. El Salvador finds fault, in particular, with the commentary of the Commission on this paragraph, which maintains, in paragraph (11), that "while some members contended that there was a hard core of procedural rights from which all aliens without exception must benefit, the Commission preferred to follow a realistic approach". Such a statement is unacceptable, as the work of the Commission must have for its object the codification and progressive development of international law[1]—not the justification or the legitimization of a "reality" that is contrary to international human rights law.

6. In fact, it is also erroneous for the Commission to regard recognition of the procedural rights of aliens with an irregular immigration status as part of "progressive development",[2] since all international human rights instruments already recognize that such rights apply to all persons irrespective of nationality.

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[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

[1] Statute of the International Law Commission, art. 1, para. 1: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."

[2] *Ibid.*, art. 15: "In the following articles, the expression 'progressive development of international law' is used for convenience as meaning 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. El Salvador therefore believes that the express establishment of procedural guarantees for all aliens with an irregular status would be viable merely as a codification exercise, since the draft articles contain procedural guarantees that are already recognized by universal and regional human rights instruments and the jurisprudence of international courts, which make no distinction in this respect.

8. In that connection, guarantees must not be viewed as privileges granted by the State, as they derive directly from human dignity, and should not be granted on the basis of discriminatory criteria, given that the right to equality—framed as equality before the law—constitutes a basic and general principle for all States that cannot be suspended, altered or limited under any circumstance.

9. Moreover, determining that a period of six months should be the benchmark for granting certain procedural guarantees would not only be unlawful for the above-mentioned reasons but would also be difficult to verify in each specific case. Worse still, aliens with an irregular status might be subjected, in the first six months, to expulsion based on the broad discretion of the State, which would result in failure to protect the individual and would represent a significant departure from the minimum requirements of the rule of law.

10. To accept this period of six months would also be to violate draft article 19, which prohibits all detention of excessive duration. In fact, in cases where an alien is detained, a period of six months of detention without guarantees would be excessive and manifestly discriminatory, particularly in comparison with shorter detention periods for nationals who have committed crimes.

11. In the case of El Salvador, for example, article 14 of the Constitution[3] establishes that:

> The judicial branch has sole authority to impose penalties. The administrative authorities may nonetheless impose penalties, by decision or by sentence, and subject to due process, for violations of laws, regulations or ordinances, consisting of imprisonment of up to five days or a fine, which may be commuted to community service.

12. Thus, the Salvadoran Constitution allows a detention period of no more than five days, which also applies in cases of expulsion;[4] in the event of non-compliance at any time, an alien may avail himself or herself of remedies and procedures[5] necessary to safeguard his rights. Consequently, when compared with this internal law, the draft articles would permit an additional 170 days of detention of persons who have unlawfully entered the territory, with no possibility of guarantees, which would be highly disproportionate.

13. Lastly, El Salvador deems it erroneous to establish a "without prejudice" clause to cover matters not regulated by international law. In other words, if the international community has no rule on equality with regard to the period of six months to which a "without prejudice" clause would refer, there is a risk that decisions in this regard would be left to the absolute discretion of each State.

14. In view of the foregoing, El Salvador reiterates that the standard of procedural guarantees to be included in the draft articles on expulsion of aliens must be internationally recognized,[6] regardless of the practice of certain States whose expulsion procedures—or lack thereof—reflect a repeated failure to comply with their human rights obligations. El Salvador therefore recommends deleting paragraph 4 from draft article 26. It would also amend paragraph 1 so as to read:

> "1. An alien person subject to expulsion enjoys the following procedural rights: …".

[3] Decree No. 38, *Diario Oficial*, vol. 281, No. 234, 16 December 1983, pp. 1–26.

[4] The Constitutional Chamber of the Supreme Court of Justice has stated in its jurisprudence that: "it must be clear that the administrative authorities may follow legal procedures for arresting an alien who has unlawfully entered the country; they may also expel him or her on those same grounds, but in no case should it be assumed that execution of an expulsion procedure authorizes the arrest of the offender for a period of more than five days for the purpose of carrying out such expulsion; exceeding that limit would be a violation of the Constitution—article 14—" (*Habeas Corpus* Process, No. 19-2008, 14 May 2009).

[5] With regard to constitutional procedures, the Constitution establishes, in article 11, paragraph 2, that: "A person has the right to *habeas corpus* when any individual or authority unlawfully or arbitrarily restricts his or her liberty. *Habeas corpus* may also be invoked if any authority harms the dignity or physical, psychological or moral integrity of detained persons." It continues, in article 247: "All persons may seek protection before the Constitutional Chamber of the Supreme Court of Justice in respect of a violation of the rights granted under the present Constitution."

[6] The Universal Declaration of Human Rights already stipulates in its article 10 that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." In its article 8, it states that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." These provisions must, moreover, be interpreted in the light of article 2 of the Declaration by which: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The International Covenant on Civil and Political Rights, for its part, states, in its article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

Netherlands

1. In the Netherlands aliens have, in principle, the right to be heard by the competent authorities. However, an exception to this right is possible, if there is no reasonable doubt that the objection to the expulsion decision made by the alien is manifestly ill-founded. In the view of the Netherlands, a similar exception to paragraph 1 (*c*) of draft article 26 is important in order to prevent abuse of this right.

2. The Netherlands would propose adding the following at the end of paragraph 1 (*d*):

> ", including the option to request a provisional measure in the form of an injunction preventing the alien's expulsion pending the outcome of the proceedings."

3. This addition would replace draft article 27 (see the commentary of the Netherlands on draft article 27 for further details).

Republic of Korea

See the comment made above under general comments.

Russian Federation

See the comment made above under general comments.

United Kingdom

1. The United Kingdom would be content to support this draft article subject to amendment of paragraph 1 (*e*).

2. The United Kingdom is not content to support the European Union's proposed amendment to article 26, paragraph 1 (*a*),[1] requiring information to be provided in writing as to the available legal remedies in every case where written notice is given of an expulsion decision. The current obligations of the United Kingdom (as set out in the Immigration (Notices) Regulations 2003) only require that information be provided about the available legal remedies where a right of appeal arises. When the available effective remedy is judicial review, the relevant authorities do not provide this information. The United Kingdom considers this to be a proportionate and appropriate approach.

3. The United Kingdom cannot accept article 26, paragraph 1 (*e*), as drafted. While the United Kingdom has no objection to a person being permitted to have representation in all cases before the competent authority, the drafting of this provision is insufficiently clear and has the potential to impose an obligation on the State to secure representation for the person before the competent authority in every case.

4. Draft article 26, paragraph 1 (*e*), provides that a person will have a "right to be represented" before the competent authority. The commentary on this draft article states, in paragraph (6), that it is based on article 13 of the International Covenant on Civil and Political Rights which, it says, "gives an alien subject to expulsion the right to be represented before the competent authority". However, the wording of article 13 of the Covenant itself does not express itself in terms of a right to be represented. It states that a person "be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority". It is clear from article 13 of the Covenant that the extent of the State's obligation is to permit the individual to be represented. The reference to "right" in draft article 26, paragraph 1 (*e*), creates the risk of this provision being interpreted as imposing a positive obligation to secure representation. This risk is exacerbated by the difference in wording between article 13 of the Covenant and draft article 26, paragraph 1 (*e*), as the use of different wording, particularly where the commentary states that one article is based on the other, strongly suggests that a different result is intended.

5. Representation is not necessary in all cases. The necessity of representation depends on a variety of factors, including the competence of the person concerned to represent themselves, the complexity and nature of the issues to be decided by the competent authority and the type of proceedings in which the person is engaged. For example, the statutory appeals system established by Part 5 of the Nationality, Immigration and Asylum Act 2002 was designed to enable access to this effective remedy without legal representation. It would be therefore disproportionate to impose an overarching requirement to secure representation for all persons before a competent authority. The securing of such representation should be determined at national level and in detailed legislation that can make provision for the variety of factors that will determine whether representation is necessary.

6. The United Kingdom would be content to accept draft article 26, paragraph 1 (*e*), if it were amended to make clear that a person must be permitted to be represented before a competent authority in all cases but that there is no right to be so represented.

7. Current legislation on the right to appeal immigration decisions is contained in the Nationality, Immigration and Asylum Act 2002. Section 82 of that Act sets out the immigration decisions that can be challenged by way of statutory appeal. These decisions include decisions to make a deportation order, and decisions to remove from the United Kingdom. There is no right of appeal against a decision to exclude a person from the United Kingdom on the ground that the presence of that person in the country is not conducive to the public good. United Kingdom legislation does not use the term "expulsion". Where there is no right of appeal, the individual has access to effective remedy by way of judicial review.

United States

1. Although the United States views the procedural rights enumerated in draft article 26 as generally appropriate, it does have several concerns with its wording at present. First, it fails to acknowledge established limitations on these procedural rights; see, for example, article 13 of the International Covenant on Civil and Political Rights:

> An alien lawfully in the territory of a State Party … shall, *except where compelling reasons of national security otherwise require*,* be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority.

2. Second, draft article 26, paragraph 1 (*d*), uses vague and confusing terminology, especially when compared with paragraph l (*b*). Consequently, the United States recommends that paragraph l (*d*) be redrafted to provide "the right to an appropriate and effective review process".

3. Third, the commentary to draft article 26, paragraph 1 (*e*), should clarify that the State does not have an obligation to provide such representation to the alien at the State's expense.

4. Fourth, draft article 26, paragraph 3, should be redrafted to reflect that this principle is an obligation of States, rather than a right of individuals, consistent with the Vienna Convention on Consular Relations. For example, it could be revised to read: "The expelling State must allow an alien subject to expulsion to seek consular assistance."

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

5. Finally, while the reference to a six-month limit in draft article 26, paragraph 4, would not conflict with United States law, this time period might appear to be arbitrary as a purported rule of international law. The standard is also likely to be difficult to administer as a practical matter; it is not always feasible to determine exactly how long an unlawful alien has been present in a State's territory. The United States recommends using more generic language here, for example, "unlawfully present in its territory for a brief duration", and then explaining in the commentary that State practice suggests that a "brief duration" generally means around six months or less.

Article 27. Suspensive effect of an appeal against an expulsion decision

Austria

Draft article 27 cannot be accepted as it stands. It should provide for exceptions from the suspensive effect of an appeal, for example if public order or safety are at risk.

Canada

Canada is unable to agree with draft article 27 since an appeal under Canadian law does not necessarily suspend an expulsion decision. Canada would suggest: "An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State *may suspend an expulsion decision, as provided by law**".

Denmark (on behalf of the Nordic countries)

The Nordic countries support the comments made by the European Union[1] on this draft article.

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

El Salvador

1. Draft article 27 provides that an appeal can have a suspensive effect only where it has been lodged by an alien with regular immigration status, which affects the right to equality before the law and could have contradictory consequences in practice.

2. El Salvador is of the view that while a suspensive effect on a decision does not constitute a general rule, it should not be determined by the person's immigration status but rather should depend on the need to guarantee a right that could be irreparably violated if the decision is executed.

3. This is not a new proposal with regard to expulsion but rather the rule governing the adoption of precautionary measures in the context of procedural law in general. Thus, the suspension of the expulsion decision would be no more than a mechanism—implemented *ab initio* or during the process—to ensure that the final decision handed down is effective in practice.

4. In some expulsion procedures, owing to the huge impact that the decision could have on the individual, precautionary measures might have to be applied in a large number of cases to prevent not only the transfer of a person from one territory to another but also any consequences that such a transfer might have on the appellant's living conditions and on the exercise of other basic rights, including protection of the family, or the right to health, education, work or private property.

5. In view of the foregoing, it would be more pertinent in such situations to analyse the actual effects of each specific case and to maintain the alien's status quo during the appeals proceeding where an expulsion decision could have serious effects or, worse still, where those effects would be irreversible even if a decision is rendered in the person's favour.

6. For example, the execution of an expulsion decision against a person who has resided a number of years in the territory of the State—whether with regular or irregular immigration status—could interfere with every aspect of that person's life, which would justify a suspension of the expulsion solely for the period of the appeals proceeding and until such time as a decision is handed down. Thus—over and above the procedures relating to refugee, asylum or stateless status—consideration must be given to the large number of cases in which the expulsion decision would inevitably have an impact on the future living conditions of the individual or on his or her personal security.

7. Furthermore, at the international level, the tendency to grant a suspensive effect on expulsion decisions during an appeals proceeding to persons with irregular immigration status is already well established, as directly reflected in article 22, paragraphs 2 and 4, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which state:

> 2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.
>
> 4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

8. In view of the foregoing, El Salvador recommends the following wording:

> "An appeal lodged by an alien person subject to expulsion shall have a suspensive effect on the expulsion decision where execution of the decision could cause irreparable harm or harm that would not be easily redressed by the final decision."

Germany

According to the Commission's commentary, draft article 27 constitutes progressive development. Germany would like to reiterate that while it supports the general concept of a suspensive effect of appeals launched against expulsion decisions, it does not see a need to further develop existing laws. The reasons for a suspensive effect are aptly stated in the commentary to the respective draft article: an appeal might well be ineffective unless

the execution of the expulsion decision is stayed. The national law of Germany—which was described in detail to the Commission in that regard—does provide suspensive effect on a broad range of appeals to administrative decisions for all the same reason. But the wording of draft article 27 leaves no room for exceptions, which are necessary to ensure that an appeal is not used to prevent a perfectly sound expulsion decision. Therefore, as already stated before, Germany supports the general concept of a suspensive effect, but would propose that draft article 27 be amended to include certain exceptions. Of course, any exception has to respect every person's right to an effective remedy.

Netherlands

It is of the utmost importance to the Netherlands that draft article 27 be deleted in its entirety. This draft article would make it virtually impossible to remove aliens from the territory of a State. The Netherlands would also refer to the European Union's comments[1] on this draft article. Recognition of the suspensive effect of an appeal lodged against an expulsion decision could indeed be seen as incitement to abuse appeal procedures to the detriment of their genuine purpose. In order to avoid removals conflict with national or international legislation, the Netherlands proposes making the addition to draft article 26, paragraph 1 (*d*), as suggested above.

[1] Written comments contained in a mimeographed document (on file with the Codification Division of the Office of Legal Affairs).

Republic of Korea

It would be better to delete this draft article. Under the Administrative Litigation Act of Korea, execution of an expulsion decision can only be suspended by a court decision. A simple appeal by an alien subject to expulsion should not have the effect of suspending a government decision, which could unduly limit State sovereignty.

United Kingdom

1. The United Kingdom cannot accept this draft article as it constitutes an unwelcome and disproportionate development of the law.

2. The immigration bill that is currently before the United Kingdom Parliament provides for non-suspensive appeals for foreign criminals where no serious irreversible harm would result from the appeal taking place after the person has departed the United Kingdom. This approach is consistent with international law and the jurisprudence of the European Court of Human Rights. This is acknowledged by the Commission in its analysis of *Čonka v. Belgium*[1] in paragraph (4) of the commentary to this draft article. It is also consistent with the judgment of the European Court of Human Rights in *De Souza Ribeiro v. France*.[2]

3. The United Kingdom considers that this represents the extent to which international law and the jurisprudence of the European Court of Human Rights require an appeal to have a suspensive effect. To extend a requirement for suspensive effect to all appeals against expulsion decisions is disproportionate. Where serious irreversible harm may result from a person being required to depart prior to the appeal being concluded, it is proportionate for the appeal right to be suspensive so that the risk of such harm does not arise. However, where there is no risk of serious irreversible harm arising because an appeal does not have suspensive effect, either because the issues in question are not such as to raise the risk of serious irreversible harm or the claim is clearly unfounded, it is disproportionate and unnecessary to require a suspensive appeal in every case.

4. The United Kingdom notes that the Commission considers that State practice in this 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 all expulsion decisions. The United Kingdom agrees and considers that, this being the case and having regard to the position of the United Kingdom, as outlined in the paragraph above, regarding the proportionality and necessity of developing the law as the Commission proposes, that the case has not been made for developing the law in this way. The United Kingdom welcomes the Commission's conclusion that a requirement for a suspensive appeal should not arise in relation to persons not lawfully present in the territory of the State in question.

5. This draft article cuts across existing domestic legislation under the Nationality, Immigration and Asylum Act 2002, which provides for non-suspensive appeals in certain cases. Section 94 provides for a non-suspensive appeal where the Secretary of State certifies an asylum or human rights claim as clearly unfounded. These provisions are a central part of the appeal framework of the United Kingdom, ensuring that unmeritorious claims cannot be used to delay departure. Where a claim is certified as clearly unfounded such that the appeal against the decision in question is non-suspensive, the certificate can be challenged by judicial review, which is suspensive of removal in these cases as a matter of policy.

United States

1. In line with the concerns expressed by several other countries, the United States does not think that this draft article reflects current State practice, and is not well crafted as a purported role of international law. First, it is overly broad to the extent it could be read to apply to every kind of appeal lodged by an alien during expulsion proceedings. Under United States immigration law, an alien subject to a final order of removal generally has the potential for several levels of appeal, although there are some exceptions, for example, expedited removal procedures under United States Code, Title 8, paragraph 1225 (*b*). A direct appeal of the removal order to the Board of Immigration Appeals has an automatic suspensive effect; further appeals would need to be accompanied by a separate request for a stay pending appeal.

2. The United States believes that draft article 26, paragraph 1, which describes a right to challenge the expulsion decision through an effective review process, adequately and appropriately addresses the underlying

[1] *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I.

[2] *De Souza Ribeiro v. France* [GC], no. 22689/07, ECHR 2012-VI.

concern motivating this draft article. States should have flexibility, within the context of their particular immigration systems and review processes, to determine whether particular kinds of petitions or appeals should have automatic suspensive effect or should allow for discretionary stays, as long as aliens ultimately have access to an effective review process. This draft article does not take into account the reasonable variations among States' practices on this issue.

3. The United States believes that this draft article should be redrafted to address these concerns or else deleted.

Article 28. Procedures for individual recourse

Cuba

Cuba suggests that, in draft article 28, it should be made clear, from a *ratione materiae* and *ratione personae* standpoint, which international body would be competent to determine whether the grounds for expulsion listed in draft article 5 existed or not. The draft article should also specify whether the competent international body shall be one recognized by the expelling State or by the expelled person.

United Kingdom

The United Kingdom has no concerns with this draft article. However, as individual recourse to a competent international body is used as an argument to suspend the implementation of expulsion decisions as an interim measure, the United Kingdom requests that the Commission have regard to its comments about draft article 27 on the extent to which a challenge to expulsion should be suspensive where there is no risk of serious irreversible harm if the remedy is pursued and concluded after expulsion.

United States

Especially given the wording of the phrase "any available procedure", the United States understands this provision to recognize only an obligation by a State to permit aliens subject to expulsion to pursue individual recourse to a competent international body where such a procedure is already generally available within, or with respect to, that State.

Part Five

LEGAL CONSEQUENCES OF EXPULSION

Article 29. Readmission to the expelling State

Australia

Australia notes that a number of the draft articles would benefit from further precision or clarification. For example, Australia notes that draft article 29, paragraph 1, is unclear as to what bodies the Commission regards as "competent authorities" and would appreciate clarification to ensure that this refers to a competent authority in the expelling State. Without further clarification on this point, Australia is not in a position to form a view as to whether this draft article is consistent with existing international law.

Canada

In international law, aliens have no right of admission to a State. Aliens who are removed are not entitled to readmission. Canada cannot agree with draft article 29 on the right to readmission should an alien's removal be later established as unlawful. Instead, an unlawful expulsion decision cannot be used to prevent the alien from requesting or reapplying for admission.

Cuba

With regard to draft article 29, which refers to the readmission of an alien to the expelling State if the expulsion was unlawful, Cuba believes that it should specify that the competent authority that can revoke a decision handed down by a domestic body must be a competent authority of the expelling State.

El Salvador

1. Draft article 29 establishes the possibility of readmission in cases of unlawful expulsion, which is an important provision of progressive development. In any case, since this is only one of the possible grounds for readmission, El Salvador recommends that the Commission add a "without prejudice" clause to clarify that there could be other grounds for readmitting the person.

2. It recommends that the following paragraph be added at the end of the draft article:

> "The present article shall be understood without prejudice to other grounds for readmission provided for by the expelling State."

Germany

Draft article 29 does not constitute *lex lata*. Even if perceived as a rule *de lege ferenda*, the wording seems too broad as it includes a "right of return" in every case in which it is established by a competent authority that the expulsion was unlawful.

Netherlands

The words "of that State" ought to be added after "by a competent authority" for the sake of clarity.

Republic of Korea

It is the sovereign right of a State whether to allow expelled aliens to be readmitted to its territory, even if it is established by a competent authority that the expulsion was unlawful. In this sense, article 11 of the Immigration Control Act provides restrictions on the readmission of aliens who have been expelled by the Government of the Republic of Korea. As such, this draft article should be deleted.

Russian Federation

1. Within the framework of the topic as a whole, the Russian Federation would like also to call attention to the institution of readmission. As is known, readmission,

like expulsion, presumes the movement of foreign nationals and stateless persons outside the territory of a State, regardless of their will. At the same time, readmission is a separate legal institution, based primarily on the norms of international law, because, unlike expulsion, it presumes not only the right of one State to expel a person, but also the obligation of another State to accept that person. In addition, in the current wording of the draft articles, only draft article 29, which affects only one of the aspects of that legal institution—the obligation of the expelling State to take back the foreign national in the event of the absence of lawful grounds to expel (so-called erroneous readmission)—is devoted to the subject of readmission.

2. The Russian Federation feels that it would make sense for the Commission to elucidate other aspects of that institution in the draft articles.

3. See also the comment made above under general comments.

United States

1. Although the United States appreciates the principles of fairness motivating this draft article, it has serious concerns to the extent it would purport to recognize an unprecedented individual "right" to be admitted by a State. In no other context does an alien possess the right to be admitted to a State; even though this draft article addresses very narrow circumstances, it would set an unacceptable precedent in this regard. The State, even in sympathetic circumstances such as those addressed by this draft article, does, and should, maintain its sovereign prerogative to determine which aliens may be allowed to enter and under what conditions.[1] Moreover, by addressing admission, this draft article goes beyond the scope of the topic of "expulsion".

2. The United States believes that this draft article should be redrafted to address these concerns or else deleted.

[1] See *Kleindienst v. Mandel*: "In accord with ancient principles of the international law of nation-States, … the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers …' " (*United States Reports*, vol. 408 (1972), p. 765); see also H. Lauterpacht, *Oppenheim's International Law*, vol. I, Peace, 8th ed. (Longman, Green and Co., 1955), pp. 675–676.

Article 30. Protection of the property of an alien subject to expulsion

Australia

In the experience of Australia there may be circumstances in which the draft article 30 requirement that States take appropriate measures to protect the property of an expelled alien would need to be limited on national security grounds, for example where the property has a connection to organized crime or the financing of terrorism.

Canada

Draft article 30 requires an expelling State to take "appropriate measures" to protect the property of an alien subject to expulsion. The commentary explains that the purpose of this provision is to provide a reasonable amount of time before or after expulsion to allow for the repatriation of property. The draft article itself should reflect this purpose.

Morocco

Protection of the property of an expelled alien is a logical extension of the expulsion process set out in the draft articles, and addresses the concern to uphold the vested rights of the expelled alien. Seen in terms of private property, expulsion should not violate the vested rights of expelled persons, including the right to receive income and other benefits owed to them. In Morocco, an expelled alien's property is fully protected from confiscation, subject to the provisions of domestic legislation, including Act No. 43-05 of 17 April 2007, as consolidated in its latest version of 17 February 2011, and other instruments adopted by Morocco (the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, and the Arab Convention on Combating Money-Laundering and the Financing of Terrorism).

United Kingdom

1. The United Kingdom has significant concerns with this draft article as currently drafted as it goes beyond the scope of those international obligations cited by the Commission in its commentary by referring to the protection of property by the State, which could be interpreted as going wider than the identified mischief, i.e. arbitrary deprivation of property.

2. The United Kingdom allows people to take property with them on removal from the country (although they may have to pay excess baggage charges) or to make arrangements with family or friends for the shipment or disposal of their property. The United Kingdom does not, and would not, take any other measures to protect the property of aliens being expelled from the country beyond those that apply generally to all persons.

3. The United Kingdom suggests that draft article 30 be redrafted, as proposed, to specifically reflect the prevention of arbitrary deprivation of property:

> "The expelling State shall take appropriate measures to ensure that aliens subject to expulsion are not arbitrarily deprived of their lawfully held personal property, and shall, in accordance with the law, allow the aliens to dispose freely of their property, even from abroad."

United States

The United States reads the term "appropriate" to afford States flexibility in the treatment of certain types of property, including property acquired by the alien through criminal means. In particular, as paragraph (4) of the commentary notes, the language

takes sufficient account of the interest that the expelling State may have in limiting or prohibiting, in accordance with its own laws, the free disposal of certain assets, particularly assets that were illegally acquired by the alien in question or that might be the proceeds of criminal or other unlawful activities.

Thus, in certain circumstances, the State is entitled to take possession of the property of an alien subject to expulsion for purposes of forfeiture. Moreover, the United States reads "appropriate measures" to mean that the State is not under an absolute obligation to protect the assets of an alien subject to expulsion.

Article 31. Responsibility of States in cases of unlawful expulsion

Austria

As Austria has already explained two years ago, the draft article seems redundant as, on the one hand, there can be no doubt that any breach of an international obligation entails international responsibility and, on the other hand, that any State can exercise the right of diplomatic protection in favour of its nationals. These obligations and rights derive from other regimes of international law and need not be repeated in this context. Additionally, it is not clear which States might be entitled to invoke the responsibility of the expelling State. At least the commentary should provide clarifications in this regard.

Republic of Korea

See the comment made above under general comments.

United Kingdom

To the extent that any of the draft articles represent existing international legal obligations, the United Kingdom agrees that a breach of those obligations could in principle entail the international responsibility of the expelling State.

United States

The United States has several drafting suggestions to improve the clarity of this provision. The words "the expelling State's" should be inserted before "international obligations"; the word "under" should be replaced by "as reflected in"; the word "under" should be inserted before "any"; the word "applicable" should be inserted before "rule"; and the words "the expelling" should be replaced by "that." As edited, the draft article would read:

> "The expulsion of an alien in violation of the expelling State's international obligations as reflected in the present draft articles or under any other applicable rule of international law entails the international responsibility of that State."

Article 32. Diplomatic protection

Austria

See the comment under draft article 31.

Germany

Germany proposes that draft article 32 be deleted. It seems sufficient to mention diplomatic protection in the commentary.

United Kingdom

The United Kingdom proposes that this draft article be reformulated as a without-prejudice article. The exercise of diplomatic protection in respect of an alien subject to expulsion would necessarily be dependent on an existing right of the relevant State to exercise diplomatic protection in respect of the subject.

United States

The United States would emphasize that, as suggested in the commentary, nothing in this draft article is intended to alter the normal application of the general rules on diplomatic protection under international law.

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

[Agenda item 4]

DOCUMENT A/CN.4/668 and Add.1[*,**]

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

[*Original: English*]
[*27 February and 11 March 2014*]

CONTENTS

[*] Incorporating document A/CN.4/668/Corr.1.

[**] The Special Rapporteur expresses his deep appreciation for assistance in the preparation of the present report to Giulio Bartolini (Assistant Professor of International Law, Department of Law, Roma Tre University), Federico Casolari (Assistant Professor of International Law, Department of Law, University of Bologna) and Emanuele Sommario (Assistant Professor of International Law, Sant'Anna School of Advanced Studies – Pisa), and to the "International Disaster Law Project", of which they are the local coordinators; to Lana Ulrich, J.D. candidate, George Washington University School of Law, Washington, D.C.; Yann Dehaudt-Delville, L.L.M. and Magistère de Droit, the Sorbonne Law School, Paris, and L.L.M. candidate, Fordham University School of Law, New York; and to Paul R. Walegur, The Hague.

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	Source
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid.*, vol. 1125, Nos. 17512–17513, pp. 3 and 609.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
International Convention on the simplification and harmonization of Customs procedures (Kyoto, 18 May 1973)	*Ibid.*, vol. 950, No. 13561, p. 269.
Protocol of Amendment to the International Convention on the simplification and harmonization of Customs procedures (Brussels, 26 June 1999)	*Ibid.*, vol. 2370, No. 13561, p. 27.
Convention on assistance in the case of a nuclear accident or radiological emergency (Vienna, 26 September 1986)	*Ibid.*, vol. 1457, No. 24643, p. 133.
International Convention on oil pollution preparedness, response and cooperation (London, 30 November 1990)	*Ibid.*, vol. 1891, No. 32194, p. 51.
Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances (London, 15 March 2000)	IMO, HNS-OPRC/CONF/11/Rev.1.
Agreement establishing the Caribbean Disaster Emergency Response Agency (Port of Spain, 26 February 1991)	United Nations, *Treaty Series*, vol. 2256, No. 40212, p. 53.
Inter-American Convention to Facilitate Disaster Assistance (Santiago, 7 June 1991)	OAS, *Official Documents*, OEA/Ser.A/49 (SEPF), p. 13.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	United Nations, *Treaty Series*, vol. 2105, No. 36605, p. 457.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	*Ibid.*, vol. 2051, No. 35457, p. 363.
Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (New York, 8 December 2005)	*Ibid.*, vol. 2689, No. A-35457, p. 59.
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 (Sochi, 15 April 1998)	Available from www.bsec-organization.org.
Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998)	United Nations, *Treaty Series*, vol. 2296, No. 40906, p. 5.
Framework Convention on civil defence assistance (Geneva, 22 May 2000)	*Ibid.*, vol. 2172, No. 38131, p. 213.
ASEAN Agreement on Disaster Management and Emergency Response (Vientiane, 26 July 2005)	*ASEAN Documents Series 2005*, p. 157.
Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007)	*Official Journal of the European Union*, C 306, 17 December 2007, p. 1.
SAARC Agreement on Rapid Response to Natural Disasters (Malé, 26 May 2011)	Available from www.ifrc.org/docs/idrl/N840EN.pdf.

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Chapter I

Consideration of the topic in 2013

1. At the sixty-fifth session of the International Law Commission, in 2013, the Special Rapporteur submitted his sixth report on the protection of persons in the event of disasters.[1] The report dealt with aspects of prevention, including disaster risk reduction, prevention as a principle of international law, and international cooperation on prevention. The report further provided an overview of relevant national policy and legislation. Proposals for the following two draft articles were made in the report: 5 *ter* (Cooperation for disaster risk reduction) and 16 (Duty to prevent).

2. The Commission considered the sixth report at its 3175th to 3180th meetings, from 8 to 16 July 2013,[2] and referred the two draft articles to the Drafting Committee.

3. The Drafting Committee, in the light of the discussion held by the Commission in plenary meeting, provisionally adopted the following two additional draft articles: 5 *ter* (Cooperation for disaster risk reduction) and 16 (Duty to reduce the risk of disasters).

4. The Commission adopted the report of the Drafting Committee on draft articles 5 *ter* and 16 at the 3187th meeting, held on 26 July 2013. Earlier in the session, at the 3162nd meeting, held on 10 May 2013, the Commission adopted the report of the Drafting Committee on draft articles 5 *bis* and 12 to 15, which had been considered and taken note of at the previous session in 2012.

5. At its 3190th and 3191st meetings, on 2 and 5 August 2013, the Commission adopted commentaries to draft articles 5 *bis*, 5 *ter* and 12 to 16. The seven draft articles, together with their respective commentaries, were reproduced in the Commission's report on the work of its sixty-fifth session.[3]

6. In November 2013, at the sixty-eighth session of the General Assembly, the Sixth Committee considered chapter VI of the Commission's annual report, devoted to the Special Rapporteur's sixth report and the debate of the Commission thereon, particular attention being given to draft articles 5 *ter* and 16 and their corresponding commentaries, as adopted by the Commission. A topical summary of the debate in the Sixth Committee has been prepared by the Secretariat at the request of the Assembly, in its resolution 68/112 of 16 December 2013.[4]

[1] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/662.

[2] The meetings mentioned in this chapter are contained in *ibid.*, vol. I.

[3] *Ibid.*, vol. II (Part Two), chap. VI, pp. 53 *et seq.*

[4] Topical summary of the discussion in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666), paras. 31–41.

Chapter II

Protection of relief personnel and their equipment and goods

A. Introduction

7. International humanitarian missions are confronted with significant risks for the personnel involved in such operations. Statistics testify to a recurrence of episodes in the form of deliberate attacks, violence and theft, to the detriment of the personnel and assets belonging to these missions, as shown notably by the periodic reports of the Secretary-General on the safety and security of humanitarian personnel and protection of United Nations personnel[5] as well as by other sources.[6] This phenomenon is most common in cases where international actors have to operate in situations of armed conflict or in States affected by a general deterioration of security conditions, owing mainly to political and economic causes.

[5] See, for example, document A/68/489.

[6] See data available from https://aidworkersecurity.org/. See also resolution 5, entitled "Health care in danger: respecting and protecting health care", adopted at the 31st International Conference of Red Cross and Red Crescent, 2011.

8. In the light of draft article 3 and its commentary, the extent of application of the present set of draft articles might appear rather limited as regards the aforementioned scenarios, since the draft articles are not concerned with political or economic crises or armed conflict as events constituting a disaster *per se*.[7] Draft article 3 focuses on the existence of a calamitous event or series of events, whether natural or human-made, leading to one or more of three possible results: widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

9. Nonetheless, even in such situations, the possibility that relief personnel and their equipment and goods will face risks is real and cannot, therefore, be excluded. In fact, some past events have highlighted the relevance of security concerns in those scenarios as well. A disaster can lead to a temporary breakdown in law and order in the affected State, thus raising the security threats posed for disaster relief personnel. Besides, the considerable value of equipment and goods belonging to international actors engaged in relief operations represents a tempting target for common criminals. Similarly, in the often chaotic situations arising from such events, some individuals affected by disasters might be moved to arbitrarily take control of relief supplies, diverting them from the areas and primary needs identified by the competent authorities of the affected State with a view to guaranteeing a response in line with the principles recognized in draft article 6.

10. The situations thus envisaged can create additional hurdles for the efficient delivery of humanitarian aid and, as a result, undermine the efforts carried out by the affected State and international actors to provide support and recovery assistance for the population which has fallen victim to a calamitous event. Violence and attacks against civilian and military personnel providing external assistance, while detrimental to equipment and goods related to the international relief operation, have an immediate harmful impact on the victims of a specific disaster, thereby reducing the likelihood that their human rights (e.g. the right to food, health, water, etc.) would be properly respected. From a long-term perspective, there is also a negative impact insofar as the result may be a reduction of the capacity and willingness of international actors to provide support in situations of disasters, thus weakening compliance with the duty to cooperate enshrined in draft article 5.

11. Besides, the specific duty to ensure the protection of personnel, equipment and goods attached to relief operations does not overlap with the parallel though distinct obligation embodied in draft article 14, namely, the facilitation of external assistance. According to draft article 14, the affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance, and shall insure that its relevant legislation and regulations are readily accessible.

12. Nevertheless, even if the guarantee of protection towards civilian and military relief personnel as well as their goods and equipment might, broadly speaking, be assimilated to facilitation in favour of external actors, its specific nature and scope make it differ from the measures envisaged in draft article 14. As stated in the corresponding commentary, the purpose of draft article 14 "is to ensure that national law accommodates the provision of prompt and effective assistance".[8] The primary objective of this provision is, thus, to compel States to take the necessary and appropriate measures within their national law, which may include, *inter alia*, legislative, executive and administrative measures, to enable them to meet the legal challenges posed by incoming external assistance in the event of a disaster or in cases where they act as transit States for international relief operations. In this connection, a non-exhaustive list of the areas covered by the measures to be taken by States is included in the text of draft article 14 and its commentary (namely (*a*) as far as relief personnel is concerned: privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and (*b*) regarding goods and equipment: customs requirements and tariffs, taxation, transport and disposal thereof), and States can certainly benefit from best practices developed in these areas to date.[9]

13. When considering the question of protecting relief personnel, equipment and goods, both the specific focus of concern and the kind of measures to be taken by the affected State can be differentiated. In such an instance, States are required to adopt a series of mainly affirmative measures aiming at achieving a specific goal: the safety and security of those individuals whose humanitarian actions constitute one of the fundamental pillars of international disaster relief. The main concern is not just for the affected State to guarantee the existence of a domestic legal order facilitating external assistance, but for that State to endeavour to establish the appropriate security conditions required for the conduct of the relief operation, thus making it possible to guarantee the protection of personnel, equipment and goods.

B. Overview of legal provisions included in multilateral and bilateral treaties and soft-law instruments concerning the protection of disaster relief personnel and their equipment and goods

14. The necessity to maintain as distinct the obligations pertaining to the facilitation of external assistance, on the one hand, and those concerning the protection of relief personnel, equipment and goods, on the other, is clearly reflected in international practice. As evidenced in universal, regional and bilateral treaties as well as in soft-law instruments, there is a definite trend in favour of reflecting those obligations in a series of separate provisions. An overview of relevant international instruments makes it possible to better appreciate the widespread recognition of the need for a separate set of rules regarding this duty

[7] See *Yearbook … 2010*, vol. II (Part Two), p. 187, para. (1) of the commentary to draft article 3. For the text of the draft articles with the commentaries approved by the Commission on first reading, see *Yearbook … 2014*, vol. II (Part Two), para. 56.

[8] *Yearbook … 2013*, vol. II (Part Two), p. 57, para. (1) of the commentary to draft article 14.

[9] See *Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (with commentary)*, Geneva, IFRC/OCHA/Interparliamentary Union, 2013, available from www.ifrc.org/docs/IDRL/MODEL%20ACT%20ENGLISH.pdf.

to protect and, consequently, the appropriateness of considering this aspect in the framework of the work carried out by the Commission on the present topic.

1. Universal treaties

15. With regard to multilateral treaties, the main conventions dealing with natural or human-made disasters have constantly included a specific reference to this additional obligation. A first mention to the duty to protect can be found in article 3 (*b*) of the Convention on assistance in the case of a nuclear accident or radiological emergency, which disposes that "[t]he requesting Party … shall ensure the protection of personnel, equipment and materials brought into its territory by, or on behalf of, the assisting Party for such a purpose." Additional provisions of the Convention detail privileges, immunities and facilities to be granted for the performance of the assistance functions.[10]

16. Subsequent universal treaties include similar provisions. Some instruments adopt a wording identical to that of article 3 (*b*) of the Convention on assistance in the case of a nuclear accident or radiological emergency, for instance annex X, paragraph 2, of the Convention on the Transboundary Effects of Industrial Accidents, or article 5, paragraph 3, of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, according to which, "[t]he requesting State Party shall ensure the protection of personnel, equipment and materials brought into its territory pursuant to this Convention". Similar terms have also been used in article 4, paragraph 5, of the Framework Convention on civil defence assistance, which, in article 4 (*a*), requires that in case of disaster "The Beneficiary State … shall provide protection for personnel and for property belonging to the Civil Defence Unit of the Supporting State". Finally, mention must also be made of the Convention on the Safety of United Nations and Associated Personnel and the Optional Protocol thereto, which could extend its application to operations delivering emergency humanitarian assistance, unless States parties have opted out in relation to missions conducted for the sole purpose of responding to a natural disaster.[11] Article 7, paragraph 2, of the Convention on the Safety of United Nations and Associated Personnel provides that "States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9". Moreover, in case of complex emergencies, provisions formulated in the context of international humanitarian law could be of relevance in this respect.[12]

2. Regional treaties

17. Regional multilateral treaties include specific provisions to the same effect. In those cases it is possible to also recognize the influence of article 3 (*b*) of the Convention on assistance in the case of a nuclear accident or radiological emergency in the drafting of subsequent regional instruments. Several of those instruments tend to simply reproduce its content. In terms that are very close to those employed in article 3 (*b*), those treaty provisions request the affected State to "ensure the protection of personnel, equipment and materials" brought into its territory for the purpose of providing external assistance. In this regard, mention can be made of the substantially identical provisions included in article 16, paragraph 5, of the Agreement establishing the Caribbean Disaster Emergency Response Agency, which reads: "The requesting State shall ensure the protection of personnel, equipment and materials brought into its territory for the purpose of rendering assistance in the event of a disaster"; article 12, paragraph 2, of the ASEAN Agreement on Disaster Management and Emergency Response, reading: "The Requesting or Receiving Party … shall also ensure the protection of personnel, equipment and materials brought into its territory by or on behalf of the Assisting Entity for such purposes"; and article IX, paragraph 2, of the SAARC Agreement on Rapid Response to Natural Disasters, according to which: "The Requesting Party shall provide, to the extent possible, local facilities and services for the proper and effective administration of the assistance. It shall also ensure the protection of personnel, equipment and materials brought into its territory by or on behalf of the Assisting Party for such purposes."

18. Provisions having a similar aim have been included in other regional treaties such as the Inter-American Convention to Facilitate Disaster Assistance, which, in article IV, paragraph (*c*), directs the assisted State to "make its best efforts to protect personnel, equipment, and materials brought into its territory by or on behalf of the assisting State for such purpose" and in 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, article 8, paragraph 4, of which provides that the "Requesting Party shall ensure security" for the members of the assistance teams.

3. Bilateral treaties

19. A large number of bilateral treaties concerning cooperation in the area of prevention and response to natural and man-made disasters contain very similar provisions, emphasizing the obligation to protect on the part of the States affected by a disaster. Common formulas have been used in most of those instruments. Thus, many such treaties include provisions according to which "[t]he authorities of the Requesting State shall … extend protection and assistance to the emergency teams or individuals dispatched to provide assistance from the Assisting State".[13]

[10] See, for example, arts. 8 and 9.

[11] See paras. 47–49 below.

[12] Several international humanitarian law provisions could be relevant in this regard, such as articles 70, para. 4, and 71, para. 2, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I); article 59 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War. See also Rules 31 and 32 in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, p. 105–111.

[13] See Agreement between the Republic of Austria and the Republic of Albania on mutual assistance in the case of disasters or serious accidents (Vienna, 27 January 2010), United Nations, *Treaty Series*,

(*Continued on next page.*)

Mention can also be made of provisions requiring that "[t]he Contracting Party requesting assistance shall ensure the safety of the relief teams and individual experts"[14] or, generally, referring to the necessity for the State affected by a disaster to ensure "security"[15] or "protection"[16] in favour of emergency teams or, alternatively, to "provide for their safety"[17] or to "ensure the security conditions needed for the conduct of their mission".[18]

20. Unlike multilateral treaties, whether universal or regional, referred to in paragraphs 15 to 18 above, bilateral treaties sometimes do not specifically refer to equipment and goods. However, it should be emphasized that equipment and goods related to international disaster relief operations are included within the sphere of application of the corresponding provisions. This conclusion is confirmed by an analysis of the articles dealing with definitions and terms of art used in such bilateral treaties. In this context, mention of "emergency teams" or "relief teams" is clearly intended to cover relevant relief equipment and goods. For example, article 2 of the Agreement between the Republic of Austria and the Republic of Albania on mutual assistance in the case of disasters or serious accidents provides that: "'Emergency teams' means specialised civilian or military units with appropriate equipment and emergency aid designated to provide assistance by the Assisting State."[19] This definition, reproduced in comparable terms in other treaties, implies that references made to the protection to be granted to the individual members of a relief mission encompass as well the equipment and goods attached to such mission. Relief personnel and their equipment and goods are inextricably linked, with the material elements playing an indisputable role in helping to guarantee a prompt and effective recovery for victims.

4. Other instruments

21. Finally, references to this duty to protect are also included in non-binding instruments. For example, the General Assembly, in its resolution 57/150 of 16 December 2002, "urges all States to undertake measures to ensure the safety and security of international urban search and rescue teams operating in their territory", thus reaffirming the comparable provision already included in the UNITAR *Model Rules for Disaster Relief Operations* of 1982, according to which: "The receiving State shall take all necessary measures to ensure the security and safety of the designated relief personnel and of all premises, facilities, means of transport and equipment used in connection with relief activities".[20]

22. Other non-binding instruments also acknowledge in concrete terms a similar, autonomous sphere of action of affected States. In this regard, mention can be made of Guideline 22 (Security) of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance:

> Affected States should take appropriate measures to address the safety and security of disaster relief and initial recovery personnel of assisting States and eligible assisting humanitarian organizations and of the premises, facilities, means of transport, equipment and goods used in connection with their disaster relief or initial recovery assistance.[21]

23. The Institute of International Law has likewise recognized the principle as one that is strictly related to the legal framework pertaining to disaster situations, for instance in article VII, paragraph 3, of its resolution on humanitarian assistance of 2003, according to which "[t]he affected

(*Footnote 13 continued.*)

vol. 2771, No. 48807, p. 307, at p. 327, art. 8, para. 3; Agreement between the Republic of Austria and the Swiss Confederation on the reciprocal assistance in cases of catastrophes or severe accidents (Vienna, 22 March 2000), *ibid.*, vol. 2176, No. 38307, p. 275, at p. 286, art. 9, para. 3; Treaty between the Republic of Austria and the Czech Republic on mutual assistance in the event of disasters or serious accidents (Vienna, 14 December 1998), *ibid.*, vol. 2137, No. 37267, p. 207, at p. 221, art. 8, para. 3; Agreement between Austria and Liechtenstein on mutual assistance in the event of disasters or serious accidents (Vienna, 23 September 1994), *ibid.*, vol. 1901, No. 32390, p. 113, at p. 122, art. 9, para. 3; Agreement between Austria and the Federal Republic of Germany concerning mutual assistance in the event of disasters or serious accidents (Salzburg, 23 December 1988), *ibid.*, vol. 1696, No. 29224, p. 61, at p. 69, art. 9, para. 3; Agreement between France and Switzerland on mutual assistance in the event of disasters or major accidents (Bern, 14 January 1987), *ibid.*, vol. 1541, No. 26743, p. 285, at p. 296, art. 9, para. 4; Convention between Denmark and the Federal Republic of Germany on mutual assistance in the event of disasters or serious accidents (Tønder, 16 May 1985), *ibid.*, vol. 1523, No. 26375, p. 95, at p. 112, art. 7, para. 3; Convention between the Netherlands and Belgium on mutual assistance in combating disasters and accidents (The Hague, 14 November 1984), *ibid.*, vol. 1526, No. 26466, p. 27, at p. 43, art. 5, para. 3; Convention between France and Belgium on mutual assistance in the event of disasters or serious accidents (Paris, 21 April 1981), *ibid.*, vol. 1437, No. 24347, p. 33, at p. 49, art. 7, para. 3; and Convention between France and the Federal Republic of Germany on mutual assistance in the event of disasters or serious accidents (Paris, 3 February 1977), *ibid.*, vol. 1214, No. 19561, p. 67, at pp. 82–83, art. 7, para. 3.

[14] Agreement between the Government of the Republic of Latvia and the Government of the Republic of Hungary on cooperation and mutual assistance in the event of disasters and other large-scale accidents (Riga, 19 November 2003), *ibid.*, vol. 2313, No. 41334, p. 759, at p. 762, art. 5, para. 5.

[15] Agreement between the Government of the Republic of Latvia and the Cabinet of Ministers of Ukraine on the cooperation in the field of prevention of disasters and elimination of their consequences (Riga, 27 April 2006), *ibid.*, vol. 2619, No. 46591, p. 95, at p. 99, art. 6, para. 4; and Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on cooperation in the field of prevention and response to natural and man-made disasters (Athens, 21 February 2000), art. 8.

[16] Agreement between the Republic of Austria and the Hashemite Kingdom of Jordan on Mutual Assistance in the Case of Disaster or Serious Accidents (Amman, 13 March 2004), art. 8, para. 3, *Federal Law Gazette for the Republic of Austria* (BGBI), vol. III, No. 119, 12 July 2005; Agreement between France and the Russian Federation on cooperation in the field of civil protection, prevention and management of emergency situations (Moscow, 18 October 1999), art. 8, *Journal officiel de la République française*, No. 90, 15 April 2001, pp. 5909 *et seq.*; and Agreement between Spain and Morocco on technical cooperation and mutual assistance in the field of civil defence (Rabat, 21 January 1987), United Nations, *Treaty Series*, vol. 1717, No. 29861, p. 143.

[17] Treaty between the Federal Republic of Germany and the Czech Republic concerning mutual assistance in the event of disasters or serious accidents, of 19 September 2000 (Berlin, 19 September 2000), *ibid.*, vol. 2292, No. 40860, p. 291, at p. 309, art. 8, para. 3.

[18] 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), *ibid.*, vol. 2153, No. 37586, p. 57, at p. 83, art. 9, para. 3.

[19] See footnote 13 above.

[20] UNITAR, *Model Rules for Disaster Relief Operations* (Mohamed El Baradei and others), Policy and Efficacy Studies, No. 8 (United Nations publication, Sales No. E.82.XV.PE/8), Model Rule 17, p. 44.

[21] IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2008), p. 19.

States shall … ensure … the protection of personnel, goods and services provided."[22]

24. The preceding survey justifies the conclusion that international practice confirms both the relevance and the autonomous character of the obligation of affected States to protect relief personnel and their equipment and goods.

C. Categories of relevant relief personnel and their equipment and goods

25. Some basic limitations are explicitly incorporated in the relevant treaties, for example, the requirement that relief personnel, equipment and goods will be considered as such only when they are so designated by the States parties to the treaty. However, provisions found in several of the above-mentioned treaties do not specifically include or exclude some other categories of humanitarian personnel who may become part of the relief effort coordinated by the affected State. Consequently, different groups of humanitarian personnel may be characterized as relevant in this context, such as civilian and military State personnel; the staff of international organizations; Red Cross and Red Crescent Movement personnel; and personnel of non-governmental organizations (NGOs), engaged as part of the relief assistance activities led by the State concerned.

26. The absence of specific exclusions cannot be interpreted as implying that any person or entity present in the territory of the affected State, with the aim of providing support in the relief efforts, could automatically qualify as being entitled to coverage under the provisions affording protection. Treaties constantly reaffirm a basic tenet of humanitarian assistance in the event of disasters, namely, the requirement to secure the consent of the affected State for the provision of external assistance and the primary role of that State in the direction, coordination and supervision of assistance and relief activities undertaken both by assisting States and non-State actors, including international organizations.

27. In that context, it is significant to note that a good number of the provisions concerning the duty to protect have been integrated, as autonomous paragraphs, within articles dealing with the coordination and management role of the affected State with regard to external assistance. For instance, the ASEAN Agreement on Disaster Management and Emergency Response, apart from reaffirming in its article 11, paragraph 2, that assistance can only be deployed at the request, and with the consent, of the Requesting Party, disposes in its article 12, paragraph 1, for the efficient *modus operandi* of the international relief operation. To that effect it requires, on the one hand, the receiving State to exercise the overall direction and supervision over assistance provided within its territory and, on the other hand, the assisting entity to appoint, in consultation with the affected State, a head of the assistance operation exercising immediate supervision over the foreign personnel and their equipment. In the immediately following article 12, paragraph 2, the ASEAN Agreement provides that the requesting State shall ensure the protection of personnel, equipment and materials brought into its territory by or on behalf of the "Assisting Entity", a broad term of art intended to include States, international organizations, and any other entities or persons that offer and/or render assistance to a State party to the ASEAN Agreement.[23] Similarly, the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations emphasizes that no telecommunication assistance shall be provided without the consent of the requesting Party, and the right of that State to direct, control, coordinate and supervise telecommunication assistance, while accepting the United Nations Emergency Relief Coordinator to be the operation coordinator under the Convention.[24] At the same time, the Tampere Convention recognizes the right of the affected State to request telecommunication assistance directly from intergovernmental organizations and non-State entities, a term of art defined in its article 1, paragraph 10, as including NGOs and the Red Cross and Red Crescent Movement. Consequently, the application of article 5, paragraph 3, of the Tampere Convention, the provision dealing with the protection of personnel, equipment and goods involved in the international mission, may extend to cover all actors involved in the provision of telecommunication resources for disaster mitigation and relief operations.

28. A similar approach is reflected in a series of multilateral international conventions framed within a similar structure. In particular, they stress the requirement for external actors to obtain the consent of the affected State in order to be able to provide assistance, as well as the primary coordination role of that State over international actors providing support and, finally, the duty of the affected State to ensure protection for disaster relief personnel and their equipment and goods. Reference can be made in this connection, for example, to articles II and IV of the Inter-American Convention to Facilitate Disaster Assistance, articles 2 and 4 of the Convention on assistance in the case of a nuclear accident or radiological emergency, and articles III and IX of the SAARC Agreement on Rapid Response to Natural Disasters.

29. The goal of the obligation of protection embodied in the above-mentioned international treaties is to induce States to act with due diligence, making their best efforts to guarantee the safety and security of those humanitarian actors whose support has been accepted and is supervised by the governmental authorities of the affected State. As will be further discussed below, such a comprehensive approach is relevant for the proper fulfilment of the obligation. The local authorities are, in fact, best placed to evaluate the security risks that might be incurred by international relief personnel, to cooperate with them in dealing with safety issues and to coordinate the activities of external actors, taking into account those concerns.

[22] Resolution on humanitarian assistance, adopted by the Institute of International Law at its Bruges Session, 2 September 2003, *Yearbook of the Institute of International Law,* vol. 70, Part I (2002–2003), pp. 399–576, and Part II, pp. 263–277, at p. 275, art. VII, para. 3. See also para. 20 (*c*) of the Draft International Guidelines for Humanitarian Assistance Operations, by Peter MacAlister-Smith (Heidelberg, Max Planck Institute for Comparative Public Law and International Law, 1991).

[23] Art. 1, para. 1, "'Assisting Entity' means a State, international organisation, and any other entity or person that offers and/or renders assistance to a Receiving Party or a Requesting Party in the event of a disaster emergency".

[24] Arts. 2 and 4.

Moreover, they are the ones who can play the inherent primary role of providing a proper safety framework for the performance of relief activities.

30. The approach described above is in line with the set of draft articles on this topic, as adopted thus far, which are premised on the core international law principles of sovereignty and non-intervention. Mention can be made in this regard of draft article 11, which makes the provision of external assistance contingent upon a consent regime of the affected State. Mention can also be made of draft article 9, stressing that the affected State has the primary role in the direction, control, coordination and supervision of relief activities and assistance, in order to fulfil its duty to protect persons affected by disasters and provide relief assistance, in line with the international law principles and rules codified and developed by the Commission in the present draft. Seen from that perspective, therefore, the protection of disaster relief personnel, equipment and goods represents an additional key element to enable the affected State to fully comply with its primary obligation as prescribed by draft article 9.

31. To better identify, for the purposes of the current project, the scope of the duty to protect, attention has to be paid also to another of the provisions already adopted, notably draft article 12. This article makes reference to a series of actors (States, the United Nations, other intergovernmental organizations and relevant NGOs) which can play a complementary role in the response to disasters, offering their assistance by means of some of the forms of cooperation envisaged in draft article 5 *bis*. The action thus taken could result in making available relief personnel, relief equipment and supplies and scientific, medical and technical resources.

32. Accordingly, once the affected State has accepted offers of assistance submitted by the relevant external actors and is satisfied that those external entities, whether States or other, are capable of supporting their own relief effort, it shall endeavour to guarantee the protection of the relief personnel, equipment and goods involved. Consequently, in the light of draft article 12, the relief personnel that would benefit from the insertion in the present set of draft articles of an express provision guaranteeing their protection may belong to either the civilian and military personnel of a State, or the staff of international organizations, or Red Cross and Red Crescent Movement personnel, or personnel attached to relevant NGOs.

33. The protection of goods and equipment belonging to those entities, which are to be used in connection with their participation in disaster relief and initial recovery assistance, is also relevant in this context. The term "equipment and materials", which is the term usually referred to in the relevant texts, should be interpreted in a broad manner as comprising those items that are necessary for the success of the operation at hand. In common usage, "equipment" describes the objects needed by relief personnel to enable them to effectively discharge their assistance function, for example, radios and vehicles, while the "materials", or other such term, denotes supplies intended for distribution to the victims of a disaster, to assist in their relief and initial recovery, as goods of prime necessity. For example, article 2 of the Agreement between the Republic of Austria and the Hashemite Kingdom of Jordan on Mutual Assistance in the Case of Disaster or Serious Accidents[25] disposes that "'[e]quipment' shall refer to materials, particularly technical facilities, means of transport and rescue dogs required for the task, and to goods used for own needs … 'Relief items' shall refer to goods intended for delivery free-of-charge to the affected people living in the requesting State." Similarly, article 2 of the Agreement between the Government of the Republic of Latvia and the Cabinet of Ministers of Ukraine on the cooperation in the field of prevention of disasters and elimination of their consequences,[26] provides that "[f]or the purpose of the present Agreement, a term: … (6) 'equipment' means materials, technical and transport facilities, medicines and medical equipment and individual kits of the members of the assistance team and/or experts; (7) 'goods of assistance' means material resources allocated for free distribution among the population affected by the disasters". A reference to these objects is already reflected in subparagraph (*b*) of draft article 14, paragraph 1, of the present draft, which mentions "goods and equipment" involved in the assistance operation. The term has been described in the respective commentary as encompassing "any and all supplies, tools, machines, foodstuffs, medicines, and other objects necessary for relief operations".[27] Logically, the objects thus included in the non-exhaustive list given in draft article 14, paragraph 1 (*b*), could likewise be part of the field of application of an eventual draft article regarding the duty to protect relief personnel, equipment and goods. In order to maintain uniformity of language in the present draft, the Special Rapporteur has utilized throughout the term "goods and equipment", rather than the most common term "materials and equipment", employed in international treaties and documents dealing with this subject.

34. Even though standard treaty provisions dealing with this issue make reference to "equipment and materials brought into" the territory of the affected State, it has to be acknowledged that humanitarian actors may need to have recourse to the local market for the procurement of objects to be used in relief activities. Consequently, independently from their origin, such equipment and goods also require the protection of the affected State.

D. Measures to be adopted by affected States to fulfil their duty to protect relief personnel and their equipment and goods

35. Measures to be adopted by affected States to fulfil their duty to protect relief personnel, and their equipment and goods, may differ in content and can imply different forms of State conduct.

36. A preliminary requirement for States affected by a disaster is to respect the negative aspect of such an obligation, so as to prevent their State organs from being directly involved in pursuing detrimental activities with regard to relief personnel and their equipment and goods. In this sense, the obligation is one of result, with a clear content,

[25] See footnote 16 above.

[26] See footnote 15 above, at p. 99.

[27] See *Yearbook … 2013*, vol. II (Part Two), p. 58, para. (5) of the commentary to draft article 14.

although its fulfilment may be rather hypothetical, as it is to be expected that States affected by a disaster will act positively on their commitment to guarantee the safety of the international actors they have allowed to engage in relief activities in their territory.

37. The fulfilment of the obligation through the positive action to be inferred from the duty to protect raises rather more complex issues. In particular, security risks for disaster relief personnel can be posed mainly by the activities of non-State actors aiming at benefiting from the volatile security conditions created by disasters, in order to obtain illicit gains from criminal activities undertaken against disaster relief personnel and their goods and equipment, or by deliberately engaging in harmful acts directed against them owing to the very fact that they form part of international missions.

38. In order to avoid detrimental activities of that kind carried out by individuals in their private capacity, affected States are required to show due diligence in taking the necessary preventive measures to endeavour to attain the objective sought by the international obligation. The duty to protect disaster relief personnel, goods and equipment can, therefore, be qualified as an obligation of conduct and not of result, thereby requiring States to act in a reasonably cautious and diligent manner to guarantee protection by attempting to avoid harmful events.

39. The characterization of this obligation as an obligation of conduct is confirmed by international instruments dealing with the duty to protect disaster relief personnel and their equipment and goods. Mention can be made in this connection of article IV (*c*) of the Inter-American Convention to Facilitate Disaster Assistance, which requires the assisted State to "make its best efforts to protect personnel, equipment, and materials brought into its territory by or on behalf of the assisting State for such purpose". Similarly, the Convention on the Safety of United Nations and Associated Personnel provides, in article 7, paragraph 2, that "States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory" from a series of crimes envisaged in the Convention. Additional references may be found in bilateral treaties, such as article 2, paragraph 3, of the Agreement between Switzerland and the Russian Federation on cooperation in the field of humanitarian rapid response to natural and man-made disasters and international development cooperation,[28] according to which, "[i]n case of need, the Parties shall give all possible support and due protection" to relief personnel and their goods and equipment. Other documents clearly emphasize the character of such provisions as obligations of conduct. For example, according to rule 17 of the UNITAR Model Rules, "[t]he receiving State shall take all necessary measures to ensure the security and safety of the designated relief personnel and of all premises, facilities, means of transport and equipment used in connection with relief activities." In a similar vein, rule 22 of the IFRC Guidelines makes reference to "appropriate measures to address the safety and security of disaster relief and initial recovery personnel … and facilities, means of transport, equipment and goods used in connection with their disaster relief or initial recovery assistance".[29]

40. Obligations of conduct require States to endeavour to attain the objective of the relevant obligation rather than succeed in achieving it. As stated by the International Court of Justice in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* when qualifying the duty to prevent genocide as an obligation of conduct,

> a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved.[30]

41. Measures to be taken by States in the realization of their best efforts to achieve the expected objective are, consequently, context-dependent. According to the International Court of Justice, "[t]he content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented."[31] Obligations of conduct leave States with a margin of appreciation on the measures to be adopted, as they are usually lacking in the precise indication of the means to achieve the result aimed at, taking into account the relevant circumstances. Thus, with regard to positive obligations related to the right to life, the European Court of Human Rights has held that

> an impossible or disproportionate 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 …; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres … This consideration must be afforded even greater weight in the sphere of emergency relief.[32]

Similarly, the International Court of Justice, in order to assess whether Nicaragua had breached its due diligence obligation to prevent the traffic through its territory of arms intended for El Salvador, took into account several circumstances, such as the limited means at the disposal of the Government, the intrinsic character of clandestine private illegal activities taking place in its territory and geographical obstacles present in the relevant areas.[33] These obligations may also assume a dynamic character according to the evolving situation, as has been affirmed by the Commission in respect of other areas of

[28] Agreement between the Swiss Agency for Development and Cooperation and the Ministry of the Russian Federation for Civil Defence, Emergencies and Elimination of Consequences of Natural Disasters on cooperation in the field of humanitarian rapid response to natural and man-made disasters and international development cooperation (Bern, 21 September 2009), United Nations, *Treaty Series*, vol. 2641, No. 47040, p. 89, at p. 91.

[29] See footnote 21 above.

[30] *Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, I.C.J. Reports 2007*, p. 43, at p. 221, para. 430.

[31] *Ibid*., p. 220, para. 429.

[32] *Budayeva and Others v. Russia*, application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECHR 2008-II, p. 290, para. 135.

[33] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986*, p. 14, at pp. 73–75, paras. 155–157.

international law. For instance, in the commentary to the draft articles on prevention of transboundary harm from hazardous activities, 2001, the Commission stated that

> [w]hat would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future.[34]

With regard to disaster situations, a series of circumstances might be relevant to evaluate the appropriateness of the measures to be taken in the implementation of the duty to protect, such as difficulties for the State to perform its regular activities owing to the chaotic situation created by the disaster and the attitude and behaviour of the humanitarian actors involved in relief operations, as well as circumstances prevailing at the time that affect the relevant area of operations.

42. At the same time, it must be emphasized that security risks should be evaluated bearing in mind the comprehensive character of relief missions and the need to guarantee to victims an adequate and effective response to a disaster. As States are required to comply only with an obligation of conduct and not of result, the duty to protect should not be misinterpreted as entailing the creation of unreasonable and disproportionate hurdles for the relief activities carried out by relevant humanitarian actors. In this regard, attention must be paid to draft article 14 of the present draft, requiring States to adopt the measures necessary to facilitate the freedom of movement of relief personnel. As rightly acknowledged by the Commission in its commentary thereto,

> [a]ffected States can restrict access to certain sensitive areas while still allowing for freedom within the area concerned. Unnecessary restriction of movement of relief personnel inhibits workers' ability to provide flexible assistance.[35]

43. Moreover, concerning the potential measures that might be adopted in this regard, it needs emphasizing that the possibility of using armed escorts in disaster relief operations should be evaluated according to the best practices developed in this area by the main humanitarian operational actors. In that respect, it merits paying particular attention to the Inter-Agency Standing Committee Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys of 2013, which are designated to assist relevant actors in making what is a very sensitive decision, with full consideration for humanitarian principles and the security of humanitarian operations. As explained under chapter II, "General Rule" in that document:

> As a general rule, humanitarian convoys will *not* use armed escorts.
>
> However, there may be exceptional circumstances in which the use of armed escorts is necessary as a "last resort" to enable humanitarian action. Before deciding on such exceptions, the consequences and possible alternatives to the use of armed escorts shall be considered.[36]

This conclusion is even more warranted in view of the fact that security concerns prevailing in disaster situations are generally far less serious than those present in situations involving the provision of assistance in armed conflicts or other such high-risk scenarios.

44. In this context, it must be noted that a series of treaties dealing with assistance in the case of disaster tend to expressly exclude the possibility that foreign military personnel participating in the disaster relief effort provide security for other personnel involved in such activities, as this is a duty reserved for the military and police forces of the affected State.[37] This limitation can also be inferred from other treaty provisions requiring foreign military personnel serving in relief missions to act unarmed.[38] However, in the presence of the express consent genuinely manifested by the affected State, particularly when complying with a specific mandate given by competent international organs such as the Security Council, the possibility that actors different from the host government military and police force could also guarantee such protection to disaster relief personnel and their equipment and goods cannot be excluded for the purposes of the present set of draft articles. Consequently, this latter option can also be foreseen, provided that it accords with the principles and rules codified and developed to date.

45. Moreover, international humanitarian actors can themselves contribute to the realization of the goal sought, by adopting a series of mitigation measures geared to reducing their vulnerability to security threats. The duty of care by the relevant humanitarian actors towards their personnel deployed in dangerous international missions is clearly part of the general duties incumbent upon them. Suffice it to recall the position already adopted by the International Court of Justice in 1949 when it affirmed that

> the Organization may find it necessary … to entrust its agents with important missions to be performed in disturbed parts of the world … Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection.[39]

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[34] *Yearbook … 2001*, vol. II (Part Two), p. 154, para. (11) of the commentary to draft article 3.

[35] See *Yearbook … 2013*, vol. II (Part Two), pp. 57–58, para. (4) of the commentary to draft article 14.

[36] IASC Non-Binding Guidelines on the Use of Armed Escorts for Humanitarian Convoys, 27 February 2013, p. 3, available from https://docs.unocha.org/sites/dms/Documents/Armed%20Escort%20Guidelines%20-%20Final.pdf.

[37] See the Agreement between the Republic of Argentina and the Republic of Peru on Cooperation in relation to Disasters (Buenos Aires, 11 June 2004), *Boletín Oficial de la República Argentina*, 25 August 2006, No. 30976, p. 5, art. 7, para. 2. See also the Agreement between the Argentine Republic and the Republic of Chile concerning cooperation in the event of disasters (Santiago, 8 August 1997), United Nations, *Treaty Series*, vol. 2776, No. 48880, p. 185, at p. 196, art. 7, para. 3.

[38] See article 12, para. 2, of the ASEAN Agreement on Disaster Management and Emergency Response; art. IX, para. 2, of the SAARC Agreement on Rapid Response to Natural Disasters. See also Council of Europe, Recommendation Rec(2002)3 of the Committee of Ministers to member States on transfrontier co-operation in civil protection and mutual assistance in the event of natural and technological disasters occurring in frontier areas, appendix, para. 13 ("should the emergency services include military or paramilitary units, the sending State should take care they intervene unarmed, subject to specific agreements with the requesting State, especially as regards the protection of the personnel and equipment dispatched"); OCHA, Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, as revised November 2007 ("Oslo Guidelines"), para. 29 ("In principle, foreign military and civil defence personnel deploying on disaster relief missions will do so unarmed and in national uniforms. The overall responsibility for providing adequate security for authorized foreign MCDA support remains with the Affected State").

[39] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 183.

Within the United Nations system, the consequential measures are to be taken primarily by the Secretary-General, as indicated in the United Nations Staff Regulations.[40] Under Regulation 1.2 (*c*),

> [s]taff members are subject to the authority of the Secretary-General … In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

Such an empowerment has been confirmed by several resolutions of the General Assembly on the safety and security of humanitarian personnel and the protection of United Nations personnel. For example, in its most recent resolution on the subject, the General Assembly requested the Secretary-General, among other things,

> to continue to take the necessary measures to ensure that United Nations and other personnel … are properly informed about and operate in conformity with the minimum operating security standards and relevant codes of conduct and are properly informed about the conditions under which they are called upon to operate and the standards that they are required to meet … and that adequate training in security … is provided so as to enhance their security and effectiveness in accomplishing their functions, and reaffirms the necessity for all other humanitarian organizations to provide their personnel with similar support.[41]

This duty of care, within the specific context of disaster relief operations, has also been reaffirmed by the IFRC Guidelines, of which Guideline 22 states, "Assisting States and assisting humanitarian organizations should also take appropriate steps in their own planning and operations to mitigate security risks".[42]

46. In spite of any preventive measures that may be adopted by the relevant actors, harmful acts can still be committed against relief personnel, their equipment and goods. These unlawful activities should be prosecuted by the affected State exercising its inherent competence to repress crimes committed within its jurisdiction. As stated in the resolution on humanitarian assistance of 2003 of the Institute of International Law, in case of attacks against personnel, installations, goods or vehicles involved in a humanitarian assistance action, "the accused persons shall be brought to trial before a competent domestic or international court or tribunal".[43]

47. In this regard, a useful role might also be played for the States parties thereto by the Convention on the Safety of United Nations and Associated Personnel and its Optional Protocol. This treaty requires States parties to ensure the security and safety of categories of personnel identified in article 2, subparagraphs 1 and 2, and to repress specific crimes listed in the Convention, based on a prosecute or extradite approach. However, in order to give application to those provisions, United Nations and associated personnel must be involved in one of the missions identified in article 1 (*c*) of the Convention or in article II of the Optional Protocol. Article 1 (*c*) of the Convention reads as follows:

> "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:
>
> (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or
>
> (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

48. Under the terms of the Convention on the Safety of United Nations and Associated Personnel, its applicability in favour of humanitarian relief personnel responding to a disaster is restricted by the requirement that the Security Council or the General Assembly make a declaration of exceptional risk. However, such declarations have never been adopted to date by either of the competent United Nations organs.

49. The Optional Protocol, in its article II, paragraph 1, extends the application of the Convention, without the added requirement of a declaration of exceptional risk, to operations conducted for the purposes of

> (*a*) Delivering humanitarian, political or development assistance in peacebuilding, or
>
> (*b*) Delivering emergency humanitarian assistance.

While this latter scenario would be relevant for a series of missions conducted in the framework of disaster response, the host State is authorized under article II, paragraph 3, of the Optional Protocol to make a declaration to the Secretary-General that it shall not apply its provisions with respect to

> an operation under article II (1) (*b*) which is conducted for the sole purpose of responding to a natural disaster. Such a declaration shall be made prior to the deployment of the operation.

Consequently, an affected State could make reference to the quoted clause relating to disaster response operations, in order not to apply the Optional Protocol and the Convention to the disaster event at hand. It must be stressed, however, that to date, the possibility thus offered to opt out, has never been utilized by States parties.

Proposal for an additional draft article

50. In the light of the foregoing, the Special Rapporteur concludes that the inclusion is warranted in the set of draft articles on protection of persons in the event of disaster of an additional draft article concerning the protection of disaster relief personnel, equipment and goods. The proposed draft article, to be provisionally placed as draft article 14 *bis*, would read as follows:

"*Draft article 14* bis. *Protection of relief personnel, equipment and goods*

"The affected State shall take all necessary measures to ensure the protection of relief personnel, equipment and goods present in its territory for the purpose of providing external assistance."

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[40] See Staff Regulations of the United Nations and provisional Staff Rules, Secretary-General's bulletin of 21 October 2009 (ST/SGB/2009/7).

[41] See General Assembly resolution 67/85 of 13 December 2012, para. 20. A series of additional measures are also envisaged in paragraphs 19 to 36 of the resolution.

[42] See footnote 21 above.

[43] Art. IX, para. 2 (see footnote 22 above).

Chapter III

General provisions

51. As in the case of drafts prepared by the Commission on other topics, the present draft should be completed by some general or saving clauses concerning its interaction with other rules of international law applicable in disaster situations. Such clauses may indeed contribute to further delimiting the scope of the draft articles.

A. Relationship with special rules of international law

52. In its memorandum of 2007 on the topic "Protection of persons in the event of disasters",[44] the Secretariat identified more than 200 international legal instruments touching upon various aspects of disaster prevention and response and being, more generally, relevant to the protection of individuals in disaster situations. Further relevant multilateral and bilateral treaties have been referenced in the six reports successively submitted since 2008 by the Special Rapporteur, notably in his sixth report.[45] Indeed, international cooperation in the provision of disaster relief assistance as well as in disaster preparedness, prevention and mitigation activities has become more prevalent in contemporary times, leading to a higher normative density in this area. Moreover, several specialized fields of international law must be taken into account in assessing the exact scope of the rights and duties of States and of other actors in relation with the prevention and management of disasters.[46] Hence the need for a provision aimed at harmonizing the present draft articles with other rules of international law.

53. To seek guidance in devising such a provision, it is necessary to examine existing instruments which, as the present draft articles do, address issues of disaster prevention and response from a general perspective. Such instruments normally deal with a wide range of issues, thus having the potential to generate dissonances with other, more specialized norms of international law. For the sake of completeness, the present survey will also include soft-law instruments and other documents developed and adopted by authoritative bodies.

1. Universal treaties

54. Turning first to universal treaties, there are currently two sectorial instruments in force containing general norms aimed at regulating the provision of international humanitarian assistance: the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, and the Framework Convention on civil defence assistance.

55. While dealing exclusively with the provision of telecommunication assistance, the Tampere Convention lays down rules on a number of aspects relevant to the activities of foreign relief actors (consent, privileges and immunities, termination of assistance, costs, regulatory barriers, etc.). To address possible tensions with other norms of international law, a provision was included establishing that the Convention "shall not affect the rights and obligations of States Parties deriving from other international agreements or international law".[47]

56. The Framework Convention on civil defence assistance aims to promote cooperation among State civil defence authorities "in terms of prevention, forecasting, preparedness, intervention and post-crisis management"[48] by setting out the principles according to which all assistance operations should be conducted. When describing its relation with other international norms, the Convention establishes that it "does not affect other obligations held by the States Parties under International Law".[49]

57. Other treaties open to universal participation are designed to comprehensively regulate the rights and obligations of States parties in preventing and addressing emergency situations caused by specific human activities.[50] It is, therefore, appropriate to include them in the present survey.

58. Among them there is the International Convention on oil pollution preparedness, response and cooperation, which lays down detailed obligations to ensure that prompt and effective action is taken to minimize the damage which may result from such incidents. Article 11 of the Convention reads:

> Nothing in this Convention shall be construed as altering the rights or obligations of any Party under any other convention or international agreement.

An identical provision is contained in the Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances.[51]

59. Similarly, the Convention on assistance in the case of a nuclear accident or radiological emergency, provides, in article 12, that:

> This Convention shall not affect the reciprocal rights and obligations of States Parties under existing international agreements which relate to the matters covered by this Convention, or under future international agreements concluded in accordance with the object and purpose of this Convention.

2. Regional treaties

60. Several regional instruments likewise cover issues dealt with in the present draft articles, and have a similar

[44] 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)).

[45] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/662, paras. 70–112. An updated database of relevant instruments is maintained by IFRC and can be consulted at www.ifrc.org/en/publications-and-reports/idrl-database/. See also De Guttry, "Surveying the law".

[46] For a comprehensive survey of the different areas of international law involved, see IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study*, pp. 33–82. See also Venturini, "International disaster response law in relation to other branches of international law".

[47] Art. 10.

[48] Preamble.

[49] *Ibid*., art. 5.

[50] For an extensive list, see 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)).

[51] Art. 9.

field of application, both *ratione materiae* and *ratione temporis*. Most of those documents contain clauses that regulate their relationship with other treaties and/or with other rules of general international law having the same scope.

61. 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 stipulates that the treaty "shall not affect the rights and obligations of the Parties laid down in other international agreements".[52]

62. One of the most recent and comprehensive treaties adopted at a regional level is the ASEAN Agreement on Disaster Management and Emergency Response. The treaty, "which reflects much of contemporary thinking in terms of disaster mitigation and risk reduction",[53] is of a general nature, covering a wide range of issues. According to one of its clauses, its provisions "shall in no way affect the rights and obligations of any Party with regard to any existing treaty, convention or instrument to which they are Parties".[54]

63. The most recent regional agreement concerning external assistance in disaster situations is the SAARC Agreement on Rapid Response to Natural Disasters. The objective of the treaty is "to provide effective regional mechanisms for rapid response to disasters 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 through concerted national efforts and intensified regional cooperation",[55] and its provisions cover many different activities related to disaster response. Article XVII of the Agreement reads:

> This Agreement shall not affect the rights and obligations of the Parties under other bilateral or multilateral Treaties, Conventions and Agreements to which they are a Party.

64. A different approach is taken in the Inter-American Convention to Facilitate Disaster Assistance of 1991, which stipulates:

> If there is any discrepancy between this Convention and other international agreements on the subject to which the assisting and assisted States are parties, the provision that affords the greatest degree of assistance in the event of disaster and favours support and protection to personnel providing assistance shall take precedence.[56]

3. Other instruments

65. Another significant text is the draft convention on expediting the delivery of emergency assistance, which was developed in the early 1980s at the initiative of the United Nations Disaster Relief Coordinator[57] and contains provisions akin to those of the present draft articles. Article 29 ("Application of other agreements on emergency assistance") reads:

> 1. This Convention is without prejudice to the applicability of other agreements concluded by a Party before its entry into force.
>
> 2. The entry into force of this Convention shall not prevent a Party from subsequently concluding other agreements on emergency assistance provided that the rights and obligations of the other States and organizations applying the provisions of this Convention are not affected.

66. Also of interest to the present survey is the resolution on humanitarian assistance adopted by the Institute of International Law in 2003. In common with the present draft articles, the resolution is intended to offer general guidance on the rights and duties of States in situations of natural or human-made disasters. The relationship between the resolution and other rules of international law is laid out in article X:

> This Resolution is without prejudice to the:
>
> (*a*) Principles and rules of international humanitarian law applicable in armed conflict, in particular the 1949 Geneva Conventions for the Protection of War Victims and the 1977 Additional Protocols;[58] and,
>
> (*b*) Rules of international law regulating humanitarian assistance in specific situations.

67. The foregoing brief survey suggests that, whenever States and expert bodies proceeded to regulate the relationship between, on the one hand, a disaster-related instrument with a broad scope of application and addressing multiple issues and, on the other hand, treaties or other rules of international law having a more specific focus, the prevalent solution has been to confer primacy to the latter category of norms.

68. Such an option is probably the one more in line with the purpose of the present draft articles, as set out in draft article 2, namely to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect of their rights". Since many of the provisions already included in the present draft set out general rules concerning international cooperation in the event of a disaster, it would be incongruous to endow them with a precedence value, over more specific rules appearing in (existing or future) bilateral or multilateral treaties. As both those categories of treaties usually spell out the obligations for the States parties, their application would, therefore, better serve the interests of the persons affected by a disaster. Obviously, it should not be expected that States will conclude bilateral or multilateral agreements containing provisions at odds with the general principles of international law enshrined in the present draft articles.

69. The approach described above has the merit of preserving the stricter standards that may have been established by means of specialized agreements, so that no conflict will exist between the present draft articles and the treaties that set such standards. The same approach would also regulate potential conflicts between the present draft

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[52] Art. 22.

[53] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/598, p. 150, para. 34.

[54] Art. 30.

[55] Art. II.

[56] Art. XV.

[57] A/39/267/Add.2-E/1984/96/Add.2. The Economic and Social Council, to which it was submitted, decided not to take further action on the initiative.

[58] It should be noted that the resolution also includes armed conflicts within its definition of "disaster" (*Yearbook of the Institute of International Law*, vol. 70 (see footnote 22 above), at p. 267, art. I, para. 2.).

articles and norms of customary law with a like scope. Nevertheless, it must be stressed that the application of such special norms cannot displace the applicability of the present draft articles inasmuch as these cover matters that are not addressed in said norms.[59]

70. In this connection, it must be recalled that the Commission has already addressed the issue of the relationship between the rules enshrined in the present project and a special branch of international law, when it dealt in draft article 4 of the present draft with the possible interaction between the draft articles and international humanitarian law. As provided in draft article 4:

> The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

In its commentary to draft article 4, the Commission has highlighted the fact that in situations of armed conflict, the rules of international humanitarian law should be given precedence over those contained in the present draft articles, thereby endorsing the commonly accepted view that international humanitarian law represents the special law applicable during armed conflicts.[60]

71. The foregoing notwithstanding, the Commission has also emphasized in the same commentary that draft article 4 should not be interpreted as warranting a blank exclusion of the applicability of the present draft articles during armed conflicts unfolding on a territory struck by a disaster, as such an exclusion "would be detrimental to the protection of the victims of the disaster".[61] The commentary goes on to explain that

> [w]hile the draft articles do not seek to regulate the consequences of armed conflict, they can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply.[62]

Hence, while prevalence is given to international humanitarian law as the special body of laws applicable in armed conflict situations, the concurrent applicability of the present draft articles is preserved.

Proposal for an additional draft article

72. In the light of the foregoing, the inclusion of the following draft article is proposed:

> ***"Draft article 17. Relationship with special rules of international law***
>
> "The present draft articles do not apply to the extent that they are inconsistent with special rules of international law applicable in disaster situations."

73. Such a wording is to be preferred to a "without prejudice" clause, because it better captures the residual nature of the draft articles in relation to special rules of international law, and because it is more in line with the wording of similar provisions recently adopted by the Commission, for example, article 17 of its draft articles on diplomatic protection, which reads as follows:

> *Special rules of international law*
>
> The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.[63]

74. Given the logical proximity existing between the proposed draft article 17 and draft article 4, it is suggested that the latter be moved and included among the draft's general provisions.[64]

B. Relationship with other rules of international law

75. After having considered the interaction between the present draft articles and different types of special rules of international law applicable to disaster situations, and bearing in mind the related proposal for inclusion in the present draft of a clause governing such interaction, it becomes appropriate to consider what other saving clauses might properly be inserted in the text. For the sake of clarity, the inquiry should extend to the question whether or not the general provisions that will complete the current draft should also deal with its relationship with other international norms covering matters not regulated by the present draft articles. In this respect, it would seem useful to include a general clause stating that applicable rules of international law continue to govern legal questions that might assume relevance in disaster situations. In this sense, such a provision is intended to complement the preceding clause (art. 17): while the latter is geared to establishing a normative priority for any special rules in the field of application of the current draft, the former would seek to ensure a parallel application of international rules having a different scope. Although doing it this way may appear *prima facie* superfluous, even obvious, the purpose of such a provision is at least twofold.

76. First, the insertion of such a clause would contribute to shed light on the interaction between the draft articles and customary international law applicable in disaster

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[59] On the relationship between general and special rules of international law, see the Commission's "Conclusions of the work of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law", *Yearbook … 2006*, vol. II (Part Two), p. 177, para. 251.

[60] See *Yearbook … 2010*, vol. II (Part Two), para. 331, p. 188, paragraph (1) of the commentary to draft article 4.

[61] *Ibid*., paragraph (2) of the commentary to draft article 4.

[62] *Ibid*., paragraph (3) of the commentary to draft article 4. Indeed, the residual applicability of the draft articles to armed conflict situations appears apposite as the rules of international humanitarian law concerning humanitarian assistance—while well developed—present certain gaps which other rules and principles of international law could contribute to address. See, e.g., Gavshon, "The applicability of IHL in mixed situations of disaster and conflict". The concurrent application of international humanitarian law and other branches of international law has been strongly reaffirmed, with respect to human rights law, by the International Court of Justice in its *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 178, para. 106. The principle has also been recognized by the Commission in its recent work on the effects of armed conflicts on treaties, which takes as its starting point the presumption that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. See article 3 of the draft articles on the effects of armed conflicts on treaties, *Yearbook … 2011*, vol. II (Part Two), para. 100.

[63] See *Yearbook … 2006*, vol. II (Part Two), p. 25, para. 49. See also article 55 (*Lex specialis*) of the 2001 draft articles on responsibility of States for internationally wrongful acts (*Yearbook … 2001*, vol. II (Part Two), p. 30, para. 76); and article 64 (*Lex specialis*) of the 2011 draft articles on the responsibility of international organizations (*Yearbook … 2011*, vol. II (Part Two), para. 87).

[64] Article 21 [4], in the text approved by the Commission at first reading, *Yearbook … 2014*, vol. II (Part Two), para. 55.

situations. In his preliminary report, the Special Rapporteur has noted that the topic "seems in principle to be the subject of progressive development".[65] This perception notwithstanding, some interactions between customary international norms and the present draft articles have been highlighted by the Special Rapporteur in subsequent reports,[66] for instance, with regard to the right of the affected State to oversee disaster response, its duty to seek assistance, and the duty to prevent.[67] Moreover, it cannot be overlooked that other customary international norms, having a different field of application, might interact with the draft's provisions. The proposed clause would then contribute to making clear that the content of the draft articles leaves the application of customary international law on matters not covered by the current draft unaffected, while pointing out that the present draft articles do not preclude the further development of customary international norms in the field of disaster management. In this respect, the clause replicates the content of the last preambular paragraph of the Vienna Convention on the Law of Treaties, which states that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention", as well as the wording of other provisions contained in draft articles adopted by the Commission, namely, article 56 of the draft articles on the responsibility of States for internationally wrongful acts and article 65 of the draft articles on the responsibility of international organizations.[68] Article 56 of the draft articles on State responsibility reads as follows:

Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.[69]

77. Secondly, the proposed clause also would seek to clarify that the present draft articles do not interfere with treaty law having a different scope. As explained by the Special Rapporteur and the Commission itself, the content of the present draft reflects an approach essentially focused on the needs and concerns of individuals, as well as on their legal rights in the context of disasters.[70] It follows that the draft articles do not address all the questions of international law that may be brought to play when a disaster occurs. Examples of other international law regimes that may complement the content of the draft articles in the event of disasters include, among other things, the provisions concerning the law of treaties, in particular, those related to the supervening impossibility of performance and the fundamental change of circumstances,[71] as well as the rules on the responsibility of both international organizations and States, and the responsibility of individuals.

Proposal for an additional draft article

78. In the light of the foregoing, the following text for a draft article concerning the interaction with other applicable rules of international law, may be proposed:

"Draft article 18. Matters related to disaster situations not regulated by the present draft articles

"The applicable rules of international law continue to govern matters related to disaster situations to the extent that they are not regulated by the present draft articles."

C. Relationship to the Charter of the United Nations

79. Among the general provisions of the current draft, a specific clause related to the interaction with the obligations under the Charter of the United Nations may also be usefully included. Its text needs to be worded in the light of Article 103 of the Charter, according to which

[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

80. The primacy of the obligations under the Charter of the United Nations has already been invoked during the Commission's work on the topic. In particular, the Commission has highlighted the cardinal role played by some principles enshrined in the Charter—namely, the principles of sovereign equality of States, non-intervention, cooperation and non-discrimination—in defining the rights and duties of States in the event of disasters.[72] It also bears mentioning that a like emphasis on the respect of Charter principles is to be observed in some international instruments adopted in *subiecta materia*. In the context of disaster relief, for example, the General Assembly, in its resolution 46/182 of 19 December 1991, states that "[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations."[73] In a similar vein, the ASEAN Agreement on Disaster Management and Emergency Response recognizes that the "sovereignty, territorial integrity and national unity of the Parties shall be respected, in accordance with the Charter of the United Nations".[74] A similar approach governs the European Union action in disaster management, which shall be exercised as far as it is compatible with the obligations under the Charter. This conclusion emerges from the Treaty on European Union, which mentions the principles of the Charter of the United Nations among those inspiring the European Union development deserving of respect. Even if that provision does not make a direct reference to the European Union disaster management, it is nonetheless evident that European Union action in this area is subject to the respect of the Charter, insofar as it represents a development of the European integration process.

[65] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/598, para. 42.

[66] See the third report (*Yearbook … 2010*, vol. II (Part One), document A/CN.4/629, para. 82), the fourth report (*Yearbook … 2011*, vol. II (Part One), document A/CN.4/643 and Corr.1, paras. 40 *et seq.*), and the sixth report (*Yearbook … 2013*, vol. II (Part One), document A/CN.4/662).

[67] For the impact of international customary law on the topic, see Ronzitti, "Conclusions".

[68] *Yearbook … 2011*, vol. II (Part Two), p. 46.

[69] *Yearbook … 2001*, vol. II (Part Two), p. 30.

[70] See *Yearbook … 2009*, vol. II (Part Two), p. 138, para. 178.

[71] Vienna Convention on the Law of Treaties, arts. 61 and 62, respectively.

[72] See, *inter alia*, the third report, *Yearbook … 2010*, vol. II (Part One), document A/CN.4/629, p. 387, paras. 64 *et seq.*; and *ibid.*, vol. II (Part Two), pp. 188–190, commentary to draft article 5.

[73] Annex, para. 3.

[74] Art. 3, para. 1.

81. Furthermore, the inclusion in the current draft of a clause reaffirming the primacy of Charter of the United Nations obligations might contribute to strengthen the leading role played by the United Nations in disaster management. That role has already been acknowledged in the draft by the wording of draft articles that properly differentiate the position of the Organization from that of other international organizations and actors involved in disaster situations,[75] and has been expressly recognized in other international instruments.[76]

[75] See articles 5, 10 and 12. On the cooperation duties of States, see also *Yearbook … 2009*, vol. II (Part Two), p. 139, para. 183.

[76] See, *inter alia*, the NATO Euro-Atlantic Partnership Council Policy of 1998 on enhanced practical cooperation in the field of international disaster relief (art. 2.2.2) and, at the European Union level, Decision No. 1313/2013/EU on a Union Civil Protection Mechanism (Recital No. 14 and arts. 5, para. 2; 13, para. 3; and 16, paras. 1 and 2 (*Official Journal of the European Union* L 347, 20 December 2013, pp. 924 *et seq.*).

Proposal for an additional draft article

82. For the above reasons, the Special Rapporteur proposes that the general provisions of the current draft also include a draft article on the interaction with the Charter of the United Nations, reading as follows:

"Draft article 19. Relationship to the Charter of the United Nations

"The present draft articles are without prejudice to the Charter of the United Nations."

Chapter IV

Use of terms

83. In conformity with the Commission's practice, as reflected in most of the draft articles it has thus far adopted on diverse topics of international law, the Special Rapporteur proposes the inclusion in the present draft articles of a provision on the "use of terms". The formulation of such a provision can be most efficiently achieved when, as it is the case at present regarding the topic "Protection of persons in the event of disasters", the text of all of the draft articles on a topic will have been adopted by the Commission. This is without prejudice to the ultimate location of the use-of-terms provision in the set of draft articles, which in the past has always been at the beginning, either as the first of the series or following the provision on scope. As regards the present topic, however, since the draft includes provisions on the scope (draft article 1) and purpose (draft article 2), as well as on the definition of disaster in a separate autonomous provision (draft article 3), the draft article on the use of terms proposed below is provisionally numbered 3 *bis*.

84. In elaborating his proposal, the Special Rapporteur focused first on terms that, according to the commentaries to the draft articles, were already singled out for definition in a provision on the use of terms, as well as on terms that are often encountered in the draft articles and on terms of art. On this basis, he has identified the following key terms for inclusion in draft article 3 *bis*: affected State; assisting State; other assisting actor; external assistance; equipment and goods; relevant NGO; relief personnel; and risk of disasters. The Special Rapporteur next examined the commentaries to ascertain whether there were elements of a definition already adopted by the Commission. He then turned to the applicable definitions found in other instruments. Having recourse to all of these sources, he has arrived at a list of composite definitions, either taking elements from different sources, as appropriate, or using one as a basis but modifying it to reflect the language and the decisions embodied in the draft articles already adopted.

85. For the purpose of defining the above-mentioned terms, the additional sources that have been used as being especially relevant are: annex I (Glossary) to the addendum to the memorandum by the Secretariat;[77] article 2 (Definitions) of the IFRC Guidelines; annex I (Glossary) to the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters;[78] the resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session of 2003; and definitional provisions contained in a number of multilateral and bilateral treaties.

A. Proposal for an additional draft article

86. The Special Rapporteur proposes the following text for a draft article 3 *bis* on the use of terms:

"Draft article 3* bis. *Use of terms

"For the purposes of the present articles:

"(*a*) 'Affected State' means the State upon whose territory persons or property are affected by a disaster;

"(*b*) 'Assisting State' means a State providing assistance to an affected State at its request or with its acceptance;

"(*c*) 'Other assisting actor' refers to an international organization, non-governmental organization, or any other entity or person, external to the affected State, which is engaged in disaster risk reduction or the provision of disaster relief assistance;

"(*d*) 'External assistance' refers to relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors, with the objective of preventing, or mitigating the consequences of disasters or meeting the needs of those affected by a disaster;

[77] 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)).

[78] Washington, D.C., Brookings-Bern Project on Internal Displacement, 2011.

"(*e*) 'Equipment and goods' includes supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects necessary for the provision of disaster relief assistance and indispensable for the survival and the fulfilment of the essential needs of the victims of disasters;

"(*f*) 'Relevant non-governmental organization' means any organization, including private and corporate entities, other than a State or governmental or intergovernmental organization, working impartially and with strictly humanitarian motives, which because of its nature, location or expertise, is engaged in disaster risk reduction or the provision of disaster relief assistance;

"(*g*) 'Relief personnel' means specialized personnel, including military personnel, engaged in the provision of disaster relief assistance on behalf of an assisting State or other assisting actor, as appropriate, having at their disposal the necessary equipment and goods;

"(*h*) 'Risk of disasters' means the probability of harmful consequences or losses with regard to human life or health, livelihood, property and economic activity, or damage to the environment, resulting from a disaster."

B. Brief analysis

"(*a*) 'Affected State' means the State upon whose territory persons or property are affected by a disaster."

87. The term "affected State" appears in seven of the draft articles already adopted—namely, draft articles 9 (Role of the affected State); 10 (Duty of the affected State to seek assistance); 11 (Consent of the affected State to external assistance); 12 (Offers of assistance); 13 (Conditions on the provision of external assistance); 14 (Facilitation of external assistance); and 15 (Termination of external assistance)—as well as in proposed draft article 14 *bis* (Protection of relief personnel, equipment and goods).

88. The Institute of International Law resolution defines the term "affected State" as follows: "the State or territorial entity where humanitarian assistance is needed".[79] The term is also defined in article 2, paragraph 8, of the IFRC Guidelines, reading as follows: "the State upon whose territory persons or property are affected by a disaster".[80]

89. Subparagraph (*a*) is drawn verbatim from the definition provided in the IFRC Guidelines. It reflects the basic orientation that the draft articles are addressed to States. It also anticipates the centrality of the role to be played by the State affected by the disaster, as established in draft article 9. The key feature is territorial control, that is, the affected State can only play the role envisaged for it in draft article 9 over the territory it controls. The provision could go further and add "or otherwise under the jurisdiction or control", as was done in the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001.[81] However, it was deemed preferable not to do so in order to avoid entering into an unnecessary discussion on extraterritorial jurisdiction, which is more the exception than the rule. Furthermore, the element of territorial control is a common feature of many instruments regulating the protection of persons in the event of disasters.

90. The definition further seeks to reflect the focus of the draft articles, namely the effect on persons, as opposed to, for example, simply asserting that it is the State upon whose territory a disaster takes place. The reference to property has been retained as a further element common to many disasters, and implied in the reference to "large-scale material … damage" in the definition of disaster in draft article 3; it being understood that the draft articles apply only to the impact of economic loss on persons.[82]

91. The formulation of the phrase "affected by a disaster" reflects the contemporary view that the focus of attention is on the effects of a disaster on persons and property, as opposed to the disaster itself. It also accords with the Commission's approach of considering the consequence of the event as a key element for purposes of establishing the threshold for the application of the draft articles.[83]

"(*b*) 'Assisting State' means a State providing assistance to an affected State at its request or with its acceptance."

92. The term "assisting State" appears in draft article 15 (Termination of external assistance).

93. The formulation is drawn from the definition of "supporting State" in the Framework Convention on civil defence assistance,[84] with the term "Beneficiary State" changed to "affected State", which is the term utilized in the draft articles and defined above. The phrase "a State providing assistance" is a reference to the concept of "external assistance", which is further defined below, and which is undertaken on the basis of the duty to cooperate in draft article 5.

94. The draft articles are addressed to three categories of entities, the first being the affected State (defined above), and the second being the State or States providing assistance to the affected State. The third category, "other assisting actors", is further defined below.

95. From the definition, it is clear that a State only falls into the category of "assisting State" once the assistance is being or has been provided. In other words, a State offering assistance is not an "assisting State", with the various legal consequences that flow from such categorization, as provided for in the draft articles, until such assistance has been accepted by the affected State.

[79] *Yearbook of the Institute of International Law*, vol. 70, Part II (see footnote 22 above), p. 268, art. I, para. 4.

[80] Guideline 2, para. 8.

[81] *Yearbook … 2001*, vol. II (Part Two), p. 146, para. 97, art. 2.

[82] See *Yearbook … 2010*, vol. II (Part Two), p. 188, para. (7) of the commentary to draft article 3.

[83] *Ibid.*, p. 187, para. (4) of the commentary to draft article 3.

[84] Art. 1 (*f*).

96. The phrase "at its request or with its acceptance" reflects the interplay between draft articles 10, 11 and 12. In particular, it reflects the basic stance taken in the draft articles that it is the duty of the affected State to seek assistance when its national response capacity has been overwhelmed by a disaster (draft article 10). At the same time, it envisages the possibility of the affected State receiving unsolicited offers of assistance, as provided for under draft article 12, the provision of which is subject to its consent, under draft article 11.

"(*c*) 'Other assisting actor' refers to an international organization, non-governmental organization, or any other entity or person, external to the affected State, which is engaged in disaster risk reduction or the provision of disaster relief assistance."

97. The term "other assisting actor" appears in draft article 15 (Termination of external assistance).

98. In addition to affected and assisting States, the draft articles also seek to regulate the position of other assisting actors. A significant proportion of contemporary disaster risk reduction and disaster relief activities is undertaken by, or under the auspices of, international organizations, including but by no means limited to the United Nations, as well as NGOs and other entities, and even individuals. This group of actors is collectively referred to in the draft articles as "other assisting actors". This is without prejudice to their differing legal status under international law, which is acknowledged in the draft articles, for example, in draft article 12.

99. The provision reflects, in part, the commentary to draft article 15, which confirms the understanding that the term "assisting actors" refers primarily to international organizations and NGOs.[85] The phrase "or any other entity or person", which is drawn from the ASEAN Agreement,[86] was added to reflect the fact that not all actors which are involved in disaster relief efforts can be categorized in one or the other categories mentioned in the commentary.

100. The phrase "external to the affected State" was introduced to reflect the concern, mentioned in the commentary to draft article 13, that the draft articles regulate the activities of actors which are external to the affected State.[87] Accordingly, domestic NGOs, for example, would not be covered. While this would obviously not be an issue with regard to international organizations, it was nonetheless thought appropriate that it be stipulated, given the nature of the other entities mentioned in the list of assisting actors.

101. The concluding phrase "which is engaged in disaster risk reduction or with the provision of disaster relief assistance" is the same formula used to describe the types of activities being undertaken by the entities in question, which are regulated by the draft articles. In the case of NGOs, such general indication is to be read together with the more specific description of their role, as provided above.

102. The definition of "other assisting actors" recognizes the fact that such actors may be involved in a range of activities, in the context of both disaster risk reduction and the provision of disaster relief assistance.

"(*d*) 'External assistance' refers to relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors with the objective of preventing, or mitigating the consequences of disasters or meeting the needs of those affected by a disaster."

103. The term "external assistance" appears in four of the draft articles already adopted, namely, draft articles 11 (Consent of the affected State to external assistance); 13 (Conditions on the provision of external assistance); 14 (Facilitation of external assistance); and 15 (Termination of external assistance); as well as on proposed draft article 14 *bis* (Protection of relief personnel, equipment and goods).

104. Subparagraph (*d*) seeks to define the type of assistance which the draft articles envisage assisting States or other assisting actors providing to the affected State, as a form of cooperation anticipated in draft article 5 *bis*.

105. The formulation, which draws inspiration from the commentary to draft article 13,[88] is based on both the Oslo Guidelines[89] and the Framework Convention on civil defence assistance.[90] The reference to "material", in the Oslo Guidelines was replaced with "equipment and goods", which is the term used in the draft articles, and is further defined below.

106. The phrase "provided to an affected State by assisting States or other assisting actors" is drawn from the commentary to draft article 13, and reiterates the nature of the legal relationship between the assisting State or actor and the affected State, as envisaged in the draft articles.

107. The remainder of the clause seeks to clarify the purpose for which external assistance ought to be provided. The phrase "with the objective of preventing, or mitigating the consequences of disasters" is drawn from the Framework Convention on civil defence assistance, and is included as a recognition of the importance of measures intended to reduce the risk of disasters, as envisaged by draft articles 5 *ter* and 16. The phrase "or meeting the needs of those affected by a disaster" is drawn from the Oslo Guidelines, and alludes to disaster relief assistance provided immediately following the onset of the disaster, which has as its goal the meeting of the needs of those affected by the disaster. While the formulation of the concluding clause is cast in the technical terminology of disaster risk reduction and response, it is understood to accord with the overall purpose of the draft articles, set out in draft article 2, namely to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights".

[85] See *Yearbook … 2013,* vol. II (Part Two), p. 58, para. (4) of the commentary to draft article 15.

[86] Art. 1, para. 1 (definition of "assisting entity").

[87] See *Yearbook … 2013,* vol. II (Part Two), p. 56, para. (2) of the commentary to draft article 13.

[88] *Ibid.*

[89] Para. 2.

[90] Art. 1 (*d*) (definition of "assistance").

"(*e*) 'Equipment and goods' includes supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles and other objects necessary for the provision of disaster relief assistance and indispensable for the survival and the fulfilment of the essential needs of the victims of disasters."

108. The term "equipment and goods" appears in two of the draft articles already adopted, namely, draft article 5 *bis* (Forms of cooperation), which uses the term "supplies" instead of "goods", and draft article 14 (Facilitation of external assistance), which uses the expression "goods and equipment", as well as in proposed draft article 14 *bis* (Protection of relief personnel, equipment and goods).

109. As indicated above, "equipment" and "goods" are a key component of the kind of external assistance being envisaged in the draft articles. The formulation is drawn from the commentary on draft article 14,[91] as well as the Institute of International Law resolution.[92] The list covers the types of material generally accepted to be necessary for the provision of disaster relief assistance. That the list is not exhaustive is confirmed by the word "includes" and the reference to "other objects".

110. Generally speaking, two types of material are being envisaged: that required by the disaster relief personnel to perform their functions, both in terms of their own sustenance and in terms of what they require to provide relief, such as supplies, tools and machines; and that which is necessary for the survival and the fulfilment of the essential needs of the victims of disasters, such as foodstuffs, drinking water, medical supplies, means of shelter, clothing and bedding. Search dogs are specifically anticipated in the phrase "specially trained animals", which is drawn from Specific Annex J of the International Convention on the simplification and harmonization of Customs Procedures.[93]

"(*f*) 'Relevant non-governmental organization' means any organization, including private and corporate entities, other than a State or governmental or intergovernmental organization, working impartially and with strictly humanitarian motives, which because of its nature, location or expertise, is engaged in disaster risk reduction or the provision of disaster relief assistance."

111. The term "relevant non-governmental organization" appears in four of the draft articles already adopted, namely, draft articles 5 (Duty to cooperate), 7 (Human dignity), 10 (Duty of the affected State to seek assistance) and 12 (Offers of assistance).

112. The category of "other assisting actors", which is defined above, includes NGOs. The definition seeks to distinguish such entities from other actors, specifically States and intergovernmental organizations. The opening clause, "any organization, including private and corporate entities, other than a State or governmental or intergovernmental organization", which makes such distinction, is drawn from the Tampere Convention.[94] The generic reference to "private and corporate entities" reflects the typical form in which most NGOs are constituted, but is not meant to be exclusive.

113. The qualifying phrase "working impartially and with strictly humanitarian motives" is drawn from paragraph 5 of the annex to General Assembly resolution 46/182 of 19 December 1991, and is the basis upon which the activities of such entities are to be performed under the draft articles.[95]

114. The recognition granted to NGOs in the draft articles is a reflection of the fact that they are typically well-situated to play a pivotal role in relief and related efforts. This is recognized in the phrase "which because of its nature, location or expertise".

115. The activities of NGOs are not limited to relief assistance, and include those aimed at prevention, mitigation and preparedness. This is recognized in the concluding clause, "is concerned with disaster risk reduction or the provision of disaster relief assistance", the first part of which is drawn from the Tampere Convention. The wording seeks to reflect the broad range of activities in which such entities participate.

"(*g*) 'Relief personnel' means specialized personnel, including military personnel, engaged in the provision of disaster relief assistance on behalf of an assisting State or other assisting actor, as appropriate, having at their disposal the necessary equipment and goods."

116. The term "relief personnel" appears in two of the draft articles already adopted, namely, draft articles 5 *bis* (Forms of cooperation) and 14 (Facilitation of external assistance), as well as in proposed draft article 14 *bis* (Protection of relief personnel, equipment and goods).

117. The subparagraph seeks to define the personnel component of external assistance provided by assisting States or by other assisting actors. The formulation employed is based on that adopted by the Commission in the commentary to draft article 5 *bis*,[96] which establishes a nexus between the assisting entity, whether a State or other actor, and the personnel in question through the requirement of "acting on behalf of". Nonetheless, such personnel would be subject to the overall direction and control of the affected State, in accordance with draft article 9.

118. The reference to "specialized" personnel reflects the recognition, in the annex to General Assembly resolution 46/182 of 19 December 1991, that what is to be

[91] See *Yearbook … 2013*, vol. II (Part Two), p. 58, para. (5) of the commentary to draft article 14.

[92] *Yearbook of the Institute of International Law*, vol. 70, Part II (see footnote 22 above), art. I, para. 1 (*a*).

[93] Definition of "relief consignments".

[94] Art. 1, para. 10.

[95] See *Yearbook … 2010*, vol. II (Part Two), pp. 189–190, para. (5) of the commentary to draft article 5.

[96] See *Yearbook … 2013*, vol. II (Part Two), p. 54, para. (7) of the commentary to draft article 5 *bis*.

expected are personnel which enjoy the necessary skill set, and are provided with the "necessary goods and equipment", to perform the functions in question.

119. The phrase "including military personnel", which is drawn from the bilateral treaty between Greece and the Russian Federation of 2000,[97] is intended as a recognition of the important role played by military personnel, as a category of relief personnel, in the provision of disaster relief assistance. The participation of military personnel in the provision of disaster relief assistance is provided for in draft article 14.

120. The traditional application of the concept of "relief personnel" has been in the context of the response to the onset of a disaster. This is reflected in the formulation "engaged in the provision of disaster relief assistance", which mirrors the type of external assistance envisaged in draft article 14, for which the facilitation of "prompt and effective" provision is called for. Nonetheless, it bears pointing out that the definition of "external assistance" above also anticipates relief personnel being involved in the prevention of disasters. This is a reflection of the more holistic approach taken in the draft articles, as a whole, which includes activities aimed at disaster risk reduction.

[97] Art. 1 (definition of "team for providing assistance") (see footnote 15 above).

"(*h*) 'Risk of disasters' means the probability of harmful consequences or losses with regard to human life or health, livelihood, property and economic activity, or damage to the environment, resulting from a disaster."

121. The term "risk of disasters" appears in two of the draft articles already adopted, namely, draft articles 5 *ter* (Cooperation for disaster risk reduction) and 16 (Duty to reduce the risk of disasters).

122. Following on the inclusion of disaster risk reduction within the scope of the draft articles the term "risk of disasters" merits further clarification. The formulation proposed is drawn from the first part of the definition provision found in the ASEAN Agreement on Disaster Management and Emergency Response.[98] That Agreement sought to link the probability of harmful consequences to "interactions between natural or human-induced hazards and vulnerable conditions". The Commission, however, did not go that far in its work on the definition of "disaster". Accordingly, it was considered more appropriate to simply indicate that such consequences result "from a disaster", which is meant as a *renvoi* to the definition of "disaster" in draft article 3. In other words, the definition of "risk of disasters" is meant as a further elaboration of that of "disaster".

[98] Art. 1, para. 5.

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

[Agenda item 5]

DOCUMENT A/CN.4/673

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

[*Original: Spanish*]
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CONTENTS

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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.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid*., vol. 500, No. 7310, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, No. 8638, p. 261.
Convention on special missions (New York, 8 December 1969)	*Ibid.*, vol. 1400, No. 23431, p. 231.
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)	*Ibid.*, vol. 1035, No. 15410, p. 167.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12).
Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)	United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.
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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 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 Kolodkin as Special Rapporteur.[2] At the same session, the Secretariat was requested to prepare a background study on the topic.[3]

2. The Special Rapporteur Mr. Kolodkin submitted three reports, in which he established the boundaries within which the topic should be considered and analysed various aspects of the substantive and procedural questions relating to the immunity of State officials from foreign criminal jurisdiction.[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]

4. At the same session, the Special Rapporteur Ms. Escobar Hernández submitted her preliminary report on the immunity of State officials from foreign criminal jurisdiction,[6] which the Commission considered during the second part of its sixty-fourth session, held in 2012.[7] The preliminary report was a "transitional report", in which the Special Rapporteur sought "to help clarify the terms of the debate up to [that] point and to identify the principal points of contention which remain[ed] and on which the Commission [might] wish to continue to work in the future".[8] The report also identified the topics which the Commission would have to consider, established the methodological bases for the study, and set out a workplan for the consideration of the topic.

5. As has been noted, the Commission examined the preliminary report at its sixty-fourth session, in 2012, and approved the methodological bases and workplan proposed by the Special Rapporteur.[9] The same year, the Sixth Committee examined the preliminary report on the immunity of State officials from foreign criminal jurisdiction as part of its consideration of the report of the Commission.[10]

6. At the sixty-fifth session of the Commission, in 2013, the Special Rapporteur submitted her second report on the immunity of State officials from foreign criminal jurisdiction,[11] which examined the scope of the topic and of the draft articles, the concepts of immunity and jurisdiction, the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the normative elements of immunity *ratione personae*. The report contained six proposed draft articles, dealing with the scope of the draft articles (draft articles 1 and 2), definitions (draft article 3), and the normative elements of immunity *ratione personae* (draft articles 4, 5 and 6), respectively.

[1] See *Yearbook … 2006*, vol. II (Part Two), p. 185, para. 257 (*b*), and p. 191, annex I.

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

[3] See *ibid.*, p. 101, para. 386. For the memorandum by the Secretariat, see document A/CN.4/596 (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] For the reports of the previous Special Rapporteur, Mr. Kolodkin, see *Yearbook … 2008*, vol. II (Part One), p. 157, document A/CN.4/601 (preliminary report); *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646 (third report).

[5] See *Yearbook … 2012*, vol. II (Part Two), para. 84.

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

[7] *Ibid.*, vol. II (Part Two), paras. 82–139.

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

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

[10] The Sixth Committee considered the topic "Immunity of State officials from foreign criminal jurisdiction" at the sixty-seventh session of the General Assembly, in 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 20th–23rd meetings (A/C.6/67/SR.20–23)). In addition, two States referred to the topic at the 19th meeting (*ibid.*, 19th meeting (A/C.6/67/SR.19)). See also the topical summary of the discussion held in the Sixth Committee during its sixty-seventh session (A/CN.4/657), paras. 26–38.

[11] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661.

7. The Commission considered the second report of the Special Rapporteur at its 3164th to 3168th and 3170th[12] meetings and decided to refer the six draft articles to the Drafting Committee.[13] On the basis of the report of the Drafting Committee, the Commission provisionally adopted three draft articles, dealing with the scope of the draft articles (draft article 1) and the normative elements of immunity *ratione personae* (draft articles 3 and 4), respectively. The draft articles contain the essential elements of five of the reworked draft articles proposed by the Special Rapporteur. The Commission also approved the commentaries to the three draft articles which it had provisionally adopted. The Drafting Committee decided to keep the draft article on definitions under review and to take action on it at a later stage.[14]

8. At its sixty-eighth session, in 2013, the Sixth Committee of the General Assembly examined the second 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. States generally welcomed the report and the progress made in the work of the Commission, and commended the Commission for submitting three draft articles to the General Assembly.[15]

9. In its annual report, the Commission requested States to

> provide information, by 31 January 2014, on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction.[16]

The Special Rapporteur wishes to thank those States that made reference to this issue during the debates in the Sixth Committee. More specifically, she wishes to express her appreciation to the States that submitted written comments.[17]

[12] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see *ibid.*, vol. I, 3164th–3168th and 3170th meetings.

[13] See *ibid.*, 3174th meeting.

[14] For the treatment of the topic by the Commission at its sixty-fifth session, in 2013, see *ibid.*, vol. II (Part Two), paras. 40–49. See in particular the draft articles with the commentaries thereto contained in paragraph 49. For the Committee's discussions on the commentaries to the draft articles, see *ibid.*, vol. I, 3193rd–3196th meetings.

[15] See *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 17th–19th meetings (A/C.6/68/SR.17–19). See also the topical summary of the discussion held in the Sixth Committee during its sixty-eighth session (A/CN.4/666), paras. 10–30.

[16] *Yearbook … 2013*, vol. II (Part Two), p. 15, para. 25.

[17] By the time the present report was completed, comments had been received from Belgium, Czech Republic, Germany, Ireland, Mexico, Norway, the Russian Federation, Switzerland, the United Kingdom, and the United States.

Chapter I

Immunity *ratione materiae*: normative elements

10. As noted in the second report of the Special Rapporteur,

> 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.[18]

This is undoubtedly owing to the fact that such a distinction has been widely accepted in both doctrine[19] and jurisprudence. The distinction was also analysed in the Memorandum by the Secretariat[20] and in the preliminary report of Special Rapporteur Kolodkin,[21] although in both cases the analysis was from a purely descriptive and conceptual standpoint. For its part, the Commission had addressed the distinction between the two types of immunity in 2013 from a normative perspective, with a view to establishing a separate legal regime for each one. This does not mean, however, that the two types of immunity do not have elements in common, especially in respect of the functional dimension of immunity in a broad sense.[22]

11. This approach was reflected in the work of the Commission at its sixty-fifth session, in 2013. In this regard, attention should be drawn to the following points:

(*a*) inclusion of the distinction between immunity *ratione personae* and immunity *ratione materiae* in the draft article on definitions which has been referred to the Drafting Committee: although the Committee has not yet taken a position on the definitions contained therein, no contrary opinions have been expressed as to the retention of separate types of immunity;[23]

[18] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, para. 47.

[19] In this respect, see, *inter alia*, Dominicé, "Problèmes actuels des immunités juridictionnelles internationales", pp. 323–326 and 337–342; Abellán Honrubia, "La responsabilité internationale de l'individu", pp. 220–223; Borghi, *L'immunité des dirigeants politiques en droit international*, pp. 129–131; Verhoeven, "Les immunités propres aux organes ou autres agents des sujets du droit international", pp. 64–67 and 94–107; Remiro Brotóns, "La persecución de los crímenes internacionales por los tribunales internacionales: el principio de universalidad", p. 505; Jorge Urbina, "Crímenes de guerra, justicia universal e inmunidades jurisdiccionales penales de los órganos del Estado", pp. 277–292; Stern, "Vers une limitation de l''irresponsabilité souveraine' des États et chefs d'État en cas de crime de droit international"; Cassese, *The Oxford Companion to International Criminal Justice*, p. 368; Dugard, *International Law: A South African Perspective*, p. 253; Fox and Webb, *The Law of State Immunity*; D'Argent, "Immunity of State officials and obligation to prosecute", pp. 5–7; and Maguire, Lewis and Sampford, *Shifting Global Powers and International Law: Challenges and Opportunities*, p. 108.

[20] See A/CN.4/596 (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)), paras. 88 *et seq.*

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

[22] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, paras. 48 and 53.

[23] For such definitions, see *ibid.*, para. 53.

(*b*) the very structure of the draft articles, consisting of a separate part (part two) on immunity *ratione personae*, to be followed by a third part on immunity *ratione materiae*;

(*c*) draft article 4, paragraph 3, provisionally adopted by the Commission in 2013, which reflects the distinction between the regimes applicable to each of the types of immunity mentioned above, by stating that "the cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law on immunity *ratione materiae*".[24]

12. As indicated in the second report of the Special Rapporteur, the basic characteristics of immunity *ratione materiae* can be identified as follows:

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

(*b*) it is granted only in respect of acts that can be characterized as "acts performed in an official capacity"; and

(*c*) it is not time-limited, since immunity *ratione materiae* continues even after the person who enjoys such immunity is no longer an official.

13. These three elements adequately reflect the different definitions of immunity *ratione materiae* recognized by the doctrine[25] and found in jurisprudence. They also take into consideration the previous work of the Commission.[26] The normative elements that make up this type of immunity should be deduced from these three characteristics; based on the method followed with regard to immunity *ratione personae*, they should be identified as follows:

(*a*) the subjective scope of immunity *ratione materiae*: What persons benefit from immunity?

(*b*) the material scope of immunity *ratione materiae*: What types of acts performed by these persons are covered by immunity?

(*c*) the temporal scope of immunity *ratione materiae*: Over what period of time can immunity be invoked and applied?

14. Although these three elements are accepted in general terms in relation to immunity *ratione materiae*, their meanings are not uniform. Thus, while there is broad consensus on the unlimited nature of the temporal scope of immunity *ratione materiae*, the material and subjective scope of such immunity is the subject of a broader discussion and still gives rise to controversy, not only in the doctrine but also in jurisprudence and practice. Determining the meanings of the expressions "official" and "acts performed in an official capacity" therefore requires detailed analysis. In any event, it should be noted that the three aspects mentioned above constitute the "normative elements" of immunity from foreign criminal jurisdiction *ratione materiae* and thus must be considered together, without the possibility of excluding any of them when defining the legal regime for this type of immunity.

15. On the other hand, it should be recalled that as indicated in the second report in relation to immunity *ratione personae*, identifying these three aspects as the normative elements of immunity *ratione materiae* does not mean that they are the only elements to be considered in defining the legal regime applicable to immunity *ratione materiae*. In particular, the Special Rapporteur wishes to emphasize that this should not be read as a pronouncement on exceptions to such immunity or as recognition that such immunity is absolute in nature.

16. Accordingly, the present report marks the starting point for the consideration of the normative elements of immunity *ratione materiae*, analysing in particular the concept of an "official".

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[24] For the distinction between the two types of immunity, see the Commission's commentary to draft article 4, in particular paragraph (7) of the commentary (*Yearbook … 2013*, vol. II (Part Two), pp. 50).

[25] These definitions are presented using various formulations, but all of them reflect the same elements mentioned above. For Cassese (*The Oxford Companion to International Criminal Justice*, p. 368), "[f]unctional immunity from the jurisdiction of foreign States covers activities performed by various State officials in the exercise of their functions and it survives the end of office", and the "official activities are performed by State organs on behalf of their State and, in principle, must be attributed to the State itself". For Fox and Webb, functional immunity, immunity *ratione materiae*, is a term initially applied to diplomats on the loss of personal immunity on vacating office so as to continue immunity but solely for acts performed in an official capacity. It is, however, now used in a wider sense as applying to all officials, functionaries, and employees of staff, whether serving or out of office, to afford them immunity in respect of acts which are performed in an official capacity (*The Law of State Immunity*). For Stern, "the immunity of an incumbent Head of State is an absolute immunity *ratione personae*, which he or she will no longer continue to enjoy after leaving office, except for 'acts committed in the performance of his or her functions'; this means that the former Head of State only enjoys immunity *ratione materiae*" ("Vers une limitation de l''irresponsabilité souveraine' des États et chefs d'État en cas de crime de droit international?", p. 521). For D'Argent: "'All representatives of the State acting in that capacity' [United Nations Convention on Jurisdictional Immunities of States and their Property, art. 2, para. 1 (*b*) (iv)] enjoy immunity *ratione materiae* (also called 'official acts immunity') for the acts so performed, even if they have acted *ultra vires* … in contrast with what is required for triggering immunity *ratione personae*, the concept of 'representatives of the State' for the purpose of immunity *ratione materiae* is not limited to persons specifically embodying or personifying it" ("Immunity of State officials and obligation to prosecute", p. 7). For Borghi, "immunity *ratione personae* is not granted to a Head of State for his or her personal benefit, but for the benefit of his or her State; it is normal that … such immunity should cease to operate when he or she leaves office … Immunity *ratione materiae*… means that the person is protected in relation to his or her official acts" (*L'immunité des dirigeants politiques en droit international*, pp. 129–130). For Jorge Urbina, "the scope of immunity *ratione personae* afforded to political leaders who serve as central organs of the State in international relations (Head of State, Head of Government or Minister for Foreign Affairs) is justified because they are the highest-ranking representatives of the State or because they play a key role in the management of foreign policy. In this connection, when they leave office, they will only be protected by immunity *ratione materiae*, which would protect them against criminal action solely for public acts performed in the fulfilment of the highest functions of State" ("Crímenes de guerra, justicia universal e inmunidades jurisdiccionales penales de los órganos del Estado", pp. 287–288).

[26] With regard to the definition of the characteristics of immunity *ratione materiae*, see *Yearbook … 1991*, vol. II (Part Two), p. 13, para. 28, commentary to draft article 2 of the draft articles on jurisdictional immunities of States and their property, in particular p. 18, paragraphs (17)–(19) of the commentary.

Chapter II

Concept of an "official"

A. General considerations

17. The concept of an "official" is particularly relevant to the topic "Immunity of State officials from foreign criminal jurisdiction", because it determines the subjective scope of the topic. This is why the term is explicitly included in the title of the topic to refer to all persons who may be covered by immunity. This generic reference to "officials" is included in the title of the topic because the Commission does not wish to limit the scope of the study to the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs.[27]

18. In this context, the concept of an "official" must be addressed horizontally, because its characteristics must be determined in such a way as to include both persons who would be covered by immunity *ratione personae* and those who would be covered by immunity *ratione materiae*. However, as pointed out in the second report, submitted to the Commission in 2013, the need to define the concept of an "official" clearly and unequivocally is particularly important in the case of immunity *ratione materiae*.[28] The reason for this is simple: persons covered by immunity *ratione personae* can be and have been identified by the Commission *eo nomine*, with the listing of the three senior officials to whom such immunity applies, namely the Head of State, the Head of Government and the Minister for Foreign Affairs.[29] In the case of immunity *ratione materiae*, however, it is impossible to draw up a list of all the office or post holders who would be classified as "officials" for the purposes of the present topic. That would simply not be feasible, given the wide variety of models which exist in State systems. Consequently, the persons covered by immunity *ratione materiae* can only be determined using "identifying criteria" which, applied on a case-by-case basis, provide sufficient reason to conclude that a given person is an "official" for the purposes of the present draft articles.

19. Secondly, it should be emphasized that the use of the term "official" is the result of a proposal of the previous Special Rapporteur, Mr. Kolodkin, who stated his preference for that term over "organ", although he left open the possibility of a future debate and a change of terminology if the Commission deemed it appropriate.[30] At that time, however, various members of the Commission noted that other terms, such as "agent" or "representative", could be used.[31] The question was subsequently reiterated in the current Special Rapporteur's previous reports, in which she pointed out that "official" may not be the most suitable term for referring to all categories of persons who would be covered by immunity from foreign criminal jurisdiction. It should be noted, moreover, that the terms used in the various language versions are neither homogenous nor interchangeable, and cannot be said to have identical or similar meanings.[32]

20. In view of these considerations, the Special Rapporteur stated in her second report that the concept of an "official" would be analysed during the consideration of immunity *ratione materiae* and that the term "official" would continue to be used on a provisional basis as the single designation applicable to all categories of persons covered by either of the two types of immunity from foreign criminal jurisdiction considered by the Commission.[33] This proposal was endorsed by the Commission and reflected in the footnote to draft article 1, paragraph 1, provisionally adopted in 2013, which stated that "the use of the term 'officials' will be subject to further consideration".[34]

21. Consequently, because the definition of the concept of an "official" is essential for the present topic,[35] the present report will specifically look into the definition of persons who may be considered beneficiaries of immunity from foreign criminal jurisdiction, or, in line with the terminology used by the Commission to date, the definition of the concept of an "official". To perform this task correctly, at least four premises must be considered:

(*a*) the general scope of the concept of an "official" has not been defined in international law;

(*b*) any definition of the concept of "official" must encompass both persons covered by immunity *ratione personae* and persons covered by immunity *ratione materiae*;

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[27] In the summary used by the Commission as the basis for including the topic in its long-term programme of work, the emphasis was placed on the Head of State, the Head of Government, the Minister for Foreign Affairs and other senior State officials (*Yearbook … 2006*, vol. II (Part Two), p. 194, annex I, para. 19 (4)). For his part, the former Special Rapporteur, in his preliminary report, adopted a broad approach by referring to all officials (*Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 185, paras. 106–107). Although in the Commission's discussions on the preliminary report some members expressed the opinion that only the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs should be considered (*Yearbook … 2008*, vol. II (Part Two), para. 289), that broad approach has been followed ever since.

[28] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, para. 32; see also *ibid.*, paras. 56–57.

[29] See draft article 3, provisionally approved by the Commission in 2013 (*Yearbook … 2013*, vol. II (Part Two), p. 39, para. 48).

[30] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 186, para. 108.

[31] *Ibid.*, p. 138, paras. 288–289.

[32] See *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, para. 66; and *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, para. 32.

[33] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, para. 32.

[34] *Ibid.*, vol. II (Part Two), p. 39, para. 48, footnote 237 to art. 1, para. 1.

[35] The importance of defining the concept of an "official" has also been emphasized by States. See, for example, the statements by the following States at the last session of the Sixth Committee: Belarus, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 18th meeting (A/C.6/68/SR.18), para. 10; Chile, *ibid.*, para. 78; Republic of Korea, *ibid.*, para. 107; Romania, *ibid.*, para. 112; Ireland, *ibid.*, para. 121; Italy, *ibid.*, 19th meeting (A/C.6/68/SR.19), para. 5; Russian Federation, *ibid.*, para. 46; and Australia, *ibid.*, para. 81. In addition, the following States have already expressed their views on the terminological question or on the criteria for identifying an "official": Portugal, *ibid.*, 17th meeting (A/C.6/68/SR.17), paras. 92 *et seq.*; Spain, *ibid.*, para. 142; the Netherlands, *ibid.*, 18th meeting (A/C.6/68/SR.18), para. 31; Chile, *ibid.*, para. 79; Thailand, *ibid.*, 19th meeting (A/C.6/68/SR.19), para. 26; and Malaysia, *ibid.*, para. 37.

(*c*) the term chosen as a single designation for all persons who enjoy immunity must take account of the differences between the categories of persons covered by immunity *ratione personae* and those covered by immunity *ratione materiae*;

(*d*) the terms used in each of the language versions to refer to persons who enjoy immunity must be homogeneous and comparable, and must, as far as possible, follow the terminology previously consolidated in the practice of the Commission.

22. In summary, the analysis of the concept of an "official" poses two types of different yet complementary and interrelated questions. The first is substantive in nature and concerns the criteria used to identify persons who may be covered by immunity from foreign criminal jurisdiction. The second is primarily language-related and concerns the choice of the most suitable term for designating persons who, in general, meet the above-mentioned substantive criteria. Each question will be analysed separately below.

23. In any case, to simplify the text and avoid confusion, the term "official", which is included in the title of the topic, will continue to be used provisionally in the present report.

B. Criteria for identifying persons who enjoy immunity

24. As stated above, the general scope of the concept of an "official" has not been defined in international law.[36] However, because the definition of that term (and related terms) is different in each country's legal order, national definitions are of little use in defining the concept or even in choosing the most suitable term for referring to this category of persons. Accordingly, the starting point for a definition of the concept of an "official" and the criteria for identifying such a person for the purposes of the present topic can only be an approximation based on an analysis of judicial practice (national and international), treaty practice and the previous work of the Commission.

25. The Commission has already analysed these elements in relation to persons having immunity *ratione personae,* namely the Head of State, the Head of Government and the Minister for Foreign Affairs. In doing so, it has also identified the elements which characterize these persons and justify their being recognized as having such immunity. Hence, as stated in the second report of the Special Rapporteur, immunity *ratione personae* is enjoyed by "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] Such representation of the State in international relations is "based on international law and performed automatically, without the need for any express authorization by the State that they represent".[38]

26. In the same vein, the commentary to draft article 3, adopted by the Commission in 2013, states:

> The Commission considers that there are two reasons, representational and functional, for granting immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State. Second, they must be able to discharge their functions unhindered.[39]

27. The following criteria for identifying persons who have immunity *ratione personae* may be derived from the above:

(*a*) they occupy a special position within the State and hence have a special link with the State;

(*b*) they perform functions which fall under governmental authority, both within the State and in international relations;

(*c*) they represent the State internationally at the highest level simply by virtue of the post which they occupy.

28. In the light of the preceding paragraph, it is worth noting that the analysis of practice—particularly national judicial practice—presented below, is limited to persons who would be covered by immunity *ratione materiae*. Through this limited perspective, persons to whom immunity from foreign criminal jurisdiction has been applied or for whom it has been claimed are identified. Secondly, it is determined whether the criteria for identifying the persons designated as "officials" have been defined in practice and, if not, whether they could be derived from the categories of persons previously identified.

1. National judicial practice

29. As indicated more than once, the issue of immunity from foreign criminal jurisdiction has not been considered extensively by national criminal courts. Indeed, there are only a few criminal cases in which there has been a reference to "officials" other than a Head of State, a Head of Government or a Minister for Foreign Affairs, and these have been limited to only a handful of States. On the other hand, this limited practice in criminal proceedings is counterbalanced by more abundant practice in civil proceedings which, although outside the scope of the present topic, is of relevance when it comes to identifying persons whom States deem to be covered by some form of immunity from jurisdiction.

30. The decisions of national courts have been analysed in reports and documents submitted to the Commission since 2007, when the Commission first included this topic in its programme of work, a topic which has been reconsidered many times since. The analysis of these cases and other subsequent decisions of national courts bring to light some elements which may be of relevance in defining the concept of an "official".

31. First, it is important to note that, in criminal proceedings in which national courts have upheld the immunity

[36] The 2008 memorandum by the Secretariat, A/CN.4/596 (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. 5, and the preliminary report of Special Rapporteur Kolodkin (*Yearbook … 2008,* vol. II (Part One), document A/CN.4/601, p. 186), para. 108, take this observation as their starting point.

[37] *Yearbook … 2013,* vol. II (Part One), document A/CN.4/661, para. 57.

[38] *Ibid.,* para. 59.

[39] *Ibid.* vol. II (Part Two), pp. 43, para. (2) of the commentary to draft article 3.

from jurisdiction of foreign officials, those who have been granted immunity from jurisdiction *ratione materiae* have held specific posts and performed specific functions within the State structure. They have included a former prime minister and minister of defence,[40] a minister of the interior,[41] senior officials (head of Scotland Yard),[42] and members of government security forces and institutions (a police officer[43] and a military officer[44]) and an executive director of a maritime authority.[45]

32. Secondly, the range of persons who enjoy immunity from jurisdiction *ratione materiae* is much broader and more varied if civil proceedings brought against foreign officials for the purpose of obtaining financial compensation are taken into consideration. In such proceedings as well, immunity *ratione materiae* has been invoked successfully for certain categories of State officials. By way of example, judicial proceedings have been brought against a former Head of State,[46] a member of the Government,[47] a member of an executive commission,[48] the Attorney-General of the State of Florida (United States) and various lower-ranking Florida officials (a prosecutor and his legal assistants, a detective in the Attorney General's office and a lawyer in a Florida state agency),[49] a former intelligence service chief [50] and a former head of a national security agency.[51]

33. Third, it must be pointed out that, on other occasions, claims of immunity from jurisdiction have not been upheld in domestic courts. However, even those courts have considered the status of the defendants as "officials", and thus their decisions as well must be taken into account. Specifically, such defendants have included former Heads of State[52] or Government,[53] a vice-president and minister of forestry,[54] the family members of a former Head of State who did not hold any position in the Government,[55] a minister of defence,[56] former ministers of defence,[57] a minister of State,[58] heads of national security agencies,[59] an army colonel[60] and other lower-ranking military personnel (Italian sailors),[61] border guards[62] and a civil servant (formerly in the military).[63]

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[40] France, *Association des familles des victimes du Joola*, Cour de cassation, Chambre criminelle, judgment of 19 January 2010, *Bulletin des Arrêts. Chambre criminelle*, No. I, January 2010.

[41] United Kingdom, *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, House of Lords, judgment of 14 June 2006 (Jones No. 2), [2006] United Kingdom House of Lords 26.

[42] Federal Republic of Germany, *Church of Scientology* case, Federal Supreme Court, judgment of 26 September 1978, ILR, vol. 65, p. 193.

[43] Ireland, *Schmidt v. Home Secretary of the Government of the United Kingdom*, Supreme Court, judgment of 24 April 1997, *Irish Reports*, 1997, vol. 2, p. 121.

[44] Italy, *Mario Luiz Lozano* case, Corte Suprema di Cassazione, Sala Penale, judgment of 24 July 2008, *Oxford Reports on International Law in Domestic Reports* 1085.

[45] France, *Agent judiciaire du trésor v. Malta Maritime Authority et Carmel X*, Cour de cassation, Chambre criminelle, judgment of 23 November 2004.

[46] United States, *Wei Ye, Hao Wang, Does, A, B, C, D, E, F, and Others Similarly Situated v. Jiang Zemin and Falun Gong Control Office, A/k/a Office 610*, United States Court of Appeals, Seventh Circuit, judgment of 8 September 2004 (383 F. 3d 620).

[47] United States, *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court of New York, New York County, judgment of 31 October 1988 (141 Misc. 2d 787).

[48] United States, *Chiudian v. Philippine National Bank*, United States Court of Appeals, Ninth Circuit, judgment of 29 August 1990 (912 F. 2d 1095).

[49] Canada, *Jaffe v. Miller et al.*, Court of Appeal for Ontario, judgment of 17 June 1993 (ILR, vol. 95, p. 446).

[50] United States, *Ali Saadallah Belhas et al. v. Moshe Ya'alon*, United States Court of Appeals, District of Columbia Circuit, judgment of 15 February 2008 (515 F. 3d 1279).

[51] United States, *Ra'Ed Mohamad Ibrahim Matar et al. v. Avraham Dichter*, United States District Court, Southern District of New York, judgment of 2 May 2007 (500 F. Supp.2d 284).

[52] United States, *Republic of the Philippines v. Ferdinand E. Marcos et al.*, United States Court of Appeals, Second Circuit, judgment of 26 November 1986 (806 F. 2d 344); and United Kingdom, *Regina v. Bartle and others*, ex parte *Pinochet*, House of Lords, judgment of 24 March 1999 (ILM, vol. 38 (1999), p. 581).

[53] United States, *Marcos Perez Jimenez v. Miguel Aristigueta and John E. Maguire*, United States Court of Appeals, Fifth Circuit, judgment of 12 December 1962 (311 F. 2d 547).

[54] France, *Teodoro Nguema Obiang Mangue et al.* case, Cour d'appel de Paris, Pôle 7, Deuxième chambre de l'instruction, judgment of 13 June 2013. This judgment is interesting also because it is the only instance in which a national court appears to restrict the immunity from foreign criminal jurisdiction of any State official to immunity *ratione materiae*. The judgment was issued in response to a complaint made by the Republic of Equatorial Guinea in the context of criminal proceedings for money-laundering and concealment of assets against various persons, among them Teodoro Nguema Obiang Mangue, the son of the President of Equatorial Guinea, who at the time was the country's Vice-President and Minister of Forestry. Equatorial Guinea applied for nullification of the arrest warrant issued against Mr. Nguema on the grounds, *inter alia*, that France had violated the immunity enjoyed by Heads of State and others holding high-level posts in a foreign Government. The Cour d'appel acknowledged that "international custom, in the absence of international provisions to the contrary, opposes the criminal prosecution of States in foreign States, and that this custom extends to organs or entities that are an extension of the State, as well as to their agents, for acts falling within the sovereignty of the State in question, provided they are performed in the fulfilment of State functions", adding that the crimes being prosecuted "are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity" (grounds, sect. C, second and third paragraphs).

[55] United States, *Maximo Hilao et al., Vicente Clemente et al., Jaime Piopongco et al. v. Estate of Ferdinand Marcos*, United States Court of Appeals, Ninth Circuit, judgment of 16 June 1994 (25 F. 3d 1467).

[56] United Kingdom, *General Shaul Mofaz* case, Bow Street Magistrates' Court, judgment of 12 February 2004 (see commentary in *International and Comparative Law Quarterly*, vol. 53, part 3 (July 2004), p. 771).

[57] United States, *Teresa Xuncax, Juan Diego-Francisco, Juan Doe, Elizabet Pedro-Pascual, Margarita Francisco-Marcos, Francisco Manuel-Mendez, Juan Ruiz Gomez, Miguel Ruiz Gomez and Jose Alfredo Callejas v. Hector Gramajo* and *Diana Ortiz v. Hector Gramajo*, United States District Court, District of Massachusetts, judgment of 12 April 1995 (886 F. Supp. 1467); and Switzerland, *A. v. Office of the Attorney-General of Switzerland, B. and C.*, Federal Criminal Tribunal, judgment of 25 July 2012 (case BB.2011.140).

[58] France, *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgment of 28 April 1961, (ILR, vol. 47, p. 275).

[59] United States, *Bawol Cabiri v. Baffour Assasie-Gyimah*, United States District Court, Southern District, New York, judgment of 18 April 1996 (921 F. Supp. 1189); and United Kingdom, *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court of Justice, Queen's Bench Division Administrative Court, judgment of 29 July 2011 (ILR, vol. 147, p. 633).

[60] Italy, *Public Prosecutor v. Adler et al.*, Tribunale di Milano, Quarta Sezione Penale, judgment of 1 February 2010 (*Oxford Reports on International Law*).

[61] India, *Italy and Others v. India and Others*, Supreme Court, judgment of 18 January 2013 (4 *Supreme Court Cases* 721).

[62] Germany, *Border Guards Prosecution Case*, Federal Supreme Court, judgment of 3 November 1992 (ILR, vol. 100, p. 364).

[63] United Kingdom, *R. v. Lambeth Justices* ex parte *Yusufu*, Divisional Court, judgment of 8 February 1985 (ILR, vol. 88, p. 323).

34. On the other hand, it should be noted that in the cases where foreign officials have been afforded immunity from criminal jurisdiction *ratione materiae*, national courts have linked that immunity from jurisdiction to their status as agents of the State. In the United Kingdom, the House of Lords, for instance, in a lawsuit brought against various Saudi officials, concluded that "all the individual defendants were at the material times acting or purporting to act as servants or agents" and "their acts were accordingly attributable to the Kingdom".[64] In another case adjudicated by the Federal Supreme Court of Germany, in which the conduct of British police officers was at issue, the Court stated that "Scotland Yard—and consequently its head—was acting as the expressly appointed agent of the British State so far as the performance of the treaty in question … The acts of such agents constitute direct State conduct and cannot be attributed as private activities to the person authorized to perform them."[65] The Supreme Court of Ireland took a similar position when it stated that a police officer "was purporting and intending to perform and in fact was performing the duties and functions of his office".[66] In France, courts have commented on this relationship between a prosecuted official and the State, noting in connection with the executive director of a maritime authority that "he is being held accountable for acts which he performed as part of his functions as a public official on behalf and under the control of the State of Malta".[67] In respect of the immunity from criminal jurisdiction of a former Minister of Defence of Senegal, they held that "[this minister,] because of the specificity of his functions and their primarily international scope, must be able to act freely on behalf of the State he represents".[68]

35. The relationship between an official and the State has also been taken into account in the reasoning of domestic courts that have entertained civil complaints against officials. Examples of this can be found in several United States precedents granting immunity from jurisdiction when an official was acting on behalf of the State, that is, "acting pursuant to (his) official capacity"[69] and "as an agent or instrumentality of the State".[70] Following this same principle, *a contrario sensu*, United States courts have held that a "lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts".[71]

36. The conclusion to be drawn at the outset from this practice is that the officials whom a foreign jurisdiction has prosecuted or has attempted to prosecute, and in respect of whom the issue of immunity from jurisdiction has been invoked, are a diverse group. They also fall into very different categories as to their connection with the State. While some of them, for instance, have an eminently political connection owing to the political mandate they have received (a minister or other member of Government, an attorney general, the head of a national security agency, etc.), others have an administrative connection as members of the civil or military structure of the State (diplomats, prosecutors or other members of an attorney general's office, police officers, members of the armed forces, customs agents, among others).

37. As a direct corollary, it should be noted that there are two main categories of officials, depending on the position they hold and the extent of their influence and power of decision within the State. The first category, which represents the majority in the jurisprudence analysed, comprises officials in the highest ranks of the State structure (civil or military), who head ministerial or other departments or administrative bodies (understood broadly) within the State, have extensive power of decision and, on occasion, are qualified to represent the State either domestically or internationally (the latter by express authority from the State). The second group, which represents the minority, comprises any officials who have no power of decision and who simply carry out decisions taken by higher-ranking officials. This makes it possible to differentiate between "high-level officials" and "other officials", a distinction frequently referred to in international jurisprudence, State practice and legal writings. As to the two categories, national judicial practice shows that the majority of foreign officials with respect to whom immunity from criminal jurisdiction *ratione materiae* has been invoked are found in the high or middle ranks of Government, and that there are very few cases in which immunity has been invoked in connection with low-ranking officials. In any event, jurisprudence does not support the conclusion that all high-level officials are necessarily those who have a primarily political connection with the State.

38. Lastly, it should be noted that, as a general rule, national courts do not set out the criteria for identifying a person as an "official", except for references to the performance of public functions or to actions as an agent of the State, in its name or on its behalf.

2. International judicial practice

39. Several international courts have directly or indirectly pronounced on matters involving the immunity of State officials from foreign criminal jurisdiction, notably the International Court of Justice, which has heard cases related to the issue on two occasions and has therefore had to consider the wide variety of persons holding certain State positions who could fall within the concept of an "official". In the *Arrest Warrant of 11 April 2000* case,[72] for instance, the Court considered the immunity from foreign criminal jurisdiction of the Minister for Foreign

[64] *Jones v. Saudi Arabia* (Jones No. 2) (footnote 41 above) (Lord Bingham of Cornhill, paras. 11 and 13).

[65] *Church of Scientology* case (footnote 42 above), p. 198.

[66] Case of *Schmidt v. Home Secretary* (footnote 43 above).

[67] See footnote 45 above.

[68] *Association des familles des victimes du Joola* (footnote 40 above), pp. 46–47.

[69] *Matar* case (footnote 51 above).

[70] *Ali Saadallah Belhas* case (footnote 50 above).

[71] Cases of *Kline et al. v. Kaneko et al.* (footnote 47 above); *Chiudian v. Philippine National Bank* (footnote 48 above); *Hilao* (footnote 55 above); *Xuncax* (footnote 57 above); and *Bawol Cabiri* (footnote 59 above).

[72] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3.

Affairs of the Democratic Republic of the Congo and, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*,[73] it considered the immunity from foreign criminal jurisdiction of the President of the Republic, the *procureur de la République* and the Head of National Security of Djibouti.

40. In the *Arrest Warrant of 11 April 2000* case, the Court stated that "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".[74] However, the Court in that case, as is known, focused on the Minister for Foreign Affairs, stating that "the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States".[75] These functions, which are analysed in detail by the Court, are derived from the exercise of the prerogatives inherent to the highest level of governmental authority.

41. In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the Court reiterated the position of high-level officials already stated in the *Arrest Warrant of 11 April 2000* case.[76] With regard to the treatment to be accorded, the *procureur de la République* and the Head of National Security, the Court concluded that they did not benefit from immunity *ratione personae*, but did not pronounce on the applicability or non-applicability of immunity *ratione materiae*. In its analysis of that possibility, however, the Court did make statements that are relevant for defining the concept of an official to whom immunity *ratione materiae* would apply. For instance, the Court mentions specifically the condition that the acts performed by the aforementioned high-level officials "were indeed acts within the scope of their duties as organs of State".[77] The Court also states that it is not apparent that the principal argument made by Djibouti is that the persons in question "benefited from functional immunities as organs of State".[78] Lastly, the Court pointed out that Djibouti never informed France that "the acts complained of … were its own acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out".[79] These statements point to elements which, in the opinion of the Court, identify the persons who may benefit from immunity *ratione materiae*, namely those persons who clearly are organs of the State and act in the name or on behalf of the State. With regard to the first of these criteria, it should be noted that the Court uses the term "organ", which is employed in article 4 of the draft articles on responsibility of States for internationally wrongful acts.

42. In short, it may be deduced from the two judgments analysed here that the following elements are useful for defining the concept of an "official" for the purposes of the present topic: (*a*) the existence of two categories of persons who benefit, respectively, from immunity *ratione personae* and immunity *ratione materiae*; (*b*) the identification of the former as high-level officials who perform functions as representatives of the State at the international level; (*c*) the identification of the latter as organs of the State that act in the name and on behalf, of the State; and (*d*) the consideration of the performance of official functions as a key element for identifying persons who may be covered by immunity.

43. The European Court of Human Rights has also heard several cases based on allegations in which immunity from the jurisdiction of national courts has been discussed and which in some way refer to alleged criminal conduct by persons whose status could fall within the concept of an official analysed in the present report. It should be noted that, in these cases, the judgments of the European Court refer not to immunity from foreign criminal jurisdiction, but to immunity from civil jurisdiction[80] and that the Court pronounces on the compatibility of immunity from civil jurisdiction with the right to fair trial recognized in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

44. In the case of *Al-Adsani*, for instance, which has been studied by the Commission, the facts underpinning the application are the detention and torture that the applicant allegedly suffered at the hands of Sheikh Jaber Al-Sabah Al-Saud Al-Sabah and two other persons in a Kuwaiti State security prison and the palace of the Emir of Kuwait's brother to which the applicant had been transported in government vehicles. However, the European Court of Human Rights in that case addressed only the issue of Kuwait's immunity from civil jurisdiction in the courts of the United Kingdom; it did not rule on the possible immunity of the persons who committed the acts of torture because the courts in the United Kingdom had already heard the case against the three persons in question, issuing judgment *in absentia* against the Sheikh and giving the applicant leave to take action against the other two persons.[81] The *Al-Adsani* judgment therefore provides no elements for defining the concept of an "official" for the purposes of the present topic.

45. The recent judgment in the case of *Jones and Others v. the United Kingdom*, however, is of greater interest for the purposes of the present report. Although the European Court of Human Rights maintained that it was taking the same position it had taken in the *Al-Adsani*

[73] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177.

[74] *Arrest Warrant of 11 April 2000*, pp. 20–21, para. 51.

[75] *Ibid.*, p. 21, para. 53.

[76] *Certain Questions of Mutual Assistance in Criminal Matters*, at pp. 236–237, para. 170.

[77] *Ibid.*, p. 243, para. 191.

[78] *Ibid.*, para. 193.

[79] *Ibid.*, p. 244, para. 196.

[80] The European Court of Human Rights refers specifically to the distinction between civil and criminal proceedings in its judgment in the case of *Al-Adsani v. the United Kingdom*, No. 35763/97, ECHR 2001 XI, paras. 34, 61 and 66. The distinction, however, was rejected by the judges who voted against the judgment (see the joint dissenting opinion of Judges Rozakis and Caflish, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić). The distinction was again highlighted by the European Court of Human Rights in the case of *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, ECHR 2014, para. 207. The distinction was also criticized in the dissenting opinion of Judge Kalaydjieva. The Government of the United Kingdom, however, accepted the distinction (see para. 179 of the judgment).

[81] See *Al-Adsani* (preceding footnote), paras. 14–15.

case, in the *Jones* case, it did not rule on a civil suit filed against the State (Saudi Arabia), but on the immunity from civil jurisdiction associated with civil complaints filed against individuals acting as organs of the State. In the *Jones v. Saudi Arabia* case, the applicants alleged that they were tortured during their detention by Saudi Arabian officials, leading them to file civil suits in the United Kingdom courts against those officials and against the Saudi Arabian State itself, seeking redress for the harm suffered. The individuals against whom legal action was taken in the United Kingdom were the Minister of the Interior, a lieutenant colonel, the deputy director of the prison where some of the applicants had been held, and two police officers. Initially, the High Court rejected the complaints filed against Saudi Arabia and the aforementioned officials on the grounds that both benefited from immunity from civil jurisdiction.[82] The Court of Appeal allowed the appeal and gave the applicants leave to sue the individuals named in the claim, on the grounds that those persons did not enjoy immunity from civil jurisdiction, because the claim in question referred to acts of torture.[83] The House of Lords, however, ultimately declared that the individuals sued did have immunity because it considered them to be agents or officials of the State and understood the acts in question to be acts of the State, even though they were acts of torture, and the State has immunity.[84]

46. In its judgment of *Jones and Others v. the United Kingdom* of 14 January 2014, the European Court of Human Rights continued and developed the arguments already set out in the *Al-Adsani* case, pronouncing on the characteristics of the persons who presumably committed the impugned acts, their connections with the State and the nature of the acts in question. After examining the matter, the Court concluded that the immunity declared by the United Kingdom courts in the case was not compatible with the right to a fair trial established in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. That was the first case in which the Court pronounced on the subject,[85] and the judgment speaks of the evolution of the issue in contemporary international law, and refers to the work of the Commission.[86] The judgment is of sufficient interest to warrant profound analysis from different angles. However, as far as the topics covered by this third report are concerned, it must be stressed that the Court does not provide a detailed analysis of the elements that make it possible to classify a person as an official; instead, it simply stated that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State,[87] adding that "individuals only benefit from State immunity *ratione materiae* where the impugned acts were carried out in the course of their official duties".[88]

47. In short, the European Court of Human Rights reiterated the two basic elements that have been upheld in national and international jurisprudence: the existence of a connection between the State and the individual who acts on its behalf; and the performance of official functions. In any event, it should be noted that the immunity considered by the Court was immunity *ratione materiae*, which it applied to all the persons sued in the United Kingdom in this case, amongst them several high-level officials, including the Home Secretary.

48. International criminal courts have tried persons who, for the purposes of this report, could be categorized as "officials". As far as the matter at hand is concerned, however, those cases were based on the principle that the official position of the defendant is irrelevant and that immunity from prosecution cannot be invoked in the international criminal courts. Consequently, judgments that could be helpful for defining the concept of an "official" are not often to be found in the case law of these courts. However, the judgment of 29 October 1997, handed down by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the case of *Blaskić*[89] is an exception to that rule inasmuch as it contains some observations on the subject.

49. In the *Blaskić* case, the Appeals Chamber responded to the appeal filed by Croatia against the decision of Trial Chamber II, of 18 July 1979. The appeal challenged the power of the International Tribunal for the Former Yugoslavia to subpoena States or officials of a State for production of evidence. In its response, the Appeals Chamber pronounced on the relationship between a State and its officials and, in that context, concluded that State officials ("*responsables officiels d'États*" in French and "*funcionarios públicos*" in Spanish) acting in their official capacity enjoy a "functional immunity", which is a well-established rule in customary international law.[90] This is justified on the basis of the characteristics of such persons, whom it refers to in other parts of the judgment as "mere instruments of a State", "an instrumentality of his State apparatus"[91] or as acting "on behalf of a State".[92] In any event, officials act only as State organs when they are performing their official functions;[93] otherwise, they fall into the category of "individuals acting in their private capacity".[94] It can thus be concluded that, for the International Tribunal for the Former Yugoslavia as well, the concept of an official is linked to action in the name and on behalf of a State and to the performance of official functions.

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[82] Decisions of the Master of the High Court of 30 July 2003 and 18 February 2004.

[83] United Kingdom, Court of Appeal, *Ronald Grant Jones v. The Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia) & Anor* (Jones No. 1), judgment of 28 October 2004 (Jones No. 1), EWCA Civ 1394.

[84] *Jones v. Saudi Arabia* (Jones No. 2) (footnote 41 above).

[85] This led two judges of the European Court of Human Rights to propose in their respective opinions that the case should have been relinquished to the Grand Chamber for it to consider whether the doctrine set forth in the *Al-Adsani* judgment remained good law. See the concurring opinion of Judge Bianku and the dissenting opinion of Judge Kalaydjieva.

[86] See the judgment in the case of *Jones and Others v. the United Kingdom* (footnote 80 above), paras. 95–101.

[87] *Ibid.*, para. 204.

[88] *Ibid.*, para. 205.

[89] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Tihomir Blaskic*, IT-95-14-AR 108, 29 October 1997.

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

[91] *Ibid.*, paras. 38, 44 and 51.

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

[93] *Ibid.*, para. 44.

[94] *Ibid.*, para. 49.

3. Treaty practice

50. Although the concept of an "official" is not defined in general international law, it is possible to find treaties that use the term or more broadly refer to categories of persons that might be covered by the concept. In the present report, the analysis focuses exclusively on a set of multilateral treaties that are particularly relevant to the topic under discussion, either because they contain provisions on the immunity from jurisdiction of a State or its officials, or because they use the concept of State official as an essential element for defining the legal regime which they establish.

(a) *Vienna Convention on Diplomatic Relations*

51. The Vienna Convention on Diplomatic Relations uses the expression "*funcionarios diplomáticos*"[95] in the preamble of the Spanish version, which it then replaces with "*agente diplomático*" in the operative part, which states that the head of a mission and other diplomatic staff are also included[96] ("diplomatic agent" is used on both occasions in the English version). The Convention does not, however, define in substantive terms what is meant by the term, doubtlessly because there is broad international consensus on what it refers to. The same occurs in the work of the Commission that paved the way for the Convention.[97] It should be noted, however, that the Convention covers other categories of persons connected with diplomatic missions who are not diplomatic agents. The functions of persons in these categories, including members of the administrative and technical staff and members of the service staff, are briefly described in article 1 of the Convention.

52. Persons in all these categories are granted some form of immunity from jurisdiction, even if the scope of that immunity varies for each category: the immunity extended to diplomatic agents is the broadest, and the immunity extended to members of the service staff is the narrowest.[98] Lastly, it should be noted that "private servants" do not enjoy any immunity whatsoever unless the receiving State voluntarily grants it to them.[99] The common element in the recognition of the immunity of these persons is that they perform certain functions in the service of the sending State, with which they have a formal connection, regardless of the legal nature of that connection (i.e. whether it is statutory or contractual). There is no doubt whatsoever as to the nature of these functions, as they are referred to in the Convention: they are public and official functions and activities. In short, they are all performed for the purpose of carrying out the functions of a diplomatic mission set out in article 3 of the Convention, which are a clear manifestation of governmental authority. This connection with public functions is strongest in the case of diplomatic agents, who, under article 42, "shall not in the receiving State practise for personal profit any professional or commercial activity". For the other categories of mission staff, the reference to the connection with the sending State and the public aims of the mission's activities is equally apparent in the continuous reference to "official functions" as the parameter for granting some form of immunity from jurisdiction.

53. It should also be borne in mind that the Vienna Convention on Diplomatic Relations accords particular importance to the special connection between the aforementioned categories of persons and the State, namely nationality. Although that connection is not critical for the performance of diplomatic, administrative, technical or service functions in a diplomatic mission, it has a bearing on the regime applicable to immunity from jurisdiction and is relevant to the topic discussed in the present report.[100] Article 38, paragraph 1, for instance, limits the immunity from jurisdiction of a diplomatic agent who is a national of, or permanently resident in, the receiving State to "official acts performed in the exercise of his functions". At the same time, the article does not recognize any kind of immunity for the other categories of persons who are in the same situation; they can enjoy immunity only if the receiving State freely and voluntarily grants it to them. The relationship between the recognition of immunity and the performance of official functions in the name of the State is thus reinforced. That relationship was already highlighted by the Commission itself when, in its commentary to draft article 37 (later art. 38, para. 1, of the Convention), it stated that in this case it was necessary to ensure that a diplomatic agent in this situation would "enjoy at least a minimum of immunity to enable him to perform his duties satisfactorily".[101]

54. In short, it is the connection with the State and action on behalf of the State and the performance of official activities for its benefit through the diplomatic mission that make it possible to distinguish the categories of persons who, in the context of diplomatic relations, benefit from immunity. And it is therefore these elements that make it possible to identify State officials.

(b) *Convention on special missions*

55. The Convention on special missions follows a similar pattern to the Vienna Convention on Diplomatic Relations by identifying the categories of mission staff members who enjoy some form of immunity. It does, however, introduce some small variations owing to the special nature of the type of diplomatic activity it covers. For instance, the Convention on special missions applies to the head of mission, the members of the diplomatic staff, members of the administrative and technical staff, and members of the service staff. It also includes the category of "representative", defined essentially by the special representative capacity conferred on that person by the State, regardless of the category into which the person falls.[102] It should be noted that the Convention never uses the term "official".

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[95] Preamble, first paragraph.

[96] Art. 1 (*e*).

[97] See *Yearbook … 1958*, vol. II, pp. 89 *et seq.*, para. 53, which contains the draft articles on diplomatic intercourse and immunities, adopted on second reading. It should be noted that there is no commentary to draft article 1, on definitions.

[98] See *ibid.*, p. 99, commentary to draft article 31; and p. 102, paragraphs (2) and (3) of the commentary to draft article 37.

[99] See *ibid.*, para. (4) of the commentary to draft article 37.

[100] See arts. 8 and 38.

[101] See *Yearbook … 1958*, vol. II, p. 102, para. (3) of the commentary to draft article 37.

[102] See article 14, which establishes that: "The head of the special mission or, if the sending State has not appointed a head, one of the representatives of the sending State designated by the latter is authorized to

56. The regime of immunities from jurisdiction enjoyed by the above-mentioned categories of persons is like that established in the Vienna Convention on Diplomatic Relations, the functions performed within the mission again being the determining factor in defining both the categories of persons who enjoy immunity from jurisdiction and the scope of the immunity.[103] In this case, the connection with the State and the public nature of the functions is determined by the very definition of the special mission, namely "a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task".[104] This means, in addition, that the representatives of the State or the members of its diplomatic staff are also prohibited from practising "for personal profit any professional or commercial activity in the receiving State".[105] These criteria apply also to nationals or permanent residents of the receiving State, their immunity being restricted to "official acts performed in the exercise of their functions", in the case of the representatives of the sending State and the members of the diplomatic staff of the mission.[106]

57. The Convention on special missions further envisages a specific category of persons in respect of whom it recognizes a special immunities regime, as stipulated in article 21:

1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.

58. The inclusion of this category of persons can doubtless be explained by the particularity of special missions and by the fact that, fairly frequently, they are headed by the Head of State, the Head of Government, the Minister for Foreign Affairs, another minister or another high-ranking authority of the State. The significance of this provision lies precisely in the distinction between two different categories of persons to whom two partially distinct regimes apply. The provision also introduces the expression "other persons of high rank", which did not appear in the Vienna Convention on Diplomatic Relations.[107]

59. In any case, the Convention on special missions also emphasizes the connection with the State, action on behalf of the State, and the exercise of official functions, making them the criteria for identifying the persons (State officials) who enjoy immunity. The concomitant inclusion of the reference to the Head of State, the Head of Government, the Minister for Foreign Affairs and other persons of high rank introduces the dimension of "high-level officials" who have a connection with the State beyond that of belonging to the State's administrative structure in a broad sense.

(c) *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*

60. The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (hereinafter the "1975 Vienna Convention"), sets out in its article 1 the various categories of persons who are governed by the legal regime it establishes. Among them are not only the head of mission and the head of delegation, but also other members of the mission or delegation. This category includes the members of the diplomatic staff of the mission or delegation, the members of the administrative and technical staff, and the members of the service staff. As in the case of the Convention on special missions, the 1975 Vienna Convention does not provide a substantive definition of what is meant by head of mission or head of delegation; nor did the Commission deal with this question in the *travaux préparatoires* of the Convention.[108]

61. The 1975 Vienna Convention establishes a regime of immunity from jurisdiction applicable to the persons mentioned above, which it bases on the nature of the relationship between the persons and the State and, in particular, on the nature of the functions they perform within the mission or delegation. Accordingly, the broadest immunity is given to the heads of mission or delegation and to the other members of the diplomatic staff of the mission or delegation,[109] and the most restricted is given to the members of the service staff.[110] It should be noted especially that, in the case of members of the administrative and technical staff, immunity from jurisdiction does not extend to acts performed outside the course of their duties,[111] and that in the case of members of the service staff, immunity from jurisdiction is restricted to acts performed in the course of their duties.[112] Also, members of the private staff enjoy immunity from jurisdiction only to the extent permitted by the host State.[113] Furthermore, the official nature of the duties assigned to persons who can be described as officials is reinforced by the fact that the Convention prohibits the head of mission and members of the diplomatic staff from practising "for personal profit any professional or commercial activity in the host

act on behalf of the special mission and to address communications to the receiving State." In article 1, para. (*e*), a "representative of the sending State in the special mission" is defined as "any person on whom the sending State has conferred that capacity". It should be borne in mind that the representative of the State need not necessarily be a member of the diplomatic staff, as can be deduced from the distinction made between the two categories of persons throughout the Convention (see, for example, arts. 29; 31; 40, para. 1; and 48).

[103] See, in particular, arts. 31, 36 and 37.

[104] See art. 1, para. (*a*). The representative nature of the special mission is also referred to in the seventh preambular paragraph of the Convention.

[105] Art. 48.

[106] Art. 40, para. 1; see also art. 10.

[107] The Commission already noted the use of this expression in its commentary provisionally adopted in 2013 (see *Yearbook … 2013*, vol. II (Part Two), para. 49, para. (11) of the commentary to draft article 3).

[108] See the draft articles on the representation of States in their relations with international organizations and the commentaries thereto in *Yearbook … 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284, para. 60.

[109] See arts. 30 and 60.

[110] See arts. 36, para. 3, and 66, para. 3.

[111] See arts. 36, para. 2, and 66, para. 2.

[112] See footnote 110 above.

[113] See arts. 36, para. 4, and 66, para. 4.

State".[114] Lastly, a head of mission or delegation or any member of the diplomatic staff who is a national or permanent resident of the host State enjoys immunity only in respect of "official acts performed in the exercise of his functions".[115]

62. Similarly, with respect to delegations sent to international conferences sponsored by an international organization of a universal character, the 1975 Vienna Convention specifies, in its article 50, that the immunities accorded to them by international law are an adjunct to those that international law grants to the Head of State, the Head of Government, the Minister for Foreign Affairs or other person of high rank:

> 1. The Head of State or any member of a collegial body performing the functions of Head of State under the constitution of the State concerned, when he leads the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law to Heads of State.
>
> 2. The Head of Government, the Minister for Foreign Affairs or other person of high rank, when he leads or is a member of the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law to such persons.

63. Concerning persons of high rank, who are also referred to in the Convention on special missions, the Commission made an interesting point in its commentary to draft article 50 of this Convention:

> The Commission … took the view that the persons of high rank referred to in paragraph 2 were entitled to special privileges and immunities by virtue of the functions which they performed in their countries and would not be performing those functions as a head of mission. The expression "person of high rank" therefore refers not to persons who because of the functions they perform in a mission are given by their State a particularly high rank, but to persons who hold high positions in their home States and are temporarily called upon to take part in a delegation to an organ or to a conference.[116]

64. The analysis of the legal regime under the 1975 Vienna Convention leads to conclusions similar to those applicable to the Vienna Convention on Diplomatic Relations or the Convention on special missions. Firstly, even though the 1975 Vienna Convention, like the others, does not expressly use the term "official" or define the categories of persons contemplated therein, it can be said that for all categories there is a connection between the beneficiaries of immunity from jurisdiction and the State on whose behalf they act, a connection that is unequivocally based on their performance of functions of a public nature. Secondly, the reference to persons of high rank in article 50 of the 1975 Vienna Convention once again introduces the idea of two partially distinct immunity regimes.

(d) *Vienna Convention on Consular Relations*

65. The Vienna Convention on Consular Relations is somewhat different from the instruments analysed above in terms of both the categories of persons who are members of a "consular post" and the scope of their immunity from jurisdiction. The main characteristic of the Convention is that it makes a distinction between "consular officers" and "consular employees", the sole categories on which it confers immunity from jurisdiction.[117] The term "consular officer" means "any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions".[118] The term "consular employee" means "any person employed in the administrative or technical service of the consular post".[119] An additional category introduced is that of "consular agents", referred to in article 69, where it is left to the States concerned to decide freely on the persons who perform consular functions and on the legal regime governing them. This is a category that was not, however, envisaged by the Commission when it formulated the draft articles.

66. The immunity from jurisdiction recognized for consular officers and consular employees is more limited in scope than that recognized for diplomatic agents, because it is expressly linked to "acts performed in the exercise of consular functions".[120] Furthermore, immunity from civil jurisdiction is excluded in respect of actions "arising out of a contract concluded by a consular officer or a consular employee in which, he did not contract expressly or impliedly as an agent of the sending State".[121] Lastly, although the Convention does not recognize immunity from criminal jurisdiction in respect of a consular officer, it does expressly establish that any criminal proceedings shall be conducted "with the respect due to him by reason of his official position and … in a manner which will hamper the exercise of consular functions as little as possible".[122]

67. Consequently, it has to be said that the Vienna Convention on Consular Relations puts even greater emphasis on the link between the granting of immunity to certain categories of persons and their exercise of specific functions on behalf of the State. As indicated before, such functions are manifestations of governmental authority. This is made clear by the nature of the functions listed in article 5 of the Convention and by the explicit provision that a consular officer may, under certain conditions, perform "diplomatic acts" or "act as representative of the sending State to any intergovernmental organization".[123] The connection between the categories of persons covered by immunity and the State thus becomes obvious. And this connection is reinforced by article 43, paragraph 2 (*a*), which refers to a consular officer or a consular employee as "an agent of the sending State".[124]

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[114] See art. 39, para. 1.

[115] See arts. 36–37.

[116] *Yearbook … 1971*, vol. II (Part One), p. 316, paragraph (6) of the commentary to draft article 50.

[117] See art. 43. See also arts. 58, para. 2, and 63 regarding honorary consular officers.

[118] Art. 1, para. 1 (*d*).

[119] Art. 1, para. 1 (*e*).

[120] Art. 43, para. 1.

[121] Art. 43, para. 2 (*a*).

[122] Art. 41, para. 3. The Convention makes this same stipulation with respect to "honorary consular officers" subject to criminal jurisdiction (art. 63).

[123] Art. 17.

[124] See also article 71, paragraph 1, which establishes restrictive rules in the case of consular officers who are nationals of or permanently resident in the receiving State.

68. From this standpoint, it can be concluded that the criteria for identifying the persons who enjoy immunity under the Vienna Convention on Consular Relations are based on the same parameters as those in the three conventions analysed earlier, namely the connection with the State, action on behalf of the State, and the exercise of official functions. The particular terminology used in the Convention should nevertheless be noted, including new terms such as "officer", "employee" and "agents of the sending State".

(e) *Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents*

69. The fifth instrument worth considering is the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents. Even though this Convention does not concern immunities, it shares the same spirit as the other conventions analysed previously, namely to establish a special system applicable to certain categories of persons in terms of their connection with the State and by reason of their performance of specific functions of an international scope. Thus, analysing the categories of "protected persons" referred to in this Convention can be useful also in order to determine the criteria for identifying a category of persons as "officials" for the purposes of the present topic.

70. In this connection, the relevant provision is article 1, paragraph 1, which lists the following "internationally protected persons":

(*a*) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs …

(*b*) any representative or official of a State ….

71. This provision differs in some respects from the text of draft article 1 as adopted at the time by the Commission, which had read:

(*a*) A Head of State or a Head of Government …

(*b*) Any official of … a State … who is entitled, pursuant to general international law or an international agreement, to special protection for or because of the performance of functions on behalf of his State ….[125]

72. It should be noted that, in the text of the Convention which was eventually adopted, the reference to the Minister for Foreign Affairs was incorporated into subparagraph (*a*) and the reference to representatives was incorporated into subparagraph (*b*),[126] while the reference to entitlement to special protection by virtue of the performance of functions on behalf of the State was deleted from subparagraph (*b*).

73. This provision is of special interest because it deals in a general way with "all" the categories of internationally protected persons, assembling them into two distinct blocs that can be seen as corresponding to the two categories of persons envisaged by the Commission in its work on the immunity from foreign criminal jurisdiction of State officials, to whom immunity *ratione personae* and immunity *ratione materiae* would apply, respectively.

74. In its consideration of immunity *ratione personae*, the Commission had already referred to article 1, paragraph 1, of this Convention in its commentary to draft article 3, adopted provisionally at its sixty-fifth session, in 2013.[127] However, this provision of the Convention is equally relevant in defining the general concept of an "official" for the purposes of the present report, given its listing of persons who may be entitled to special protection by reason of their relation with the State and of the functions they perform in representation and in the name and on behalf of the State. Here, attention is drawn particularly to the Commission's commentary to draft article 1, adopted in 1972, where it distinguishes between the status of the Head of State and the Head of Government and that of all other officials and official persons. The former are identified *eo nomine* and the protection accorded them under international law attaches to their "status" and their having "the quality of Head of State or Government".[128] All other representatives or officials and official persons are defined by a series of requirements,[129] among them that they be "officials of a State", that is, "in the service of a State".[130] Moreover, their entitlement to international protection is "for or because of the performance of official functions".[131] These comments by the Commission are fully valid for article 1 of the Convention, even though the reference to the performance of functions in the name of the State has been dropped.

75. Thus, the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents offers two interesting elements that are useful for the purposes of the present report. First, there are two different categories of persons who enjoy international protection on different grounds. Second, there is an emphasis on the connection with the State, either on account of the status or special position of the persons in question, or because of the fact that certain persons act in the name of the State. Another terminological point should be added: the Convention reserves the term "official" for the second category of persons, which it uses jointly with the terms "representatives" and "other official persons".

[125] Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, art. 1, in *Yearbook … 1972*, vol. II, document A/8710/Rev.1, p. 219, at p. 312.

[126] The French and Spanish versions of the official texts of the Convention had included the term "*personnalité officielle*" and "*personalidad official*" (official personality), respectively, in addition to "representative or official", owing to the fact that it had been used in the French version of draft article 1 adopted by the Commission: "*toute personnalité officielle ou tout fonctionnaire d'un État*" ("any official person or any official of a State") (*Annuaire de la Commission du droit international 1972*, vol. II, p. 340).

[127] *Yearbook … 2013*, vol. II (Part Two), pp. 43–47, commentary to draft article 3, especially paragraph (4) thereof.

[128] *Yearbook … 1972*, vol. II, pp. 312–313, para. (2) of the commentary to draft article 1.

[129] *Ibid.*, p. 313, para. (4). Although paragraph (9) (*ibid.*, p. 314) gives examples, they are limited to diplomatic agents on mission, experts on mission and consular officers as well as certain officials and agents of international organizations.

[130] *Ibid.*, pp. 313–314, paragraph (7).

[131] *Ibid.*, p. 314, paragraph (10).

(f) *United Nations Convention on Jurisdictional Immunities of States and Their Property*

76. The United Nations Convention on Jurisdictional Immunities of States and Their Property also contains provisions in which organs and persons that enjoy immunity are mentioned. Article 2, paragraph 1 (*b*) (i), for example, refers to "the State and its various organs of government" and article 2, paragraph 1 (*b*) (iv), refers to "representatives of the State acting in that capacity", while article 3, paragraph 2, refers to "privileges and immunities accorded under international law to Heads of State *ratione personae*".

77. It should be recalled that this Convention does not apply to criminal jurisdiction and therefore falls outside the scope of the topic "Immunity of State officials from foreign criminal jurisdiction".[132] However, the references to the State and its "various organs of government", to "representatives of the State acting in that capacity" and to the "immunity *ratione personae* of Heads of State" are useful for determining the criteria for identifying an "official" for the purposes of the present report. First, these references provide sufficient justification to deduce that there are two different categories of persons to whom immunity *ratione personae* and immunity *ratione materiae* apply, respectively. Second, they highlight the representative capacity required for persons to whom immunity *ratione materiae* applies.[133]

78. From a terminological point of view, it should be noted that the expression "official" is used neither by the Commission in the draft articles on jurisdictional immunities of States and their property nor in the Convention. As mentioned above, however, reference is made to the State's "organs of government" and "representatives". Also, in relation to those draft articles, the Commission considered at the time that the phrase "organs of State" referred to entities rather than to persons, with the sole exception of the Head of State and the Head of Government, whom it partially included in that category.[134]

(g) *Convention on the prevention and punishment of the crime of genocide*

79. With regard to international treaties which define conduct that could constitute a crime, regardless of its connection with international relations, reference to the category of officials appears very early in treaty practice. The Convention on the prevention and punishment of the crime of genocide, for example, expressly mentions in its article IV "rulers, public officials or private individuals", in referring to persons who can commit the crime of genocide. Although the Convention contains no definition of these concepts, the reference to "rulers" and "public officials", as opposed to "private individuals", points to the existence of two categories of persons, the first acting in an official capacity and the second in a private capacity. Article IV does not, however, provide any other information to help differentiate between "rulers" and "public officials", or to help deduce the criteria for determining whether they are acting in an official capacity or not.

80. Nevertheless, the use of the terms "rulers" and "public officials" points to the existence of two different categories of persons who act on behalf of the State, albeit in different capacities. In this regard, it should be recalled that the inclusion of the term "rulers" gave rise to an intense and interesting debate in the Sixth Committee in 1948, which revealed that, for the majority of States, the terms "ruler" and "public official" are not interchangeable.[135] For example, Egypt said that "the concept of ruler did indeed include not only the constitutional monarch … but also ministers and all those exercising governmental power, in contrast to administrative officials";[136] India drew attention to the need to "include persons exercising authority in the State in addition to public officials and private individuals";[137] while France said that the term "rulers" "in reality embraced … those having the actual responsibility of power".[138] That debate remains of interest for the purposes of the present report.

81. Lastly, it should be noted that the proposal by Belgium[139] to replace the terms "rulers" and "public officials" with "agents of the State", which in its view could be validly used to refer to both categories of persons, was not adopted.

(h) *Convention against torture and other cruel, inhuman or degrading treatment or punishment*

82. The Convention against torture and other cruel, inhuman or degrading treatment or punishment includes the concept of an "official" as one of the components of the definition of torture itself by stipulating that the "pain or suffering" of victims must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (art. 1, para. 1). Article 2, paragraph 3, refers to orders from superiors as those that come from "a superior officer or a public authority". Lastly, in establishing the obligation of States to criminalize torture in their domestic laws, it once again refers expressly to "a public official or other person acting in an official capacity" (art. 16, para. 1).[140]

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[132] See, in this regard, *Yearbook … 2013*, vol. II (Part Two), pp. 44–45, para. (4) of the commentary to draft article 3 and footnote 267 to that paragraph.

[133] In this connection, the comments of the Commission contained in the commentary to the draft articles on jurisdictional immunities of States and their property, adopted on second reading in 1991, are of interest. See *Yearbook … 1991*, vol. II (Part Two), para. 28, pp. 14–15 and 18, paras. (6), (8) and (17) of the commentary to draft article 2; and p. 21, para. (1) of the commentary to draft article 3.

[134] *Ibid.*, pp. 14–16, paras. (6) and (8)–(10) of the commentary to draft article 2.

[135] See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 93rd meeting, pp. 314–322. With regard to the use of the two terms, only Venezuela stated that "all the rulers of his country were regarded as public officials". It added, however, that "since it was not so in all countries", it did not object to retaining the term "rulers" (*ibid.*, p. 318).

[136] *Ibid.*, p. 315.

[137] *Ibid.*, p. 317.

[138] *Ibid.*, p. 315.

[139] *Ibid.*, p. 316.

[140] In addition to these explicit references to officials and public authorities, the following categories of persons are mentioned in article 10, paragraph 1, on training measures for the prevention of torture: "law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment".

83. For its part, the Committee against Torture has reflected the terminology of the Convention in the general comments which it has adopted to date,[141] adding the expressions "persons who act, *de jure* or *de facto*, in the name of … the State",[142] "officials and those acting on its behalf",[143] "State authorities or others acting in an official capacity",[144] "a superior or public authority",[145] "officials in the chain of command"[146] and "those exercising superior authority—including public officials".[147] In addition, when the Committee states in its general comment No. 3 (2012) on the implementation of article 14 that the immunity of certain persons is incompatible with the Convention, it uses the expression "agents" of the State.[148]

84. The Convention against Torture does not, however, define the concept of an "official", a "public authority" or "other person acting in an official capacity". Neither has the Committee against Torture defined these concepts to date. The Convention, however, clearly emphasizes the notion of "acting in an official capacity" and uses the qualifier "public" to refer to both "officials" and "authorities". The connection of the person with the State and with the performance of State functions is thus made evident. This connection with the State has also been emphasized by the Committee against Torture through its continuous reference to the need for officials, authorities and persons to be "acting in an official capacity or on behalf of the State", and the use of the expression "State authorities", in addition to the statement that persons "are acting in an official capacity on account of their responsibility for carrying out the State function".[149] On the basis of the above, a second identifying criterion can also be deduced, namely the existence of a variety of persons who have such a connection with the State and with the exercise of public functions. These persons do not all conform to the strict concept of an "official", since other formulations such as "authorities" and "agents" are included.[150]

(i) *Instruments against corruption*

85. For the purposes of the present report, universal and regional instruments adopted since the 1990s to combat the phenomenon of corruption are of particular interest. A common feature of all these instruments is that they revolve around State officials. Consequently, they not only expressly mention this category of persons in their articles but also include definitions of what is meant by an "official".

86. For example, the United Nations Convention against Corruption establishes the following in its article 2 (*a*):

> "Public official" shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.

87. The Convention also refers to a "foreign public official", which it defines in article 2 (*b*) as

> any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.

The reference to "public officials" and "foreign public officials" is maintained uniformly throughout the Convention,[151] although some of its provisions also refer to "civil servants" as a separate category of "public official".[152]

88. The Inter-American Convention against Corruption refers jointly to the terms "'[p]ublic official', 'government official', or 'public servant'", which it defines in its article I as

> any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy.

89. Lastly, the Criminal Law Convention on Corruption of the Council of Europe establishes the following:

> (*a*) "public official" shall be understood by reference to the definition of "official", "public officer", "mayor", "minister" or "judge" in the national law of the State in which the person in question performs that function and as applied in its criminal law;
>
> (*b*) the term "judge" referred to in subparagraph (*a*) above shall include prosecutors and holders of judicial offices;
>
> (*c*) in the case of proceedings involving a public official of another State, the prosecuting State may apply the definition of public official only insofar as that definition is compatible with its national law.[153]

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[141] In general comment No. 1 (1997) on the implementation of article 3 in the context of article 22 of the Convention, the Committee refers to "a public official or other person acting in an official capacity" (Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), pp. 52–53, annex IX, paras. 3 and 8 (*b*)). In general comment No. 2 (2007) on the implementation of article 2, the Committee refers to "officials and others … acting in official capacity" (para. 15) and "officials" (para. 18) (see *ibid., Sixty-third Session, Supplement No. 44* (A/63/44), pp. 179–180, annex VI). In general comment No. 3 (2012) on the implementation of article 14, the Committee refers to "State authorities or others acting in their official capacity" (para. 7) and to "public officials" (para. 18) (*ibid., Sixty-eighth Session, Supplement No. 44* (A/68/44), pp. 255 and 257, annex X).

[142] *Ibid., Sixty-third Session, Supplement No. 44* (A/63/44), general comment No. 2, p. 177, para. 7.

[143] *Ibid.*, pp. 177 and 179, paras. 7 and 15.

[144] *Ibid.*, p. 180, para. 18; *Sixty-eighth Session, Supplement No. 44* (A/68/44), general comment No. 3, p. 255, para. 7.

[145] *Ibid., Sixty-third Session, Supplement No. 44* (A/63/44), general comment No. 2, p. 182, para. 26.

[146] *Ibid.*, p. 177, para. 7.

[147] *Ibid.*, p. 182, para. 26.

[148] *Ibid., Sixty-eighth Session, Supplement No. 44* (A/68/44), general comment No. 3, p. 262, para. 42.

[149] *Ibid., Sixty-third Session, Supplement No. 44* (A/63/44), general comment No. 2, p. 180, para. 17.

[150] The variety of persons connected with the State is made clear in the following list, contained in general comment No. 2: "officials and others, including agents, private contractors, and others acting in an official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law" (*ibid.*, p. 179, para. 15).

[151] See arts. 7, 8, 12, 15–20, 25, 30, 38 and 52.

[152] See arts. 7 and 30.

[153] Art. 1.

90. This definition is also applicable to the Civil Law Convention on Corruption of the Council of Europe, adopted on 4 November 1999, which simply refers to "public officials in the exercise of their functions".[154]

91. The definition of a "public official" contained in the Criminal Law Convention on Corruption is of particular interest for the purposes of the present report because, as stated in the Explanatory Report to the Convention:

> The drafters of this Convention wanted to cover all possible categories of public officials in order to avoid, as much as possible, loopholes in the criminalisation of public sector bribery. This, however, does not necessarily mean that States have to redefine their concept of "public official" in general. In reference to the "national law" it should be noted that it was the intention of the drafters of the Convention that Contracting parties assume obligations under this Convention only to the extent consistent with their Constitution and the fundamental principles of their legal system, including, where appropriate, the principles of federalism.[155]

92. The autonomy of national systems in defining the persons which each State categorizes internally as "public officials" is thus maintained, but the categories of persons and posts which must be understood to be included as a minimum in the concept of a public official are explicitly stated to avoid loopholes in the prosecution of corruption. In this connection, the reference to "mayors and ministers", who "[i]n many countries … are assimilated to public officials for the purpose of criminal offences committed in the exercise of their powers",[156] is of particular significance. Similarly, the Explanatory Report refers to "judges" as "holders of judicial office, whether elected or appointed. This notion is to be interpreted to the widest extent possible: the decisive element being the functions performed by the person, which should be of a judicial nature, rather than his or her official title. Prosecutors are specifically mentioned as falling under this definition, although in some States they are not considered as members of the 'judiciary'".[157] This all-encompassing approach adopted by the Convention with regard to the concept of a public official is also reflected in the Additional Protocol to the Criminal Law Convention on Corruption, which extends the scope of the Convention to arbitrators and jurors, both national and foreign.[158]

93. Despite the differences among the various instruments analysed in this section, the following common elements can be deduced for the definition of an "official": (*a*) the term includes persons performing public functions in the name or on behalf of the State; (*b*) it is irrelevant whether these persons were elected or appointed to that position; (*c*) it is also irrelevant whether they perform these functions on a permanent, temporary, paid or unpaid basis; (*d*) it is irrelevant whether they perform these public functions within the executive branch (administration), the judicial branch or the legislative branch; and (*e*) it is also irrelevant whether they perform these functions in central organs of the State, in other political or administrative structures, or even in public sector companies or other public sector bodies. Although it is debatable whether all of these characteristics should be applied in relation to the immunity of State officials from foreign criminal jurisdiction, it is undeniable that they can serve as a basis for identifying the criteria which can be used to define the concept of an official for the purposes of the present topic.

(j) *Rome Statute of the International Criminal Court*

94. Article 27, paragraph 1, of the Rome Statute establishes the following:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

95. The article lists several persons who fall within the concept of "official capacity", which is irrelevant to the purpose of determining international criminal responsibility. This list is of interest for the present report, given that article 27, paragraph 2, links the concept of "official capacity" to immunity by establishing that

> immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

96. Article 27 is all-encompassing in that it aims to include anyone to whom the concept of "official capacity" can be applied; this reflects to some degree the approach taken by the Commission in its draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996.[159] It can thus be assumed that the concept of "official capacity" includes any person who represents, or acts on behalf or in the name of the State.[160]

97. Article 8 *bis* of the Rome Statute, on the crime of aggression, defines aggression as a leadership crime, establishing in its paragraph 1 that it is committed by "a person in a position effectively to exercise control over or to direct the political or military action of a State".[161] However, it should be noted that this provision does not alter the contents of article 27 or expand its scope. In fact, the reference to the capacity to effectively "exercise control over or to direct the political or military action of a State" should be understood as a factual element, linked to the person's influence and decision-making power, which applies whether the perpetrator of a crime of aggression is or is not one of persons listed in paragraph 1

[154] Art. 5.

[155] Council of Europe, Explanatory Report to the Criminal Law Convention on Corruption, *European Treaty Series No. 173*, p. 6, para. 27.

[156] *Ibid.*, para. 28.

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

[158] See art. 1 of the Additional Protocol.

[159] *Yearbook … 1996*, vol. II (Part Two), p. 17, para. 50. See also paras. 102–105 below.

[160] The doctrine has also followed this interpretation, on the understanding that the concept of an "official" applies to persons who *de facto* hold or carry out the functions referred to in article 27 of the Rome Statute. See, *inter alia*, Triffterer, "Irrelevance of official capacity", pp. 788–789; Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, pp. 449–450.

[161] Similar language is used in the amendments to the Elements of Crimes in respect of article 8 *bis*, approved at the Review Conference of the Rome Statute. See *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, Official Records*, p. 21, resolution RC/Res.6, annex II, "Elements", para. 2.

of article 27.[162] Accordingly, this factual element cannot, in and of itself, be considered a criterion for defining the general concept of an "official", irrespective of whether it applies to any of the persons included in this category.

4. Other work of the Commission

98. On several past occasions, the Commission has had to address the concept of a State official, organ or agent. Cases when this work resulted in treaties have already been analysed within the framework of treaty practice. However, other work done by the Commission may serve as a useful reference for the purposes of the present report, namely, the Nürnberg Principles, the draft Code of Offences against the Peace and Security of Mankind, and the draft articles on responsibility of States for internationally wrongful acts.

(a) *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*

99. In the draft document that set out the Nürnberg Principles, which were subsequently adopted by the General Assembly,[163] the Commission made reference in Principle III to a person who acted "as Head of State or responsible Government official" and, in Principle IV, to the orders from the "Government or of a superior". While neither the Special Rapporteur, Mr. Spiropoulos, nor the Commission provided a definition of "responsible government official", the commentaries adopted by the Commission make it clear that in both of these cases, especially in Principle III, reference is being made to a person acting in an official capacity, based on the references made by the Nürnberg Tribunal to the "representatives of the State" and individuals "while acting in pursuance of the authority of the State".[164]

(b) *Draft Code of Offences against the Peace and Security of Mankind (1954)*

100. In article 2 of the first draft Code of Offences against the Peace and Security of Mankind,[165] adopted on second reading in 1954, the Commission refers to the "authorities of a State" as potential perpetrators of the offences defined therein. Furthermore, article 3 of the Code, which states that acting in an official capacity is irrelevant in respect of the responsibility for such offences, explicitly uses the terms "Head of State" and "responsible government official". However, like the Nürnberg Principles, the draft Code does not define "responsible government official"; this term is contrasted with "private individuals" in the commentary to draft article 2. In any case, it may be concluded on the basis of this link between the draft Code and the Nürnberg Principles adopted in 1950 that they both refer to a person acting in the name and on behalf of the State.

101. However, the Commission's work that led to the adoption of the first draft Code indicates that the definition of the term "responsible government official" was already generating uncertainty at the time. Special note should also be taken of the second report of the Special Rapporteur, Mr. Spiropoulos, which, in its analysis of the positions maintained by States in the Sixth Committee, cited in particular the statements made by Belgium (Mr. Van Glabbeke) and the Netherlands (Mr. Röling). Belgium said that "there was still some confusion regarding the exact meaning of the words 'responsible government official'. Opinions differed: some said 'responsible government official' referred solely to a member of a government … or even any person occupying an important post in the three important branches of government, the legislative, the executive or the judicial. Some documents referred to highly placed officials and the meaning of that expression was no clearer than the term 'responsible government official'".[166] For its part, the Netherlands maintained that "the provision concerning the official position of a defendant could not be applied in the same way to major and minor war criminals".[167] Despite these comments, the Special Rapporteur did not address the definition of the concept and the scope of the term "responsible government official" in his report, only indicating that, in the case of the invasion of a territory by the troops of another State, "the simple soldier would not be criminally responsible under international law … it would go beyond any logic to consider a mere soldier as criminally responsible for an action which has been decided and directed by the authorities of a State".[168] However, in his third report, which was submitted to the Commission in 1954 and formed the basis for the adoption of the Code on second reading, in draft article 3, the Special Rapporteur referred expressly to the use of the term "responsible government official" ("*gouvernant*" in French) and, in reference to the discussions in the General Assembly of the Convention on the prevention and punishment of the crime of genocide, stated that the term referred to "those having the actual responsibility of power".[169] In any case, in its commentary to the draft Code, the Commission did not offer any definition of the term "responsible government official".

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[162] It should be recalled that the reference to effective control and direction is based on the jurisprudence of the Nürnberg Tribunal in respect of the criminal responsibility of industrialists, who obviously cannot be considered to exercise official functions. On this point, see McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, pp. 178–179 and 181.

[163] General Assembly resolution 488 (V) of 12 December 1950.

[164] See the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook … 1950*, vol. II, pp. 374–378, document A/1316, paras. 95–127, in particular paras. 103–104. The text is reproduced in *Yearbook … 1985*, vol. II (Part Two), p. 12, para. 45.

[165] *Yearbook… 1954*, vol. II, p. 149.

[166] *Yearbook … 1951*, vol. II , document A/CN.4/44, para. 85.

[167] *Ibid.*, para. 82.

[168] *Ibid.*, p. 58, commentary to draft article I, para. 3. This view was upheld by the Commission in its report upon adoption of the draft Code on first reading, particularly in the commentary, where, with regard to the issue of complicity, the Commission similarly affirmed that "it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of offences against the peace and security of mankind could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offence all the members of the armed forces of a State or the workers in war industries" (*ibid.*, p. 137, para. (12) of the commentary to draft article 2, third paragraph). While these comments obviously refer to the relevance of the seniority of a person to his or her criminal responsibility, they are pertinent because they affirm that a distinction can be made between a "responsible government official" and other persons engaged in acts on behalf of the State, in fulfilment of decisions taken by others (*ibid.*).

[169] *Yearbook… 1954*, vol. II, p. 120, sect. XIV (*c*). The French version of the commentary refers to "*ceux qui ont la responsabilité effective du pouvoir*".

(c) *Draft Code of Crimes against the Peace and Security of Mankind (1996)*

102. In several provisions of the draft Code of Crimes against the Peace and Security of Mankind, adopted in 1996, the Commission refers to individuals who would fall within any of the categories set out in the present report. The most relevant provision is draft article 7, which notes, for the purposes of establishing individual criminal responsibility for the commission of the crimes contained in the draft Code, that the "official position of an individual who commits a crime [is irrelevant] … even if he acted as Head of State or Government".[170] Additionally, in the commentaries to draft articles 2, 4, 5 and 16, the Commission also refers, albeit in different ways, to the various categories of persons discussed in this report.

103. When defining individual responsibility and distinguishing it from State responsibility, the Commission refers to the "agent of the State", to an individual who acts "on behalf of the State" or "in the name of the State", or even as "a *de facto* agent, without any legal power",[171] and particularly emphasizes the fact that "aggression can be committed only by individuals who are agents of the State and who use their power to give orders and the means it makes available in order to commit this crime".[172] The commentaries also contain references to individuals who "are in positions of governmental authority or military command",[173] the "governmental hierarchy or military chain of command"[174] and to "senior government officials and military commanders".[175] However, the Commission does not define or list the persons to whom these categories apply in any of the commentaries. In this regard, the commentary to draft article 7 does not specify what is meant by "the official position of an individual who commits a crime" referred to in the article, although the Commission does clarify the concept by referring to "persons in positions of governmental authority who are capable of formulating plans or policies" and who can "invoke the sovereignty of the State",[176] "individuals who occupy the highest official positions and therefore have the greatest powers of decision",[177] and persons who claim "that the acts constituting the crime were performed in the exercise of [their] functions".[178]

104. It must thus be inferred from these references that the individuals referred to in the aforementioned provisions of the draft Code have a connection with the State (the person is an agent of the State, an official or a military officer, or acts in the name or on behalf of the State) and exercises some sort of governmental authority or power, including at the highest level. These qualities are especially pertinent when setting out the criteria for identifying an "official" for the purposes of the present topic.

105. Lastly, it should be noted that the Commission has not used a specific term to refer to such persons either, with the exception of the Head of State. With respect to other individuals, it only mentions their "official position" in draft article 7, or refers to "government officials and military commanders", "the highest official positions" or "positions of government authority or military command" in the commentaries to the articles.

(d) *Draft articles on responsibility of States for internationally wrongful acts*

106. The draft articles on responsibility of States for internationally wrongful acts[179] contain several provisions that are germane to the present report, especially the articles in chapter II concerning attribution to a State of conduct by persons and entities. These provisions are interesting because they refer to different categories of persons (or entities) that act in the name and on behalf of the State and which therefore fall within the concept of an "official" analysed in the present report.

107. With this in mind, it should be noted that draft articles 4 and 5 refer to two separate categories, described respectively as "organs of a State" and "persons or entities exercising elements of governmental authority" though not organs of a State. According to draft article 4, a State organ is any person or entity that "exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of the territorial unit of the State" (para. 1). That person or entity must, moreover, have the "status [of an organ] in accordance with the internal law of the State" (para. 2). Draft article 5 refers to a "person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority". Although draft articles 4 and 5 refer to both persons and entities, only the reference to persons is relevant for the consideration of what constitutes an official.

108. The commentaries to the draft articles contained in chapter II also present interesting points. For instance, the introductory commentary to chapter II sets out the general rule that "the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State".[180] The conduct of a State organ is attributable to the State "irrespective of the level of administration or government at which the conduct occurs",[181] which means that in practice there can be a variety of persons or officials who act as agents of the State. The essential element for attributing conduct to a State is that an official must be acting as an organ of the State, regardless of the particular motivation the official may have. Furthermore, what is relevant is not the internal function the

[170] *Yearbook … 1996*, vol. II (Part Two), p. 26, para. 50.

[171] *Ibid.*, p. 19, para. (4) of the commentary to draft article 2. The same terms are highlighted by the Commission in the commentary to draft article 4.

[172] *Ibid.*, pp. 19–20, para. (5) of the commentary to draft article 2. See also the commentary to draft article 16 (pp. 42 *et seq.*).

[173] *Ibid.*, p. 23, para. (1) of the commentary to draft article 5.

[174] *Ibid.*, pp. 23–24, para. (2) of the commentary to draft article 5.

[175] *Ibid.*, p. 21, para. (14) of the commentary to draft article 2; and p. 24, para. (3) of the commentary to draft article 5.

[176] *Ibid.*, pp. 26–27, para. (1) of the commentary to draft article 7.

[177] *Ibid.*, p. 27, para. (5) of the commentary to draft article 7.

[178] *Ibid.*, para. (6) of the commentary to draft article 7.

[179] *Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76.

[180] *Ibid.*, p. 38, para. (2) of the introductory commentary to chapter II.

[181] *Ibid.*, p. 39, para. (5) of the introductory commentary to chapter II.

agent performs within the State, but rather the fact that he performs "public functions" and exercises "public powers".[182] As to the concept of an official, the commentary to this provision makes it clear that even conduct by lower-level staff, if performed in an official capacity, can be attributed to the State. As the Commission indicates in its commentary to draft article 7, the central issue is whether "the conduct was performed by the body in an official capacity or not".[183]

109. In addition, when considering the scope of such governmental authority, the Commission pointed out that the term "governmental" is necessarily imprecise. In order to define it, "of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise".[184] In internal law, the connection between the State and the subject exercising elements of governmental authority can take various forms. However, in international law, the main point is that the act performed be regarded as an official "governmental" act. Such authority can be exercised even by *de facto* organs or agents if they are "in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority" (art. 9).

110. Thus, the draft articles on responsibility of States for internationally wrongful acts offer significant elements that help determine the criteria for defining the concept of an "official" for the purposes of the present topic, namely (*a*) the existence of a connection between the individual and the State, which can take different forms; (*b*) the fact that the individual is acting on behalf of the State; and (*c*) the requirement that the individual should be exercising official governmental functions and prerogatives.

5. Conclusions

111. On the basis of the foregoing study of the practice, a number of conclusions can be drawn for determining the criteria for identifying what constitutes an official for the purposes of the draft articles on immunity from foreign criminal jurisdiction, namely:

(*a*) the official has a connection with the State. This connection can take several forms (constitutional, statutory or contractual) and can be temporary or permanent. The connection can be *de jure* or *de facto*;

(*b*) the official acts internationally as a representative of the State or performs official functions both internationally and internally;

(*c*) the official exercises elements of governmental authority, acting on behalf of the State. The elements of governmental authority include executive, legislative and judicial functions.

112. These identifying criteria apply both to those State officials who enjoy immunity *ratione personae* (Heads of State, Heads of Government and Ministers for Foreign Affairs) and to those who enjoy immunity *ratione materiae* (all other officials). The criteria in question, however, are especially relevant in the case of immunity *ratione materiae* because it is not possible to enumerate explicitly the categories of persons to whom it applies. In order, then, to identify a given person as an official, it must be determined on a case-by-case basis if all the criteria are met.

C. Terminology

113. The second question to be considered in connection with the concept of an official concerns the terms employed to designate the persons to whom immunity would apply. As already indicated above, this is a primarily terminological issue, but it goes beyond a mere linguistic preference for one word over another. The choice of terms is governed basically by two criteria: (*a*) the term must be broad enough in meaning to encompass all the persons concerned; and (*b*) the term must take account of the previous practice of the Commission. To these two should be added a third consideration: the term chosen must be easily comprehensible—leaving no room for error—to the national officials responsible for applying the rules governing immunity, in particular, judges, prosecutors, attorneys and other law-enforcement officials. It must be borne in mind that such persons, as specialists in their respective legal systems, will necessarily be led to "think" according to the categories and terms of their own internal law. Consequently, in its approach to the issue of terminology, the present report will advocate the use of terms that can in no instance be misinterpreted, especially in the case of terms that have different meanings in different countries, where their use might have the unwanted effect of conditioning the way in which the subjective scope of immunity is interpreted.

114. With this in mind, the first point to be made is that it is obvious from the foregoing analysis of the practice that there is a lack of uniformity in the use of one or several terms to refer to the same persons. Setting aside the express and uniform reference to Heads of State, Heads of Government and Ministers for Foreign Affairs, it must be said that both the jurisprudence and the conventions examined, and even the legal writings, employ different terms to refer to the category of persons at issue in the present report. What is more, it is not always possible in each instance to explain the reason why one term is used rather than another.

115. Taking treaties alone, as an example, the following terms are used in English, alongside their equivalents in Spanish and French:

(*a*) diplomatic agent ("*funcionario diplomático*"/"*agent diplomatique*");[185]

(*b*) diplomatic agent ("*agente diplomático*"/"*agent diplomatique*");[186]

[182] *Ibid.*, para. (6) of the introductory commentary to chapter II.

[183] *Ibid.*, p. 46, para. (7) of the commentary to draft article 7.

[184] *Ibid.*, p. 43, para. (6) of the commentary to draft article 5.

[185] Vienna Convention on Diplomatic Relations.

[186] *Ibid.*

(*c*) diplomatic staff ("*personal diplomático*"/"*personnel diplomatique*");[187]

(*d*) consular officer ("*funcionario consular*"/"*fonctionnaire consulaire*");[188]

(*e*) consular employee ("*empleado consular*"/"*employé consulaire*");[189]

(*f*) consular agent ("*agente consular*"/"*agent consulaire*");[190]

(*g*) agent of the sending State ("*agente del Estado que envía*"/"*mandataire de l'État d'envoi*");[191]

(*h*) administrative and technical staff, service staff ("*personal administrativo y técnico y personal de servicio*"/"*personnel administratif et technique*", "*personnel de service*");[192]

(*i*) representatives ("*representantes*"/"*représentants*"), in a general sense;[193]

(*j*) representative ("*representante*"/"*représentant*"), in the context of a special mission;[194]

(*k*) representative or official ("*representante, funcionario o personalidad oficial*"/"*représentant, fonctionnaire ou personnalité officielle*");[195]

(*l*) persons of high rank ("*personalidades de rango elevado*"/"*personnalités de rang élevé*");[196]

(*m*) organs of Government ("*órganos de gobierno*"/"*organes de gouvernement*"), including in this category Heads of State and Heads of Government;[197]

(*n*) constitutionally responsible rulers, public officials ("*gobernantes*", "*funcionarios*"/"*gouvernants*", "*fonctionnaires*");[198]

(*o*) public official or other person acting in an official capacity ("*funcionario público u otra persona en el ejercicio de funciones públicas*"/"*agent de la fonction publique ou toute autre personne agissant à titre officiel*");[199]

(*p*) superior officer or a public authority ("*funcionario superior o autoridad pública*"/"*supérieur ou autorité publique*");[200]

(*q*) public official ("*funcionario público*"/"*agent public*") and foreign public official ("*funcionario público extranjero*"/"*agent public étranger*");[201]

(*r*) civil servants ("*empleados públicos*"/"*fonctionnaires*");[202]

(*s*) public official, government official or public servant ("*funcionario público, oficial gubernamental o servidor público*"/"*fonctionnaire, employé gouvernemental ou serviteur public*");[203]

(*t*) public official ("*agente público*"/"*agent public*");[204]

(*u*) official capacity ("*cargo oficial*"/"*qualité officielle*").[205]

116. As can be seen, not only are the terms employed very varied, but they also do not always correspond to the terms used in Spanish and French.

117. Secondly, an analysis of the work of the Commission that was not incorporated into treaties shows the following terms used in English, followed by their Spanish and French equivalents:

(*a*) responsible government official ("*autoridad del Estado*"/"*chef d'État ou de gouvernement*");[206]

(*b*) official position ("*carácter oficial*"/"*qualité officiel*");[207]

(*c*) agent of the State ("*agente del Estado*"/"*agent de l'État*");[208]

(*d*) high-level government officials or military commanders ("*funcionarios públicos o mandos militares de alto nivel*"/"*hauts fonctionnaires de l'administration ou chefs militaires*") and senior government officials and military commanders ("*funcionarios y jefes militares*"/ "*hauts fonctionnaires de l'administration et chefs militaires*");[209]

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[187] Convention on special missions, and the 1975 Vienna Convention.

[188] Vienna Convention on Consular Relations.

[189] *Ibid.*

[190] *Ibid.*

[191] *Ibid.*

[192] Vienna Convention on Diplomatic Relations, Convention on special missions and the 1975 Vienna Convention.

[193] United Nations Convention on Jurisdictional Immunities of States and Their Property.

[194] Convention on special missions.

[195] Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents.

[196] Convention on special missions, and the 1975 Vienna Convention.

[197] United Nations Convention on Jurisdictional Immunities of States and Their Property.

[198] Convention on the prevention and punishment of the crime of genocide.

[199] Convention against torture and other cruel, inhuman or degrading treatment or punishment.

[200] *Ibid.*

[201] United Nations Convention against Corruption.

[202] *Ibid.*

[203] Inter-American Convention against Corruption.

[204] Criminal Law Convention on Corruption.

[205] Rome Statute of the International Criminal Court. This term includes the Head of State ("*Jefe de Estado*"/"*chef d'État*"), Head of Government ("*Jefe de Gobierno*"/"*chef de gouvernement*"), a member of a Government ("*miembro de un Gobierno*"/"*membre d'un gouvernement*"), a member of a parliament ("*parlamentario*"/"*membre d'un parlement*"), an elected representative ("*representante elegido*"/"*représentant élu*") and a government official ("*funcionario de gobierno*"/"*agent d'un État*").

[206] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and the draft Code of Offences against the Peace and Security of Mankind (1954).

[207] Draft Code of Offences against the Peace and Security of Mankind (1996).

[208] Draft Code of Offences against the Peace and Security of Mankind (1996) (commentaries).

[209] *Ibid.*

(*e*) State organ ("*órgano del Estado*"/"*organe de l'État*");[210]

(*f*) person exercising governmental authority ("*persona que ejerce atribuciones del poder público*"/"*personne qui exerce des prérogatives de puissance publique*").[211]

118. As in the case of the treaties, note should be taken of the variety of terms employed in English and the fact that they do not always correspond to the terms used in the other two languages.

119. The conclusion, therefore, is that there is no term that is used uniformly and regularly to refer to the category of persons analysed in the present report. Moreover, the terms used do not always cover all persons who might, following the criteria described above, be included in that category. On the contrary, some of the terms listed in the two paragraphs above are frequently used to refer to only one category of persons, leaving aside others who would by definition enjoy immunity *ratione personae*. Bearing this in mind, and considering the earlier discussions in the Commission and its use of these terms in its work, the Special Rapporteur believes it necessary to examine in greater detail the terms that appear in the actual title of the topic, namely, "official" in English, "*funcionario*" in Spanish and "*représentant*" in French; along with the terms "organ" ("*órgano*" in Spanish and "*organe*" in French) and "agent" ("*agente*" in Spanish and "*agent*" in French). The following is a brief analysis of the terms, as defined in both general and legal dictionaries, with a view to determining their suitability.

1. "*Funcionario*"

120. According to the *Diccionario de la lengua española* (Real Academia Española), the Spanish term "*funcionario*" ("official") is defined in the general sense as "a person who holds a public post", although in Argentina, Ecuador and Uruguay it can also mean "a high-ranking employee, particularly in the State hierarchy".[212] These two meanings are not essentially different. On the other hand, various legal dictionaries refer to an official as "a person who performs functions in the administration and is at the service of the State, having voluntarily become part of its organizational structure, and earning his livelihood from those functions",[213] "a person who serves in a public administration in a paid professional relationship, as regulated by administrative law",[214] "a person who performs public functions and is at the service of the State, having voluntarily become part of its organizational structure",[215] and "a person who has been authorized to act in an official capacity" or "who exercises public functions, or holds a government post, either through popular election or by appointment by a competent authority".[216] It should be said in any case that the term "*funcionario*" is not generally used in Spanish-speaking countries to refer to the Head of State, the Head of Government, the Minister for Foreign Affairs or other government ministers, including, in some cases, other political officials. The more frequent term used is "*mandatario*" or "*dignatario*" in the case of the first group and "*alto cargo*" or "*alto funcionario*" for the others. Furthermore, the term "*funcionario*" is not normally used to refer to parliamentarians either, who are called "*representantes*", nor, although to a lesser extent, to refer to persons who exercise judicial functions even though they are usually officials in the administrative sense of the word.

121. The term "*funcionario*" is normally translated as "*fonctionnaire*" in French, and by "officer", "official", "civil servant" or "public servant" in English.[217]

122. In the case of the French term "*fonctionnaire*", the non-specialized dictionaries define it as a "public agent who, having been appointed to a permanent post, occupies a professional rank in the hierarchy of the State administration", or is "appointed to exercise a public function",[218] and as a "person who performs a public function" or "who has been appointed to a permanent post at the professional level of a public administration".[219] In the legal dictionaries, the term "*fonctionnaire*" means an "agent of a public body whose status in the civil service entails appointment to a permanent post and to a professional rank in the hierarchy", or a "person appointed to a permanent post and to a professional rank in the hierarchy",[220] as governed, based on this definition, by administrative law.[221] In the *Dictionnaire de Droit International Public*, an official is taken to be a synonym of an agent of the State ("*agent de l'État*") and is defined as a "person normally appointed to occupy a permanent post in the State administration,

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[210] Draft articles on responsibility of States for internationally wrongful acts.

[211] *Ibid.*

[212] Real Academia Española, *Diccionario de la lengua española*, 22nd ed. (Madrid, Espasa, 2001). The definitions read in Spanish: "*[p]ersona que desempeña un empleo público*"; and "*[e]mpleado jerárquico, particularmente el estatal*".

[213] *Gran Diccionario Jurídico DVE* (Barcelona, De Vecchi, 1991). The Spanish text reads: "*la persona que realiza funciones de la Administración y que está al servicio del Estado por haberse incorporado voluntariamente a la estructura orgánica del mismo, haciendo de la función asumida su medio habitual de vida*".

[214] *Diccionario Jurídico Espasa* (Madrid, Espasa Calpe, 1991). The Spanish text reads: "*aquellas personas incorporadas a la [administración pública] por una relación de servicios profesionales y retribuidos, regulada por el derecho administrativo*".

[215] Luís Ribó Durán, ed., *Diccionario de Derecho*, 2nd ed. (Barcelona, Bosch, 1995). The Spanish text reads: "*la persona que realiza funciones públicas y que está al servicio del Estado por haberse incorporado voluntariamente en la estructura orgánica del mismo*".

[216] Ignacio Rivera García, ed., *Diccionario de términos jurídicos*, 2nd ed. (Orford, Equity, 1985). The Spanish texts read: "*aquel que ha sido investido con la autoridad de un cargo*" and "*que ejerce funciones públicas, faena de Gobierno, ya sea por elección popular o por nombramiento de autoridad competente*".

[217] Edgard Le Docte, ed., *Diccionario jurídico en cuatro idiomas* (Antwerp, Maklu Uitgevers, 1987).

[218] *Larousse* (www.larousse.fr/dictionnaires/francais). The definitions in French read: "*agent public qui, nommé dans un emploi permanent, a été titularisé dans un grade de la hiérarchie des administrations de l'État*" and "*titulaire d'une fonction publique*".

[219] *Le Grand Robert de la langue française* (https://grandrobert.lerobert.com). The definition in French reads: "*personne qui remplit une fonction publique; personne qui occupe, en qualité de titulaire, un emploi permanent dans les cadres d'une administration publique.*"

[220] Gérard Cornu *and others*, eds., *Vocabulaire juridique* (Paris, Presses Universitaires de France, 1987). The definition in French reads: "*agent d'une collectivité publique dont la situation dans la fonction publique est caractérisée par la permanence de l'emploi dans lequel il a été nommé et par sa titularisation dans un grade de la hiérarchie.*"

[221] *Lexique des termes juridiques*, 20th ed. (Paris, Dalloz, 2013). The definition in French reads: "*personne nommée dans un emploi permanent et titularisée dans un grade de la hiérarchie*".

who acts on behalf of the State, having been authorized to exercise public powers as recognized by national legislation and under the authority of the Government".[222]

123. Furthermore, attention should be drawn to the fact that the English term "official", which will be examined later, has a broader meaning than "*funcionario*" or "*fonctionnaire*", although on occasion it can have an equivalent meaning. It should also be borne in mind that the Spanish term "*funcionario*" can correspond also to the term "civil servant", which has a more limited scope as a category encompassing persons belonging to the "civil service", defined as follows: "The civil service is the body of officials … whose task it is to administer the government … under the control and direction of Ministers … Civil servants do not owe their employment to political allegiance; they are restricted as to the political activities in which they may engage, and remain in post notwithstanding changes of government".[223]

2. "*Représentant*"

124. The French term "*représentant*" is defined in the general dictionaries as "a person who has received the power to act in the name of someone, or who performs an act in the name and on behalf of someone",[224] and as "a person who represents or who has received the power to act in someone's name", "a person to whom a social group entrusts political power, to exercise it in its name", "a person who has been elected or to whom power has been delegated through an election (in particular legislative power)" or "a person appointed to represent a State or Government before another State or Government".[225] The legal dictionary *Vocabulaire juridique*, however, defines the term "*représentant*" as "an organ of an authority acting in the public interest or sometimes even a person delegated by that organ",[226] and states that in international relations, the term is used to designate more specifically diplomatic representatives and representatives at an international organization. In a similar vein, the dictionary also mentions representatives in its definition of the term "*gouvernant*" ("ruler"): "doctrinal term designating all representatives, trustees or holders of political power, in contrast to mere agents and ordinary citizens".[227] For its part, the *Dictionnaire de droit international* defines "*représentant*" as "an individual duly invested with the power to speak, act and transmit and receive communications on behalf of a subject of international law (a State, an international organization or another entity), being capable, in so doing, of legally binding said subject". It further states: "this term is applied in particular to diplomatic agents … and to delegates at an international conference or in an organ of an international organization", and that it is "used by design to take into account particular situations, making it possible to avoid the use of the traditional terminology for referring to heads of mission".[228] Just as interesting is the definition in the same dictionary of the term "*représentativité (ou caractère représentatif)*" (representativeness (or representative capacity)) as the "capacity of an organ or person that appears as the image or symbol of the nation which it embodies. This is one of the characteristics attributed to Heads of State to this day".[229]

125. The term "*représentant*" is usually translated by the terms "*representante*" in Spanish and "representative" in English,[230] and also on occasion by "agent" in English.[231]

126. In Spanish, the word "*representante*" is defined in general terms in the *Diccionario de la lengua española* as that "which represents" and as the "person who represents a … community". The legal dictionaries are no more explicit, since they do not normally include the term "*representante*" but only the definition of "*representación*" ("representation"), which is defined as a group "of persons who represent an entity, a community, a corporation or a Government",[232] or as "the legal institution which makes it possible for a person, the person represented, to act through another, called the representative, who acts as a legal substitute for the former".[233] Lastly, in some dictionaries only the term "*representación política*" (political representation) is specifically defined, with a meaning unique to constitutional law, namely the "relationship between the people and those who act in their name as an embodiment of the body politic".[234]

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[222] Jean Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant, 2001). The definition in French reads: "*personne nommée pour occuper normalement un emploi permanent dans l'administration de l'État et qui agit au nom de celui-ci, ayant été habilitée à l'exercice de prérogatives de la puissance publique dans le cadre des compétences reconnues par la législation nationale et sous l'autorité du gouvernement.*"

[223] Peter Cane and Joanne Conoghan, eds., *The New Oxford Companion to Law* (Oxford, Oxford University Press, 2008). The clarification that follows is also relevant: "This fundamental division among the personnel of central government, often recognized in foreign constitutions in a distinction between 'government' and 'administration', is in the United Kingdom essentially a matter of politics, not law. In law both Ministers and civil servants are 'servants of the Crown'."

[224] *Larousse*. The dictionary gives the terms "*agent*" and "*mandataire*" as synonyms. The definition in French is as follows: "*personne qui a reçu pouvoir d'agir au nom de quelqu'un, qui accomplit un acte au nom et pour le compte de quelqu'un*".

[225] *Le Grand Robert*. The definitions in French are as follows: "*personne qui représente, qui a reçu pouvoir d'agir au nom de quelqu'un*", "*personne à laquelle un groupe social confie le pouvoir politique, pour l'exercer en son nom*", "*personne qui a été élue, a reçu par élection la délégation d'un pouvoir (surtout du pouvoir législatif)*" or "*personne désignée pour représenter un État, un gouvernement, auprès d'un autre.*"

[226] *Vocabulaire juridique*. The definition in French is as follows: "*organe d'une autorité agissant dans un intérêt public ou parfois même délégataire de cet organe*".

[227] *Ibid.* The definition in French is as follows: "*terme doctrinal désignant, par opposition aux simples agents et aux gouvernés, l'ensemble des représentants, dépositaires ou titulaires du pouvoir politique*".

[228] *Dictionnaire de droit international public*. The definitions in French are as follows: "*personne physique dûment investie du pouvoir de parler, d'agir, de transmettre et de recevoir des communications au nom d'un sujet de droit international (État, organisation internationale ou autre entité) et susceptible, ce faisant, d'engager ce sujet de droit*"; "*ce terme s'applique notamment aux agents diplomatiques … ainsi qu'aux délégués à une conférence internationale ou dans un organe d'une organisation internationale*"; and "*utilisé à dessein pour prendre en compte des situations particulières et permettant d'éviter l'emploi de la terminologie traditionnelle utilisée pour se référer aux chefs de mission*".

[229] *Ibid.* The definition in French is as follows: "*Caractère d'un organe ou d'une personne qui apparaît comme l'image ou le symbole de la nation qu'il incarne. Tel est un des caractères attribué encore aujourd'hui aux chefs d'État*".

[230] *Diccionario jurídico en cuatro idiomas* (see footnote 217 above).

[231] *Dictionnaire de l'anglais juridique* (Paris, BMS, 2004).

[232] *Diccionario de términos jurídicos* (see footnote 216 above).

[233] *Gran Diccionario Jurídico DVE* (see footnote 213 above).

[234] *Diccionario Jurídico Espasa* (see footnote 214 above).

127. The term "representative" is defined in the general dictionaries as "a person chosen or appointed to act or speak for another or others, in particular … a person chosen or elected to speak and act on behalf of others in a legislative assembly or deliberative body", or "a delegate who attends a conference, negotiations, etc., so as to represent the interests of another person or group".[235] In *Black's Law Dictionary*, it is defined simply as "one who stands for or acts on behalf of another", also making reference to the concept of "agent".[236]

3. "Official"

128. The term "official" is defined as "a person holding public office or having official duties, especially as a representative of an organization or government department".[237] In *Black's Law Dictionary*, an "official" is defined as "one who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers; also termed *public official*".[238] These definitions are not equivalent to that of "civil service", defined as "the administrative branches of a government" and "the group of people employed by these branches—civil servant",[239] or that of "civil servant",[240] defined as "a member of the civil service", and would correspond better to the concept of "*funcionario*" examined above.

129. The term "official" is usually translated into Spanish by "*funcionario*"[241] or "*responsable*"[242] and into French by "*fonctionnaire*",[243] but, as can be deduced from the preceding paragraphs, these terms do not have equivalent or interchangeable meanings for the purposes of the present report.

4. "Agent"

130. The Spanish term "*agente*" (agent) is defined in the *Diccionario de la lengua española* as a "person who acts with the power of another". In the legal dictionaries, it is defined as a "person who acts, operates and performs tasks in the name and on behalf of another", and the term "*agencia del Gobierno*" ("government agency") is used in the sense of "an entity subordinate to the sovereign, created to perform a government function".[244] In other legal dictionaries, it is defined as "the person who acts or intervenes in the name of another, with powers to achieve a given end",[245] or is simply offered as an equivalent to the concept of administrative organs.[246] Lastly, in one legal dictionary, the only reference to this term is to "diplomatic agent".[247]

131. In French, the term "*agent*" is defined in the general dictionaries as a "person who performs certain tasks on behalf of an individual or a community (a society, government, State, etc.)", and as an "employee in the public or private sector who performs tasks under the control of an authority, or the holder of certain positions who plays the role of an intermediary".[248] It is also defined as a "person entrusted with the affairs and interests of an individual, group or country, on behalf of which he/she acts", and is presented as a synonym of "*fonctionnaire*".[249] The legal dictionaries, for their part, define an "agent" as "any person in the service of a public administration; in this sense, agents differ from rulers, who alone have representative capacity",[250] as "any collaborator of a public service, most often administrative, associated for a certain period with the direct implementation of the specific activities of that service and therefore governed by administrative law",[251] or as a "person recruited by the State, as an employee or as a contractor, to perform certain functions", and as being "entrusted with public functions, on a permanent or temporary basis, on behalf of the State and local communities or independent public institutions".[252] In any case, the preceding definitions refer to an "agent" essentially from the perspective of State administrative law. The legal dictionaries, however, also refer to an "agent" in international law. In this connection, the meanings given to the term in the *Dictionnaire de droit international public* are of particular interest: "a person who acts on behalf of an international legal entity and is entrusted by it with functions or missions, whether public or private …; a person entrusted with diplomatic or consular functions …; a person entrusted with non-diplomatic political representation functions", and "in the field of international responsibility, organs of the State or of an international organization".[253]

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[235] See www.oxforddictionaries.com.

[236] B.A. Garner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul, West, 2009).

[237] See www.oxforddictionaries.com.

[238] *Black's Law Dictionary*. *Black's* defines the term "officer" as "a person who holds an office of trust, authority, or command. In public affairs, the term refers especially to a person holding public office under a national, State, or local government, and authorized by that government to exercise some specific function".

[239] *Ibid.*

[240] See www.oxforddictionaires.com.

[241] S.M. Kaplan, ed., *English/Spanish and Spanish/English Legal Dictionary*, 4th ed. (Alphen aan den Rijn, Wolters Kluwer, 2013).

[242] *Ibid.*

[243] *Dictionnaire de l'anglais juridique* (see footnote 231 above).

[244] *Diccionario de términos jurídicos* (see footnote 216 above).

[245] *Gran diccionario jurídico DVE* (see footnote 213 above).

[246] *Diccionario de Derecho* (see footnote 215 above).

[247] *Diccionario Jurídico Espasa* (see footnote 214 above).

[248] *Larousse*. The definitions in French are as follows: "*personne qui accomplit certaines missions pour le compte d'un particulier ou d'une collectivité (société, gouvernement, État)*"; and "*employé des secteurs public et privé exerçant une fonction d'exécution sous le contrôle d'une autorité, ou titulaire de certaines charges jouant un rôle d'intermédiaire*". The dictionary offers "*émissaire*", "*mandataire*" and "*représentant*" as synonyms.

[249] *Le Grand Robert*. The definition in French is as follows: "*personne chargée des affaires et des intérêts d'un individu, d'un groupe ou d'un pays, pour le compte desquels elle agit.*"

[250] *Vocabulaire juridique*. The definition in French is as follows: "*toute personne au service d'une administration publique, en ce sens les agents s'opposent aux gouvernants, qui ont seuls la qualité de représentant*".

[251] *Lexique des termes juridiques*. The definition in French is as follows: "*tout collaborateur d'un service public, le plus souvent administratif, associé pour une certaine durée à l'exécution directe de l'activité spécifique de celui-ci et relevant à ce titre du droit administratif*".

[252] *Dictionnaire de droit international public*. The definitions in French are as follows: "*personne recrutée par l'État, sous statut ou sous contrat, afin d'accomplir certaines fonctions*" and "*chargée de fonctions publiques, à titre permanent ou temporaire, aussi bien pour le compte de l'administration de l'État que pour celui des collectivités locales ou des établissements publics autonomes*".

[253] *Ibid.* The definitions in French are as follows: "*personne qui agit pour le compte d'une personne juridique internationale, qui est chargé par elle de fonctions ou de missions, soit publiques soit privées …;*

(*Continued on next page.*)

132. In English, the term "agent" is defined in a generic sense as a "person who acts on behalf of another person or group".[254] In legal terms, an agent is defined as an "employee or representative of a governmental body" (government agent),[255] and as a "person appointed to act for the public in matters pertaining to governmental administration or public business" (public agent).[256] *Black's Law Dictionary* also defines the concept of "public power" as a "power vested in a person as an agent or instrument of the functions of the State", on the basis that "public powers comprise the various forms of legislative, judicial, and executive authority".[257]

5. "Organ"

133. According to the *Diccionario de la lengua española*, an "*órgano*" (organ) is a "person or set of persons who act in representation of an organization or legal entity in a specific area of competence". In the Spanish legal dictionaries, the term "*órgano administrativo*" (administrative organ) is defined as "the persons who carry out a public office".[258] This generic definition includes all types of organs: those which act in a representative and honorific capacity, as well as those which act in return for remuneration as part of a professional career within the administration; those which act by directing others, have the power to give commands and enjoy prerogatives of honour and dignity (authorities); those which act by implementing the decisions of others; and those which perform their functions on a permanent as well as on a temporary basis.

134. The French general dictionaries define "*organe*" (organ) as "that which serves as an intermediary or spokesperson" and as an "institution responsible for ensuring the delivery of certain State services".[259] In the legal dictionaries, the term "*organe*" is defined broadly, as the "person or service responsible for performing a given constitutional, administrative or international function".[260] The *Dictionnaire de droit international public* defines it as a "person, group or institution through which a subject of international law performs certain functions", and it is "applied, sometimes in a more limited way, to officials who may represent the State and embody the State in international relations. Examples of organs in foreign affairs are the Head of State, the Minister for Foreign Affairs and diplomatic agents". It is also defined as, "in the field of international responsibility, a person or group considered to be acting in the name of the State and whose acts are consequently attributed to that State".[261] It should be noted that the *Dictionnaire de droit international public* defines the Head of State as the "supreme organ" and the Head of Government as the "superior organ" of the State.[262]

135. Lastly, the term "organ" is defined in the *Oxford English Dictionary* as "a person, body of people, or thing by which some purpose is carried out or some function is performed".[263] It has not, however, been given a separate entry in the legal dictionaries consulted.

6. Conclusions

136. The terminological analysis carried out above leads to the conclusion, from the outset, that the terms "*funcionario*", "official" and "*représentant*" have different meanings. As indicated at the beginning of this report, these terms do not have uniform or equivalent meanings and therefore cannot be used interchangeably in the various language versions of the draft articles.

137. Of these three terms, only "official" seems suitable for use in a broad sense which generally makes it possible for it to be applied to all categories of persons covered by immunity from criminal jurisdiction. However, its equivalents in Spanish and French ("*funcionario*" and "*fonctionnaire*") do not seem to offer the same flexibility.

138. Moreover, it should be noted that the terms "*funcionario*" and "*fonctionnaire*" are intricately linked to the conception of an administrative system in which there is a clear distinction between the Government and the administration, with the latter being the permanent bureaucratic machinery at the service of the State, in general, and the Government in particular. In such cases, "officials" ("*funcionarios*" or "*fonctionnaires*") are, strictly speaking, permanently linked with the administration and serve the State within the administration, but are not part of the political apparatus and usually do not perform representative functions, unlike members of the government, in the broad sense of the word. In this connection, it appears that the terms "official", "*funcionario*" and "*fonctionnaire*" are not the most suitable for designating the group of persons who are the subject of the present report.

(*Footnote 253 continued.*)

personne chargée de fonctions diplomatiques ou consulaires …; personne chargée de fonctions de représentation politique sans caractère diplomatique", and "*en matière de responsabilité internationale: organes de l'État ou de l'organisation internationale*". In a similar vein, the *Vocabulaire juridique* defines an "agent" as a "term sometimes used in diplomatic documents to designate a person entrusted by a Government with a mission, for example the establishment of official relations with another Government".

[254] See www.oxforddictionaries.com.

[255] *Black's Law Dictionary*.

[256] *Ibid.*

[257] *Ibid.*

[258] *Diccionario de la lengua española* and *Gran diccionario jurídico DVE*.

[259] *Larousse*. The definitions in French are as follows: "*ce qui sert d'intermédiaire, de porte-parole*" and "*institution chargée de faire fonctionner certains services de l'État*". *Le Grand Robert* gives the latter sense in a similar form.

[260] *Vocabulaire juridique*. The definition in French is as follows: "*personne ou service chargé de remplir une fonction constitutionnelle, administrative ou internationale déterminée.*"

[261] *Dictionnaire de droit international public*. The definitions in French are as follows: "*personne, groupe ou institution par laquelle un sujet de droit international remplit certaines fonctions*", "*appliqué parfois de manière plus restreinte aux fonctionnaires susceptibles de représenter l'État, exprimer sa volonté dans les relations internationales. Par exemple: organes des relations extérieures: chef d'État, ministre des affaires étrangères, agents diplomatiques, etc.*" and "*dans le domaine de la responsabilité internationale, personne ou groupe considéré comme agissant au nom de l'État et dont les actes sont par conséquent imputés à cet État*".

[262] *Ibid.*

[263] John Simpson and Edmund Weiner, eds., *Oxford English Dictionary*, 2nd ed. (Oxford, Oxford University Press, 1989).

139. On the other hand, the term "representative" and its equivalents in the other languages put the emphasis on the representative capacity of the persons to whom they apply. This therefore raises the question of whether the term in question is the most suitable for referring to all the categories of persons to whom immunity from foreign criminal jurisdiction may apply, including Heads of State, judges, military officers and police officers, to name but a few. This question is particularly relevant in the context of the present topic because the Commission has concluded that persons who can benefit from immunity are those who either represent the State or perform public functions. In this connection, it is important to consider the need to differentiate the representative capacity of a person from the possibility of that person's acts being considered to have been "carried out in an official capacity", or to be attributable to the State. The person's representative capacity is governed by norms of international law in the case of the Head of State, the Head of Government and the Minister for Foreign Affairs. However, all persons who may enjoy immunity *ratione materiae* may not necessarily have representative capacity *per se*, given that this capacity would depend on the norms of domestic law that confer powers and functions to them and that constitute the legal basis on which they perform acts for which they may one day claim immunity from criminal jurisdiction. Consequently, the term "representative" also does not appear to be the most suitable for referring in general to all persons who are the subject of the present report.

140. Of course, international instruments do not always use identical terms to refer to the same categories of persons, given the need to take into account the necessary flexibility imposed by multilingualism on the drafting of international legal texts. On the other hand, it should be borne in mind that the Commission itself has sometimes used different terms in different draft articles to refer to the same categories of persons. However, an analysis of the lists of terms in paragraphs 115 and 117 above confirms the tendency to always use the same term or relatively similar terms to refer to the same categories of persons in a specific instrument.

141. The Special Rapporteur believes that this same practice should also be followed in the case of the draft articles on immunity from foreign criminal jurisdiction; in this connection, consideration should be given to the use in all language versions of the terms "agent of the State" or "organ of the State". Both terms have the advantage of being ordinarily used in international practice to refer to a person connected with the State and who acts in the name and on behalf of the State. Furthermore, the broad meaning that both terms seem to usually generate allows them to be used in an all-encompassing sense to refer to persons who represent the State internationally as well as to persons who perform functions that involve the exercise of governmental authority. Lastly, both terms have been used previously in the treaties analysed as well as by the Commission. However, it should be noted that the Commission opted for the term "organ" in relation to two topics which, despite their conceptual and methodological differences, are still related somewhat to immunity from foreign criminal jurisdiction, namely jurisdictional immunities of States and their property, and the responsibility of States for internationally wrongful acts. Although in both cases the term "organ" refers to persons and entities, nothing prevents it from being used in the present topic to refer to persons exclusively. The use of the term "organ" offers another advantage in that it seems more suitable for referring to the Head of State and the Head of Government, in respect of whom the term "agent" is not frequently used in legal practice or in diplomacy.

142. Consequently, the Special Rapporteur believes that the term "organ" is more suitable for referring to all persons who may enjoy immunity from foreign criminal jurisdiction, and therefore suggests that the Commission take action during the current session on the designation of persons who enjoy this immunity by amending the title of the topic and indicating that the term "official" used in the draft articles that have already been adopted should be replaced by "organ". Nonetheless, until the Commission makes a decision in that regard, both in the present report and in the draft articles included herein, the term "official" in English, "*funcionario*" in Spanish and "*représentant*" in French will continue to be used on a provisional basis.

D. General concept of an "official" for the purposes of the draft articles

143. The draft article proposed below is based on the preceding analysis of the criteria for defining the concept of an "official". It takes into consideration the existence of two categories of persons who are clearly differentiated by the type of immunity applicable to them: immunity *ratione personae* or immunity *ratione materiae*. In this connection, each category is addressed in a separate subparagraph. The proposed definition also takes into account the criteria for defining the concept of an "official" listed in paragraph 108 above and captured in subparagraph (ii) below.

144. Given that the definition contained in the proposed draft article refers to any person who enjoys immunity, both *ratione personae* and *ratione materiae*, it should be incorporated into the draft article on definitions or terminology, which would become subparagraph (*e*). The proposal is therefore to include the following subparagraph in draft article 2 (formerly 3):

"*Draft article 2 (formerly 3). Definitions*

"For the purposes of the present draft articles:

"(*e*) State official means:

"(i) The Head of State, the Head of Government and the Minister for Foreign Affairs;

"(ii) Any other person who acts on behalf and in the name of the State, and represents the State or exercises elements of governmental authority, whether the person exercises legislative, executive or judicial functions, whatever position the person holds in the organization of the State."

E. Subjective scope of immunity *ratione materiae*

145. As indicated in paragraphs 12 and 13 above, determining the persons to whom immunity *ratione materiae* applies is one of the normative elements of this type of immunity from criminal jurisdiction. The first criterion for identifying these persons is the existence of a connection with the State, which justifies the recognition of their immunity from criminal jurisdiction in the interests of the State, in order to protect the sovereign prerogatives of the State. This connection with the State is therefore a central element in defining the concept of an official.

146. This connection is related to the concept of "an act performed in an official capacity", which constitutes the second normative element of immunity *ratione materiae*, but which cannot be identified or confused with the same. On the contrary, for the purposes of defining the subjective scope of this type of immunity, reference to the connection with the State must be confined to the observation that the individual may act in the name and on behalf of the State, performing functions that involve the exercise of governmental authority. Accordingly, to define the concept of an "official" for the purposes of immunity *ratione materiae*, the specific content of the act performed by the individual should not be taken into consideration; said content is related to the concept and limits of "acts performed in an official capacity" and, therefore, will be analysed in the next report. In short, the existence of a connection between the beneficiary of immunity *ratione materiae* and the State should be taken to mean that the person in question is in a position to perform acts that involve the exercise of governmental authority. Whether a specific act performed by an official benefits from that immunity or not would depend on the existence or non-existence of the two normative elements of such immunity, namely whether the act in question can be deemed an "act performed in an official capacity" and whether said act was performed by the person at a time when he or she was an official of the State.

147. This is an important detail because, given the variety of State practices, it is possible to find persons who have formal connections with the State but are nonetheless not assigned to functions involving the exercise of governmental authority. They include doctors, professors, transit system operators, administrative officials or personal service staff members who, in some national administrations, have an official role but could not be considered—as a rule and based solely on this link with the State—to perform functions in the exercise of elements governmental authority. In this connection, it should be recalled that, although officials are afforded immunity from foreign criminal jurisdiction in order to guarantee State sovereignty, such immunity can only be recognized for persons who are in a position to exercise State prerogatives or governmental authority.

148. The Commission had previously addressed the concept of governmental authority but without defining it. However, in the elaboration of the draft articles on responsibility of States for internationally wrongful acts, it used the expression on various occasions and, in the commentaries to the relevant articles, it gave some isolated examples of what constitutes governmental authority, including the functions of the police,[264] powers of detention and discipline pursuant to a judicial sentence or to prison regulations, or immigration control and quarantine.[265] The lack of a definition of the concept of "governmental authority" may be ascribed to the variety of scenarios that can exist in practice and that necessitate a case-by-case analysis. "Of particular importance will be not just the content of the powers, but the way they are conferred … the purposes of which they are to be exercised and the extent to which the entity is accountable to government for their exercise".[266] In any case, there is no doubt that the concept of "governmental authority" must be understood in a broad sense to include the exercise of legislative, judicial and executive prerogatives.

149. In any event, the relevant element for the definition of an "official" for the purposes of immunity *ratione materiae* is the possibility that the person may exercise elements of governmental authority based on the powers conferred by domestic law. Accordingly, the rank of the official is not, in and of itself, a sufficient or autonomous element to warrant a conclusion that the person is a State official for the purposes of the present topic. The practice analysed above makes it clear that immunity *ratione materiae* is ordinarily claimed in relation to high- and mid-ranking officials; claims of such immunity in respect of low-level officials are extraordinary, having occurred on very few occasions. This practice confirms the point mentioned above, since high- and mid-ranking officials are most often the ones empowered to perform functions in exercise elements of governmental authority. However, that other low-ranking officials may exercise the same prerogatives in specific circumstances cannot be ruled out *prima facie*. Clearly, the existence of a connection with the State that puts a person in a position to exercise governmental authority does not depend automatically on formal criteria such as the person's rank or the legal status of the post or the function performed; rather, the weight that these formal elements may have in determining whether a person may exercise elements of governmental authority will depend on each specific situation and requires a case-by-case analysis. In short, it cannot be concluded that persons who have a connection with the State that allows them to be considered officials in the broad sense necessarily enjoy immunity *ratione materiae*, nor can it be concluded that only high-ranking officials enjoy such immunity.

150. Lastly, it should be noted that, as the Commission has indicated, a former Head of State, a former Head of Government and a former Minister for Foreign Affairs may also benefit from immunity *ratione materiae*.[267] Such persons should therefore have been considered as being

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[264] See *Yearbook … 2001*, vol. II (Part Two), p. 39, para. (6) of the introductory commentary to chapter II; and p. 43, para. (5) of the commentary to draft article 5.

[265] *Ibid.*, para. (2) of the commentary to draft article 5.

[266] *Ibid.*, para. (6) of the commentary to draft article 5. The Commission stated at the time that "what is regarded as 'governmental' depends on the particular society, its history and traditions".

[267] See draft article 4, para. 3, as well as the commentary to that draft article, in particular para. (7) thereof (*Yearbook … 2013*, vol. II (Part Two), pp. 47–50).

included in the scope of this type of immunity, since there is no doubt that, during their term in office, they all had a connection with the State that put them in a position to exercise governmental authority.

151. In the light of the foregoing, the following draft article is proposed; it follows the same pattern as the draft article on the subjective scope of immunity *ratione personae* adopted by the Commission in 2013.

"Part Three

"IMMUNITY *RATIONE MATERIAE*

"*Draft article 5. Beneficiaries of immunity* ratione materiae

"State officials who exercise elements of governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction."

Chapter III

Future workplan

152. In her next report, the Special Rapporteur proposes to conclude her analysis of the other normative elements of immunity *ratione materiae*, namely the concept of an "act performed in an official capacity" and the temporal scope of the immunity. She also proposes to address the exceptions to immunity from foreign criminal jurisdiction. With that report, she will conclude her study of the substantive aspects of the immunity, reserving the procedural aspects thereof for a subsequent report.

Annex

Proposed draft articles

Draft article 2 (formerly 3). Definitions

For the purposes of these draft articles:

(*e*) State official means:

(i) The Head of State, the Head of Government and the Minister for Foreign Affairs;

(ii) Any other person who acts on behalf and in the name of the State, and represents the State or exercises elements of governmental authority, whether the person exercises legislative, executive or judicial functions, whatever position the person holds in the organization of the State.

Part Three

IMMUNITY *RATIONE MATERIAE*

Draft article 5. Beneficiaries of immunity ratione materiae

State officials who exercise elements of governmental authority benefit from immunity *ratione materiae* in regard to the exercise of foreign criminal jurisdiction.

SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

[Agenda item 6]

DOCUMENT A/CN.4/671

Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur*

[*Original: English*]
[*26 March 2014*]

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	Source
Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field (Geneva, 22 August 1864)	*International Red Cross Handbook*, 12th edition, 1983, p. 19.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Geneva, 27 July 1929)	League of Nations, *Treaty Series*, vol. 118, No. 2733, p. 303.
Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.
International Convention for the Regulation of Whaling (Washington, D.C., 2 December 1946)	*Ibid.*, vol. 161, No. 2124, p. 72.
Convention on the International Maritime Organization (IMCO Convention) (Geneva, 6 March 1948)	*Ibid.*, vol. 289, No. 4214, p. 3.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	*Ibid.*, vol. 75, Nos. 970–973, pp. 31 *et seq.*
Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949)	*Ibid.*, vol. 75, No. 972, p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949)	*Ibid.*, vol. 75, No. 973, p. 287.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid.*, vol. 1125, Nos. 17512–17513, pp. 3 and 609.
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.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	*Ibid.*, vol. 189, No. 2545, p. 137.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, No. 7310, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, No. 8638, p. 261.
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D.C., 1 July 1968)	*Ibid.*, vol. 729, No. 10485, p. 161.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
Convention on wetlands of international importance especially as waterfowl habitat (Ramsar, 2 February 1971)	*Ibid.*, vol. 996, No. 14583, p. 245.
Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (London, Moscow and Washington, D.C., 10 April 1972)	*Ibid.*, vol. 1015, No. 14860, p. 163.
Convention on the prevention of marine pollution by dumping of wastes and other matter (London, Mexico City, Moscow, Washington, D.C., 29 December 1972)	*Ibid.*, vol. 1046, No. 15749, p. 120.
Convention on international trade in endangered species of wild fauna and flora (Washington, D.C., 3 March 1973)	*Ibid.*, vol. 993, No. 14537, p. 243.

	Source
Convention on the conservation of migratory species of wild animals (with appendices) (Bonn, 23 June 1979)	*Ibid.*, vol. 1651, No. 28395, p. 333.
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 (with protocols) (Geneva, 10 October 1980)	*Ibid.*, vol. 1342, No. 22495, p. 137.
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Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994)	*Ibid.*, vol. 1836, No. 31364, p. 3.
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Introduction

1. During its sixty-fifth session, in 2013, the International Law Commission considered the first report on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and provisionally adopted five draft conclusions with commentaries.[1] These draft conclusions:

(*a*) Situate the topic within the general framework of the rules on the interpretation of treaties as reflected in the Vienna Convention on the Law of Treaties (hereinafter the "1969 Vienna Convention") (draft conclusion 1);

(*b*) Characterize subsequent agreements and subsequent practice under article 31, paragraph 3, of the 1969 Vienna Convention as authentic means of interpretation (draft conclusion 2);

(*c*) Circumscribe the relationship between subsequent agreements, subsequent practice and the conditions under which treaty terms may be interpreted as evolving over time (draft conclusion 3);

(*d*) Formulate definitions of a subsequent agreement and two forms of subsequent practice (draft conclusion 4);

(*e*) Address the attribution of subsequent practice (draft conclusion 5).

2. During the debate in the Sixth Committee of the General Assembly on the report of the Commission on its sixty-fifth session,[2] States generally reacted favourably to the work of the Commission on the topic.[3] Specific matters and concerns which were raised in the debate will be addressed in the present report as well as when the Commission reviews the draft conclusions according to its procedures. Relevant developments since the sixty-fifth session of the Commission include the judgments of the International Court of Justice in the *Maritime Dispute (Peru v. Chile)*[4] and *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*[5] cases. The second report covers the following aspects of the topic:

(*a*) The identification of subsequent agreements and subsequent practice (chap. I);[6]

(*b*) Possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (chap. II);

[1] *Yearbook … 2013*, vol. II (Part Two), chap. IV, paras. 29–39.

[2] *Yearbook … 2013*, vol. II (Part Two).

[3] The statements delivered by States during the debate of the Sixth Committee on the topic "Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (agenda item 81)" are available from *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 17th–26th meetings (A/68/C.6/SR.17–A/68/C.6/SR.26).

[4] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3.

[5] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226. See also *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment, I.C.J. Reports 2013*, p. 281, at p. 307, para. 75.

[6] Article 31, paragraph 3 (*a*), synonymously speaks of subsequent agreement "between the parties".

(*c*) The form and value of subsequent practice under article 31, paragraph 3 (*b*) (chap. III);[7]

(*d*) The conditions for an "agreement" of the parties regarding the interpretation of a treaty under article 31, paragraph 3 (chap. IV);[8]

(*e*) Decisions adopted within the framework of conferences of State Parties (chap. V); and

(*f*) The possible scope for interpretation by subsequent agreements and subsequent practice (chap. VI).

[7] The Commission has left this question pending (see *Yearbook … 2013*, vol. II (Part Two), p. 31, para. (20) of the commentary to draft conclusion 4); the sequence follows a distinction made by the WTO Appellate Body, which noted in *United States—Gambling* that "subsequent practice" involved two elements: "(i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision" (WTO, Panel Reports, *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R and WT/DS377/R, adopted 21 September 2010, para. 7.558).

[8] The Commission has left this question pending (see *Yearbook … 2013*, vol. II (Part Two), p. 30, para. (16) of the commentary to draft conclusion 4).

Chapter I

Identification of subsequent agreements and subsequent practice

3. Subsequent agreements and subsequent practice, as means of interpretation, must be identified as such.

A. Conduct "in the application" and "regarding the interpretation" of the treaty

4. Subsequent practice under article 31, paragraph 3 (*b*), and article 32 must be "in the application of the treaty"[9] and subsequent agreements under article 31, paragraph 3 (*a*), must be "regarding the interpretation of the treaty or the application of its provisions".[10] Although there may be aspects of "interpretation" which remain unrelated to the "application" of a treaty,[11] every application of a treaty presupposes its interpretation—even if the rule in question may appear to be clear on its face.[12] Therefore, conduct "regarding the interpretation" of the treaty and conduct "in the application" of the treaty both imply that one or more States parties assume, or are attributed, a position regarding the interpretation of the treaty.[13] Whereas in the case of a "subsequent agreement between the parties regarding the interpretation of the treaty" under article 31, paragraph 3 (*a*) (first alternative), the position regarding the interpretation of a treaty is specifically and purposefully assumed, this may be less clearly identifiable in the case of a "subsequent agreement … regarding … the application of its provisions" under article 31, paragraph 3 (*a*) (second alternative).[14] Such an assumption of a position regarding interpretation "by application" is implied in simple acts of application of the treaty, that is, in "every measure taken on the basis of the interpreted treaty",[15] under article 31, paragraph 3 (*b*), and article 32.[16]

5. It is difficult to conceive of conduct "in the application of the treaty" which does not imply the assumption by the acting State party of a position "regarding the interpretation" of the treaty. In fact, conduct by which the acting State cannot be said to assume a position regarding the interpretation of the treaty also cannot be undertaken "in" its "application". It follows that conduct "in the application of the treaty" is only an example, albeit the most important one, of all acts "regarding the interpretation" of a treaty. The word "or" in article 31, paragraph 3 (*a*), thus does not designate an alternative but rather an example of the same thing.

6. It should be noted that an "application" of the treaty does not necessarily reflect the position of a State party that it is the only legally possible one under the treaty and under the circumstances.[17] Further, the concept of "application" does not exclude practices by non-State actors which the treaty recognizes as forms of its application and which are attributable to one or more of its parties.[18]

[9] *Ibid.*, para. 38, draft conclusion 4, para. 3.

[10] *Ibid.*, para. 1.

[11] According to Haraszti, interpretation has "the elucidation of the meaning of the text as its objective" whereas application "implies the specifying of the consequences devolving on the contracting parties" (*Some Fundamental Problems in the Law of Treaties*, p. 18); Haraszti recognizes, however, that "a legal rule manifesting itself in whatever form cannot be applied unless its content has been elucidated" (*ibid.*, p. 15).

[12] Report of the Study Group of the International Law Commission on the fragmentation of international law, document A/CN.4/L.682 and Corr.1 and Add.1 (available from the Commission's website, documents of the fifty-eighth session; the final text will appear as an addendum to *Yearbook … 2006*, vol. II (Part One)), para. 423; Gardiner, *Treaty Interpretation*, pp. 27–29 and 213; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", p. 47; Linderfalk, "Is the hierarchical structure of articles 31 and 32 of the Vienna Convention real or not? Interpreting the rules of interpretation", pp. 141–144 and 147; Distefano, "La pratique subséquente des États parties à un traité", p. 44; Villiger, "The rules on interpretation: misgivings, misunderstandings, miscarriage? The 'crucible' intended by the International Law Commission", p. 111.

[13] Gardiner, *Treaty Interpretation*, p. 235; Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, p. 167; Karl, *Vertrag und spätere Praxis im Völkerrecht: Zum Einfluss der Praxis auf Inhalt und Bestand völkerrechtlicher Veträge*, pp. 114 and 118; Dörr, "Article 31—General rule of interpretation", pp. 556–557, paras. 80 and 82.

[14] This second alternative was introduced at the proposal of Pakistan, but its scope and purpose were never addressed and clarified, 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), 31st meeting, p. 168, para. 53.

[15] Linderfalk, *On the Interpretation of Treaties…*, p. 167.

[16] *Yearbook … 2013*, vol. II (Part Two), p. 17, para. 38, draft conclusion 1, para. 4 and draft conclusion 4, para. 3.

[17] See chapter I, section C, and chapter II, section B.2, below.

[18] See Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance': towards embedding subsequent practice in its operative milieu", pp. 54, 56 and 59–60.

B. Conduct not "in the application of" the treaty or "regarding its interpretation"

7. Subsequent conduct which takes place regardless of a treaty obligation is not "in the application of the treaty" or "regarding" its interpretation. In the *Certain Expenses* case, for example, some judges doubted whether the continued payment of their membership contributions signified acceptance by the Member States of the United Nations of a certain practice of the organization.[19] Judge Sir Gerald Fitzmaurice formulated a well-known warning in this context, according to which "the argument drawn from practice, if taken too far, can be question-begging".[20] According to Sir Gerald, it would be "hardly possible to infer from the mere fact that Member States *pay,* that they necessarily admit in all cases a positive legal obligation to do so".[21]

8. Similarly, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court.[22]

9. Another example of a voluntary practice which is not meant to be "in application of" or "regarding the interpretation" of a treaty concerns "complementary protection" in the refugee law context. Persons who are denied refugee status under the Convention relating to the Status of Refugees are nonetheless often granted "complementary protection", which is equivalent to that under the Convention. States which grant complementary protection, however, do not consider themselves as acting "in the application of" the Convention.[23]

10. It is sometimes difficult to distinguish relevant subsequent agreements or practice regarding the interpretation or the application of a treaty under article 31, paragraph 3 (*a*) and (*b*), and article 32 from other conduct or developments in the wider context of the treaty, including from "contemporaneous developments" in the area of the treaty. Such a distinction is, however, important, since only conduct regarding the interpretation by one or more parties introduces their specific authority into the process of interpretation. Suffice it to say at this point that the more specifically an agreement or a practice is related to a treaty, the more probative or interpretative value it can acquire under article 31, paragraph 3 (*a*) and (*b*), and article 32.[24] The judgment in the *Maritime Dispute (Peru v. Chile)* case provides only the latest example for the need, but also for the occasional difficulty, of drawing the distinction.[25]

C. Determination of whether conduct is "in the application" or "regarding the interpretation" of a treaty

11. The characterization of a subsequent agreement or subsequent practice under article 31, paragraph 3, and article 32 of the 1969 Vienna Convention as assuming a position regarding the interpretation of a treaty, often requires a careful factual and legal analysis. This can be illustrated by examples from judicial and State practice.

1. International Court of Justice

12. The jurisprudence of the International Court of Justice provides a number of examples where what at first sight may have appeared relevant, was ultimately not found to be a pertinent subsequent agreement or practice, and vice versa. Thus, on the one hand, the Court did not consider a "Joint Ministerial Communiqué" to "be included in the conventional basis of the right of free navigation", since the "modalities for cooperation which they put in place are likely to be revised in order to suit the parties".[26] The Court has held, however, that the lack of certain assertions regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice which indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.[27] In any case, the exact significance of a collective expression of views of the parties can only be identified by careful consideration as to whether and to what extent it is meant to be "regarding the interpretation" of the treaty. Accordingly, the Court held in the *Whaling in the Antarctic* case that

> relevant resolutions and Guidelines [by the International Whaling Commission] that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available.[28]

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[19] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at pp. 201–202 (separate opinion of Sir Gerald Fitzmaurice) and pp. 189–195 (separate opinion of Sir Percy Spender).

[20] *Ibid*., p. 201.

[21] *Ibid*.

[22] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, at p. 16, para. 28.

[23] See Skordas, "General provisions: article 5", p. 682, para. 30; McAdam, *Complementary Protection in International Refugee Law*, p. 21.

[24] On the (probative or interpretative) "value" of an agreement or practice as a means of interpretation, see chapter III below.

[25] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at pp. 42–58, paras. 103–151.

[26] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 234–235, para. 40; see also *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1091, para. 68, where the Court implied that one of the parties did not consider that certain forms of practical cooperation were legally relevant for the purpose of the question of boundary at issue and thus did not agree with a contrary position of the other party.

[27] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, paras. 55–56; see also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; Gardiner, *Treaty Interpretation*, pp. 232–235.

[28] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

2. Iran–United States Claims Tribunal

13. When the Iran–United States Claims Tribunal was confronted with the question of whether the Claims Settlement Declaration obliged the United States to return military property to the Islamic Republic of Iran, *inter alia*, by referring to the subsequent practice of the parties, the Tribunal found that this treaty contained an implicit obligation of compensation in case of non-return:

> 66. … Although Paragraph 9 of the General Declaration does not expressly state any obligation to compensate Iran in the event that certain articles are not returned because of the provisions of U.S. law applicable prior to 14 November 1979, the Tribunal holds that such an obligation is implicit in that Paragraph.
>
> …
>
> 68. Moreover, the Tribunal notes that the interpretation set forth in paragraph 66 above is consistent with the subsequent practice of the Parties in the application of the Algiers Accords and, particularly, with the conduct of the United States. Such a practice, according to Article 31 (3) (*b*) of the Vienna Convention, is also to be taken into account in the interpretation of a treaty. In its communication informing Iran, on 26 March 1981, that the export of defence articles would not be approved, the United States expressly stated that "Iran will be reimbursed for the cost of equipment in so far as possible".[29]

This position was criticized by Judge Holtzmann in his dissenting opinion:

> Subsequent conduct by a State party is a proper basis for interpreting a treaty only if it appears that the conduct was motivated by the treaty. Here there is no evidence, or even any argument, that the United States' willingness to pay Iran for its properties was in response to a perceived obligation imposed by Paragraph 9. Such conduct would be equally consistent with a recognition of a contractual obligation to make payment. In the absence of any indication that conduct was motivated by the treaty, it is incorrect to use that conduct in interpreting the treaty.[30]

Together, the majority opinion and the dissent clearly identify the relevant points.

3. European and Inter-American Courts of Human Rights

14. The fact that States parties assume a position regarding the interpretation of a treaty may sometimes also be inferred from the character of the treaty or of a specific provision. Whereas subsequent practice in the application of a treaty often consists of acts by different organs of the State (executive, legislative or judicial) in the conscious application of a treaty at different levels (domestic and international), the European Court of Human Rights, for example, typically does not explicitly address the question of whether a particular practice was undertaken "in the application" or "regarding the interpretation" of the Convention for the Protection of Human Rights and Fundamental Freedoms,[31] or whether the State was thereby assuming a legal position. Thus, when describing the domestic legal situation in the member States, the Court rarely asks whether this legal situation results from a legislative process during which the possible requirements of the Convention were discussed. The Court nevertheless presumes that the member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the Convention, and that they act in a way which reflects their *bona fide* understanding of their obligations.[32] Like the International Court of Justice, the European Court of Human Rights has occasionally even considered that the "lack of any apprehension" of the parties regarding a certain interpretation of the Convention may be indicative of their assuming a position regarding the interpretation of the treaty.[33] The Inter-American Court of Human Rights, while referring less to the legislative practice of States and concentrating more on broader international developments, has nevertheless on occasion used such legislative practice as a means of interpretation.[34]

4. Law of the Sea

15. The Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 provides an important example of the need to determine carefully, in the first place, whether an act or an agreement actually constitutes a subsequent agreement or a subsequent practice "regarding the interpretation" or "in application" of the treaty. The Agreement provides that it shall be interpreted with the Convention as a "single instrument" and that it shall prevail in cases of conflict.[35] The fact that only parties to the Convention can become parties to this Implementation Agreement[36] suggests that, as long as not all parties to the Convention are parties to the Agreement, it is (also) aimed at influencing the interpretation of the Convention. Therefore, although the Implementation Agreement provides for the "disapplication" of provisions of the Convention[37] and creates new institutions and arguably even formulates amendments to the United Nations Convention on the Law of the Sea, it is also a form of subsequent practice regarding the interpretation of the Convention by assuming certain positions regarding its interpretation.[38]

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[29] *Iran–United States Claims Tribunal Reports*, vol. 19, 1988-II, Partial Award No. 382-B1-FT, *The Islamic Republic of Iran and the United States of America*, 1989, pp. 294–295, paras. 66 and 68.

[30] *Ibid.*, separate opinion of Judge Holtzmann, concurring in part, dissenting in part, p. 304.

[31] See, e.g., *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, Series A, no. 161, p. 40, para. 103; *Dudgeon v. the United Kingdom*, no. 7275/76, 22 October 1981, Series A, no. 45, para. 60; *Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008-V, p. 417, para. 48; however, by way of contrast, compare with *Mamatkulov and Askarov v. Turkey* [GC], no. 46827/99 and 46951/99, ECHR 2005-I, para.. 146; and *Cruz Varas and Others v. Sweden*, no. 15576/89, 20 March 1991, Series A, no. 201, p. 36, para. 100.

[32] See previous footnote; see further *Marckx v. Belgium*, no. 6833/74, 13 June 1979, Series A, no. 31, p. 19, para. 41; *Jorgic v. Germany*, no. 74613/01, ECHR 2007-III, p. 288, para. 69; *Mazurek v. France*, no. 34406/97, ECHR 2000-II, pp. 38–39, para. 52.

[33] *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII, para. 62.

[34] See, for example, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago (Merits, Reparations and Costs)*, Judgment of 21 June 2002, Inter-American Court of Human Rights, Series C, No. 94, p. 10, para. 12.

[35] The Agreement provides in several places (art. 2; annex, sect. 1, para. 17; annex, sect. 2, para. 6; annex, sect. 3, para. 14; and annex, sect. 7, para. 2), that the relevant provisions of Part XI, section 4, of the Convention shall be interpreted and applied in accordance with the Agreement.

[36] *Ibid.*, art. 4, para. 2.

[37] *Ibid.*, see, for example, annex, sect. 2, para. 3.

[38] In contrast, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of

(*Continued on next page.*)

5. International humanitarian law

16. Article 118 of the Geneva Convention relative to the Treatment of Prisoners of War (Convention III) provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The will of a prisoner of war not to be repatriated was intentionally not declared to be relevant by the States parties in order to prevent States from abusively invoking the will of prisoners of war in order to delay repatriation.[39] In its practice, however, ICRC has always insisted as a condition for its participation that the will of a prisoner of war not to be repatriated be respected.[40] This practice does not necessarily mean, however, that article 118 should be interpreted as demanding that the repatriation of a prisoner of war must not happen against his or her will. The ICRC Study on customary international humanitarian law carefully notes in its commentary on rule 128 A:

> According to the Fourth Geneva Convention, no protected person may be transferred to a country "where he or she may have reason to fear persecution for his or her political opinions or religious beliefs" [art. 45, para. 4, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War]. While the Third Geneva Convention does not contain a similar clause, practice since 1949 has developed to the effect that in every repatriation in which ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC conditions for participation, including ICRC being able to check prior to repatriation (or release in case of a non-international armed conflict), through an interview in private with the persons involved, whether they wish to be repatriated (or released).[41]

17. This formulation suggests that the practice of respecting the will of the prisoner of war is limited to cases in which ICRC is involved and in which the organization has formulated such a condition. States have drawn different conclusions from this practice of ICRC.[42] The 2004 *Joint Service Manual of the Law of Armed Conflict* of the United Kingdom Ministry of Defence provides:

> A more contentious issue is whether prisoners of war *must* be repatriated even against their will. Recent practice of States indicates that they should not. It is United Kingdom policy that prisoners of war should not be repatriated against their will.[43]

18. This particular combination of the words "must" and "should" indicates that, like ICRC, the United Kingdom is not firmly basing its policy on the view that subsequent practice suggests, namely, that the declared will of the prisoner of war must always be respected.[44]

D. Conclusion

19. The examples from the case law and State practice substantiate the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations. This is particularly necessary in the case of so-called memoranda of understanding.[45] Ultimately, the stated or discernible purpose of any agreement of the parties is decisive.[46] The preceding considerations suggest the following conclusion:

"Draft conclusion 6. Identification of subsequent agreements and subsequent practice

"The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32 requires careful consideration, in particular of whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations."

(*Footnote 38 continued.*)

Straddling Fish Stocks and Highly Migratory Fish Stocks is open for signature by States that are not parties to the United Nations Convention on the Law of the Sea (art. 1, para. 2), and provides, in article 4, that "nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention". The Agreement has, however, also been read as specifying the general obligations to cooperate that are set out in article 63, paragraph 2, and articles 64 and 117 of the United Nations Convention on the Law of the Sea (Anderson, "The Straddling Stocks Agreement of 1995: an initial assessment", p. 468).

[39] Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, pp. 145–156 and pp. 171–175; see in general on the duty to repatriate, Krähenmann, "Protection of prisoners in armed conflict", pp. 409–410.

[40] Thus, by its involvement, ICRC tries to reconcile the interests in speedy repatriation and the respect of the will of prisoners of war (*ibid.*).

[41] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules*, p. 455.

[42] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume 2: Practice*, pp. 2893–2894, paras. 844–855 and online update for Australia, Israel, the Netherlands and Spain, available from www.icrc.org/customary-ihl/eng/docs/v2_rul_rule128_sectiond.

[43] United Kingdom of Great Britain and Northern Ireland, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict,* p. 205, para. 8.170.

[44] The United States manual mentions only the will of prisoners of war who are sick or wounded (see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume 2: Practice*, pp. 2893–2894, paras. 844–855); but United States practice after the Second Gulf War was to have ICRC establish the prisoner's will and to act accordingly (United States of America, Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*).

[45] See chapter IV, section D, below.

[46] See also Crema, "Subsequent agreements and subsequent practice within and outside the Vienna Convention", pp. 25–26.

Chapter II

Possible effects of subsequent agreements and subsequent practice in interpretation

20. Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interpretation of a treaty in a particular case, that is, in the interactive process, which consists of placing appropriate emphasis on the various means of interpretation in a "single combined operation".[47] The taking into account of subsequent agreements and subsequent practice under

[47] *Yearbook … 2013*, vol. II (Part Two), p. 20, para. (12) of the commentary to draft conclusion 1.

article 31, paragraph 3, and article 32 may thus contribute to a clarification of the meaning of a treaty[48] in the sense of a specification (narrowing down) of different possible meanings of a particular term or provision, or the scope of the treaty as a whole (sects. A and B, subsect. 1, below), or to a clarification in the sense of confirming a wider interpretation or a certain scope for the exercise of discretion by the parties (broad understanding) (sects. A and B, subsect. 2, below). The specificity of a subsequent practice is often an important factor for its value as a means of interpretation in a particular case, depending on the treaty in question (sect. C below).

A. Case law of the International Court of Justice

21. International courts and tribunals usually begin their reasoning in a given case by determining the "ordinary meaning" of the terms of the treaty.[49] Subsequent agreements and subsequent practice mostly enter their reasoning at a later stage, when courts ask the question of whether such conduct confirms or modifies the preliminary result arrived at by the initial textual interpretation (or by other means of interpretation).[50] If the parties do not wish to convey the ordinary meaning of a term, but rather a special meaning in the sense of article 31, paragraph 4, subsequent agreements and subsequent practice may contribute to bringing this special meaning to light. The following examples, mainly from the jurisprudence of the International Court of Justice,[51] illustrate how subsequent agreements and subsequent practice, as means of interpretation, can contribute, by their interaction with other means in the process of interpretation, to the clarification of the meaning of a treaty.

1. "Ordinary meaning" of a term

22. The taking into account of subsequent agreements and subsequent practice can contribute to the identification of the "ordinary meaning" of a particular term in the sense of confirming a narrow interpretation of different possible shades of meaning of this term. This was the case, for example,[52] in the *Nuclear Weapons* advisory opinion where the International Court of Justice determined that the expressions "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.[53]

23. On the other hand, there are also cases where variation of subsequent practice has contributed to preventing a specification of the meaning of a general term according to one or the other of different possible meanings.[54] This was confirmed, for example, in the *Case concerning rights of nationals of the United States of America in Morocco,* where the Court 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. It requires an interpretation which is more flexible than either of those which are respectively contended for by the Parties in this case.[55]

24. It is, of course, possible that different forms of practice contribute to both a narrow and a broad interpretation of different terms in the same treaty and in the same judicial procedure. A well-known example is the interpretation by the International Court of Justice in the *Certain Expenses of the United Nations* opinion of the terms "expenses" (broad) and "action" (narrow) in the light of the respective subsequent practice of the organization.[56]

2. "Terms of the treaty in their context"

25. A treaty shall be interpreted in accordance with the ordinary meaning to be given to the "terms of the treaty in their context" (art. 31, para. 1). Subsequent agreements and subsequent practice may also, in interaction with this particular means of interpretation, contribute to identifying a narrower or broader interpretation of a term of a treaty.[57] In the *Inter-Governmental Maritime Consultative Organization (IMCO)* advisory opinion, for example, the International Court of Justice had to determine the meaning of the expression "eight … largest ship-owning nations" under article 28, paragraph (*a*), of the Convention on the International Maritime Organization (IMCO Convention). Since this concept of "largest ship-owning nations" permitted different interpretations (determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members

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[48] The terminology follows guideline 1.2 (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties: " 'Interpretative declaration' means a unilateral statement, whereby … [a State or an international organization] purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions" (*Yearbook … 2011*, vol. II (Part Three), para. 1); see also *ibid*., p. 54, para. (18) of the commentary to guideline 1.2.

[49] *Yearbook … 2013*, vol. II (Part Two), pp. 20–21, para. (14) of the commentary to draft conclusion 1; *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 8.

[50] See, for example, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 656, paras. 59–61, and p. 665, para. 80; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports, 1994*, p. 6, at pp. 34–37, paras. 66–71; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 290 (Declaration of Judge *ad hoc* Guillaume).

[51] A review of the jurisprudence of other international courts and tribunals leads to the same result and more examples, see Nolte, "Second report of the ILC Study Group on treaties over time: jurisprudence under special regimes relating to subsequent agreements and subsequent practice".

[52] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at pp. 306–307, para. 67; *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

[53] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 248, para. 55.

[54] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25.

[55] *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America), Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 211.

[56] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at pp. 158–161 ("expenses") and pp. 164–165 ("action").

[57] See, for example, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 87, para. 40.

under article 28 (*a*) itself, the Court turned to other provisions in the Convention and held:

> This reliance upon registered tonnage in giving effect to different provisions of the Convention … persuade[s] the Court to view that it is unlikely that when the latter article [art. 28, para. (*a*)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest shipping owning nations.[58]

26. More recently, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has similarly used the "best environmental practices" under the "Sulphides Regulation" in order to interpret the previously adopted "Nodules Regulation".[59]

3. "Object and Purpose"

27. Together with the text and the context, article 31, paragraph 1, accords the "object and purpose" of a treaty an importance, but not an overriding importance, for its interpretation.[60] Subsequent agreements and subsequent practice may also contribute to a clarification of the object and purpose of a treaty itself,[61] or reconcile invocations of the "object and purpose" of a treaty with other means of interpretation.

28. In the *Maritime Delimitation in the Area between Greenland and Jan Mayen*[62] and *Oil Platforms* cases,[63] for example, the International Court of Justice clarified the object and purpose of bilateral treaties by referring to subsequent practice of the parties. In the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court 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.[64]

29. When the "object and purpose" of a treaty appears to be in tension with specific purposes of certain of its rules, subsequent practice can help reduce possible conflicts.[65] In the *Kasikili/Sedudu Island* case, for example, the Court emphasized that the parties to the 1890 Treaty "sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence"[66] and thereby reconciled a possible tension by taking into account a certain subsequent practice as a subsidiary means of interpretation (under art. 32).

B. State practice

30. State practice outside of judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice can contribute to clarifying the meaning of a treaty by either narrowing the range of conceivable interpretations or by indicating a certain margin of discretion which a treaty grants to States.

1. Narrowing the range of conceivable interpretations

31. Whereas the terms of article 5 of the Convention on International Civil Aviation do not appear to require a charter flight to obtain permission to land while *en route*, long-standing State practice requiring such permission has led to general acceptance that this provision is to be interpreted as requiring permission.[67]

32. The term "feasible precautions" in article 57, paragraph 2 (*a*) (ii), of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) has been circumscribed in article 3, paragraph 4, of the Protocol on prohibitions or restrictions on the use of mines, booby traps and other devices (Protocol II), which provides that "feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations". This specification has come to be accepted by way of subsequent practice in many military manuals as a general definition of "feasibility" for the purpose of article 57 of Protocol I.[68]

33. Finally, article 31, paragraph 4, of the Vienna Convention on Consular Relations provides that the means

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[58] *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. 150, at p. 169; see also *ibid.*, pp. 167–169; and *obiter dictum: Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, Final Award Decision of 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 59, at p. 99, para. 141.

[59] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 48, paras. 136–137; see also Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance'…", p. 66.

[60] Gardiner, *Treaty Interpretation*, pp. 190 and 198.

[61] *Ibid*., pp. 191–194; see also *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, at p. 31, para. 53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109; 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; Crema, "Subsequent agreements and subsequent practice within and outside the Vienna Convention", p. 21.

[62] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at pp. 50–51, para. 27.

[63] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 813–815, paras. 27 and 30.

[64] See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at pp. 306–307, para. 67.

[65] See WTO, Appellate Body Reports, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 17 ("most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes"); Gardiner, *Treaty Interpretation*, p. 195.

[66] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1074, para. 45.

[67] Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 85; Aust, *Modern Treaty Law and Practice*, p. 215.

[68] For the military manuals of Argentina (1989), Canada (2001) and the United Kingdom (2004), see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, volume* 2: *Practice*, pp. 359–360, paras. 160–164 and the online update for the military manual of Australia (2006) (www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectionc); see also Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, p. 683, para. 2202.

of transport of a mission shall be immune from search, requisition, attachment or execution. While certain forms of police enforcement will usually be met with protests of States,[69] the towing of diplomatic cars has been found permissible in practice.[70] This practice suggests that, while punitive measures against diplomatic vehicles are forbidden, cars can be stopped or removed if they prove to be an immediate danger or obstacle for traffic and/or public safety.[71] In that sense, the meaning of the term "execution", and thus, the scope of protection accorded to means of transportation, is specified by the subsequent practice of parties.

34. Thus, subsequent agreements and subsequent practice can contribute to specifying the meaning of a term in the sense of narrowing the possible meanings of the rights and obligations under a treaty.

2. Widening the range of conceivable interpretation or supporting a certain scope for the exercise of discretion

35. Such agreements or practice can, however, also indicate a wide range of acceptable interpretation or a certain scope for the exercise of discretion which a treaty grants to States:[72] Article 12 of 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) provides:

> Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

36. Although the term "shall" suggests that it is obligatory for States to use the distinctive emblem for marking medical personnel and transports, subsequent practice suggests that States possess a certain discretion in this regard.[73] As armed groups have in recent years specifically attacked medical convoys which were well recognizable due to the protective emblem, States have in certain situations refrained from marking such convoys with a distinctive emblem. Responding to a parliamentary question on its practice in Afghanistan, the Government of Germany stated:

> As other contributors of ISAF contingents, the Federal Armed Forces have experienced that marked medical vehicles have been targeted. Occasionally, these medical units and vehicles, clearly distinguished as such by their protective emblem, have even been preferred as targets. The Federal Armed Forces have thus, alongside with Belgium, France, the UK, Canada and the US, decided within ISAF to cover-up the protective emblem on medical vehicles.[74]

37. Such practice by States confirms an interpretation according to which article 12 does not contain an obligation to use the protective emblem in all circumstances,[75] and thereby indicates a margin of discretion for the parties.

38. A treaty provision granting States a certain scope for the exercise of discretion can raise the question of whether this scope is limited by the purpose of the rule. According to article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may notify the sending State, without having to give reasons, that a member of the mission is *persona non grata*. States typically issue such notifications in cases in which members of the mission were found or suspected of having engaged in espionage activities, or having committed other serious violations of the law of the receiving State, or caused significant political irritation.[76] However, many States also make such declarations in more mundane circumstances, for example to enforce their impaired driving policy,[77] or when envoys caused serious injury to a third party,[78] or

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[69] Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, pp. 160–161; Salmon, *Manuel de droit diplomatique*, pp. 207–208, para. 315; see also the protest by the British authorities after a British Air attaché and the Canadian Armed Forces attaché were removed from a car belonging to the British Embassy (Marston, "United Kingdom materials on international law 1981", p. 434).

[70] See, for example, Australia, Department of Foreign Affairs and Trade, "Privileges and immunities of foreign representatives", available from http://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Pages/5-privileges-and-immunities.aspx; Iceland, Protocol Department, Ministry of Foreign Affairs, Diplomatic handbook, p. 14, available from www.government.is/media/utanrikisraduneyti-media/media/PDF/Diplomatic_Handbook_March2010.pdf; United Kingdom, statement of the Parliamentary Under-Secretary of State, Home Office (Lord Elton) in the House of Lords (HL Deb, 12 December 1983 vol. 446 cc 3–4; United States, AJIL, vol. 2, 1994, pp. 312–313.

[71] Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, p. 160; Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis*, p. 70.

[72] This is not to suggest that there may exist different possible interpretations of a treaty, but rather that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts. See Gardiner, *Treaty Interpretation*, p. 30, quoting the House of Lords in *Regina v. Secretary of State for the Home Department*, ex parte *Adan*, ex parte *Subaskaran*, ex parte *Aitseguer* (*The Law Reports. Appeal Cases*, 2001, vol. 2, pp. 515–517) (Lord Steyn): "It is necessary to determine the autonomous meaning of the relevant treaty provision … It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting State. In principle there can only be one true interpretation of a treaty … In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning."

[73] Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, p. 1440, paras. 4742–4744; Spieker, "Medical transportation", pp. 54–55, paras. 7−12; see also the less stringent future tense in the French version "*sera arboré*".

[74] Federal Parliament of Germany, "Antwort der Bundesregierung: Rechtlicher Status des Sanitätspersonals der Bundeswehr in Afghanistan", 9 April 2010, *Bundestagsdrucksache 17/1338*, p. 2 (translation by the Special Rapporteur).

[75] Spieker, "Medical transportation", p. 55, para. 12.

[76] See Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, pp. 77–88, with further references to declarations in relation to espionage; see also Salmon, *Manuel de droit diplomatique*, pp. 483–484 para. 630; and Richtsteig, *Wiener Übereinkommen über diplomatische und konsularische Beziehungen: Entstehungsgeschichte, Kommentierung, Praxis*, p. 30.

[77] See Canada, Foreign Affairs, Trade and Development, "Revised impaired driving policy", available from www.international.gc.ca/protocol-protocole/vienna_convention_idp-convention_vienne_vfa.aspx?lang=eng; United States, Department of State, Diplomatic Note 10-181, 24 September 2010, pp. 8–9, available from https://2009-2017.state.gov/documents/organization/149985.pdf.

[78] The Netherlands, Protocol Department, Ministry of Foreign Affairs, *Protocol Guide for Diplomatic Missions and Consular Posts*, available from www.diplomatmagazine.nl/wp-content/uploads/protocol-guide-for-diplomatic-missions-and-consular-posts-january-2013.pdf.

committed serious or repeated infringement of the law.[79] It is even conceivable that declarations are made, without clear reasons, for political motives. Other States do not seem to have asserted that such practice constitutes an abuse of the power to declare members of a mission as *personae non gratae* for purposes unrelated to political or other more serious concerns. Thus, such practice suggests that article 9 provides a very broad scope for the exercise of discretion.[80]

C. Specificity of practice

39. The interpretative value of subsequent practice in relation to other means of interpretation in a particular case often depends on its specificity in relation to the treaty concerned.[81] This is confirmed, for example, by decisions of the International Court of Justice, arbitral awards and reports of the WTO Panel and Appellate Body.[82] The award of the ICSID tribunal in *Plama v. Bulgaria* is instructive:

> It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria–Cyprus BIT in 1987. In the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bulgaria and Cyprus indicate that these Contracting Parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions… It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs.[83]

40. While the International Court of Justice and arbitral tribunals tend to accord more interpretative value to rather specific subsequent practice by States, the European Court of Human Rights mostly limits itself to broad and sometimes rough comparative assessments of the domestic legislation or international positions adopted by States.[84] In this context, it must be borne in mind that the rights which are articulated in human rights treaties are usually not designed to be authoritatively interpreted and applied by State organs, but they must rather correctly translate (within the given margin of appreciation) the treaty obligations into the law, the executive practice and international arrangements of their respective State. For this purpose, sufficiently strong commonalities in the national legislations of a significant number of member States can already be relevant for the determination of the scope of a human right or the necessity of its restriction. In addition, the character of certain rights sometimes speaks in favour of taking less specific practice into account. For example, in the case of *Rantsev v. Cyprus* the Court held:

> It is clear from the provisions of these two [international] instruments that the Contracting States … have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking … Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 [prohibition of forced labour] must be considered within this broader context.[85]

41. Similarly, in the case of *Chapman v. the United Kingdom*, the Court observed "that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle",[86] but ultimately said that it was "not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation".[87] The preceding considerations suggest the following conclusion:

> *"Draft conclusion 7. Possible effects of subsequent agreements and subsequent practice in interpretation*
>
> "1. Subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties.
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> "2. The value of a subsequent agreement or subsequent practice as a means of interpretation may, inter alia, depend on their specificity."

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[79] France, Ministry for Europe and Foreign Affairs, Guide for foreign diplomats serving in France: immunities—"Respect for local laws and regulations", available from www.diplomatie.gouv.fr/en/the-ministry-and-its-network/protocol/immunities/article/respect-for-local-laws-and; Turkey, Ministry of Foreign Affairs, Principal Circular Note, 63552, "Traffic regulations" 2005/PDGY/63552, 6 April 2005, available from www.mfa.gov.tr/06_04_2005--63552-traffic-regulations.en.mfa; United Kingdom, Foreign and Commonwealth Office, circular dated 19 April 1985 to the heads of diplomatic missions in London, reprinted in Marston, "United Kingdom materials on international law 1981", p. 437.

[80] See Hafner, "Subsequent agreements and practice: between interpretation, informal modification, and formal amendment", p. 112, for an even more far-reaching case under article 9 of the Vienna Convention on Diplomatic Relations.

[81] Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 91.

[82] See, for example, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at pp. 55–56, para. 38; *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, decision of 14 January 2003, UNRIAA, vol. XXV, part IV, p. 231, at p. 259, para. 74; WTO, Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009; WTO, Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, para. 625.

[83] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, *ICSID Review: Foreign Investment Law Journal*, vol. 20, No. 1 (spring 2005), pp. 323–324, para. 195.

[84] See, for example, *Cossey v. the United Kingdom*, 27 September 1990, no. 10843/84, Series A, no. 184, p. 16, para. 40; *Tyrer v. the United Kingdom*, 25 April 1978, no. 5856/72, Series A, no. 26, p. 15, para. 31; *Norris v. Ireland*, 26 October 1988, no. 10581/83, Series A, no. 142, p. 20, para. 46. This has been criticized by commentators: see, for example, Carozza, "Uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights", pp. 1223–1224; Helfer, "Consensus, coherence and the European Convention on Human Rights", p. 140.

[85] *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010-I, p. 125, para. 285.

[86] *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, p. 72, para. 93.

[87] *Ibid*., para. 94.

Chapter III

Form and value of subsequent practice under article 31, paragraph 3 (*b*)

42. The Commission has recognized that subsequent practice under article 31, paragraph 3 (*b*), consists of any "conduct" in the application of a treaty which may contribute to establishing an agreement regarding the interpretation of the treaty.[88] Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, as well as practices by non-State entities which fall within the scope of what the treaty conceives as forms of its application.[89] The individual conduct which may contribute to a subsequent practice under article 31, paragraph 3 (*b*), must not meet any particular formal criteria.[90] This does not, however, answer the question of whether the collective "subsequent practice which establishes the agreement of the parties" under article 31, paragraph 3 (*b*), requires a particular form.

A. Variety of possible forms of subsequent practice under article 31, paragraph 3 (*b*)

43. It is clear that subsequent practice by all parties can establish their agreement regarding the interpretation of a treaty. Such practice need not necessarily be joint conduct.[91] A merely parallel conduct may suffice. This can be the case, for example, when two States grant oil concessions independently from each other in a way which suggests that they thereby implicitly recognize a certain course of a boundary in a maritime area. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice stated that oil concessions "may … be taken into account" if they are "based on express or tacit agreement between the parties".[92] It is a separate question whether parallel activity of such a kind actually articulates a sufficient common understanding (agreement) regarding the interpretation of a treaty in a particular case (see chap. IV below).[93]

B. Density and uniformity of subsequent practice

44. The Commission indicated that "if … the concept of subsequent practice … is distinguished from a possible agreement between the parties, frequency is not a necessary element of the definition of the concept of 'subsequent practice' … under article 32".[94] This does not answer the question of whether "subsequent practice" under article 31, paragraph 3 (*b*),[95] requires more than a one-time application of the treaty as a possible basis for an agreement of the parties regarding its interpretation. The WTO Appellate Body has asserted a rather demanding standard in this respect by stating in its early decision *Japan—Alcoholic Beverages II*:

> 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 discernible pattern implying the agreement of the parties regarding its interpretation.[96]

45. This definition suggests that subsequent practice under article 31, paragraph 3 (*b*), requires more than one "act or pronouncement" regarding the interpretation of a treaty, but rather requires action of such frequency and uniformity as to warrant the conclusion that the parties are in a repeatedly confirmed settled agreement over the interpretation of the treaty. This is a rather high threshold which would imply that subsequent practice under article 31, paragraph 3 (*b*), does not simply refer to subsequent practice as a means of identifying any agreement, but that it rather requires a particularly broad-based, settled and qualified form of collective practice in order to establish agreement between the parties regarding interpretation.

46. The International Court of Justice, on the other hand, has not formulated such an abstract definition of subsequent practice as a collective activity under article 31, paragraph 3 (*b*). The Court has rather applied this provision flexibly, without adding any further conditions. This is true, in particular, for its judgment in the leading case of *Kasikili/Sedudu Island*, in which the Court reaffirmed its previous relevant case law.[97] Other international courts have mostly followed the International Court of Justice in its flexible understanding of the threshold for the application of article 31, paragraph 3 (*b*). This is

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[88] *Yearbook … 2013*, vol. II (Part Two), pp. 30–31, paras. (16)–(19) of the commentary to draft conclusion 4.

[89] See, for example, draft conclusion 5, *ibid.*, para. 38; *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3 at pp. 41–45, paras. 103–111, pp. 48–49, paras. 119–122, and p. 50, para. 126; Gardiner, *Treaty Interpretation*, pp. 228–230; Dörr, "Article 31—General rule of interpretation", pp. 555–556, para. 78; Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance'...", pp. 54, 56 and 59–60.

[90] Gardiner, *Treaty Interpretation*, pp. 226–227; Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance'…", p. 53.

[91] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 33; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1213, para. 17 (dissenting opinion of Judge Parra-Aranguren).

[92] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at pp. 447–448, para. 304.

[93] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at p. 737, para. 258; but see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at pp. 84–85, para. 117, where the Court recognized concessions granted by the parties to the dispute as evidence of their tacit agreement; see also *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3.

[94] *Yearbook … 2013*, vol. II (Part Two), pp. 33–34, para. (35) of the commentary to draft conclusion 4.

[95] *Ibid.*, p. 28, draft conclusion 4, para. 2.

[96] WTO, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, sect. E, p. 13.

[97] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1075–1076, paras. 47–50, and p. 1087, para. 63; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports, 1994*, p. 6, at pp. 34–37, paras. 66–71.

true for the Iran–United States Claims Tribunal[98] and the European Court of Human Rights,[99] whereas the International Tribunal for the Law of the Sea[100] and the European Court of Justice[101] have at least not adopted the standard which the WTO Appellate Body formulated in *Japan — Alcoholic Beverages II*. ICSID tribunals have rendered divergent awards.[102]

47. Upon closer inspection, the difference between the standard formulated by the WTO Appellate Body and individual ICSID awards, on the one hand, and the approach of the International Court of Justice and other international tribunals on the other, is more apparent than real. The WTO Appellate Body seems to have taken the "concordant, common and consistent" formula from a publication by Sir Ian Sinclair,[103] who himself drew on a similar formulation in French by Mustafa Kamil Yasseen, a former member of the Commission.[104] Sir Ian, however, did not make the categorical statement that subsequent practice, in order to fulfil the requirements of article 31, paragraph 3 (*b*), must be "concordant, common and consistent", but rather wrote that "the *value** of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent".[105] This suggests that the formula "concordant, common and consistent" did not originally serve to establish a formal threshold for the applicability of article 31, paragraph 3 (*b*), but rather provided an indication as to the circumstances under which subsequent practice under article 31, paragraph 3 (*b*), would have more or less value as a means of interpretation in a process of interpretation.[106] And indeed the WTO Appellate Body has itself on occasion relied, in an analogous situation, on this nuanced perspective when it held:

> The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties.[107]

48. It is therefore suggested that the formula "concordant, common and consistent" does not establish a minimum threshold for the applicability of article 31, paragraph 3 (*b*). It is rather the extent to which subsequent practice is "concordant, common and consistent" that a "discernible pattern" can be identified which implies an agreement of the parties which then "must be read into the treaty".[108] Accordingly, the Commission has found that "[t]he value of subsequent practice varies depending on how far it shows the common understanding of the parties as to the meaning of the terms."[109] The reason the WTO Appellate Body has occasionally formulated a more demanding definition may be due to the specific character and the working of the WTO agreements rather than to a considered view of the requirements of article 31, paragraph 3 (*b*), for a broad range of other treaties. The preceding considerations suggest the following conclusion:

"*Draft conclusion 8. Forms and value of subsequent practice under article 31, paragraph 3 (b)*

"Subsequent practice under article 31, paragraph 3 (*b*), can take a variety of forms and must reflect a common understanding of the parties regarding the interpretation of a treaty. Its value as a means of interpretation depends on the extent to which it is concordant, common and consistent."

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[98] *The Islamic Republic of Iran v. the United States of America*, No. ITL 83-B1-FT (Counterclaim), Interlocutory Award, *Iran–United States Claims Tribunal Reports*, vol. 38 (2004–2009), p. 77, at pp. 116–126, paras. 109–133.

[99] *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, Series A, no. 161, p. 40, para. 103; *Loizidou v. Turkey, Preliminary Objections*, no. 15318/89, 23 March 1995, Series A, no. 310, pp. 27–29, paras. 73 and 79–82; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII, paras. 56 and 62.

[100] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, pp. 61–62, at paras. 155–156.

[101] *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, Judgment, 5 July 1994, *European Court Reports 1994*, p. I-03087, Case C-432/92, paras. 43, 46 and 50–54; *Leonce Cayrol v. Giovanni Rivoira & Figli*, Judgment, 30 November 1977, *European Court Reports 1977*, p. 2261, Case C-52/77, para. 18.

[102] *Enron Corporation and Ponderosa Assets, L. P. v. Argentine Republic* (United States/Argentina BIT), Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, ICSID Case No. ARB/01/3, 7 October 2008, para. 70, available from http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3/DC830_En.pdf; *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (United States/Sri Lanka BIT), Award, ICSID Case No. ARB/00/2, 15 March 2002, *ICSID Reports*, vol. 6, 2004, p. 317, para. 33; *National Grid plc v. Argentine Republic* (United Kingdom/Argentina BIT), Decision on Jurisdiction (UNCITRAL), 20 June 2006, pp. 25–26, paras. 84–85; Fauchald, "The legal reasoning of ICSID tribunals: an empirical analysis", p. 345; see also Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States", pp. 207–215.

[103] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 137.

[104] Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", pp. 48–49; while "commune" is taken from the work of the Commission, "d'une certaine constance" and "concordante" are conditions that Yasseen derives through further reasoning; see *Yearbook … 1966*, vol. II, pp. 98–99, paras. 17–18 and pp. 221–222, para. (15) of the commentary to draft articles 27 and 28.

[105] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 137; *The Islamic Republic of Iran v. the United States of America*, No. ITL 83-B1-FT (Counterclaim), Interlocutory Award, *Iran–United States Claims Tribunal Reports*, vol. 38 (2004–2009), p. 77, at p. 118, para. 114.

[106] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, p. 53, at p. 187, para. 169; Cot, "La conduite subséquente des parties a un traité", pp. 644–647 ("valeur probatoire"); Distefano, "La pratique subséquente des États parties à un traité", p. 46; Dörr, "Article 31—General rule of interpretation", p. 556, para. 79; see also the oral argument before the International Court of Justice in *Maritime Dispute (Peru v. Chile)*, CR 2012/33, pp. 32–36, paras. 7–19 (Wood) and CR 2012/36, pp. 13–18, paras. 6–21 (Wordsworth), available from www.icj-cij.org/en/case/137.

[107] WTO, Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, p. 36, para. 93.

[108] *Yearbook … 1966*, vol. II, p. 221, para. (14) of the commentary to draft articles 27 and 28; reaffirmed in *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1075–1076, para. 49; see also Simma, "Miscellaneous thoughts on subsequent agreements and practice", p. 46 and Gardiner, *Treaty Interpretation*, pp. 218 and 239–241.

[109] *Yearbook … 1966*, vol. II, p. 222, para. (15) of the commentary to draft articles 27 and 28; Cot, "La conduite subséquente des parties à un traité", p. 652.

Chapter IV

Agreement of the parties regarding the interpretation of a treaty

49. The element which distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31, paragraph 3 (*a*) and (*b*), and other subsequent practice as a supplementary means of interpretation under article 32,[110] is the "agreement" of the parties regarding the interpretation of the treaty concerned. It is the agreement of the parties which gives the means of interpretation under article 31, paragraph 3,[111] their specific function and value for the interactive process of interpretation under the general rule of interpretation of article 31.[112]

A. Existence and scope of agreement

50. Conflicting positions expressed by different parties to a treaty exclude the existence of an agreement. This has been confirmed, *inter alia,* by the Arbitral Tribunal in the case of *German External Debts* which held that a "tacit subsequent understanding" could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.[113]

51. However, the lack of agreement reaches only as far as the divergence goes and as long as it lasts. The scope and the coming about of any agreement need to be carefully elucidated (see chap. I above).[114] The fact that States implement a treaty differently does not, as such, permit a conclusion about the legal relevance of this divergence. Such difference can reflect a disagreement over the (one) correct interpretation, but also a common understanding that the treaty permits a certain scope for the exercise of discretion in its implementation.[115] Treaties characterized by considerations of humanity or other general community interests, such as human rights treaties or the Convention relating to the Status of Refugees, presumably aim at a uniform interpretation as far as they establish minimum obligations and do not leave a scope for the exercise of discretion to States.

52. Whereas equivocal conduct by one or more parties will normally prevent the identification of an agreement,[116] international courts have occasionally recognized an agreement regarding interpretation under article 31, paragraph 3, to have come about despite the existence of certain indications to the contrary. Thus, not every element of the conduct of a State which does not fully fit into a general picture necessarily has the effect of making the conduct of that State so equivocal that it precludes the identification of an agreement. The Court of Arbitration in the *Beagle Channel* case, for example, found that the fact that the parties conducted negotiations and later revealed a difference of opinion regarding the interpretation of a treaty is not necessarily sufficient to establish that this lack of agreement was permanent:

> In the same way, negotiations for a settlement that did not result in one, could hardly have any permanent effect. At the most they might temporarily have deprived the acts of the Parties of probative value in support of their respective interpretations of the treaty, insofar as these acts were performed during the process of the negotiations. The matter cannot be put higher than that.[117]

In the same case, the Court of Arbitration considered that:

> The mere publication of a number of maps of (as the Court has already shown) extremely dubious standing and value could not—even if they nevertheless represented the official Argentine view—preclude or foreclose Chile from engaging in acts that would, correspondingly, demonstrate her own view of what were her rights under the 1881 Treaty—nor could such publication of itself absolve Argentina from all further necessity for reaction in respect of those acts, if she considered them contrary to the treaty.[118]

53. Similarly, in *Loizidou v. Turkey,* the European Court of Human Rights held that the scope of the restrictions which the parties could place on their acceptance of the competence of the Commission and the Court 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".[119] The Court described such a State practice as being "uniform and consistent", despite the fact that it simultaneously recognized that two States possibly constituted exceptions.[120] This

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[110] *Yearbook … 2013,* vol. II (Part Two), p. 30, para. (16) of the commentary to draft conclusion 4.

[111] See Crawford, "A consensualist interpretation of Article 31 (3) of the Vienna Convention on the Law of Treaties", p. 30: "There is no reason to think that the word 'agreement' in para. (*b*) has any different meaning as compared to the meaning it has in para. (*a*)."

[112] See *Yearbook … 2013,* vol. II (Part Two), p. 30, paras. (12)–(15) of the commentary to draft conclusion 1; article 31 must be "read as a whole" and conceives of the process of interpretation as "a single combined operation", and is "not laying down a legal hierarchy of norms for the interpretation of treaties", *Yearbook … 1966*, vol. II, p. 219, paras. (8) and (9) of the commentary to draft articles 27 and 28.

[113] *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 between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Decision of 16 May 1980, UNRIAA, vol. XIX, part III, p. 67, at pp. 103–104, para. 31; see also WTO, Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, adopted 22 June 1998, pp. 36–37, para. 95; *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985, UNRIAA, vol. XIX, part IV, p. 149, at p. 175, para. 66; *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, Judgment, 5 July 1994, *European Court Reports 1994*, p. I-03087, Case C-432/92, paras. 50−51.

[114] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, pp. 40-41, para. 99.

[115] See chapter II above.

[116] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France,* Decision of 14 January 2003, UNRIAA, vol. XXV, part IV, p. 231, at p. 258, para. 70; Kolb, "La modification d'un traité par la pratique subséquente des parties", p. 16.

[117] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, p. 53, at p. 188, para. 171.

[118] *Ibid.*

[119] *Loizidou v. Turkey, Preliminary Objections*, Series A, no. 310, p. 28, paras. 79–80.

[120] *Ibid*., p. 29, para. 82.

decision is noteworthy because the Court, in contrast to its usual way of reasoning, expressly invoked and applied article 31, paragraph 3 (*b*).[121] The decision suggests that interpreters possess some margin of appreciation when identifying whether an agreement of the parties regarding a certain interpretation is established.[122]

B. An "agreement" under article 31, paragraph 3, may be informal

54. The term "agreement" in the 1969 Vienna Convention,[123] and its use in the customary international law on treaties, does not imply a particular degree of formality.[124] Accordingly, the Vienna Convention also does not envisage any requirements of form for an "agreement" under article 31, paragraph 3 (*a*) and (*b*).[125] The Commission has, however, noted that, in order to distinguish a subsequent agreement under article 31, paragraph 3 (*a*), and a subsequent practice which "establishes the agreement" of the parties under article 31, paragraph 3 (*b*), the former presupposes a "single common act".[126] Apart from this minimal degree of formality for the particular means of interpretation under article 31, paragraph 3 (*a*), any identifiable agreement of the parties is sufficient. There is no requirement that such an agreement be published or registered under article 102 of the Charter of the United Nations.[127]

C. Awareness of the parties of their agreement

55. For an agreement under article 31, paragraph 3, it is not sufficient that the positions of the parties regarding the interpretation or application of the treaty happen to overlap, but the parties must also be aware that these positions are common. Thus, in the *Kasikili/Sedudu Island* case, the International Court of Justice required for practice under article 31, paragraph 3 (*b*), that the "authorities were fully aware of and accepted this as a confirmation of the Treaty boundary."[128] Indeed, only the awareness of the position of the other parties regarding the interpretation of a treaty justifies the characterization of an agreement under article 31, paragraph 3, as an "authentic" means of interpretation.[129] It is, however, possible that the awareness of the position of the other party or parties is constructive, particularly in the case of treaties which are implemented at the national level without a common supervisory mechanism.

D. An agreement under article 31, paragraph 3, need not, as such, be legally binding

56. An "agreement" under article 31, paragraph 3 (*a*), need not necessarily be binding.[130] The same is true, *a fortiori*, for subsequent practice under article 31, paragraph 3 (*b*). This is confirmed by the fact that the Commission in its final articles on the law of treaties used the expression "any subsequent practice which establishes the *understanding** of the parties".[131] The United Nations Conference on the Law of Treaties replaced the expression "understanding" by the word "agreement" not for any substantive reason but "related to drafting only" in order to emphasize that the understanding of the parties was to be their "common" understanding.[132] The expression "understanding" suggests that the term "agreement" in article 31, paragraph 3,[133] does not require that the parties would thereby undertake or create any legal obligation existing in addition to, or independently of, the treaty.[134] It is sufficient that the parties, by a sub-

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[121] The case did not concern the interpretation of a particular human right, but rather the question of whether a State was bound to the Convention at all.

[122] The more restrictive jurisprudence of the WTO Dispute Settlement Body suggests that different interpreters may evaluate matters differently, see WTO, Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, para. 7.218: "even if it were established conclusively that all the 76 Members referred to by the European Communities have adopted a [certain] practice … this would only mean that a considerable number of WTO Members have adopted an approach different from that of the United States. … We note that one third party in this proceeding submitted arguments contesting the view of the European Communities".

[123] See article 2, para. 1 (*a*); article 3; article 24, para. 2; articles 39–41, 58 and 60.

[124] *Yearbook … 2013*, vol. II (Part Two), p. 28, para. (5) of the commentary to draft conclusion 4; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", p. 45; Distefano, "La pratique subséquente des États parties à un traité", p. 47.

[125] *Yearbook … 2013*, vol. II (Part Two), p. 29, para. (5) of the commentary to draft conclusion 4; Gardiner, *Treaty Interpretation*, pp. 208–209 and 216–220; Aust, *Modern Treaty Law and Practice*, p. 213; Dörr, "Article 31—General rule of interpretation", p. 554, para. 75.

[126] *Yearbook … 2013*, vol. II (Part Two), p. 29, para. (10) of the commentary to draft conclusion 4; a "single common act" may also consist of an exchange of letters, see *European Molecular Biology Laboratory Arbitration (EMBL v. Germany)*, 29 June 1990, ILR, vol. 105, p. 1, at pp. 54–56; Fox, "Article 31 (3) (*a*) and (*b*) of the Vienna Convention and the *Kasikili/Sedudu Island* case", p. 63; Gardiner, *Treaty Interpretation*, pp. 220–221.

[127] Aust, "The theory and practice of informal international instruments", pp. 789–790.

[128] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1094, para. 74 ("occupation of the island by the Masubia" tribe) and pp. 1077–1078, para. 55 ("Eason Report" which "appears never to have been made known to Germany"); Dörr, "Article 31—General rule of interpretation", p. 560, para. 88.

[129] In this respect, the ascertainment of subsequent practice under art. 31, para. 3 (*b*), may be more demanding than what the formation of customary international law requires; but see Boisson de Chazournes, "Subsequent practice, practices, and 'family resemblance'…", pp. 53–55.

[130] *Yearbook … 2013*, vol. II (Part Two), p. 29, para. (6) of the commentary to draft conclusion 4; this means that a subsequent agreement under article 31, paragraph 3 (*a*), does not necessarily have an identical legal effect as the treaty to which it relates; in *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1091, para. 68, the Court implied that one of the parties did not consider that certain forms of practical cooperation were legally relevant for the purpose of the question of boundary at issue and thus did not agree with a contrary position of the other party.

[131] *Yearbook … 1966*, vol. II, p. 222, para. (15) of the commentary to draft articles 27 and 28.

[132] *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), 31st meeting, p. 169, para. 60; Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États".

[133] Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", p. 30: "There is no reason to think that the word 'agreement' in para. (*b*) has any different meaning as compared to the meaning it has in para. (*a*)"; Linderfalk, *On the Interpretation of Treaties…*, pp. 169–171.

[134] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, p. 53, at p. 187, para. 169; *Case concerning... the re-evaluation of the German Mark...*, Decision of 16 May 1980 (see footnote 113 above), para. 31; Karl, *Vertrag und spätere Praxis im Völkerrecht …*,

sequent agreement or a subsequent practice under article 31, paragraph 3, attribute a certain meaning to the treaty,[135] or in other words, adopt a certain "understanding" thereof.[136] Subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), even if they are not in themselves legally binding, can nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31.[137]

57. This understanding of the term "agreement" in article 31, paragraph 3, has been confirmed by the jurisprudence of international courts and tribunals. International courts and tribunals have not required that an "agreement" under article 31, paragraph 3, reflect the intention of the parties to create new, or separate, legally binding undertakings (e.g. "pattern implying the agreement of the parties regarding its interpretation",[138] or "pattern … must imply *agreement* on the interpretation of the relevant provision",[139] or "practice [which] reflects an agreement as to the interpretation",[140] or that "State practice was "indicative of a lack of any apprehension on the part of the Contracting States").[141] Similarly, memorandums of understanding have, on occasion, been recognized as "a potentially important aid to interpretation"—but "not a source of independent legal rights and duties".[142] Indeed, if the parties conclude a legally binding agreement regarding the interpretation of a treaty, the question arises whether such an agreement would merely purport to be a means of interpretation among others,[143] or whether it would claim precedence over the treaty, like an amending agreement under article 39 (see chap. VI, sect. C.2, at p. 145 below).

E. Silence as a possible element of an agreement under article 31, paragraph 3

58. Although an "agreement" under article 31, paragraph 3, may be informal and need not necessarily be binding, it must nevertheless be identifiable in order to be "established". This requirement is formulated explicitly only for subsequent practice under article 31, paragraph 3 (*b*), but it is also an implicit condition for a "subsequent agreement" under article 31, paragraph 3 (*a*), which must be reflected in a "single common act".[144] A "subsequent agreement" under article 31, paragraph 3 (*a*), cannot therefore be derived from the mere silence of the parties.

59. On the other hand, the Commission has recognized that an "agreement" resulting from subsequent practice under article 31, paragraph 3 (*b*), can result, in part, from silence or omission. When it explained why it used the expression "the understanding of the parties" in draft article 27, paragraph 3 (*b*) (which later became "the agreement" in article 31, paragraph 3 (*b*)), and not the expression "the understanding of *all* the parties", the Commission stated that

> [i]t considered that the phrase "the understanding of the parties" necessarily means "the parties as a whole". It omitted the word "all" merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.[145]

60. The Commission thus assumed that not all parties must have engaged in a particular practice but that such practice could, if it is "accepted" by those parties not engaged in the practice, establish a sufficient agreement regarding the interpretation of a treaty.[146] Decisions by international courts and tribunals before and after the work of Commission on the law of treaties confirm that such acceptance can be brought about by silence or omission.

1. Case law of international courts and tribunals

61. The International Court of Justice has recognized the possibility of expressing agreement regarding interpretation by silence or omission by stating in the *Case concerning the Temple of Preah Vihear* that "where it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".[147]

pp. 190–195; Kolb, "La modification d'un traité par la pratique subséquente des parties", pp. 25–26; Linderfalk, *On the Interpretation of Treaties…*, pp. 169–171.

[135] This terminology follows the commentary to guideline 1.2 (Definition of interpretative declarations) of the Commission's Guide to Practice on Reservations to Treaties (see *Yearbook … 2011*, vol. II (Part Three), para. 2, paragraphs (18)–(19) of the commentary to guideline 1.2).

[136] *Yearbook … 1966*, vol. II, p. 222, paras. (15)–(16) of the commentary to draft articles 27 and 28 (using the term "understanding" both in the context of what became art. 31, para. 3 (*a*), as well as what became art. 31, para. 3 (*b*)).

[137] *United States–United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, 30 November 1992, UNRIAA, vol. XXIV, p. 3, at p. 131, para. 6.7; Aust, "The theory and practice of informal international instruments", pp. 787 and 807; Linderfalk, *On the Interpretation of Treaties…*, p. 173; Hafner, "Subsequent agreements and practice …"; Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", p. 434.

[138] WTO, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996, sect. E, p. 13.

[139] WTO, Panel Reports, *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R and WT/DS377/R, adopted 21 September 2010, para. 7.558.

[140] *The Islamic Republic of Iran v. the United States of America*, No. ITL 83-B1-FT (Counterclaim), Interlocutory Award, *Iran–United States Claims Tribunal Reports*, vol. 38 (2004–2009), p. 77, at p. 119, para. 116.

[141] *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII, para. 62.

[142] *United States–United Kingdom Arbitration concerning Heathrow Airport User Charges* (see footnote 137 above), p. 131, para. 6.7; see also *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, UNRIAA, vol. XXVII, part II, p. 35, at p. 98, para. 157.

[143] Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", pp. 31−33; see, for example, *United States–United Kingdom Arbitration concerning Heathrow Airport User Charges* (see footnote 137 above), p. 131, para. 6.8.

[144] *Yearbook … 2013*, vol. II (Part Two), p. 29, para. (10) of the commentary to draft conclusion 4.

[145] *Yearbook … 1966*, vol. II, p. 222, para. (15) of the commentary to draft articles 27 and 28.

[146] WTO, Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, p. 101, para. 259.

[147] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 23.

62. The *Temple* case concerned a practice which may not only have implied a simple interpretation of a treaty but perhaps even a modification of a boundary treaty. However, regardless of whether a treaty can be modified by subsequent practice of the parties (see chap. VI below), the general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions[148] as well as generally by writers.[149] The "circumstances" which will "call for some reaction" include the particular setting in which the States parties interact with each other in respect of the treaty.[150]

63. The possible significance of silence for establishing an agreement regarding interpretation was explained by the Arbitration Tribunal in the *Beagle Channel* case.[151] In this case, the Tribunal dealt with the contention by Argentina that acts of jurisdiction by Chile over certain islands could not be counted as relevant subsequent conduct, since Argentina had not reacted to these acts. The Court, however, held that

> The terms of the Vienna Convention do not specify the ways in which agreement may be manifested. In the context of the present case the acts of jurisdiction were not intended to establish a source of title independent of the terms of the treaty; nor could they be considered as being in contradiction of those terms as understood by Chile. The evidence supports the view that they were public and well-known to Argentina, and that they could only derive from the Treaty. Under these circumstances the silence of Argentina permits the inference that the acts tended to confirm an interpretation of the meaning of the Treaty independent of the acts of jurisdiction themselves.[152]

64. The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court held that

> Some of these activities—organization of public health and education, policing, administration of justice—could normally be considered to be acts *à titre de souverain*. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria.[153]

65. This judgment suggests that, in cases which concern treaties establishing a delimited boundary, the circumstances will only very exceptionally call for a reaction. In such situations, there appears to be a strong presumption that silence does not constitute acceptance of a practice.[154] It has indeed been asked whether the determination of the International Court of Justice in the case concerning the *Temple of Preah Vihear,* according to which the specific circumstances of that case did call for a reaction on the part of Thailand, was appropriate.[155] This aspect does not, however, call into question the general standard the Court enunciated regarding the relevance of silence.

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[148] See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 815, para. 30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Prosecutor v. Furundžija*, International Tribunal for the Former Yugoslavia, Trial Chamber, Judgment, 10 December 1998, IT-95-17/1, para. 179; *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010-I, p. 125, para. 285; cautiously: WTO, Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R and WT/DS286/AB/R, adopted 27 September 2005, p. 105, para. 272; see also, for a limited holding, *RayGo Wagner Equipment Company v. Iran Express Terminal Corporation, Iran–United States Claims Tribunal Reports*, vol. 2, 1984, Award No. 30-16-3, p. 141, at p. 144; *Case concerning... the re-evaluation of the German Mark...*, Decision of 16 May 1980 (see footnote 113 above), para. 31.

[149] Kamto, "La volonté de l'État en droit international", pp. 134–141; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", p. 49; Gardiner, *Treaty Interpretation*, p. 236; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 431, para. 22; Dörr, "Article 31—General rule of interpretation", pp. 557–558 and 559, paras. 83 and 86.

[150] For example, when acting within the framework of an international organization, 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. 644, at pp. 675–676, paras. 99–101; Kamto, "*La volonté de l'État en droit international*", p. 136.

[151] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, p. 53.

[152] *Ibid*., p. 187, para. 169 (*a*).

[153] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 67.

[154] *Ibid*., at p. 351, para. 64: "The Court notes, however, that now that it has made its findings that the frontier in Lake Chad was delimited … it necessarily follows that any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*"; *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at pp. 586–587, para. 63: "It must however state forthwith, in general terms, what legal relationship exists between such acts and the titles on which the implementation of the principle of *uti possidetis* is grounded. For this purpose, a distinction must be drawn[:] … [w]here the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not coexist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice"; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, UNRIAA, vol. XX, part II, p. 119, at p. 137, para. 70 (*a*) (dissenting opinion of Mr. Mohammed Bedjaoui): "I cannot however agree with the Separate Opinion of Judge Ago in the 1982 *Continental Shelf* case between Tunisia and Libya, who considered that the regulations adopted on 16 April 1919 by the Italian Government in Tripolitania and Cyrenaica *delimited* the maritime boundary between Tunisia and Libya simply because Tunisia had not voiced an objection. Where the issue concerns a frontier—whether a maritime boundary or a land frontier—and one which is officially recognized as such, the requirements must necessarily be more strict because of the political importance of the operation. In any case, the establishment of a frontier must be the result of an agreement, and not be based on the fragile element of the absence of opposition on the part of one of the parties."

[155] See *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 128 (dissenting opinion of Sir Percy Spender): "In determining what inferences may or should be drawn from Thailand's silence and absence of protest must, I believe, be had to the period of time when the events we are concerned with took place, to the region of the world to which they related, to the general conditions existing in Asia at this period, to political and other activities of Western countries in Asia at the time and to the fact that of the two States concerned one was Asian, the other European. It would not, I think, be just to apply to the conduct of Siam in this period objective standards comparable to those which reasonably might be today or might then have been applied to highly developed European States"; see also Chan, "Acquiescence/estoppel in international boundaries: *Temple of Preah Vihear* revisited", p. 439; Kelly, "The *Temple Case* in historical perspective", p. 471.

2. General considerations

66. Whereas the correct application of the general legal standard on the relevance of silence for the establishment of an agreement regarding interpretation depends to a large extent on the circumstances of the specific case, certain general criteria can be derived from decisions of international courts and tribunals. They demonstrate that an acceptance by silence or omission constituting the necessary common understanding is not established easily, even beyond the area of boundary treaties.

67. Subsequent practice by one party which remains unknown to another party cannot be the basis for a common understanding resulting from the silence of this other party (see sect. C above). The question is, however, under which circumstances it can be expected that another State takes note of and reacts to conduct which was not communicated to it, but which is nevertheless available to it in some way, in particular by being in the public domain. Domestic parliamentary documents and proceedings, for example, are usually public but they are mostly not communicated to other parties to the treaty. International courts and tribunals have been reluctant to accept that parliamentary proceedings or court judgments are considered as subsequent practice under article 31, paragraph 3 (*b*), to which other parties to the treaty would be expected to react, even if such proceedings or judgments had come to their attention through other channels, including by their own diplomatic service.[156]

68. Even where a party, by its conduct, expresses a certain position towards another party (or parties) regarding the interpretation of a treaty, this does not necessarily call for a reaction by the other party or parties. In the *Kasikili/Sedudu Island* case, the International Court of Justice held that a State that did not react to the findings of a joint commission of experts that had been entrusted by the parties to determine a particular factual situation with respect to a disputed matter did not thereby provide a ground for the conclusion that an agreement had been reached with respect to the dispute.[157] This was because the parties in that particular case had considered the work of the experts as being merely a preparatory step for a separate decision subsequently to be taken on the political level. On a more general level, the WTO Appellate Body has held that

> in specific situations, the "lack of reaction" or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it.[158]

69. This standard, with its emphasis on "notification or … participation in a forum", is useful as a general guideline. The conditions for the relevance of silence may, however, be different for different treaties.[159] The European Court of Human Rights, in particular, frequently relies on subsequent practice when it identifies a "consensus", "vast majority", "great majority", "generally recognised rules" or a "distinct tendency"[160] and does not purport to place such practice under the condition of agreement under article 31, paragraph 3 (*b*). This may explain why the European Court of Human Rights—in contrast to the International Court of Justice—has hardly ever openly considered the role of silence, or acquiescence, by certain State parties for the purpose of determining the relevance of a given practice for a question of interpretation.

70. The possible legal significance of silence in the face of a subsequent practice of a party to a treaty is not limited to contributing to a possible underlying common agreement, but it may also play a role for the operation of non-consent based rules, such as preclusion or prescription.[161]

F. Subsequent practice as indicating agreement on a temporary non-application of a treaty or merely on a practical arrangement

71. A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may also signify their agreement to not apply the treaty temporarily, or on a practical arrangement (*modus vivendi*). The following examples confirm this point. Article 7 of the Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field provided that "[a] distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. … [the] … flag shall bear a red cross on a white ground." During the Russo-Turkish War of 1876−1878, the Ottoman Empire declared that it would in the future use the red crescent on a white ground to mark its own ambulances, while respecting the red cross sign protecting enemy ambulances and stated that the distinctive sign of the Convention "has so far prevented [Turkey] from exercising its rights under the Convention because it gave offence to the Muslim soldiers".[162] This declaration led to a correspondence between the Ottoman Empire, Switzerland (as depositary) and the other parties, which resulted in the acceptance of the red crescent only for the duration of the conflict.[163] At The Hague Peace Conferences of 1899 and 1907 and during the Geneva Revision Conference of 1906, the Ottoman Empire, Persia and Siam unsuccessfully requested the inclusion of the red crescent,

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[156] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at pp. 650–651, para. 48; WTO, Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (see footnote 148 above), pp. 129–130, para. 334 ("mere access to a published judgment cannot be equated with acceptance").

[157] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1089–1091, paras. 65–68.

[158] WTO, Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts* (footnote 148 above), pp. 105–106, para. 272.

[159] Treaties establishing international organizations will be addressed more specifically at a later stage of the work on the topic.

[160] *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010-I, p. 125, para. 285; *Jorgic v. Germany*, no. 74613/01, ECHR 2007-III, p. 288, para. 69; *Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008-V, p. 418, para. 52; *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, no. 16130/90, Series A, no. 264, p. 15, para. 35; *A. v. the United Kingdom*, no. 35373/97, ECHR 2002-X, p. 144, para. 83; *Mazurek v. France*, no. 34406/97, ECHR 2000-II, pp. 38–39, para. 52.

[161] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at pp. 190–192 (separate opinion of Sir Percy Spender).

[162] *Bulletin international des Sociétés de Secours aux Militaires blessés*, No. 29, January 1877, pp. 35–37, cited in Bugnion, *Red Cross, Red Crescent, Red Crystal*, p. 9, footnote 16.

[163] *Bulletin international des Sociétés de Secours aux Militaires blessés*, No. 31, July 1877, p. 89, cited in Bugnion, *Red Cross, Red Crescent, Red Crystal*, p. 9, footnote 17. See also Bugnion, "The emblem of the Red Cross: a brief history".

the red lion and sun, and the red flame in the Convention.[164] The Ottoman Empire and Persia, however, at least gained the acceptance of reservations that they formulated to that effect in 1906.[165] It was only on the occasion of the revision of the Geneva Conventions in 1929, when Turkey, Persia and Egypt claimed that the use of other emblems had become a *fait accompli* and that those emblems had been used in practice without giving rise to any objections,[166] that the red crescent and the red lion and sun were finally recognized as a distinctive sign by article 19, paragraph 2, of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. This recognition, first by the acceptance of the reservations of the Ottoman Empire and Persia in 1906, and second by article 19, paragraph 2, of the 1929 Geneva Convention, did not mean, however, that the parties had accepted that the Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field had been modified prior to 1906 by subsequent unopposed practice. The practice by the Ottoman Empire and Persia was rather seen, until 1906, as not being covered by the 1864 Convention, but it was accepted as a temporary and exceptional measure which left the general treaty obligation unchanged.

72. Parties may also subsequently agree, expressly or by their conduct, to leave the question of the correct interpretation of a treaty open and to establish a practical arrangement (*modus vivendi*) subject to challenge by judicial or quasi-judicial institutions or subject to challenge by other States parties.[167] One example of such a practical arrangement is the Memorandum of Understanding between the Department of Transportation of the United States of America and the Secretaría de Comunicaciones y Transportes of the United Mexican States on International Freight Cross-Border Trucking Services of 6 July 2011.[168] The Memorandum of Understanding does not refer to the third party of the North American Free Trade Agreement (NAFTA), Canada, and specifies that it "is without prejudice to the rights and obligations of the United States and Mexico under the NAFTA".[169] These circumstances suggest that the Memorandum of Understanding does not claim to constitute an agreement regarding the interpretation of NAFTA under article 31, paragraph 3 (*a*) or (*b*), but that it rather remains limited to being a practical arrangement which is subject to challenge by other parties or by a judicial or quasi-judicial institution.

[164] Bugnion, *Red Cross, Red Crescent, Red Crystal*, p. 11.

[165] Joined by Egypt upon accession in 1923 (see *ibid.*, p. 12).

[166] *Actes de la Conférence diplomatique de Genève de 1929*, pp. 248–49, cited in Bugnion, *Towards a Comprehensive Solution to the Question of the Emblem*, p. 13, footnote 21.

[167] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 234–235, para. 40; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 65–66, paras. 138–140; Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", p. 32.

[168] Crook, "Contemporary practice of the United States", pp. 809–812; see also Mexico, *Diario Oficial de la Federación* (7 July 2011), "Decreto por el que se modifica el artículo 1 del diverso por el que se establece la Tasa Aplicable durante 2003, del Impuesto General de Importación, para las mercancías originarias de América del Norte, publicado el 31 de diciembre de 2002, por lo que respecta a las mercancías originarias de los Estados Unidos de América".

[169] Art. 2, para. 1; see also Crook, "Contemporary practice of the United States", p. 811.

G. Changing or ending of an agreement regarding interpretation under article 31, paragraph 3 (*a*) or (*b*)

73. Once established, an agreement between the parties under article 31, paragraph 3 (*a*) and (*b*), can eventually come to an end. One possibility is that the parties replace it by another agreement with a different scope or content regarding the interpretation of the treaty. In this case, the new agreement replaces the previous one as an authentic means of interpretation from the date of its existence, at least with effect for the future.[170]

74. It is also possible for a disagreement to arise between the parties regarding the interpretation of the treaty after they had reached a subsequent agreement regarding such interpretation. Such a disagreement will not, however, normally replace the original subsequent agreement, since the principle of good faith prevents a party from simply disavowing the legitimate expectations which have been created by a common interpretation.[171] On the other hand, clear expressions of disavowal by one party of a previously agreed subsequent practice "do reduce in a major way the significance of the practice after that date", without, however, diminishing the significance of the previous common practice.[172] The actual agreement of the parties at the time of the interpretation of the treaty has, of course, the highest value under article 31, paragraph 3.[173]

75. The preceding considerations suggest the following conclusion:

"*Draft conclusion 9. Agreement of the parties regarding the interpretation of a treaty*

"1. An agreement under article 31, paragraph 3 (*a*) and (*b*), need not be arrived at in any particular form nor be binding as such.

"2. An agreement under article 31, paragraph 3 (*b*), requires a common understanding regarding the interpretation of a treaty of which the parties are aware. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (*b*), may vary. Silence on the part of one or more parties can, when the circumstances call for some reaction, constitute acceptance of the subsequent practice.

"3. A common subsequent agreement or practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty or to establish a practical arrangement (*modus vivendi*)."

[170] Hafner, "Subsequent agreements and practice…", p. 118; this means that the interpretative effect of an agreement under art. 31, para. 3, does not necessarily go back to the date of the entry into force of the treaty, as Yasseen maintains ("L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", p. 47).

[171] Karl, *Vertrag und spätere Praxis im Völkerrecht* … p. 151.

[172] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 56, para. 142.

[173] Karl, *Vertrag und spätere Praxis im Völkerrecht* … pp. 152–153.

Chapter V

Decisions adopted within the framework of conferences of States parties

76. States use conferences of States parties[174] as a form of action for the continuous process of multilateral treaty review and implementation.[175]

A. Forms of conferences of States parties

77. There is some debate regarding the legal nature of conferences of States parties. For some, such a conference "is in substance no more than a diplomatic conference of States".[176] Other commentators describe them as autonomous, institutional arrangements.[177] In any case, it can be said that conferences of States parties reflect different degrees of institutionalization. At one end of the spectrum are those which are an organ of an international organization (e.g. those under the Organisation for the Prohibition of Chemical Weapons, WTO and the International Civil Aviation Organization) and in which States parties act in their capacity as members of that organ.[178] Such conferences of States parties are outside the scope of the present report, which does not address the subsequent practice of international organizations.[179] At the other end of the spectrum are those conferences of States parties which are provided for by treaties which foresee more or less periodic meetings of States parties for their review. Such review conferences are frameworks for States parties' cooperation and subsequent conduct with respect to the treaty. They may also have specific assignments in relation to amendments and/or the adaptation of treaties. Examples include the review conference process of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction,[180] the Review Conference under the Treaty on the Non-Proliferation of Nuclear Weapons,[181] and conference of States parties established by international environmental treaties.[182] Although the latter usually display a higher degree of institutionalization than the periodic review conferences under the Biological Weapons Convention and the Non-Proliferation Treaty, they are neither an international organization nor an organ thereof.

78. It is not necessary, for the purpose of the present report, to resolve doctrinal questions concerning the classification of conferences of States parties. In the following, a conference of States parties is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty. This does not include meetings in which States parties act as members of an organ of an international organization. Reference will be made, however, to the recent judgment of the International Court of Justice in the *Whaling in the Antarctic* case,[183] which addresses a borderline case, the International Whaling Commission under the International Convention for the Regulation of Whaling.[184]

B. Types of acts adopted by States parties within the framework of a conference of States parties

79. The conference of States parties performs a variety of acts, the legal nature and implications of which depend, in the first place, on the treaty concerned. For the purpose of the present report, the most important distinction concerns the measures which a conference of States parties can adopt "to review the implementation of the treaty" and amendment procedures.[185]

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[174] Other designations include meetings of the parties or assemblies of the States parties.

[175] See Röben, "Conference (meeting) of States parties", p. 605; Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law", p. 623; Brunnée, "COPing with consent: law-making under multilateral environmental agreements", p. 1; Wiersema, "The new international law-makers? Conferences of the parties to multilateral environmental agreements", p. 231; Boisson de Chazournes, "Environmental treaties in time", p. 293.

[176] Boyle, "Saving the world? Implementation and enforcement of international environmental law through international institutions", p. 235.

[177] Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …", p. 623; Sands and Klein, *Bowett's Law of International Institutions*, p. 115. The term "institutional arrangement" is employed by the WHO Framework Convention on Tobacco Control (p. 244, part VIII: Institutional arrangements and financial resources).

[178] Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction; Marrakesh Agreement establishing the World Trade Organization; and the Convention on International Civil Aviation.

[179] International organizations will be the subject of another report.

[180] According to article XII of this mechanism, States parties meeting in a review conference shall "review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention … are being realised. Such review shall take into account any new scientific and technological developments relevant to the Convention".

[181] Article VIII, paragraph 3, establishes that a review conference shall be held five years after its entry into force, and, if so decided, at intervals of five years thereafter "in order to review the operation of this Treaty with a view to assuring that the purposes of the preamble and the provisions of the Treaty are being realized". By way of such decisions, States parties review the operation of the Treaty, article by article, and formulate conclusions and recommendations on follow-on actions.

[182] Examples include the Conference of the Parties of the United Nations Framework Convention on Climate Change, the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and the Conference of the Contracting Parties of the Convention on wetlands of international importance especially as waterfowl habitat.

[183] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226.

[184] The Convention is often described as establishing an international organization, but it does not do so clearly, and it provides the International Whaling Commission with features which fit the present definition of a conference of States parties.

[185] Convention on wetlands of international importance especially as waterfowl habitat, art. 6, para. 1 (review functions) and art. 10 *bis* (amendments); United Nations Framework Convention on Climate Change, art. 7, para. 2 (review powers) and art. 15 (amendments); Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 13, para. 4 (review powers of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol) and art. 20 (amendment procedures); Convention on international trade in endangered species of wild fauna and flora, art. XI (review by Conference of the Parties) and art. XVII (amendment procedures); Treaty on the Non-Proliferation of Nuclear Weapons; WHO Framework Convention on Tobacco Control, art. 23, para. 5 (review powers), art. 28 (amendments) and art. 33 (protocols).

80. The conference of States parties review powers can be contained in general clauses or in specific provisions. Article 7, paragraph 2, of the United Nations Framework Convention on Climate Change represents a typical general review clause:

> The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.

81. Such a general review power has, for example, led the Review Conference Process for the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction to adopt "additional agreements" regarding the interpretation of the Convention's provisions.[186] These agreements have been adopted by States parties within the framework of review conferences, by consensus, and they "have evolved across all articles of the treaty to address specific issues as and when they arose".[187] The Biological Weapons Convention Implementation and Support Unit[188] defines an "additional agreement" as one which:

> (*a*) interprets, defines or elaborates the meaning or scope of a provision of the Convention; or
>
> (*b*) provides instructions, guidelines or recommendations on how a provision should be implemented.[189]

82. Specific powers to review certain provisions are spread throughout the different treaties, sometimes referring to "guidelines" to be developed and proposed by a conference of States parties,[190] and sometimes establishing that the conference of States parties shall define "modalites" and "rules".[191]

83. There are two types of amendment procedures: formal amendment procedures (which mostly need to be ratified by States parties according to their constitutional procedures), as well as tacit acceptance[192] and non-objection procedures.[193] Formal amendment procedures usually apply to the main text of the treaties, while tacit acceptance procedures commonly apply to annexes and appendices, containing lists of substances, species or other elements that need to be updated regularly. According to the tacit acceptance procedure, sometimes also called "tacit consent procedure"[194], the amendments enter into force for all parties if they are approved by a qualified majority (usually two thirds), and unless objected to by one or more parties within a certain period of time. When an express objection is formulated within the given time frame, the amendment does not enter into force in respect of the party or parties formulating the objection (opt-out mechanism).

C. Subsequent agreements and subsequent practice under article 31, paragraph 3, may result from conferences of States parties

84. Review conferences typically oversee the operation of the treaties concerned with a view to ensuring the fulfilment of their objectives. Hence, decisions or declarations adopted within their framework perform an important function for the adaptation of the treaties to factual developments or for interpreting them in a way which the parties agree to be the correct one at a given point in time. Such decisions and declarations may also constitute or reflect subsequent agreements under article 31, paragraph 3 (*a*), by which the underlying treaty is interpreted. Thus, the International Maritime Organization (IMO) Sub-Division for Legal Affairs, upon a request of the governing bodies, has opined in relation to a decision on an "interpretative resolution":

> According to article 31(3) (*a*) of the Vienna Convention on the Law of Treaties, 1969 … subsequent agreements between the Parties shall be taken into account in the interpretation of a treaty. The article does not provide for a specific form of the subsequent agreement containing such interpretation. This seems to indicate that, provided its intention is clear, the interpretation could take various forms, including a resolution adopted at a meeting of the parties, or even a decision recorded in the summary records of a meeting of the parties.[195]

85. Commentators have also read such decisions as being capable of embodying subsequent agreements regarding the application and interpretation of provisions of the Treaty on the Non-Proliferation of Nuclear Weapons[196] and have observed that

> Such declarations are not legally binding in and of themselves, but they may have juridical significance, especially as a source of authoritative interpretations of the treaty.[197]

In a similar vein, with respect to the International Convention for the Regulation of Whaling, the International Court of Justice has held that

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[186] See Millett, "The Biological Weapons Convention: securing biology in the twenty-first century", p. 42.

[187] *Ibid.*, p. 33.

[188] The "Implementation Support Unit" was created by the Conference of States Parties, in order to provide administrative support to the Conference, and to enhance confidence building measures among States parties (see Final Document of the Sixth Review Conference of the States Parties to the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (BWC/CONF.VI/6), pp. 19–20).

[189] Background information document submitted by the Implementation and Support Unit, prepared for the Seventh Review Conference of the States Parties to the Convention, entitled "Additional agreements reached by previous Review Conferences relating to each article of the Convention" (BWC/CONF.VII/INF.5) (updated to include the understandings and agreements reached by that Conference, Geneva 2012), section I (Introduction), para. 1.

[190] This is particularly clear in the case of articles 7 and 9 of the WHO Framework Convention on Tobacco Control.

[191] Article 17 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change regarding emissions trading provides an instructive example. The use of the word "rules" in this provision has provoked a debate about the legal nature of such Conference of the Parties activities, and their binding or non-binding effects. See Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …", p. 639; Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", pp. 110–115.

[192] See the website of IMO: www.imo.org/en/About/Conventions/Pages/Home.aspx.

[193] See Brunnée, "Treaty amendments", pp. 354–360.

[194] *Ibid.*

[195] Agenda item 4 (Ocean fertilization), submitted by the Secretariat on procedural requirements in relation to a decision on an interpretive resolution: views of the IMO Sub-Division of Legal Affairs (document LC 33/J/6, para. 3).

[196] Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, p. 83; Aust, *Modern Treaty Law and Practice*, pp. 213–214.

[197] Carnahan, "Treaty review conferences", p. 229.

Article VI of the Convention states that "[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention". These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule.[198]

86. The following examples support the proposition that decisions by conferences of States parties can embody subsequent agreements under article 31, paragraph 3 (*a*).

1. WHO Framework Convention on Tobacco Control

87. The main function of the Conference of the Parties to the WHO Framework Convention on Tobacco Control is to review and promote the effective implementation of the Convention.[199] The treaty leaves room for States parties to subsequently agree on guidelines which elucidate the meaning of a rule. This necessarily implies an interpretation of the treaty. As far as the interpretations which are contained in the Conference of the Parties guidelines are "proposals", they are, as such, not legally binding. They can, however, also establish an agreed interpretation. Accordingly, the WHO Legal Counsel has recognized (albeit in an overly broad formulation) that

> Decisions of the Conference of the Parties, as the supreme body comprising all Parties to the FCTC, undoubtedly represent a "subsequent agreement between the Parties regarding the interpretation of the treaty", as stated in Article 31 of the Vienna Convention.[200]

88. A guideline on article 14 of the WHO Framework Convention on Tobacco Control, for example, demonstrates that the Conference of the Parties has subsequently specified the meaning and scope of a rule and interpreted the meaning of its terms. Article 14, paragraph 1, states that

> [e]ach Party shall develop and disseminate appropriate, comprehensive and integrated guidelines based on scientific evidence and best practices, taking into account national circumstances and priorities, and shall take effective measures to promote cessation of tobacco use and adequate treatment for tobacco dependence.

89. The guideline on implementation of article 14, adopted by the fourth session of the Conference of the Parties (2010), clarifies, *inter alia*, that tobacco addiction/dependence "means":

> a cluster of behavioral, cognitive, and physiological phenomena that develop after repeated tobacco use and that typically include a strong desire to use tobacco, difficulties in controlling its use, persistence in tobacco use despite harmful consequences, a higher priority given to tobacco use than to other activities and obligations, increased tolerance, and sometimes a physical withdrawal State.[201]

90. This definition is taken from the WHO International Statistical Classification of Diseases,[202] and shows that the States parties to the WHO Framework Convention on Tobacco Control have agreed on the endorsed definition of the world organization on health issues as an interpretation of article 14.

2. Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction

91. The Review Conference of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, acting under its general review functions, regularly reaches "additional understandings and agreements" relating to the provisions of the Convention. Through these understandings, States parties interpret the provisions of the Convention by defining, specifying or otherwise elaborating on the meaning and scope of the provisions, as well as through the adoption of guidelines on their implementation. Therefore, "additional understandings and agreements" may constitute subsequent agreements under article 31, paragraph 3 (*a*). The following example is illustrative: article I, paragraph 1, of the Biological Weapons Convention provides that States parties never undertake in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

> Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.

At the third Review Conference, in 1991, States parties specified that the prohibitions established in this provision related to "microbial or other biological agents or toxins harmful to plants and animals, as well as humans".[203]

3. Montreal Protocol on Substances that Deplete the Ozone Layer

92. The Beijing Amendment under article 4 of the Montreal Protocol on Substances that Deplete the Ozone Layer has given rise to a debate about its interpretation. The Conference of the Parties acknowledged "that the meaning of the term 'State not party to this Protocol' may be subject to differing interpretations with respect to hydrochlorofluorocarbons by parties to the Beijing Amendment". It then decided "in that context on a practice in the application of article 4, paragraph 9, of the Protocol by establishing by consensus a single interpretation of the term 'State not party to this Protocol', to be applied by parties to the Beijing Amendment for the

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[198] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 248, para. 46.

[199] Art. 5, para. 4; arts. 7 and 8; and art. 23, para. 5.

[200] See Conference of the Parties to the World Health Organization Framework Convention on Tobacco Control, Intergovernmental Negotiating Body on a Protocol on Illicit Trade in Tobacco Products, "Revised Chairperson's text on a protocol on illicit trade in tobacco products, and general debate: legal advice on the scope of the protocol", note by the WHO Legal Counsel on scope of the protocol on illicit trade in tobacco products (WHO, document FCTC/COP/INB-IT/3/INF.DOC./6, annex, para. 8). This has also been recognized in doctrine, see Halabi, "The World Health Organization's Framework Convention on Tobacco Control: an analysis of guidelines adopted by the Conference of the Parties", pp. 14–16.

[201] "Guidelines for implementation of article 14 of the WHO Framework Convention on Tobacco Control", in *WHO Framework Convention on Tobacco Control, Guidelines for Implementation—Article 5.3, Article 8, Articles 9 and 10, Article 11, Article 12, Article 13, Article 14* (Geneva, WHO, 2013), p. 118.

[202] *International Statistical Classification of Diseases and Related Health Problems*, 10th Revision (ICD-10) (Geneva, WHO, 2007).

[203] Final Declaration of the Third Review Conference of the Parties to the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (BWC/CONF.III/23, part II), art. I, second paragraph.

purpose of trade in hydrochlorofluorocarbons under article 4 of the Protocol."[204]

4. Convention on the prevention of marine pollution by dumping of wastes and other matter

93. While the acts which are the result of a tacit acceptance (amendment) procedure are not, as such, subsequent agreements by the parties under article 31, paragraph 3 (*a*), they can, in addition to their primary effect under the treaty, under certain circumstances imply such a subsequent agreement. One example concerns certain decisions of the Conference of the Parties to the Convention on the prevention of marine pollution by dumping of wastes and other matter. At its Sixteenth meeting, held in 1993, the Consultative Meeting of Contracting Parties adopted three amendments to annex I by way of the available tacit acceptance procedure.[205] As such, these amendments were not subsequent agreements. They did, however, also imply a wide-ranging interpretation of the underlying treaty itself.[206] Indeed, the amendment refers to and builds on a resolution which was adopted by the Consultative Meeting that was held three years earlier and which had established the agreement of the parties that "the London Dumping Convention is the appropriate body to address the issue of low-level radioactive waste disposal into sub-seabed repositories accessed from the sea".[207] The resolution has been described as "effectively expand[ing] the definition of 'dumping' under the Convention by deciding that this term covers the disposal of waste into or under the seabed from the sea but not from land by tunneling".[208] Thus, the amendment confirmed that the interpretative resolution contained a subsequent agreement regarding the interpretation of the treaty.

5. Conclusion

94. These examples demonstrate that decisions of conferences of States parties may under certain circumstances embody subsequent agreements under article 31, paragraph 3 (*a*), and, *a fortiori*, subsequent practice under articles 31, paragraph 3 (*b*), and 32. Such decisions do not, however, automatically constitute a subsequent agreement under article 31, paragraph 3 (*a*), since it must always be specifically established. This is not the case where the parties do not intend that their agreement has any legal, but only political, significance (see chap. I above). Such an intention is identifiable in particular by the specificity and the clarity of the terms chosen in the light of the text of the Conference of the States Parties decision as a whole, its object and purpose, and the way in which it is applied.

95. It also cannot simply be said that, because the treaty does not accord the Conference of the States Parties a competence to take binding decisions, all conference of States parties' decisions are necessarily legally irrelevant and constitute only political commitments.[209] It may be true that many conference of States parties decisions are often not intended to embody a subsequent agreement under article 31, paragraph 3 (*a*), by themselves, either because they are not meant to be a statement regarding the interpretation of the treaty in the first place, or because they produce a legal effect only in combination with a general duty to cooperate under the treaty which then puts the parties "under an obligation to give due regard" to such a decision.[210] This broad assessment can, however, only justify a presumption against a general characterization of (consensual) conference of State parties decisions as implying subsequent agreements under article 31, paragraph 3 (*a*). If, however, the parties have made it sufficiently clear that the conference of State parties decision embodies their agreement regarding the interpretation of the treaty, such a presumption would be rebutted. Whether this is the case ultimately depends on the circumstances of each particular case. Another indication may be whether States parties uniformly or without challenge apply the treaty as interpreted by the conference of States parties decision. Discordant practice following a conference of States parties decision, on the other hand, may be an indication that States did not assume that the decision would be a subsequent agreement under article 31, paragraph 3 (*a*).[211] Conference of States parties decisions which do not qualify as subsequent agreements under

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[204] For details, see decision XV/3 on obligations of parties to the Beijing Amendment under article 4 of the Montreal Protocol with respect to hydrochlorofluorocarbons (Report of the Fifteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.15/9, sect. XVIII.A):

"1. … (*a*) The term 'State not party to this Protocol' in Article 4, paragraph 9 does not apply to those States operating under Article 5, paragraph 1 of the Protocol until January 1, 2016 when, in accordance with the Copenhagen and Beijing Amendments, hydrochlorofluorocarbon production and consumption control measures will be in effect for States that operate under Article 5, paragraph 1, of the Protocol;

"(*b*) The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments;

"(*c*) Recognizing, however, the practical difficulties imposed by the timing associated with the adoption of the foregoing interpretation of the term 'State not party to this Protocol,' paragraph 1 (*b*) shall apply unless such a State has by 31 March 2004:

"(i) Notified the Secretariat that it intends to ratify, accede or accept the Beijing Amendment as soon as possible;

"(ii) Certified that it is in full compliance with Articles 2, 2A to 2G and Article 4 of the Protocol, as amended by the Copenhagen Amendment;

"(iii) Submitted data on (i) and (ii) above to the Secretariat, to be updated on 31 March 2005,

"in which case that State shall fall outside the definition of 'State not party to this Protocol' until the conclusion of the Seventeenth Meeting of the Parties."

[205] Sixteenth Consultative Meeting of the Contracting Parties, held in London, resolutions LC.49 (16), LC.50 (16) and LC.51 (16). First, it was decided to amend the phase-out-dumping of industrial waste by 31 December 1995. Second, the incineration at sea of industrial waste and sewage sludge was banned. And finally, it was decided to replace paragraph 6 of annex I, banning the dumping of radioactive waste or other radioactive matter (see IMO, "Dumping at sea: the evolution of the Convention on the prevention of marine pollution by dumping of wastes and other matter (LC), 1972").

[206] It has even been asserted that these amendments to annex I of the Convention on the prevention of marine pollution by dumping of wastes and other matter "constitute major changes in the Convention" (Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …", p. 638).

[207] IMO, resolution LDC.41 (13), para. 1, *International Organizations and the Law of the Sea, Documentary Yearbook 1990*, p. 332.

[208] Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …", p. 641.

[209] See *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 248, para. 46.

[210] *Ibid.*, p. 257, para. 83.

[211] See chapter IV, section G, above.

article 31, paragraph 3 (*a*), or as subsequent practice under article 31, paragraph 3 (*b*), may, however, nevertheless be applicable as subsidiary means of interpretation under article 32.[212]

D. Form and procedure

96. Acts which originate from conferences of States parties may have different forms and designations, and they may be the result of different procedures. In order to be recognized as subsequent agreements under article 31, paragraph 3 (*a*), decisions by conferences of States Parties must embody the "agreement" regarding the interpretation of the treaty by a "single common act".[213] The question is whether the form or the procedure of an act resulting from a conference of States parties gives any indication as to the agreement in substance regarding the interpretation of a treaty.

97. If the decision of the conference of States parties is based on a unanimous vote in which all parties participated, it can clearly embody a "subsequent agreement" under article 31, paragraph 3 (*a*), provided that it is "regarding the interpretation of the treaty" and unless a specific provision of the treaty does not provide otherwise or a party explicitly indicates the contrary. Conference of States parties decisions regarding review functions are, however, normally adopted by consensus. This practice derives from rules of procedure which usually require States parties to make every effort to achieve consensus on substantive matters. An early example can be found in the Rules of Procedure of the Review Conference to the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (BWC/CONF.I/2). According to rule 28, paragraph 2:

> The task of the review Conference being to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted.

98. This formula, with only minor variations, has become the standard with regard to conference of States parties substantive decision-making procedures.

1. Consensus and agreement in substance

99. The question as to whether a conference of States parties decision which is adopted by consensus can embody a subsequent agreement under article 31, paragraph 3 (*a*), was put, albeit implicitly, to the IMO Sub-Division for Legal Affairs in 2011 by the Intersessional Working Group on Ocean Fertilization, which agreed to recommend that "the IMO Legal Affairs and External Relations Division should be requested to advise the governing bodies in October 2011 about the procedural requirements in relation to a decision on an interpretative resolution and, in particular, whether or not consensus would be needed for such a decision."[214]

100. In its response, the IMO Sub-Division for Legal Affairs, while confirming that a resolution by the conference of States parties can, in principle, constitute a subsequent agreement under article 31, paragraph 3 (*a*),[215] advised the governing bodies that even if the Conference were to adopt a decision based on consensus, that would not mean that the decision would be binding on all parties. Pointing to certain decisions of national courts which did not recognize interpretative decisions made by conferences of States parties under related treaty regimes as being binding, the IMO Sub-Division for Legal Affairs "suggested that the way of the interpretative resolution is not 100% safe and, if pursued, it would also be advisable to adopt suitable amendments to the LC [London Convention] and LP [London Protocol] at the same time".[216]

101. The opinion of the IMO Sub-Division for Legal Affairs, although it proceeds from the erroneous assumption that a "subsequent agreement" under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention is or should be binding "as a treaty, or an amendment thereto",[217] ultimately comes to the correct conclusion that a subsequent agreement is not necessarily binding.[218] This position is in line with the position of the Commission according to which a subsequent agreement under article 31, paragraph 3 (*a*), is only one of several different means of interpretation which shall be taken into account in the process of interpretation.[219] Thus, interpretative resolutions by conferences of States parties which are adopted by consensus, even if they are not binding as such, can nevertheless be subsequent agreements under article 31, paragraph 3 (*a*), or subsequent practice under article 31, paragraph 3 (*b*), if there are sufficient indications that such was the intention of the parties.[220] This conclusion is compatible with the fact that some national courts have not considered certain interpretative resolutions that were adopted within the framework of related regimes to be binding.[221] It is only necessary that courts, when interpreting the treaty provision in question, give appropriate weight to an interpretative resolution, not that they accept it as binding.[222]

102. It follows that the question of whether an "interpretative resolution" requires adoption by consensus is misleading. Adoption by consensus is a necessary, but not a sufficient, condition for an agreement under article 31, paragraph 3 (*b*). The rules of procedure of the respective conference of States parties usually do not give an indication as to the possible legal effect of a resolution as a subsequent agreement under article 31, paragraph 3 (*a*), or a

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[212] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, separate opinion of Judge *ad hoc* Charlesworth, para. 4: "I note that resolutions adopted by a vote of the IWC have some consequence although they do not come within the terms of Article 31.3 of the Vienna Convention."

[213] *Yearbook … 2013*, vol. II (Part Two), p. 29, para. (10) of the commentary to draft conclusion 4.

[214] IMO, document LC 33/4, p. 7, para. 4.15.2.

[215] *Ibid.*, document LC 33/J/6, para. 3.

[216] *Ibid*., para. 15.

[217] *Ibid*., para. 8.

[218] See chapter IV, section D, above.

[219] *Yearbook … 2013*, vol. II (Part Two), p. 22, para. (4) of the commentary to draft conclusion 2.

[220] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, separate opinion of Judge Greenwood, para. 6, and separate opinion of Judge *ad hoc* Charlesworth, para. 4.

[221] For references, see IMO, document LC 33/J/6, paras. 8–13.

[222] See footnote 219 above.

subsequent practice under article 31, paragraph 3 (*b*). Such rules of procedure only determine how the conference of States parties adopts its decisions, not their possible collateral legal effect as a subsequent agreement under article 31, paragraph 3. Although subsequent agreements under article 31, paragraph 3 (*a*), are not binding as such, the 1969 Vienna Convention attributes them a legal effect under article 31 which is only justified if the agreement between the parties covers the substance of the matter and is specifically present at a given point in time. The International Court of Justice has confirmed that the distinction between the form of a collective decision and the agreement in substance is pertinent in such a context.[223]

103. Consensus, on the other hand, is not a concept which necessarily indicates any degree of agreement on substance. According to the *Comments on some Procedural Questions* issued by the Office of Legal Affairs of the United Nations Secretariat, in accordance with United Nations General Assembly resolution 60/286:[224]

> Consensus is generally understood as a decision-taking process consisting in arriving at a decision without formal objections and vote. It may however not necessarily reflect "unanimity" of opinion on the substantive matter. It is used to describe the practice under which every effort is made to achieve general agreement and no delegation objects explicitly to a consensus being recorded.[225]

2. Consensus and objections

104. Since a decision taken within the framework of a conference of States parties, if it is to constitute a subsequent agreement under article 31, paragraph 3 (*a*), must express an agreement between the parties on a question of interpretation regarding the substance of a treaty provision, certain decisions, despite having been declared as being adopted by consensus, cannot represent a subsequent agreement under article 31, paragraph 3 (*a*). This is true in particular for such decisions which have been adopted in the face of an objection by one or more States. The following example is illustrative.

105. At its Sixth Meeting in 2002, the Conference of the Parties to the Convention on Biological Diversity worked on formulating guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats or species.[226] After several efforts to reach an agreement had failed, the President of the Conference of the Parties proposed that the decision be adopted, and the reservations which Australia had raised in the final report of the meeting be recorded. Australia's representative reiterated that the guiding principles could not be accepted and that "his formal objection therefore stood".[227] The President declared the debate closed and "following established practice", adopted the decision without a vote, clarifying that the objections of the dissenting States would be reflected in the final report of the meeting. Following the adoption, Australia reiterated its view that consensus was adoption without formal objection and expressed grave concerns about the legality of the adoption of the draft decision. At the end, Australia requested that "in the event of the President's decision that the text had been adopted, Australia wished the inclusion of a detailed statement in the report, to the effect that Australia did not agree with some specific elements in the guiding principles".[228] In addition to the inclusion of this statement in the final report of the meeting, one representative entered a formal objection during the process leading to the adoption of this decision and underlined that he "did not believe that the Conference of the Parties could legitimately adopt a motion or text with a formal objection in place, and he … formally objected to the adoption of the draft document".[229] Some other representatives also expressed reservations regarding the procedure leading to the adoption of this decision.

106. In this situation, the Executive Secretary of the Convention on Biological Diversity formulated a request for a legal opinion from the United Nations Legal Counsel,[230] who responded that a party could "disassociate from the substance or text of the document, indicate that joining consensus does not constitute acceptance of the substance or text or parts of the document and/or present any other restrictions on its Government's position on the substance or text of the document … [but] that by definition … where there is formal objection, there is no consensus".[231] He added that, in the face of Australia's clear objection, the President of the Conference of the Parties should not have proceeded to declare the decision adopted by consensus and that by doing so, he had "clearly acted contrary to established practice".[232] However, he concluded that, despite the serious procedural flaws, "once the Chairman declared the decision adopted, the representative of Australia did not formally object to the adoption or seek to nullify the decision itself".[233] In the view of the United Nations Legal Counsel, Australia's post-adoption position constituted a reservation on the procedure, rather than a formal objection against the decision.[234] Later, at the eighth meeting of the Conference of the Contracting Parties to the Convention on wetlands of international importance especially as waterfowl habitat, in November 2002, Australia took the opportunity to make a formal statement, and stated that it did not agree with the United Nations Legal Counsel's opinion, and did not accept that the decision had been validly adopted at the sixth meeting of the Conference of Parties to the Convention on Biological Diversity.[235]

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[223] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 257, para. 83.

[224] See General Assembly resolution 60/286 of 8 September 2006 on revitalization of the General Assembly, requiring the United Nations Secretariat "to make precedents and past practice available in the public domain with respect to rules and practices of the intergovernmental bodies of the Organization" (para. 24).

[225] See "Consensus in UN practice: general", paper prepared by the Secretariat, available from http://legal.un.org/ola/media/GA_RoP/GA_RoP_EN.pdf.

[226] Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity (UNEP/CBD/COP/6/20), p. 240, annex I, decision VI/23).

[227] *Ibid.*, p. 58, para. 313.

[228] *Ibid.*, p. 59, para. 321.

[229] *Ibid.*, para. 318.

[230] Available from the secretariat of the Convention on Biological Diversity, document SCBD/SEL/DBO/30219 (6 June 2002).

[231] Available from the secretariat of the Convention on Biological Diversity, document UNEP/SCBD/30219R (17 June 2002), p. 1.

[232] *Ibid.*, p. 2.

[233] *Ibid.*

[234] *Ibid.*

[235] Conference report of the 8th meeting of the Conference of the Contracting Parties to the Convention on wetlands of international importance especially as waterfowl habitat, Valencia, Spain, 18–26 November 2002, p. 17, para. 91, available from www.ramsar.org/sites/default/files/documents/library/cop8_report_english.pdf.

107. The above-mentioned decision under the Convention on Biological Diversity, as well as a similar decision by the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol to the Framework Convention on Climate Change, held in Cancun (Mexico) from 29 November to 10 December 2010 (the objection of the Plurinational State of Bolivia notwithstanding),[236] raise the important question of what "consensus" means.[237] This issue must, however, be distinguished from the question of under which circumstances the parties to a treaty arrive at an agreement regarding substantive matters of the interpretation of a treaty under article 31, paragraph 3 (*a*) and (*b*).

E. Acts not adopted in the presence of all parties to a treaty

108. Decisions by conferences of States parties are not necessarily adopted by all parties to a treaty. Although all parties usually have the possibility pursuant to a treaty to participate in a conference of States parties, some may choose not to attend the meeting. In such cases, the question may arise as to whether a decision by a conference of States parties, which would be a subsequent agreement under article 31, paragraph 3 (*a*), if all the parties had adopted it, can also be so considered if one or more parties did not participate in the Conference.

109. It would be difficult to assume that a party to a treaty has agreed, by its consent to be bound by the treaty, to accept decisions which are subsequently taken in its absence by other States parties within the framework of the conference of States parties concerned. It should therefore be possible for non-participating States to subsequently express their disagreement with a decision that was taken within the framework of a conference of States parties. On the other hand, the principle of good faith and the duty to cooperate within the treaty framework speak in favour of a duty of non-participating States to articulate their possible disagreement as soon as possible under the circumstances, otherwise their agreement in the form of silence (acquiescence) would have to be assumed.

110. There remains the more doctrinal question of whether a conference of States parties decision with which non-participating States have agreed by their subsequent silence should be conceived as a subsequent agreement under article 31, paragraph 3 (*a*), or rather as a subsequent practice under article 31, paragraph 3 (*b*). The fact that the Commission has distinguished both forms of subsequent conduct by requiring, for a subsequent agreement under article 31, paragraph 3 (*a*), a "common act"[238] seems, at first impression, to lead to the conclusion that such an agreement is not based on such a "common act". It is, however, also possible to regard such a decision by the conference of States parties as an inchoate "common act" which is completed by the implicit acceptance by the non-participating States within a reasonable time. The latter seems to be the better view, given the centrality of the collective act and the constructive character of the acceptance of the non-participating States.

111. The preceding considerations suggest the following conclusion:

"*Draft conclusion 10. Decisions adopted within the framework of a conference of States parties*

"1. A conference of States parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

"2. The legal effect of a decision adopted within the framework of a conference of States parties depends primarily on the treaty and the applicable rules of procedure. Depending on the circumstances, such a decision may embody a subsequent agreement under article 31, paragraph 3 (*a*), or give rise to subsequent practice under article 31, paragraph 3 (*b*), or article 32.

"3. A decision adopted within the framework of a conference of States parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted."

[236] See the Report of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol on its sixth session, held in Cancun 29 November–10 December 2010 (FCCC/KP/CMP/2010/12/Add.1), decision 1/CMP.6 on the Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session; and decision 2/CMP.6 on the Cancun Agreements: Land use, land-use change and forestry, adopted by Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol; and proceedings of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (FCCC/KP/CMP/2010/12), p. 10, para. 29.

[237] See Nolte, "Third report of the ILC Study Group on Treaties over Time: subsequent agreements and subsequent practice of States outside of judicial or quasi-judicial proceedings", pp. 372–377.

[238] See footnote 213 above.

Chapter VI

Scope for interpretation by subsequent agreements and subsequent practice

112. According to article 31, paragraph 3, subsequent agreements and subsequent practice shall be taken into account in the "interpretation" of a treaty. This raises the question of the scope, and thus also the limits, of subsequent agreements and subsequent practice as means of interpretation, including the relation to other legal effects which subsequent agreements and subsequent practice may have according to the law of treaties.

A. Specific interpretation procedures and article 31, paragraph 3 (*a*) and (*b*)

113. Interpretation by subsequent agreements and subsequent practice can be provided for by the treaty itself. Some treaties contain special clauses regarding the interpretation of treaties by their parties or by treaty organs. Article IX, paragraph 2, of the Marrakesh Agreement

establishing the World Trade Organization, for example, provides that "the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements" by a decision that "shall be taken by a three-fourths majority of the Members". In the case of *European Communities—Customs Classification of Frozen Boneless Chicken Cuts,* the Appellate Body did not, however, see a *lex specialis* relationship between article IX, paragraph 2, and the means of interpretation under article 31, paragraph 3, of the 1969 Vienna Convention:

> We fail to see how the express authorization in the WTO Agreement for Members to adopt interpretations of WTO provisions which requires a three-quarter majority vote and not a unanimous decision would impinge upon recourse to subsequent practice as a tool of treaty interpretation under Article 31, paragraph 3 (*b*) of the Vienna Convention.[239]

114. Other courts and tribunals have come to the same conclusion with respect to comparable clauses in other treaties.[240] Commentators have concluded that specific interpretation clauses are not usually intended to exclude recourse to the means of interpretation under article 31, paragraph 3 (*a*) and (*b*).[241]

B. The relationship between interpretation and modification

115. In the case concerning the *Dispute regarding Navigational and Related Rights,* the International Court of Justice has held that "subsequent practice of the parties, within the meaning of Article 31, paragraph 3 (*b*), of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement".[242] It is not entirely clear whether the Court thereby wanted to recognize that subsequent practice under article 31, paragraph 3 (*b*), may also have the effect of modifying a treaty, or whether it was merely making a point relating to the interpretation of treaties. The second alternative is possible since the "original" intent of the parties is not necessarily conclusive for the interpretation of a treaty. Indeed, the Commission recognized in provisionally adopted draft conclusion 3 that subsequent agreements and subsequent practice, like other means of interpretation, "may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time".[243] The scope for "interpretation" is therefore not necessarily determined by a fixed "original intent", but must rather be determined by taking into account a broader range of considerations, including certain later developments.

116. From a practical point of view, the somewhat ambiguous dictum of the International Court of Justice raises the inextricably connected questions of how far subsequent agreements and subsequent practice under article 31, paragraph 3, can contribute to "interpretation", and whether subsequent agreements and subsequent practice may have the effect of modifying a treaty. Both questions come under the present topic as they "remain within the scope of the law of treaties" and they concern the "main focus" of the topic, which is "the legal significance of subsequent agreements and subsequent practice for interpretation" "as explained in the original proposal for the topic".[244] Indeed, the dividing line between the interpretation and the modification of a treaty is in practice often "difficult, if not impossible, to fix".[245]

C. Modification of a treaty by subsequent agreements or subsequent practice

117. It is necessary to make a distinction when addressing the interconnected questions of the possible scope of subsequent agreements and subsequent practice as means of interpretation, and whether those forms of action can also lead to a modification of a treaty. The question of whether a treaty may be modified by the subsequent practice of the parties provoked a debate at the United Nations Conference on the Law of Treaties as well as significant judicial and other pronouncements, since the question of a possible modification of a treaty by a subsequent agreement raises somewhat different, but closely related, issues.

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[239] WTO, Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R and WT/DS286/AB/R, adopted 27 September 2005, p. 107, para. 273.

[240] *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, UNRIAA, vol. XXI, part II, p. 53, at p. 187, para. 169, and p. 188, para. 173; *Methanex Corporation v. United States of America,* UNCITRAL Arbitration Under NAFTA Chapter Eleven, Final Award on Jurisdiction and Merits, 9 August 2005 (https://2009-2017.state.gov/documents/organization/51052.pdf), part II, chap. H, p. 11, para. 23.

[241] Hafner, "Subsequent agreements and practice …", p. 120; Pan, "Authoritative interpretation of agreements: developing more responsive international administrative regimes", pp. 519–525.

[242] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 242, para. 64; see also *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Decision of 14 January 2003, UNRIAA, vol. XXV, part IV, p. 231, at p. 256, para. 62; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", p. 51; Kamto, "La volonté de l'État en droit international", pp. 134–141; Bernhardt, *Die Auslegung völkerrechtlicher Verträge*, p. 132.

[243] *Yearbook … 2013*, vol. II (Part Two), p. 24, draft conclusion 3; and *ibid.*, pp. 24–28, paras. (1)–(18) of the commentary to draft conclusion 3.

[244] The Study Group on Treaties over Time noted, as part of its recommendation to the Commission in 2012 on the change of work on the topic, that "it would be understood that the topic would remain within the scope of the law of treaties. The main focus would be on the legal significance of subsequent agreements and subsequent practice for interpretation (art. 31 of the Vienna Convention on the Law of Treaties), as explained in the original proposal for the topic", (*Yearbook … 2012*, vol. II (Part Two), para. 238); at its 3136th meeting, on 31 May 2012, the Commission decided to change the format of the work on this topic as suggested by the Study Group (*ibid*., para. 269).

[245] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 138; Gardiner, *Treaty Interpretation*, p. 243; Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 90; Simma, "Miscellaneous thoughts on subsequent agreements and practice" p. 46; Karl, *Vertrag und spätere Praxis im Völkerrecht …*, pp. 42–43; Sorel and Boré Eveno, "Article 31: Convention of 1969", pp. 825–826, para. 42; Dörr, "Article 31—General rule of interpretation", pp. 555–556, para. 76; this is true even if the two processes can theoretically be seen as being "legally quite distinct", see the dissenting opinion of Judge Parra-Aranguren in *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1212–1213, para. 16; similarly Hafner, "Subsequent agreements and practice …", p. 114; Linderfalk, *On the Interpretation of Treaties…*, p. 168.

1. Modification of a treaty by subsequent practice

118. In its draft articles on the law of treaties, the Commission proposed to include a provision in the 1969 Vienna Convention that would have explicitly recognized the possibility of a modification of treaties by subsequent practice. Draft article 38 read:

Modification of treaties by subsequent practice

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.[246]

119. This draft article gave rise to a controversial debate at the United Nations Conference on the Law of Treaties.[247] A majority of States expressed objections. Some thought that a modification of a treaty would normally require following the formal amendment procedure.[248] There was also concern that the stability of treaties and treaty relations could be endangered if a possibility of informal modification was recognized, and that the proposed draft article could lead to abuse and weaken the principle *pacta sunt servanda*.[249] It was also said that informal modifications of treaties by subsequent practice could give rise to problems of domestic constitutional law.[250] Some States called into question whether the draft article was actually necessary since the draft article which dealt with subsequent practice as a means of interpretation (the later art. 31, para. 3 (*b*)) covered what was needed, and that in any case it was difficult to draw a distinction between interpretation and modification.[251] Finally, concerns were voiced about the possibility that modifications could be brought about without the necessary agreement of all the parties to a treaty[252] and that minor officials could produce modifications beyond the control of the competent State organs.[253]

120. Other States were of the opinion that international law was not as formalistic as domestic law.[254] It was said that informal modifications of treaties by subsequent practice had previously been recognized by judicial bodies[255] and that they had never created problems in a domestic constitutional context.[256] Some issues which had arisen in practice could not be dealt with by way of interpretation. Another argument was that, if all the parties agreed to apply the treaty in a way which deviated from its original meaning, there could be no violation of the principle *pacta sunt servanda*.[257] Several delegations considered draft article 38 as a pre-existing rule or principle of international law.[258]

121. Special Rapporteur Sir Humphrey Waldock, acting as expert consultant at the Conference, said, *inter alia*, that he was surprised that some delegations seemed to think that article 38 constituted a quasi-violation of the principle *pacta sunt servanda*, especially as the legal basis of the article was good faith. He also addressed the concern that article 38 might authorize variations of treaties in violation of internal law. In his view, so far, "such modified applications of treaties had never raised any constitutional problem. The variations normally did not touch the main basis of the treaty and did not give rise to any objections from parliaments."[259]

122. An amendment to delete draft article 38 was put to a vote and was adopted by 53 votes to 15, with 26 abstentions. After the United Nations Conference on the Law of Treaties, writers discussed the question of whether the rejection of draft article 38 at the Conference meant that the possibility of a modification of a treaty by subsequent practice of the parties was thereby excluded. They mostly came to the conclusion that the negotiating States simply did not wish to address this question in the Convention and that treaties could, as a general rule under the customary law of treaties, indeed be modified by subsequent practice which established the agreement of the parties to that effect.[260]

123. In order to properly assess this question today, it is necessary to determine, in the first place, whether the possibility of a modification by subsequent practice has been recognized, after the adoption of the 1969 Vienna Convention, by international courts and in State practice.

(a) *International Court of Justice*

124. Aside from the above-mentioned dictum in the case concerning the *Dispute regarding Navigational and*

[246] *Yearbook … 1966*, vol. II, p. 236.

[247] Distefano, "La pratique subséquente des États parties à un traité", pp. 56–61.

[248] *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), 37th meeting, p. 208, para. 63 (France).

[249] *Ibid*., p. 210, para. 75 (Chile); *ibid*., 38th meeting, p. 212, para. 35 (Uruguay).

[250] *Ibid*., 37th meeting, p. 208, para. 58 (Japan); *ibid*., p. 208, para. 63 (France); *ibid*., p. 209, para. 68 (Spain); *ibid*., 38th meeting, p. 211, para. 21 (Colombia).

[251] *Ibid*., 37th meeting, pp. 207–208, para. 57 (Finland).

[252] *Ibid*., p. 210, para. 73 (Spain).

[253] *Ibid*., p. 209, para. 68 (Spain); *ibid*., 38th meeting, pp. 210–211, para. 6 (United States).

[254] *Ibid*., 38th meeting, p. 211, para. 9 (Iraq); *ibid*., para. 22 (Italy).

[255] *Ibid*., p. 214, para. 51 (Argentina).

[256] *Ibid*., p. 214, para. 57 (Sir Humphrey Waldock).

[257] *Ibid*., p. 214, para. 51 (Argentina); see also *ibid*., p. 213, para. 49 (Cambodia).

[258] *Ibid*., p. 212, para. 33 (Austria); *ibid*., p. 214, para. 51 (Argentina). See also *ibid*., p. 211, para. 22 (Italy): "a legal fact which had always existed"; and p. 213, para. 48 (Israel).

[259] *Ibid*., pp. 214–215, paras. 55–58 (Sir Humphrey Waldock).

[260] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 138; Gardiner, *Treaty Interpretation*, pp. 243–245; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", pp. 51–52; Kamto, "La volonté de l'État en droit international", p. 134; Aust, *Modern Treaty Law and Practice*, p. 213; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 432, para. 23; Dörr, "Article 31—General rule of interpretation", pp. 555–556, para. 76 (in accord Odendahl, "Article 39—General rule regarding the amendment of treaties", p. 702, paras. 10–11); Distefano, "La pratique subséquente des États parties à un traité", pp. 62–67; Thirlway, "The law and procedure of the International Court of Justice 1960–1989: supplement, 2006—part three", p. 65; Shaw, *International Law*, p. 934; Buga, "Subsequent practice and treaty modification", footnote 65 with further references. Disagreeing with this view, in particular (stressing the solemnity of the conclusion of a treaty in contrast to the informality of practice), is Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", pp. 89-90; also critical is Hafner, "Subsequent agreements and practice …", pp. 115–117 (differentiating between the perspectives of courts and States, as well as emphasizing the importance of amendment provisions in this context).

Related Rights,[261] it appears that the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. Some cases have, however, been read as implying that, in substance, this was the case. This is true, in particular, of the *Namibia Advisory Opinion*, in which the Court held that article 27, paragraph 3, of the Charter of the United Nations, according to which decisions of the Security Council on non-procedural matters shall be made including the "concurring" votes of the permanent members, did not constitute "a bar to the adoption of resolutions" when one or more permanent members abstained. According to the Court, "the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as having been "generally accepted by the Members of the United Nations" and as evidencing "a general practice of the Organization".[262] And in the *Wall Advisory Opinion*, the Court considered that the "increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security … is consistent with Article 12, paragraph 1, of the Charter."[263]

125. The Court came to this conclusion even though Article 12, paragraph 1, of the Charter of the United Nations states that "while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation". The only reason given by the Court as to why this "increasing tendency over time" was compatible with Article 12, paragraph 1, of the Charter was that it had been an "accepted practice of the General Assembly, as it has evolved".[264]

126. In these advisory opinions, the International Court of Justice recognized that subsequent practice had an important, even a decisive, effect on the determination of the meaning of the treaty, but it stopped short of explicitly recognizing that such practice had actually led to a modification of the treaty.[265] Another reason why the value of these cases may be limited is that they concern treaties establishing an international organization. The 1969 Vienna Convention indicates by way of its article 5 (which refers in particular to the "rules of the organization") that such treaties may possess a special character. Article 2, paragraph 1 (*j*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations even refers to the "established practice of the organization" as a specific form of subsequent practice for international organizations. It would therefore not seem to be appropriate to derive a general rule of the law of treaties solely from precedents which concern a distinguishable type of treaty for which subsequent practice may play a specific role. It is also for this reason that the questions of subsequent practice and subsequent agreements relating to international organizations will be the subject of a later report.[266]

127. Other cases in which the International Court of Justice has raised the issue of a possibly modifying effect of the subsequent practice of the parties mostly concern boundary treaties. As the Court has said in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*:

> Hence the conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law.[267]

128. The best-known case in which the International Court of Justice may have found such acquiescence is the case concerning the *Temple of Preah Vihear*, where it placed decisive emphasis on the fact that there had been clear assertions of sovereignty by one side (France) which, according to the Court, required a reaction on the part of the other side (Thailand).[268] This judgment, however, was rendered before the adoption of the 1969 Vienna Convention and was thus at least implicitly taken into account by States in their debate at the United Nations Conference on the Law of Treaties.[269] It also stops short of explicitly recognizing the modification of a treaty by subsequent practice as the Court left open the question whether the line on the French map was compatible with the watershed line that had been agreed upon in the original boundary treaty between the two States, although it is often assumed that this was not the case.[270]

129. In conclusion, while raising the possibility that a treaty might be modified by the subsequent practice of the parties, the International Court of Justice has so far not explicitly recognized that such an effect has actually been produced in a specific case. The Court has rather

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[261] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 242, para. 64.

[262] *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, at p. 22, para. 22.

[263] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 149–150, paras. 27–28.

[264] *Ibid*, para. 28.

[265] Thirlway, "The law and procedure of the International Court of Justice 1960–1989: supplement, 2006—part three", p. 64.

[266] See *Yearbook … 2012*, vol. II (Part Two), para. 238; and *Yearbook … 2008*, vol. II (Part Two), p. 159, para. 42.

[267] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[268] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 23: "an acknowledgement by conduct was undoubtedly made in a very definite way … it is clear that the circumstances were such as called for some reaction"; and *ibid.*, p. 30: "a clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined" and therefore "demanded a reaction".

[269] Kohen, "*Uti possidetis*, prescription et pratique subséquente à un traité dans l'affaire de *l'Île de Kasikili/Sedudu* devant la Cour internationale de Justice", p. 272.

[270] *Case concerning the Temple of Preah Vihear* (see footnote 268 above), p. 26, "a fact, which if true, must have been no less evident in 1908". Judge Parra-Aranguren has opined that the *Temple* case demonstrated "that the effect of subsequent practice on that occasion was to amend the treaty", *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at pp. 1212–1213, para. 16 (dissenting opinion of Judge Parra-Aranguren); Buga, "Subsequent practice and treaty modification", footnote 113.

found formulations which left open the possibility that it had merely arrived at a particularly broad interpretation, or a very specific interpretation which was difficult to reconcile with the ordinary meaning of the text of the treaty, but which coincided with the identified practice of the parties.

(b) *Arbitral tribunals*

130. Arbitral tribunals, on the other hand, have occasionally confirmed that subsequent practice of the parties may lead to a modification of the express terms of a treaty and have applied this perceived rule. In the *Case of Eritrea v. Ethiopia*, the Arbitral Tribunal came to the conclusion that the boundary, as it resulted from the text of the treaty, had in fact been modified in certain areas by the subsequent practice of the parties.[271] A modification by subsequent practice was also recognized in the *Air transport services agreement* case, in which the Arbitral Tribunal found that the air transport services agreement between the United States and France was effectively modified by a subsequent practice of United States airlines flying to certain destinations which were not covered by the original agreement. The Arbitral Tribunal stated:

> This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the Parties and on the rights that each of them could properly claim.[272]

131. The holding in the *Case of Eritrea v. Ethiopia* has, however, been characterized by a commentator as being an "isolated exception"[273] (at least in the context of the determination of boundaries) and the award in the *Air transport services agreement* case was rendered before the United Nations Conference on the Law of Treaties and was critically referred to at the Conference.[274]

(c) *World Trade Organization*

132. The WTO Appellate Body has made it clear that it would not accept an interpretation which would result in a modification of a treaty obligation, as this would not anymore be an "application" of an existing treaty provision.[275] The insistence by the Appellate Body that subsequent agreements or subsequent practice may not lead to a modification of applicable provisions under WTO covered agreements must, however, be read in the light of the specific provision of article 3, paragraph 2, of the Understanding on rules and procedures governing the settlement of disputes, according to which "recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements".[276]

(d) *European Court of Human Rights*

133. The European Court of Human Rights has on occasion recognized the subsequent practice of the parties as a possible source for a modification of the Convention for the Protection of Human Rights and Fundamental Freedoms. *Al-Saadoon and Mufdhi v. the United Kingdom* concerned the permissibility of the transfer of a person by a Convention State to a non-Convention State in which he or she faced a real risk of being sentenced to death. The case turned on the question of whether article 3 of the Convention, which prohibits subjecting a person "to inhuman or degrading treatment or punishment", should be interpreted as prohibiting such a measure. However, to interpret article 3 in that way would appear to be incompatible with article 2 of the Convention, which protects the right to life against intentional deprivation "save in the execution of a sentence of a court following his conviction of a crime". In *Al-Saadoon and Mufdhi*, the Court recalled that it had already recognized, in an *obiter dictum* in the 1989 case of *Soering v. the United Kingdom*,

> that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3.[277]

134. Applying the same reasoning, the Court came to the following conclusion in *Al-Saadoon and Mufdhi*:

> All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty.[278]

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[271] *Decision Regarding Delimitation of the Border between Eritrea and Ethiopia*, 13 April 2002, UNRIAA, vol. XXV, p. 83, at pp. 110–111, paras. 3.6–3.10; see also *Case concerning the location of boundary markers in Taba between Egypt and Israel*, 29 September 1988, UNRIAA, vol. XX, p. 1, at pp. 56–57, paras. 209–210, in which the Arbitral Tribunal held, in an *obiter dictum*, "that the demarcated boundary line would prevail over the Agreement if a contradiction could be detected".

[272] *Interpretation of the air transport services agreement between the United States of America and France*, 22 December 1963, UNRIAA, vol. XVI, p. 5, at pp. 62−63.

[273] Kohen, "Keeping subsequent agreements and practice in their right limits", p. 42. This assessment has, however, been contested: see Kolb, "La modification d'un traité par la pratique subséquente des parties", p. 20, who refers to the Iran–United States Claims Tribunal and the *Taba* arbitration.

[274] *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), p. 208, para. 58 (Japan); Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 89.

[275] WTO, Appellate Body Reports, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5*, WT/DS27/AB/RW2/ECU and Corr.1 and WT/DS27/AB/RW/USA and Corr.1, adopted 11 and 22 December 2008, pp. 130–132, paras. 391–393.

[276] Available from www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3.

[277] *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010, no. 61498/08, ECHR 2010-II, pp. 123–124, para. 119, referring to *Öcalan v. Turkey* [GC], 12 May 2005, no. 46221/99, ECHR 2005-IV.

[278] *Ibid*., pp. 125–126, para. 120; see *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, Series A, no. 161, pp. 40–41, paras. 102–104. Malkani, "The obligation to refrain from assisting the use of the death penalty", p. 523.

135. The Court concluded that a violation of article 3 of the Convention had occurred by the transfer of a person in time of war by a Contracting State to a non-Contracting State where that person faced a real risk of being subjected to the death penalty. Although the Court has been quite explicit in its reasoning, its recognition of a modification of article 2 of the Convention by the practice of States could be interpreted as an *obiter dictum* if one considered that the decision rests solely on article 3. Such reasoning would, however, artificially separate two inextricably interconnected provisions.

(e) *Other international courts and tribunals*

136. Other international courts and tribunals—such as the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, the International Criminal Court and the international criminal tribunals, and the European Court of Justice—either do not seem to have addressed the question or have not recognized that subsequent practice of the parties may modify a treaty.[279]

(f) *State practice which is unrelated to judicial proceedings*

137. There are a certain number of cases where States parties to a treaty follow a practice which they appear to consider as having effectively modified the treaty, without an international court or tribunal having pronounced on the matter.[280] Such cases seem to include, for example, the term "migratory species" under the Convention on the conservation of migratory species of wild animals, a concept which is now interpreted to cover species that are or become non-migratory due to climate change.[281] Such cases are, however, difficult to clearly identify[282] and it is particularly difficult to assess whether a specific practice implies the assumption or the agreement of the parties according to which the underlying treaty is thereby modified. It has been suggested in this context that it would be "entirely reasonable to postulate, for example, that States are very reluctant to permit dispute settlers to use subsequent conduct to modify a treaty relationship, but that States are quite happy amongst just themselves to view a treaty as modified based on mutual understandings".[283]

(g) *Evaluation*

138. The case law of international courts and tribunals presents a mixed picture. While some have not addressed the question of whether subsequent practice by the parties can lead to a modification of a treaty, the International Court of Justice seems to have recognized the possibility in general terms without, however, clearly applying it in a specific case. The Court also seems to prefer to convey the impression that a particular subsequent practice of the parties is within the range of a permissible interpretation of a treaty. The WTO Appellate Body, on the other hand, has rejected the possibility of a modification of the WTO Covered Agreements by the subsequent practice of the parties, whereas the European Court of Human Rights has recognized and applied this possibility in at least one case.[284]

139. This situation suggests the following conclusions: the WTO case demonstrates that a treaty may preclude the subsequent practice of the parties from having a modifying effect. Thus, the treaty itself governs the question in the first place. The case of the European Court of Human Rights also supports the point that the treaty itself is controlling in the first place and that it may conversely permit common standards, as they are manifested in national legislations or executive practice, on occasion to take precedence over the text of the treaty. Thus, ultimately much depends on the treaty or of the treaty provisions concerned.[285]

140. However, treaty rules that govern the matter (such as article 3, paragraph 2, of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, or a recognized understanding of a treaty as under the European Convention of Human Rights) are exceptional. The situation is more complicated in the case of treaties for which no comparable indications in one or the other direction exist. No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice. It is, however, possible to draw the conclusion that the Court, while finding that the possibility of a modification of a treaty by subsequent practice of the parties "cannot be wholly precluded as a possibility in law",[286] considered that applying such a modification should nevertheless be avoided, if at all possible. The Court is therefore prepared to accept very broad interpretations which may stretch the ordinary meaning of the terms of the treaty, and possibly even special meanings of those terms.

141. This conclusion from the jurisprudence of the International Court of Justice is in line with certain general considerations which were articulated during the debates on draft article 38 of the 1969 Vienna Convention. Today, the consideration that amendment procedures which are provided for in a treaty should not be circumvented by informal means seems to have gained more weight in relation to the equally true general observation that international law is often not as formalist as national law.[287] It

[279] See Nolte, "Second report of the ILC Study Group on Treaties over Time: jurisprudence under special regimes relating to subsequent agreements and subsequent practice", pp. 268–275 and 282–301.

[280] Nolte, "Third report of the ILC Study Group on Treaties over Time: subsequent agreements and subsequent practice of States outside of judicial or quasi-judicial proceedings", pp. 353–356.

[281] Trouwborst, "Transboundary wildlife conservation in a changing climate: adaptation of the Bonn Convention on migratory species and its daughter instruments to climate change", pp. 286–288; Buga, "Subsequent practice and treaty modification", footnote 115.

[282] See generally on the difficulties of identifying conclusive State practice, Gardiner, *Treaty Interpretation,* p. 72.

[283] Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 83.

[284] *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010-II.

[285] Buga, "Subsequent practice and treaty modification", footnotes 126–132.

[286] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 353, para. 68.

[287] Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 89; Simma, "Miscellaneous thoughts on subsequent agreements and practice", p. 47; Hafner, "Subsequent agreements and practice …", pp. 115–117; Alvarez, "Limits of change by way of subsequent agreements and practice", p. 130.

should also be noted that the concern which was expressed by a number of States at the United Nations Conference on the Law of Treaties, that the possibility of modifying a treaty by subsequent practice could create difficulties for domestic constitutional law, can no longer be simply dismissed.[288] And, finally, while it is true that the principle *pacta sunt servanda* is not formally called into question by a modification of a treaty by subsequent practice of all the parties, it is equally true that the stability of treaty relations may be called into question if an informal means of identifying agreement as subsequent practice would simply be recognized as being able to modify a treaty.[289] It is also worth emphasizing that even Sir Humphrey Waldock, in his intervention at the United Nations Conference on the Law of Treaties, limited the possible scope of a modification by subsequent practice of the parties by formulating that this should "not touch the main basis of the treaty".[290]

142. Thus, while there are indications in international jurisprudence that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties may lead to certain limited modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts should make every effort to conceive an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way. Such efforts of interpretation can take place within a rather large scope since article 31 of the 1969 Vienna Convention does not accord primacy to one particular means of interpretation contained therein, but rather requires the interpreter to take into account all means of interpretation as appropriate.[291]

2. Subsequent agreements

143. According to article 39 of the 1969 Vienna Convention, "a treaty may be amended by agreement between the parties". Article 31, paragraph 3 (*a*), on the other hand, refers to subsequent agreements "between the parties regarding the interpretation of the treaty and the application of its provisions", and does not seem to address the question of modification. As the WTO Appellate Body has held:

> The term "application" in Article 31(3) (*a*) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied"; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation.[292]

144. Article 31, paragraph 3 (*a*), and article 39, if read together, demonstrate that agreements that the parties reach subsequently to the conclusion of a treaty can interpret and modify the treaty.[293] An agreement under article 39 need not display the same form as the treaty which it amends (unless this treaty provides otherwise).[294] Like an agreement under article 31, paragraph 3 (*a*), an agreement under article 39 may be reached by more informal means, as well as be limited to modifying or suspending the obligations under the treaty for only one or a certain number of cases of its application.[295] As the International Court of Justice has held in the *Pulp Mills on the River Uruguay* case:

> Whatever its specific designation and in whatever instrument it may have been recorded (the [River Uruguay Executive Commission] minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement.[296]

145. The lack of different formal requirements for an agreement under article 39 and for one under article 31, paragraph 3 (*a*), is one reason that some authors consider that an agreement under article 31, paragraph 3 (*a*), can also have the effect of modifying a treaty.[297] In any case, it may be necessary to determine whether—and if so, to what extent—an agreement is designed to modify (under article 39) or to interpret (under article 31, paragraph 3 (*a*)) a treaty,[298] in particular whether the distinction can be iden-

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[288] See *NATO Strategic Concept Case*, German Federal Constitutional Court, Judgment of the Second Senate of 22 November 2001, Application 2 BvE 6/99, paras. 19–21 (an abbreviated version of the decision in English is available from www.bundesverfassungsgericht.de/entscheidungen/es20011122_2bve000699en.html); Kadelbach, "Domestic constitutional concerns with respect to the use of subsequent agreements and practice at the international level", pp. 145–148; Alvarez, "Limits of change by way of subsequent agreements and practice", p. 130; Wuerth, "Treaty interpretation, subsequent agreements and practice, and domestic constitutions", pp. 154–159; and Ruiz Fabri, "Subsequent practice, domestic separation of powers, and concerns of legitimacy", pp. 165–166.

[289] See, for example, Kohen, "*Uti possidetis*, prescription et pratique subséquente à un traité dans l'affaire de *l'Île de Kasikili/Sedudu* devant la Cour internationale de Justice", p. 274 (in particular with respect to boundary treaties).

[290] *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), 38th meeting, pp. 214–215, para. 57 (Sir Humphrey Waldock).

[291] *Yearbook … 2013*, vol. II (Part Two), p. 17, draft conclusion 1, para. 5, and the accompanying commentary (*ibid.*, pp. 17–22, especially pp. 20–22, paras. (12)–(15)); Hafner, "Subsequent agreements and practice …", p. 117; some authors support the view that the range of what is conceivable as an "interpretation" is wider in case of a subsequent agreement or subsequent practice under art. 31, para. 3, than in the case of interpretations by other interpreters, including the range for evolutive interpretations by courts or tribunals, for example, Gardiner, *Treaty Interpretation*, p. 243; Dörr, "Article 31—General rule of interpretation", pp. 555–556, para. 76.

[292] WTO, Appellate Body Reports, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5*, WT/DS27/AB/RW2/ECU and Corr.1 and WT/DS27/AB/RW/USA and Corr.1, adopted 11 and 22 December 2008, respectively, p. 131, para. 391.

[293] Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 88.

[294] According to art. 39, second sentence.

[295] Sinclair, *The Vienna Convention on the Law of Treaties*, p. 107, with reference to Sir Humphrey Waldock, *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), 37th meeting, p. 207, paras. 49–52; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, pp. 513–515, paras. 7, 9 and 11; Odendahl, "Article 39—General rule regarding the amendment of treaties", p. 706, at para. 16.

[296] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 62, para. 128; the Court then concluded, in the case under review, that these conditions had not been fulfilled, at pp. 62–66, paras. 128–142.

[297] Aust, *Modern Treaty Law and Practice*, pp. 223–224, with examples.

[298] In judicial practice it is sometimes not necessary to determine whether an agreement has the effect of interpreting or modifying a treaty, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports, 1994*, p. 6, at p. 29, para. 60: "in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration".

tified by formal criteria, or whether it merely depends on the presumed intentions of the parties. International case law and State practice present a nuanced picture.

(a) *International Court of Justice*

146. In the *Pulp Mills on the River Uruguay* case, the International Court of Justice was confronted with a claim that the parties had set aside a procedure that was provided for in a treaty in the individual case of the disputed construction of certain pulp mills, by way of an "understanding" between the foreign ministers of Argentina and Uruguay on how to further proceed in the matter. The Court held:

> The Court concludes that the "understanding" of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the "understanding", only if Uruguay had complied with the terms of the "understanding". In the view of the Court, it did not do so. Therefore the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute.[299]

147. Although the Court accepted that the "understanding" could have had the effect of "exempting Uruguay from compliance with the procedural obligations" of the treaty, it stopped short of recognizing that this would have had the effect of modifying the obligations under the treaty. This suggests that informal agreements which are alleged to derogate from treaty obligations should be narrowly interpreted. An agreement to modify a treaty is thus not excluded but also not to be presumed.[300]

(b) *Iran–United States Claims Tribunal*

148. The Iran–United States Claims Tribunal has recognized, albeit only in an *obiter dictum*, that a subsequent agreement of the parties can lead to a modification of the Algiers Accords:

> Yet, if the two Parties that created the Tribunal, i.e., Iran and the United States, were to agree to submit a case to the Tribunal, then this would arguably be sufficient to grant the Tribunal jurisdiction over such case, as it would constitute an international agreement modifying the Algiers Declarations with respect to the particular case. But this is not the issue here.[301]

149. This dictum suggests that the question of whether an agreement merely interprets or rather modifies a treaty can be derived from its stated effect.

(c) *Free Trade Commission note 2001: an agreement to interpret or to modify?*

150. According to NAFTA article 1131, paragraph 2, 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.[302] The Commission has resorted to this possibility by issuing an interpretative note on 31 July 2001 with regard to NAFTA article 1105, paragraph 1.[303] The note clarified, *inter alia*, that the term "international law" as regards the minimum standard of treatment shall be understood as referring to "customary international law" and that "fair and equitable treatment" as well as "full protection and security" do not require treatment beyond that customary standard.[304] The note has been interpreted differently by different chapter 11 panels, in particular with regard to the question of whether it should be considered as an authentic interpretation under NAFTA article 1131, paragraph 2, a subsequent agreement under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention, an (impermissible) amendment, or a (perhaps permissible) informal modification.[305] The following decisions are of particular significance.

151. The Panel in the case of *ADF Group Inc. v. United States*, assessing whether the note constituted an interpretation or an amendment, relied on the fact that the note itself purported to be an interpretation:

> We observe in this connection that the FTC [Free Trade Commission] Interpretation of 31 July 2001 expressly purports to be an interpretation of several NAFTA provisions, including Article 1105 (1), and not an "amendment", or anything else… There is, therefore, no need to embark upon an inquiry into the distinction between an "interpretation" and an "amendment" of Article 1105 (1). But whether a document submitted to a Chapter 11 tribunal purports to be an amendatory agreement in respect of which the Parties' respective internal constitutional procedures necessary for the entry into force of the amending agreement have been taken, or an interpretation rendered by the FTC under Article 1131 (2), we have the Parties themselves—all the Parties—speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.[306]

152. The Panel in *Methanex v. United States* interpreted the note as a subsequent agreement under article 31, paragraph 3 (*a*):

> With respect to Article 1105, the existing interpretation is contained in the FTC's Interpretation of 31st July 2001. 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 (3) (*a*) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA … It follows that any interpretation of Article 1105 should look to the ordinary meaning of the provision in accordance with Article 31 (1) of the Vienna Convention,

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[299] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 63, para. 131.

[300] *Ibid*., p. 66, para. 140; Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", p. 32.

[301] *The Islamic Republic of Iran v. the United States of America*, No. ITL 83-B1-FT (Counterclaim), Interlocutory Award, *Iran–United States Claims Tribunal Reports*, vol. 38 (2004–2009), p. 77, at p. 126, para. 132.

[302] Brower, "Why the FTC notes of interpretation constitute a partial amendment of NAFTA article 1105", pp. 349–350.

[303] "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

[304] For the text of the North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission, see www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp; see also Brower, "Why the FTC notes of interpretation constitute a partial amendment of NAFTA Article 1105", pp. 351–354.

[305] See, for example, Brower, "Why the FTC notes of interpretation constitute a partial amendment of NAFTA Article 1105", pp. 354–356 and 363; Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States", pp. 180–181 and 216.

[306] *ADF Group Inc. v. United States of America* (Case No. ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, pp. 84–85, para. 177 (https://2001-2009.state.gov/documents/organization/16586.pdf).

and also take into account the interpretation of 31st July 2001 pursuant to Article 31 (3) (*a*) of the Vienna Convention.[307]

153. The Panel also addressed the question of whether the note was interpretative in nature or implied an amendment to NAFTA:

> Even assuming that the FTC interpretation was a far-reaching substantive change (which the Tribunal believes not to be so with respect to the issue relating to this case), Methanex cites no authority for its argument that far-reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the parties.
>
> Article 39 of the Vienna Convention on the Law of Treaties stipulates simply that "[a] treaty may be amended by agreement between the parties". No particular mode of amendment is required and many treaties provide for their amendment by agreement without requiring a re-ratification. Nor is a provision on the order of article 1131 inconsistent with rules of international interpretation. Article 31 (3) (*a*) of the Vienna Convention provides that: "3. There shall be taken into account, together with the context: (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[308]

154. The Panel in *Pope and Talbot v. Canada*, while indicating a clear preference for considering the note an amendment, nevertheless proceeded on the basis of an assumption that the Commission's action was an "interpretation".[309]

155. Despite their different assessments concerning the note in question, the different tribunals did not identify any formal criteria by which a subsequent agreement under article 31, paragraph 3 (*a*), and an agreement to modify a treaty (under article 39 or otherwise) could be distinguished. They rather preferred, as far as possible, to consider the specific agreement of the parties under review as one on the interpretation of the treaty, and not as an amendment or a modification, and thereby accepted what the parties had purported to do.

(d) *United Nations Convention on the Law of the Sea*

156. Examples from practice show that States parties to a treaty occasionally aim to bring about by way of a subsequent agreement what effectively appears to be a modification of a treaty, without using or successfully completing an available amendment procedure.

157. The Meeting of States Parties to the United Nations Convention on the Law of the Sea agreed to postpone the first election of judges to the International Tribunal for the Law of the Sea from 16 May 1995 (the last possible date, according to article 4, paragraph 3, of annex VI to the Convention) to 1 August 1996.[310] The Meeting took a similar decision with regard to the first election of the Commission on the Limits of the Continental Shelf.[311] Both decisions were adopted by consensus. Neither was adopted through the amendment procedures in articles 312–316 of the Convention,[312] and without a debate on their legality. It may be possible to regard these decisions as decisions not to apply the Convention in a particular case (which would leave the treaty obligation unaffected, but merely unenforced). However, in view of the need to provide a secure legal basis for the elections, it is more plausible to assume that the parties intended to modify the Convention with respect to the particular case in order to ensure that effect.

158. Article 4 of annex II to the Convention provides for the possibility of an extension of the outer limits of the continental shelf beyond 200 nautical miles in accordance with article 76 of the Convention and requires that the requesting State "shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State". When States demanded an extension of the time limit,[313] the Meeting of the States Parties decided that in the case of States for which the treaty had entered into force before 13 May 1999, the 10-year time limit shall be taken to have commenced on 13 May 1999.[314] A background paper by the Secretariat expressed several ways to achieve this aim but favoured a subsequent agreement by the State Parties over a formal amendment process according to article 312 or 313 of the Convention or an implementation agreement.[315] At the meeting of the States Parties, a majority stated that this issue was a procedural matter and would therefore fall within the competence of the Meeting of States Parties to the United Nations Convention on the Law of the Sea.[316] The States Parties agreed to decide by consensus and concurred that resort to articles 312–314 of the Convention was not necessary in this case. Given the clear terms of article 76 of the Convention, it is difficult to conceive of the decision of the Meeting of the States Parties, even if it is regarded a procedural matter, as anything else than a modification of the provision.[317] At the same time, it is clear that the States Parties did not wish to explicitly recognize this.

(e) *Montreal Protocol on Substances that Deplete the Ozone Layer*

159. The difficulty of drawing a line between an agreement regarding the interpretation of a treaty and an

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[307] *Methanex Corporation v. United States of America*, UNCITRAL Arbitration Under NAFTA Chapter Eleven, Final Award on Jurisdiction and Merits, 9 August 2005 (https://2001-2009.state.gov/documents/organization/51052.pdf), part II, chap. H, p. 11, para. 23.

[308] *Ibid*., part IV, chap. C, pp. 9–10, paras. 20–21.

[309] *Pope and Talbot Inc. v. Government of Canada (Award in Respect of Damages)*, UNCITRAL Arbitration Under NAFTA Chapter Eleven, 31 May 2002, pp. 22–23, paras. 46–47 (http://italaw.com/sites/default/files/case-documents/ita0686.pdf).

[310] See the first report of the meeting of the States parties of the United Nations Convention on the Law of the Sea, held in New York on 21 and 22 November 1994 (SPLOS/3), p. 7, para. 16 (*a*).

[311] Although article 2, paragraph 2, of annex II to the United Nations Convention on the Law of the Sea provided a deadline of 16 May 1996 for a decision, at the third meeting of the States parties the decision was delayed to 13 March 1997 (see SPLOS/5, p. 7, para. 20).

[312] Treves, "The General Assembly and the meeting of the States parties in the implementation of the LOS Convention", pp. 68−70.

[313] See SPLOS/60, p. 10, para. 61.

[314] See SPLOS/73, p. 13, para. 81; and decision regarding the date of commencement of the 10-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of annex II to the United Nations Convention on the Law of the Sea (SPLOS/72, p. 1).

[315] See background paper prepared by the Secretariat on issues with respect to article 4 of annex II to the United Nations Convention on the Law of the Sea (SPLOS/64), pp. 7–8; see also SPLOS/73, pp. 12−13.

[316] See SPLOS/73, p. 13, para. 79.

[317] See, for example, German Federal Foreign Office, International Law Division, "International Law Commission topic 'Treaties over time'" (14 February 2011), p. 7.

agreement on its modification is further exemplified by a decision of the Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, by which several amendments to that instrument were adopted.[318] According to article 9, paragraph 5, of the Vienna Convention for the Protection of the Ozone Layer, amendments to the Protocol "shall enter into force between parties having accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance … by at least two-thirds of the parties to the protocol concerned, except as may otherwise be provided in such protocol." The Montreal Protocol foresees a special "adjustment procedure",[319] which, as mentioned above, must be distinguished from the amendments to the Protocol to which article 9, paragraph 5, of the Vienna Convention for the Protection of the Ozone Layer applies.

160. At the second Meeting of the Parties to the Montreal Protocol, held in London, from 27 to 29 June 1990, the parties took "decision II/2" on several amendments to the Protocol. The amendments and their entry-into-force procedure are set out in annex II to the final report of the Meeting of the Parties.[320] Article 2 of annex II reads:

> This Amendment shall enter into force on 1 January 1992, provided that at least twenty instruments of ratification, acceptance or approval of the Amendment have been deposited by States or regional economic integration organizations that are Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer. In the event that this condition has not been fulfilled by that date, the Amendment shall enter into force on the ninetieth day following the date on which it has been fulfilled.[321]

161. This Meeting of the Parties decision represents a subsequent agreement by the parties which arguably goes beyond an interpretation by providing a modification of the amendment procedure set forth in the Vienna–Montreal treaty regime. Subsequent practice of the parties has confirmed the 1990 decision through successive decisions using the same entry-into-force procedure.[322]

(f) *Subsequent agreements and amendment procedures*

162. There are cases in which the parties to a treaty initiate a formal amendment procedure and at the same time reach a more informal subsequent agreement on the modification of the provision of the treaty which they begin to comply with before they have completed the formal amendment procedure. In such cases, the question may arise whether the subsequent agreement can be taken as authentically articulating the treaty obligation as long as the formal amendment procedure is not completed. One example for this practice has arisen from the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal. Based on a request which was formulated at the first Conference of the Parties by the Group of 77 States in 1994, the second Conference of the Parties decided, by consensus, to ban the transboundary movement of hazardous waste from OECD to non-OECD member States.[323] During the debates of the second Conference of the Parties, some States, however, expressed concern about whether this decision should not rather be taken by way of the formal amendment procedure under article 17 of the Basel Convention.[324] Criticism continued to be expressed, particularly in the domestic sphere of some States Parties.[325] At its third meeting, in 1995, the Conference of the Parties decided to initiate a formal amendment of the Basel Convention with a view to prohibiting the transboundary movement of hazardous waste from OECD to non-OECD countries. This amendment has still not entered into force under the procedure which is provided for under article 17 of the Convention. During the debates of the third Conference of the Parties, several States expressed the view that the decision to submit this matter to a formal amendment procedure did not deprive the prior decision of the Conference of the Parties of its binding character, while others expressly rejected this view.[326]

(g) *Distinctions between subsequent agreements*

163. The preceding examples from the jurisprudence and State practice suggest that it is often very difficult to draw a distinction between agreements of the parties under a specific treaty provision which attributes binding force to subsequent agreements, simple subsequent agreements under article 31, paragraph 3 (*a*), which are not binding as such, and, finally, agreements on the modification of a treaty under article 39. There do not seem to be any formal criteria, apart from the ones which may be provided for in the applicable treaty itself, which are recognized as distinguishing these different forms of subsequent agreements. It is clear, however, that States and international courts are generally prepared to accord States parties a wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may stretch and even go beyond the ordinary meaning of the terms of the treaty. The recognition of this broad scope for the interpretation of a treaty goes hand in hand with reluctance by States and courts to recognize that an agreement actually has the effect of modifying a

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[318] See e.g. Brunnée, "COPing with consent: law-making under multilateral environmental agreements", p. 31; Churchill and Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements …", p. 641.

[319] See Brunnée, "Reweaving the fabric of international law? Patterns of consent in environmental framework agreements", pp. 109–110.

[320] Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, London, 27–29 June 1990 (UNEP/OzL.Pro.2/3), p. 9, para. 40.

[321] *Ibid.*, p. 32.

[322] For a list of the amendments to the Montreal Protocol, see United Nations Environment Programme (UNEP), Ozone Secretariat (https://ozone.unep.org/treaties/montreal-protocol/amendments).

[323] See report of the second meeting of the Conference of the Parties to the Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal, Geneva, 21–25 March 1994 (UNEP/CHW.2/30, p. 19, decision II/12).

[324] See decision III/1 adopted by the third meeting of the Conference of the Parties to the Basel Convention, Geneva, 18–22 September 1995 (UNEP/CHW.3/35, p. 1); see also Handl, "International 'lawmaking' by conferences of the parties and other politically mandated bodies", p. 132.

[325] In Australia, for example, Members of Parliament worried about "a loss of parliamentary sovereignty". See Handl (preceding footnote), footnote 23.

[326] See report of the third meeting of the Conference of the Parties to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, Geneva, 18–22 September 1995 (UNEP/CHW.3/34); see also Handl, "International 'lawmaking' ..." (foonote 324 above) .

treaty.[327] The case of the Basel Convention need not necessarily be interpreted as an *ex post* recognition by the parties that the decision by the Conference of the Parties required a formal amendment, but can also be seen as an effort to avoid disagreement among themselves and to use a "safe" way of proceeding even if this was not strictly necessary. It appears, however, that the initiation of a formal amendment procedure normally suggests that the parties consider such a procedure to be legally required.

164. The presumption that a subsequent agreement which does not satisfy the procedural requirements of the amendment clause of a treaty should be interpreted narrowly so as not to purport to modify the treaty, appears to be even stronger in cases in which the subsequent agreement would affect the object and purpose of the treaty, i.e. an essential element of the treaty.[328] One of those essential elements may be the creation of certain individual rights by the treaty.[329] If, however, a subsequent agreement is clear enough, it may even contribute to modifying an essential element of a treaty.[330]

[327] It may be that States, in diplomatic contexts outside court proceedings, tend to acknowledge more openly that a certain agreement or common practice amounts to a modification of a treaty (see Murphy, "The relevance of subsequent agreement and subsequent practice for the interpretation of treaties", p. 83).

[328] See guideline 3.1.5 of the Commission's Guide to Practice on Reservations to Treaties (*Yearbook … 2011*, vol. II (Part Three), para. 1); Aust, *Modern Treaty Law and Practice*, p. 214.

[329] See Human Rights Committee, General Comment No. 26 on issues relating to the continuity of obligations under the International Covenant on Civil and Political Rights (report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 40* (A/53/40), annex VII), para. 4 (which, however, addresses the power to denounce the International Covenant on Civil and Political Rights); see report of the Study Group on the fragmentation of international law, document A/CN.4/L.682 and Corr.1 and Add.1 (available from the Commission's website, documents of the fifty-eighth session; the final text will appear as an addendum to *Yearbook … 2006*, vol. II (Part One)), para. 108 (which, however, addresses the question of *lex specialis*); Buga, "Subsequent practice and treaty modification", footnotes 152–155.

[330] See, for example, Simma, "Miscellaneous thoughts on subsequent agreements and practice", p. 46; Crawford, "A consensualist interpretation of article 31 (3) of the Vienna Convention on the Law of Treaties", p. 31 (referring to the agreements on the privatization of the international telecommunications satellite organizations, which were reached outside the regular amendment procedures); Roberts, "Power and persuasion in investment treaty interpretation: the dual role of States".

3. Conclusion

165. The case law of international courts and tribunals, and State practice, confirm that, while the modification (or amendment) of a treaty by way of a subsequent agreement or agreed subsequent practice can theoretically be distinguished from its interpretation, in practice, as the Commission has put it rather cautiously, "there may be a blurring of the line between the interpretation and the amendment of a treaty by subsequent practice".[331] The International Court of Justice has not discussed criteria for distinguishing an interpretation from a modification by way of subsequent agreement or agreed subsequent practice. The most reasonable approach seems to be that the line between interpretation and modification cannot be determined by abstract criteria but must rather be derived, in the first place, from the treaty itself, the character of the specific treaty provision at hand, and the legal context within which the treaty operates, as well as the specific circumstances of the case. In this context, an important consideration is how far an evolutive interpretation of the pertinent treaty provision is possible. In the case concerning the *Dispute regarding Navigational and Related Rights*,[332] for example, the International Court of Justice could leave the question open of whether the term "comercio" had been modified by the subsequent practice of the parties, since it decided that it was possible to give this term an evolutive interpretation.

166. The preceding considerations lead to the following conclusion:

> *"Draft conclusion 11. Scope for interpretation by subsequent agreements and subsequent practice*
>
> "1. The scope for interpretation by subsequent agreements or subsequent practice as authentic means of interpretation under article 31, paragraph 3, may be wide.
>
> "2. It is presumed that the parties to a treaty, by a subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized."

[331] *Yearbook … 1964*, vol. II, p. 60, para. (25) of the commentary to draft article 71.

[332] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 242–243, paras. 64–66.

Chapter VII

Future programme of work

167. According to the original plan of work,[333] the third report, for the sixty-seventh session, in 2015, will address subsequent agreements and subsequent practice in relation to constituent treaties of international organizations. The report might also deal with the practice of treaty bodies, the role of national courts, and other matters which members of the Commission or States may wish to see addressed within the framework of the topic. Depending on the progress made, a final report might be submitted for the sixty-eighth session, in 2016, which would address possibly remaining matters. The Commission could then undertake a review of the draft conclusions as a whole, with a view to their final adoption.

[333] See *Yearbook … 2012*, vol. II (Part Two), p. 79, para. 238.

ANNEX

Proposed draft conclusions

Draft conclusion 6. Identification of subsequent agreements and subsequent practice

The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32 requires careful consideration, in particular of whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations.

Draft conclusion 7. Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties.

2. The value of a subsequent agreement or subsequent practice as a means of interpretation may, *inter alia*, depend on their specificity.

Draft conclusion 8. Forms and value of subsequent practice under article 31, paragraph 3 (b)

Subsequent practice under article 31, paragraph 3 (*b*), can take a variety of forms and must reflect a common understanding of the parties regarding the interpretation of a treaty. Its value as a means of interpretation depends on the extent to which it is concordant, common and consistent.

Draft conclusion 9. Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (*a*) and (*b*), need not be arrived at in any particular form nor be binding as such.

2. An agreement under article 31, paragraph 3 (*b*), requires a common understanding regarding the interpretation of a treaty of which the parties are aware. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (*b*), may vary. Silence on the part of one or more parties can, when the circumstances call for some reaction, constitute acceptance of the subsequent practice.

3. A common subsequent agreement or practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may instead signify their agreement temporarily not to apply the treaty or to establish a practical arrangement (*modus vivendi*).

Draft conclusion 10. Decisions adopted within the framework of a conference of States parties

1. A conference of States parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a conference of States parties depends primarily on the treaty and the applicable rules of procedure. Depending on the circumstances, such a decision may embody a subsequent agreement under article 31, paragraph 3 (*a*), or give rise to subsequent practice under article 31, paragraph 3 (*b*), or article 32.

3. A decision adopted within the framework of a conference of States parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted.

Draft conclusion 11. Scope for interpretation by subsequent agreements and subsequent practice

1. The scope for interpretation by subsequent agreements or subsequent practice as authentic means of interpretation under article 31, paragraph 3, may be wide.

2. It is presumed that the parties to a treaty, by a subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized.

PROVISIONAL APPLICATION OF TREATIES

[Agenda item 8]

DOCUMENT A/CN.4/675

Second report on the provisional application of treaties,* by Mr. Juan Manuel Gómez Robledo, Special Rapporteur

[*Original: Spanish*]
[*9 June 2014*]

CONTENTS

Multilateral instruments cited in the present report

	Source
Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, *Treaty Series*, vol. 55, No. 814, p. 308.
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 on the Functioning of the European Union (Rome, 25 March 1957)	Consolidated version, *Official Journal of the European Union*, No. C 326/47, 26 October 2012.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

* The Special Rapporteur is deeply grateful to Mr. Pablo Arrocha for his invaluable contribution to the preparation of this report.

	Source
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid*., vol. 1144, No. 17955, p. 123.
Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, D.C., 20 August 1971)	*Ibid*., vol. 1220, No. 19677, p. 21.
Agreement on an International Energy Program (Paris, 18 November 1974)	*Ibid*., vol. 1040, No. 15664, p. 271.
International Sugar Agreement, 1977 (Geneva, 7 October 1977)	*Ibid*., vol. 1064, No. 16200, p. 219.
International Dairy Arrangement of the General Agreement on Tariffs and Trade (Geneva, 12 April 1979)	*Ibid*., vol. 1186, No. 814, p. 54.
International Telecommunication Convention (Nairobi, 6 November 1982)	*Ibid*., vol. 1531, No. 26559, p. 2.
Convention on early notification of a nuclear accident (Vienna, 26 September 1986)	*Ibid*., vol. 1439, No. 24404, p. 275.
Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (Paris, 13 January 1993)	*Ibid*., vol. 1974, No. 33757, p. 45.
Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994)	*Ibid*., vol. 1836, No. 31364, p. 3.
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Food Assistance Convention (London, 25 April 2012)	United Nations, *Treaty Series*, vol. 2884, No. 50320, p. 3.
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Introduction

1. In his first report on the provisional application of treaties,[1] submitted in June 2013 for consideration by the International Law Commission, the Special Rapporteur presented a general preliminary analysis to serve as a guide for identifying possible areas of study for future reports.

2. In particular, the Special Rapporteur discussed issues concerning the background and terminology associated with this legal concept, and analysed the purposes and usefulness of the provisional application of treaties. He also embarked on a study of the legal regime of provisional application, focusing on three key areas: the source of obligations; forms of expression of intention; and forms of termination of the regime created by provisional application.

3. In addition, he indicated that the legal consequences arising both within the State and at the international level would be considered in subsequent reports.

4. The purpose of this second report is to provide a substantive analysis of the legal effects of the provisional application of treaties, as indicated in paragraph 37 of the first report.

5. The issue of the legal effects of provisional application has been raised repeatedly, both by the Commission members and by the States that have taken part in the discussions on this topic, as a priority for the further study of this question, as it concerns the impact of this treaty law concept on the acquisition of international rights and obligations by the State or States that decide to make use of it.

6. The Special Rapporteur will accordingly take into account the comments made by States during the relevant discussion in the Sixth Committee at the sixty-eighth session of the General Assembly, as well as the information on State practice that has been received to date in response to the Commission's request to Member States in its report on the work of its sixty-fifth session,[2] of which the General Assembly took note in paragraph 1 of its resolution 68/112 of 16 December 2013.

7. While the Commission has already received several reports on the practice of States, the Special Rapporteur finds it advisable and necessary to collect more information on the subject in order to be in a position to present the Commission with a more structured vision and possible conclusions on State practice.

8. The reports submitted thus far have, of course, been taken into account in the preparation of the present report, and the Special Rapporteur is grateful to the States that provided them. He will nonetheless postpone any conclusions on State practice to a later date.

[1] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664.

[2] *Ibid*., vol. II (Part Two), para. 27.

CHAPTER I

Analysis of views expressed by Member States

9. In the discussion held by the Sixth Committee during the sixty-eighth session of the General Assembly, many delegations referred in their statements to the provisional application of treaties and, in particular, to the Special Rapporteur's first report.

10. The Special Rapporteur sincerely thanks all delegations for their valuable contributions, comments and input, which have been duly considered in studying the issue in the present report.

11. In their statements, Member States identified important areas of study in relation to the provisional application of treaties. For example, some States suggested that the Special Rapporteur should focus on the ways in which States could express their consent to the provisional application of a treaty. Others suggested that he should analyse whether "provisional accession" was a possibility and whether that would be equivalent to provisional application upon the treaty's entry into force. It was also suggested that he should examine the provisional establishment of subsidiary bodies created by the treaty itself, as well as the provisional application of treaties by international organizations. Those and other topics were reflected in the summary of the discussion prepared by the Secretariat.[3]

[3] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666).

12. Those contributions also included questions on legal effects, such as, for example, whether provisional application from the date of signature had consequences that differed from those of provisional application from the date of ratification and whether provisional application referred to the entire treaty or to only some of its provisions.

13. In general, the Special Rapporteur has discerned that the area of interest that the vast majority of delegations have in common is, primarily, the question of the legal effects of the provisional application of treaties.

14. In this connection, an analysis of the information furnished by States thus far shows that the provisional application of a treaty undoubtedly creates a legal relationship and therefore has legal effects. This does not seem to be a matter of debate. On the contrary, all the comments and questions submitted to the Special Rapporteur presume that provisional application does indeed have legal effects, even beyond the obligation not to defeat the object and purpose of the treaty in question, as set out in article 18 of the Vienna Convention on the Law of Treaties (hereinafter the "1969 Vienna Convention").

15. The Special Rapporteur also appreciates and shares the views of the Commission members and of Member States to the effect that the task of the Commission is not to encourage or discourage recourse to provisional application, but to provide guidance to enhance understanding of that mechanism. The provisional application of a treaty should be understood as a transitory and to some extent palliative mechanism, never as a means of avoiding the ratification of treaties and their entry into force in accordance with the requirements they establish.

16. With respect to the practice of States, as reported to him, the Special Rapporteur would like to make two observations.

17. First, the statements made in the Sixth Committee show that States are especially interested in highlighting the fact that the provisional application of a treaty will also depend on the provisions of domestic law and the particular circumstances in each State. In other words, States were very careful to indicate that recourse to provisional application, including the manner in which consent is expressed, is subject to the relevant national legal rules. In that connection, some States suggested that a comparative analysis of national laws should be prepared in order to shed light on the operation of that mechanism within States.

18. Although the Special Rapporteur understands the concern of States about the need to respect the requirements laid down in their national laws, he does not propose to carry out such a comparative study. That endeavour would take considerably longer than the time available, and there are valid doubts as to its usefulness to the General Assembly. In terms of international law, as stated by the Permanent Court of International Justice, "municipal laws are merely facts which express the will and constitute the activities of States".[4] Likewise, the discussions in the Commission, from the time the topic was first introduced, have tended towards the view that an analysis of national laws is not relevant to the study of the provisional application of treaties.

19. The Special Rapporteur agrees with the comments made by some Commission members to the effect that the Commission need not concern itself with the national legislation invoked by States for the purpose of applying or not applying a treaty provisionally. The analysis of the provisional application of treaties will therefore focus on its legal effects at the international level, while naturally bearing in mind that provisional application may give rise to an actual occurrence of the possibility envisaged in article 46, paragraph 1, of the 1969 Vienna Convention, i.e. a manifest violation of internal law with respect to a rule of fundamental importance regarding competence to conclude treaties, as was also suggested by some members of the Commission.

20. Second, by the time the present report was completed, the Commission had received reports on national practice regarding the provisional application of treaties from only 10 States: Botswana, Czech Republic, Germany, Mexico, Micronesia (Federated States of), Norway, Russian Federation, Switzerland, United Kingdom of Great Britain and Northern Ireland, and United States of America. The Special Rapporteur greatly appreciates these reports, which are an important complement to the discussions held in the General Assembly and an invaluable source of information on the position of those States.

21. It is interesting to note that one State, Micronesia (the Federated States of), submitted a report on its practice to the Commission even though that State is not a party to the 1969 Vienna Convention. In the Special Rapporteur's view, this reflects the degree of interest in the Commission's study of this topic.

22. As noted above, the Special Rapporteur intends to collect more information on State practice before presenting the conclusions of his analysis of such practice.

[4] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

Chapter II

Legal effects of provisional application

23. As early as 1966, Special Rapporteur Fitzmaurice, in the context of his work on the law of treaties, put before the Commission the view that treaty clauses that are applied provisionally undoubtedly have legal effects that *de facto* bring those clauses into force.[5] The memorandum

[5] *Yearbook … 1966*, vol. II, para. (1) of the commentary to art. 22, "Entry into force provisionally" ("But there can be no doubt that such

prepared by the Secretariat in 2013, which is also referred to in the Special Rapporteur's first report, points out that the general position maintained by the Commission has been that the provisional application of a treaty results in an obligation to execute the treaty, even if only on a provisional basis.[6]

24. Bearing in mind the analysis put forward in the first report on this topic, as well as the contributions from States, it seems appropriate to accept the premise that the provisional application of treaties has legal effects, although this should not be interpreted as a simplified form of entry into force of the treaty or of some of its provisions. It has already been clarified in the first report that entry into force falls under a different legal regime.[7]

25. At the same time, the information submitted by States such as Botswana and Norway, while not contradicting this conclusion, indicates that the process for allowing provisional application is the same as the process for seeking the ratification and entry into force of a treaty. Switzerland, for example, does not regard "provisional application" and "provisional entry into force" as two distinct legal concepts; it thus views these concepts as being the same from the standpoint of their legal effects. It even raises the question of whether, that being the case, the regime governing reservations should also cover provisional application. The United States, meanwhile, reports that, in the view of a member of the Senate Foreign Relations Committee, a treaty that is applied provisionally has the same legal status as any other United States agreement concluded by the President and that treaties applied provisionally have full effect at the national level pending a decision to ratify them.

26. Such effects may have an impact both within a State and internationally, depending on the treaty itself and on the specific clauses that are applied provisionally. The subject matter of the treaty in question is also of relevance. Treaties on human rights or tariff reduction, to cite two examples, will produce effects primarily within the State.[8]

27. Even if the proposal by some legal writers to regard provisional application as the application not of the treaty *per se* but of a parallel agreement, created by virtue of the provisional application itself, were to be taken into account,[9] this would not affect the conclusion that such provisional application would produce legal effects.

28. As indicated above and as several Member States have recalled, the use of provisional application is not confined to the States parties to a treaty; international organizations may also apply a treaty provisionally,[10] if the treaty is subject to signature and ratification by these subjects of international law.

29. Moreover, the cases of *Kardassopoulos*[11] and *Yukos*,[12] in which the material dispute at arbitration concerned the interpretation and scope of article 45 of the Energy Charter Treaty, which governs the provisional application of that instrument, show that this mechanism produces legal effects that entail rights and obligations under international law. In this case, the arbitral tribunal analysed the procedure for the provisional application of the Treaty, but did not question the legal validity of the concept of provisional application *per se*. In other words, the issue was one not of public international law, but of the constitutional law of one of the parties to the dispute.[13]

30. It should not be forgotten, however, that the effects of treaties "relate to the authors of the act: from their will do they proceed and they are nothing apart from that will".[14] The work of Mr. Georg Nolte, Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties, has underscored the necessity of always discerning the will of the parties.[15]

31. Lastly, the Special Rapporteur wishes to highlight the academic research carried out by Anneliese Quast Mertsch on the binding nature of the obligations arising from the provisional application of treaties, which is very valuable for understanding the characteristics and scope of the legal effects of the provisional application of treaties.[16]

A. Source of obligations

32. In discussing the legal regime of provisional application in his first report, the Special Rapporteur indicated that the source of the obligation to apply a treaty provisionally may arise from a provision of the treaty or from a separate or parallel agreement concerning the treaty; he also indicated that the intention to apply a treaty provisionally may be communicated either expressly or tacitly.[17]

33. This means that the legal nature of the obligations and the scope of the legal effects will depend, first of all, on what the treaty says with respect to the possibility of applying it provisionally in whole or in part. The United States, in the report on its practice, divides the list of treaties it has applied provisionally into those it has so applied

clauses have legal effect and bring the treaty into force on a provisional basis").

[6] See *Yearbook … 2013*, vol. II (Part One), A/CN.4/658, para. 66.

[7] *Ibid*., document A/CN.4/664, paras. 7–24.

[8] Gutiérrez Baylón, *Derecho de los Tratados*, p. 74.

[9] Vignes, "Une notion ambigüe: l'application à titre provisoire des traités", p. 192.

[10] Reuter, *Introduction to the Law of Treaties*, p. 68.

[11] *Ioannis Kardassopoulos v. Georgia*, *Decision on Jurisdiction*, 6 July 2007, International Centre for Settlement of Investment Disputes (ICSID) case No. ARB/05/18. Available from http://icsid.worldbank.org/.

[12] *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, *Interim Award on Jurisdiction and Admissibility*, 30 November 2009, Permanent Court of Arbitration case No. AA 227.

[13] Klaus, "The Yukos case under the Energy Charter Treaty and the provisional application of international treaties", p. 4.

[14] Reuter, *Introduction to the Law of Treaties*, p. 94.

[15] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/660 (first report); and document A/CN.4/671 (second report), reproduced in the present volume.

[16] See Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature*.

[17] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664, paras. 43–47.

in full[18] and those it has so applied in part,[19] for example. That list includes treaties with provisional application provisions that are subject to national law,[20] specific eligibility requirements,[21] exceptions[22] and time limits,[23] among others.

34. Article 25 of the 1969 Vienna Convention states that

> 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.

35. This presumes that provisional application results from an agreement between negotiating States, as defined in article 2, paragraph 1 (*e*), of the 1969 Vienna Convention.[24] However, at least four types of situations can be distinguished:

(*a*) Cases in which the treaty establishes that it is to be applied provisionally from the time of its adoption, i.e. once the requirements referred to in articles 9 and 10 of the 1969 Vienna Convention, concerning, respectively, the adoption and authentication of the text of a treaty, have been met. In these cases, a State's obligation to apply the treaty provisionally arises from the mere participation of that State in its adoption; in the absence of such an express provision, the obligation arises as a result of an unequivocal indication by the State that it accepts provisional application, usually through its consent to a decision or resolution adopted for that purpose.[25] A State that does not so consent or that requires what may be called a more substantial legal basis will not be subject to that obligation. For example, as the Czech Republic indicated in the report on its practice, the legal basis for the provisional application of agreements concluded between the European Union and third States or international organizations is set out in article 218, paragraph 5, of the Treaty on the Functioning of the European Union, which provides as follows:

> The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

(*b*) Cases in which the treaty establishes that it is to be applied provisionally by the States that have become signatories through any of the modalities referred to in article 10 (*b*) of the 1969 Vienna Convention, in which case the obligation to apply the treaty provisionally arises from the signature, signature *ad referendum* or initialling of the treaty or of the final act of a conference incorporating the text.[26]

(*c*) Cases in which the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the possibility for each State to decide whether or not it wishes to apply the treaty provisionally, pursuant to article 25, paragraph 1 (*a*), of the 1969 Vienna Convention, at any point in the process from the adoption of the text until or even after its entry into force. In these circumstances, the expression of intention that creates the obligations arising from provisional application may take the form of a unilateral declaration by the State.[27] When two or more States agree to apply a treaty provisionally, they may do so by means of a parallel agreement, which can take various forms. For example, in the report on its practice, the United States drew the Commission's attention to the Treaty between the United States of America and Ukraine on Mutual Legal Assistance in Criminal Matters,[28] in respect of which the parties agreed to provisional application through an exchange of diplomatic notes signed on 30 September 1999.

(*d*) A final case is that of a treaty that says absolutely nothing about provisional application. In this case, it is useful to consider a hypothetical example in which one or more negotiating States react, for whatever reason, to a decision by a State or States to apply a treaty provisionally by invoking the fact that article 25, paragraph 1 (*b*), refers to "the negotiating States", which could imply that the consent of all the negotiating States is required in order for one or more of them to apply the treaty provisionally. What legal consequences would such a situation have? The Special Rapporteur has not encountered any examples of a situation of this kind, but would appreciate any information that could be provided in this regard.

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[18] See Air Transport Agreement between the Government of the United States of America and the Government of the Federal Democratic Republic of Ethiopia (Washington, D.C., 17 May 2005), TIAS 06-721.1; Protocol Additional to the Agreement between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America (Vienna, 12 June 1998), United Nations, *Treaty Series*, vol. 2593, No. 20737; Air Transport Agreement between the Government of the United States of America and the Government of the Republic of Guatemala (San José, 8 May 1997), KAV 5945; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; Convention on early notification of a nuclear accident; and International Dairy Arrangement of the General Agreement on Tariffs and Trade.

[19] See Treaty between the United States of America and the Russian Federation on measures for the further reduction and limitation of strategic offensive arms, with Protocol (Prague, 8 April 2010), TIAS 11-205 (see also ILM, vol. 50 (2011), No. 3, p. 340); and International Telecommunication Convention.

[20] See Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982; Agreement between the Government of the United States of America and the Government of the Kingdom of Denmark on Enhancing Cooperation in Preventing and Combating Serious Crime (Copenhagen, 14 October 2010), TIAS 11-505; Agreement between the Government of the United States of America and the Government of the Czech Republic on Enhancing Cooperation in Preventing and Combating Serious Crime (Prague, 12 November 2008), TIAS 10-501; Arrangement on Provisional Application of the Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project; Agreement on an International Energy Program; and Protocol of Provisional Application of the General Agreement on Tariffs and Trade.

[21] See Food Assistance Convention; Food Aid Convention, 1999; International Natural Rubber Agreement, 1994; and International Sugar Agreement, 1977.

[22] See Millennium Challenge Compact between the United States of America acting through the Millennium Challenge Corporation and the Republic of Cape Verde (Praia, 10 February 2012), TIAS 12-1130.1.

[23] See Document Agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe of November 19, 1990.

[24] Mathy, "1969 Vienna Convention: Article 25 provisional application", p. 649.

[25] Aust, *Modern Treaty Law and Practice*, p. 172.

[26] *Ibid*.

[27] Mathy, "1969 Vienna Convention: Article 25 provisional application", p. 651.

[28] Kiev, 22 July 1998, TIAS 12978.

36. In short, the source of the obligations incurred as a result of provisional application may take the form of one or more unilateral declarations or the form of an agreement. In any event, it is undeniable that a commitment to apply a treaty provisionally has legal effects.[29]

37. Regarding unilateral declarations, the International Court of Justice has recognized that

> declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. … When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[30]

38. In this view, a State's decision to apply a treaty provisionally is an autonomous unilateral act governed solely by the intentions of that State and creating a new legal situation for it,[31] distinct from the rights and obligations created contractually by the treaty itself with regard to the parties once the treaty has entered into force.

39. The United States considers, for example, that the President's power to decide unilaterally to apply a treaty provisionally arises exclusively from its domestic law and that, consequently, the unilateral provisional application of a treaty should be understood as a matter of constitutional law.

40. Of relevance in this regard is the Commission's work on unilateral acts of States and, in particular, the guiding principles applicable to unilateral declarations of States capable of creating legal obligations.[32] In its resolution 61/34 of 4 December 2006, the General Assembly commended the dissemination of these principles, which set out the basic criteria that must be met in order for a unilateral declaration to produce obligations under international law.

41. In particular, principles 1,[33] 3,[34] 9[35] and 10[36] highlight the effects produced by the obligations incurred with respect to third States, which are entitled to require that such obligations be respected; the need to take account of the reactions of such third States to determine the legal effects of a unilateral declaration; and the conditions for revoking a unilateral declaration, in particular when other subjects of international law can invoke the enforceability of the obligations created by virtue of the unilateral declaration.

42. In any event, it seems that the determining factor in defining the source of the obligations arising from provisional application is the clear expression of intention, which may be manifested in writing, orally or by any conduct that is indicative of such intention, especially active conduct,[37] although the above-mentioned guiding principles acknowledge that informal conduct or even, in certain situations, silence can produce the same effects.

43. In short, the form in which the intention to apply a treaty provisionally is expressed will have a direct impact on the scope of the rights and obligations assumed by the State in question.

B. Rights

44. In cases where States agree that a treaty is to be applied provisionally from the time of its adoption or signature, the rights enjoyed by States under the treaty will be enforceable from the time of adoption or signature, respectively.

45. This is clearer still in the case of bilateral treaties in which the parties agree that the treaty is to be applied provisionally prior to its entry into force. The Russian Federation provided some examples of this in the report on its practice: the agreement between the Russian Federation and Serbia on the supply of natural gas[38] and the Agreement between the Russian Federation and Azerbaijan on the construction of a road bridge over the Samur River.[39]

46. The first agreement stipulates that it is to be applied provisionally from the date of signature, while the second establishes that it is to be applied provisionally 30 days after the date of signature.

47. Similarly, Mexico, in the report on its practice, cites the provisional application agreed upon in four bilateral treaties: the air transport agreement between Mexico and

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[29] Mathy, "1969 Vienna Convention: Article 25 provisional application", p. 652.

[30] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 267, para. 43.

[31] Geslin, *La mise en application provisoire des traités*, p. 188.

[32] The guiding principles adopted by the Commission and the commentaries thereto appear in *Yearbook … 2006*, vol. II (Part Two), paras. 176–177.

[33] *Ibid*., "Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected".

[34] *Ibid*., "To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise".

[35] *Ibid*., "No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration".

[36] *Ibid*., "A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:

(*a*) any specific terms of the declaration relating to revocation;

(*b*) the extent to which those to whom the obligations are owed have relied on such obligations;

(*c*) the extent to which there has been a fundamental change in the circumstances."

[37] Reuter, *Introduction to the Law of Treaties*, p. 34.

[38] Agreement between the Government of the Russian Federation and the Government of the Republic of Serbia on the Supply of Natural Gas from the Russian Federation to the Republic of Serbia (Belgrade, 13 October 2012), Russian Federation, *Bulletin of International Agreements*, 2014, No. 8, pp. 60–63 (in Russian).

[39] Agreement between the Government of the Russian Federation and the Government of the Republic of Azerbaijan on the Construction of a Road Bridge over the Samur River in the Locality of Yarag-Kazmalyar (Baku, 13 August 2013), *ibid*., No. 10, pp. 35–40 (in Russian).

Colombia;[40] the trade agreement between Mexico and Gabon;[41] the agreement on cultural, scientific and technical cooperation between Mexico and Gabon;[42] and the general agreement on cooperation between Mexico and Gabon.[43]

48. The first of these agreements establishes, in article 17:

> This Agreement shall be applied provisionally from the date of its signature and shall enter into force definitively on the date indicated in an exchange of diplomatic notes, such exchange to take place once the Contracting Parties have obtained the approval required by them in accordance with their respective constitutional procedures.

49. The second agreement provides, in article VIII, that it will "enter into force" provisionally, treating this concept as equivalent to provisional application:

> This Agreement shall enter into force provisionally on the date of its signature. It shall subsequently be ratified in accordance with the procedure in force in each country.

50. The third and fourth agreements include a provision very similar to the one cited from the second agreement in articles XV and V, respectively:

> This Agreement shall enter into force provisionally on the date of its signature and shall become final after the exchange of instruments of ratification.
>
> This Agreement shall enter into force provisionally on the date of its signature, and definitively following the exchange of the relevant instruments of ratification.

51. In these circumstances, the agreement between the parties to apply the treaty provisionally arises from the treaty itself and, in turn, gives rise to rights and obligations that are mutually recognized and therefore enforceable and opposable *vis-à-vis* third parties.

52. It should be noted that Germany, in the report on its practice, indicated that most of its bilateral agreements do not provide for provisional application, while the United Kingdom provided the Commission with a long list of treaties that provide for provisional application, clarifying that, for that State, provisional application is not legally binding *per se* in the case of so-called memorandums of understanding, probably because the United Kingdom does not regard instruments of that type as having treaty status.

C. Obligations

53. The question of the scope of the obligations arising from provisional application is especially relevant in cases where the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the possibility for each State to decide whether it wishes to apply the treaty provisionally.

54. In such cases, as noted above, the nature and scope of the obligations will be comparable to those arising from a unilateral declaration, unless two or more States conclude a parallel agreement. While States may in these cases have unilaterally undertaken in good faith to apply the treaty or part of the treaty provisionally, this "does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases", as the International Court of Justice held in the *Case concerning military and paramilitary activities in and against Nicaragua*.[44]

55. Thus, the scope of the obligations may not exceed what is expressly set out in the treaty, and, given the need to ensure stable relations with the other negotiating or signatory States, it is understood that a State may not alter "the scope and the contents of its solemn commitments".

56. A good example of this situation is reflected in the provisional application provided for in article 23 of the recently adopted Arms Trade Treaty, which stipulates:

> 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 [a]rticle 6 and [a]rticle 7 pending the entry into force of this Treaty for that State.

57. At the time of writing of the present report, 18 States had submitted a declaration of provisional application pursuant to the above-cited article, namely, Antigua and Barbuda, Austria, Costa Rica, Denmark, Estonia, Finland, Germany, Hungary, Iceland, Latvia, Mexico, Norway, Saint Vincent and the Grenadines, Serbia, Slovakia, Spain, Trinidad and Tobago and the United Kingdom. All of these States except Serbia and Spain have ratified the treaty.[45]

58. According to the declarations made, those States have unilaterally undertaken to apply, in the domestic sphere, articles 6 and 7 of the Arms Trade Treaty ("Prohibitions" and "Export and Export Assessment", respectively).

59. At this point, it is necessary to draw a distinction, while avoiding overly broad categories that do not reflect the variety of situations that may arise, as it is always important to take specific circumstances into account.

60. The proposed distinction is between the obligations resulting from provisional application that produce effects exclusively in the domestic sphere of the State that has opted for this mechanism, on the one hand, and obligations that produce effects at the international level, on the other, including, of course, for the other negotiating or signatory States.

61. For example, in the case of a multilateral human rights treaty, compliance with provisional application is generally enforceable only by individuals who acquire rights under the treaty.

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[40] Air Transport Agreement between the Government of the United Mexican States and the Government of the Republic of Colombia (Bogotá, 9 January 1975), United Nations, *Treaty Series*, vol. 1364, No. 23023, p. 249.

[41] Trade Agreement between the Government of the United Mexican States and the Government of the Gabonese Republic (Mexico City, 14 September 1976), *ibid*., vol. 1379, No. 23121, p. 113.

[42] Agreement on Cultural, Scientific and Technical Cooperation between the Government of the United Mexican States and the Government of the Gabonese Republic (Mexico City, 14 September 1976), *ibid*., vol. 1379, No. 23120, p. 103.

[43] General Agreement on Cooperation between the United Mexican States and the Gabonese Republic (Mexico City, 14 September 1976), *ibid*., vol. 1400, No. 23407, p. 139.

[44] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 418, para. 59.

[45] See http://disarmament.un.org/treaties/t/att.

62. In contrast, in a case such as that of the Arms Trade Treaty, the obligation to carry out the risk assessment process established in the Treaty before authorizing any export of the items covered will have effects at the international level, as this is an obligation that is enforceable by the importing State.

63. Those examples raise the question of whether the obligations acquired by virtue of provisional application will have different legal consequences, in terms of their effects, depending on whether they apply in the domestic sphere or the international sphere. This question will become clearer once a more representative sample of State practice has been made available.

64. Moreover, a distinction should be drawn in this connection between the enforceability of an obligation thus acquired and its opposability *vis-à-vis* third parties. Those are separate legal concepts and, for the purposes of this study, only the enforceability of the obligation is relevant, at least for the present report.

65. In any event, and beyond these distinctions, the obligations arising from provisional application fall within the scope of the *pacta sunt servanda* principle, in that they constitute a commitment to perform the obligations thus acquired in good faith.[46]

66. Another emblematic case in relation to the legal effects of provisional application and, in particular, to the obligations arising from such application is the accession by the Syrian Arab Republic to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. The Syrian Arab Republic deposited its instrument of accession to the Convention on 14 September 2013, and the Convention entered into force for that State on 14 October 2013.[47] However, upon depositing its instrument of accession, the Syrian Arab Republic informed the Secretary-General, as depositary of the Convention, that it "shall comply with the stipulations contained [in the Convention] and observe them faithfully and sincerely, applying the Convention provisionally pending its entry into force for the Syrian Arab Republic".[48]

67. It was on this basis that the Executive Council of the Organization for the Prohibition of Chemical Weapons adopted, at its 33rd meeting, its decision on destruction of Syrian chemical weapons, in which it affirmed that "the provisional application of the Convention gives immediate effect to its provisions with respect to the Syrian Arab Republic".[49]

68. In this case, it was the decision of the Executive Council of the Organization for the Prohibition of Chemical Weapons recognizing the legal effects of provisional application that made it possible to implement the Convention immediately through the establishment of a binding plan of action for chemical disarmament in that country.

D. Termination of obligations

69. In his first report, the Special Rapporteur indicated that, pursuant to article 25, paragraph 2, of the 1969 Vienna Convention, provisional application may be terminated by a unilateral notification or by arrangement among the negotiating States.[50]

70. On the assumption that provisional application has legal effects giving rise to rights and obligations, it may be presumed that the regime resulting from the termination of provisional application must be, *mutatis mutandis*, the same as that resulting from the termination of a treaty.

71. In this case, article 70 of the 1969 Vienna Convention sets out the consequences of the termination of a treaty:

> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (*a*) Releases the parties from any obligation further to perform the treaty;
>
> (*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
>
> 2 If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

72. In practice, treaties generally do not contain provisions concerning the consequences or effects of their termination, except in the case of treaties such as multilateral human rights treaties, for example.[51]

73. It may be assumed that the term "consequences" in article 70 refers to the "effects" of termination[52] and accordingly establishes the general treaty law regime for that purpose.

74. In any event, a treaty may contain transitional provisions on its partial or full application in which acts that the States parties undertake to perform during or after termination are specified.[53]

75. It is interesting to note that for some States, such as Mexico, in cases where provisional application must be terminated in advance, the State must perform the obligations agreed upon during a transitional period over which they are phased out, in the same manner as in the case of termination of the effectiveness of a treaty pursuant to article 70, paragraph 1 (*b*), of the 1969 Vienna Convention.

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[46] See Michie, "The provisional application of treaties in South African law and practice", p. 6.

[47] See "Syria's accession to the Chemical Weapons Convention enters into force", available from www.opcw.org/news/article/syrias-accession-to-the-chemical-weapons-convention-enters-into-force.

[48] See *Multilateral Treaties Deposited with the Secretary-General*, chap. XXVI.3.

[49] EC-M-33/DEC.1, 27 September 2013, eleventh preambular paragraph.

[50] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664, p. 88, paras. 48–52.

[51] See American Convention on Human Rights, art. 78, para. 2, and the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 58, para. 2.

[52] Ascensio, "1969 Vienna Convention. Article 70: Consequences of the termination of a treaty", p. 1586.

[53] Aust, *Modern Treaty Law and Practice*, p. 302.

76. This pattern of conduct shows that some States regard the effects of provisional application as having the same legal validity as the effects of a treaty in force.

77. The United States pointed out, in the report on its practice, that clauses concerning the termination of provisional application may refer to the treaty's entry into force,[54] to an express decision not to ratify the treaty[55] or to the expiration of a given time period,[56] among other issues.

78. It should be stressed that nothing in the 1969 Vienna Convention prevents a State from terminating the provisional application of a treaty and subsequently rejoining the treaty regime through ratification or accession.

79. The Convention is silent in this regard, as it assumes, rather, that a decision by a State to cease the provisional application of a treaty indicates an intention not to become a party to it in the future, as reflected in article 25, paragraph 2; nonetheless, such a decision may be based on national circumstances of various kinds, of a legal or political nature, or it may be a means of reminding other negotiating or signatory States of the importance of conducting and concluding their ratification processes.[57]

80. In any event, "general international treaty law has never established a rule of no return with respect to the signing of treaties".[58]

81. Lastly, the intention of a State that has decided to terminate, by some means or other, the provisional application of a treaty is subject to the requirement that it explain to the other States to which the treaty applies provisionally, or to the other negotiating or signatory States, whether that decision was taken for other reasons. During the negotiation of the 1969 Vienna Convention, various ideas concerning the possible inclusion of a provision on termination as a consequence of unreasonable delay or reduced probability of ratification were discussed, but were not accepted.[59]

82. It should be borne in mind, however, that provisional application cannot be revoked arbitrarily, in view of the obligations it has created, as established in principle 10 of the above-mentioned guiding principles applicable to unilateral declarations of States capable of creating legal obligations.

83. Furthermore, the termination of the provisional application of a treaty does not necessarily entail the termination of obligations created by such provisional application prior to its termination, as indicated in article 70, paragraph 1 (*b*), of the 1969 Vienna Convention, regarding the termination of a treaty.

84. Considering that provisional application is intended to serve as a transitional stage prior to a treaty's entry into force, the treaty ceases to be applied provisionally precisely when it enters into force, but it is clear that performance obligations under provisional application will produce legal effects specific to each case.

85. When a treaty enters into force, provisional application will terminate for the States parties, but not for those States that have applied the treaty provisionally but have not yet expressed their consent to be bound by the treaty.[60] The 1969 Vienna Convention supports the presumption that provisional application ends when the treaty enters into force, but does not prohibit the continuation of provisional application by those States that are not yet in a position to ratify or accede to the treaty. This presumption was also discussed during the negotiations that led to the adoption of article 25 of the 1969 Vienna Convention, but references to termination based on the passage of time were not accepted.[61]

[54] See Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982; Agreement relating to the International Telecommunications Satellite Organization "INTELSAT"; and Agreement on an International Energy Program.

[55] See Agreement relating to the International Telecommunications Satellite Organization "INTELSAT"; and Agreement on an International Energy Program.

[56] See Agreement relating to the International Telecommunications Satellite Organization "INTELSAT"; Agreement on an International Energy Program; Agreement between the United States of America and Cuba Extending the Provisional Application of the Maritime Boundary Agreement of December 16, 1977 (effected by an exchange of notes at Havana and Washington, 24 November 2011 and 8 February 2012), TIAS 12-208.1.

[57] Rogoff and Gauditz, "The provisional application of international agreements", p. 52.

[58] Gutiérrez Baylón, *Derecho de los Tratados*, p. 184.

[59] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/658, paras. 101–108.

[60] Lefeber, "Treaties, provisional application", para. 10.

[61] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/658, paras. 91–100.

Chapter III

Legal consequences of the breach of a treaty applied provisionally

86. Given that provisional application produces legal effects and is capable of creating rights and obligations under international law, it may be concluded that a breach of an obligation arising from the provisional application of a treaty will also have legal consequences, including all those established by the law of State responsibility for internationally wrongful acts.

87. Under the treaty regime established by the 1969 Vienna Convention, in particular article 60, the operation of a treaty may be suspended or terminated as a result of a breach of the treaty.

88. It may be assumed that, in the aforementioned cases in which provisional application is the result of an agreement between two or more States, the breach of a treaty applied provisionally may also give rise to the termination or suspension of provisional application by any State or States that have been affected by the breach.

89. The universally recognized international legal principle *inadimplenti non est adimplendum*[62] underlies this legal consequence. This principle modifies the rule of *pacta sunt servanda* and incorporates the concept of negative reciprocity.[63]

90. This circumstance may be more likely to arise in the case of breaches during the provisional application of bilateral treaties. In any event, "the breach does not invariably entail the termination of the treaty or the impairment of the agreement as a whole".[64]

91. As established by the Commission in the commentary to draft article 1 of the draft articles on responsibility of States for internationally wrongful acts, it is a principle of international law that every internationally wrongful act of a State entails the international responsibility of that State.[65] This principle has been widely reiterated in international jurisprudence.[66]

92. Article 2, which refers to the elements of an internationally wrongful act of a State, establishes that

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (*a*) is attributable to the State under international law; and
>
> (*b*) constitutes a breach of an international obligation of the State.

93. As it has already been established that provisional application can create obligations for a State, acts attributable to the State that constitute a breach of such an international obligation will meet the definition set out in that article.

94. The Special Rapporteur shares the view expressed in the Commission's discussions on this subject by several members who reiterated that the existing regime concerning the responsibility of States for internationally wrongful acts also applies to cases in which a State breaches obligations arising from the provisional application of a treaty.

95. That being the case, the Special Rapporteur will not go into further detail on the responsibility regime, but will merely reiterate the applicability of the existing legal regime.

[62] *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, dissenting opinion of M. Anzilotti, p. 50.

[63] Simma and Tams, "1969 Vienna Convention. Article 60: termination or suspension of the operation of a treaty as a consequence of its breach", p. 1353.

[64] Gutiérrez Baylón, *Derecho de los Tratados*, pp. 191–192.

[65] *Yearbook … 2001*, vol. II (Part Two), para. (1) of the commentary to draft article 1, p. 32.

[66] See, for example, *Phosphates in Morocco, Preliminary Objections, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28; *S.S. "Wimbledon", Judgment, 1923, P.C.I.J., Series A, No. 1*, p. 15, at p. 30; *Factory at Chorzów (Claim for Indemnity) (Jurisdiction), Judgment No. 8, P.C.I.J., Series A, No. 9*, 1927, p. 3, at p. 21; *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at p. 23; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at para. 283; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at para. 47; *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174, at p. 184.

Chapter IV

Conclusion

96. The Special Rapporteur does not find it necessary to revert in this second report to the question of what the final outcome of the consideration of this topic should be. Rather, he will simply refer the reader to the ideas outlined in his first report and in his presentation to the Commission.

97. The Special Rapporteur would like to be more precise as to his plans for future work, but must recall that his efforts will be highly contingent on receiving more information on State practice, which will provide him with a representative sample of such practice from which to draw conclusions.

98. At any rate, the Special Rapporteur is mindful that his mandate also includes studying the question of the provisional application of treaties by international organizations. This will naturally be addressed as part of his further work. The Special Rapporteur will of course be highly appreciative of any guidance and advice in that regard from the members of the Commission.

IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

[Agenda item 9]

DOCUMENT A/CN.4/672

Second report on identification of customary international law, by Sir Michael Wood, Special Rapporteur*

[*Original: English*]
[*22 May 2014*]

CONTENTS

Multilateral instruments cited in the present report

	Source
Bolivarian Agreement on Extradition (Caracas, 18 July 1911)	OAS, *Official Records* (OEA/SER.X.1), p. 19.
Convention on the Continental Shelf (Geneva, 29 April 1958)	United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311.
Convention on the settlement of investment disputes between States and nationals of other States (Washington, D.C., 18 March 1965)	*Ibid.*, vol. 575, No. 8359, p. 159.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	*Ibid.*, vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.*, vol. 999, No. 14668, p. 171.

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	Source
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	A/CONF.67/16.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
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Introduction

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 held an initial debate on the basis of a note by the Special Rapporteur, Sir Michael Wood.[1] Also in 2012 the General Assembly, following a debate in the Sixth Committee, noted with appreciation the Commission's decision to include the topic in its programme of work.[2]

2. At its sixty-fifth session, in 2013, the Commission held a general debate[3] on the basis of the Special Rapporteur's first report,[4] which was of an introductory nature, and of a memorandum by the Secretariat on elements in the previous work of the International Law Commission that could be particularly relevant to the topic.[5] In light of the debate, and following informal consultations, the Commission decided to change the title of the topic to read "Identification of customary international law". This was done in part to avoid difficulties with the translation of the word "evidence" into other official United Nations languages, and to emphasize that the principal objective of the topic was to offer guidance to those called upon to identify the existence of a rule of customary international law. The change in title was made on the understanding that matters relating both to what one Commission member referred to as the "formative elements", and to evidence or proof of customary international law, remained within the scope of this topic.[6]

3. In addition, the Special Rapporteur drew the following conclusions[7] from the debate and informal consultations:

(*a*) There was general support among members of the Commission for the "two-element" approach, that is to say, that the identification of a rule of customary international law required an assessment of both general practice and acceptance of that practice as law. Virtually all those who spoke expressly endorsed this approach, which was also supported by the wide array of materials covered in the first report, and none questioned it. At the same time, it was recognized that the two elements could sometimes be "closely entangled", and that the relative weight to be given to each could vary according to the circumstances;

(*b*) There was widespread agreement that the primary materials for seeking guidance on the topic would likely be the approach of States, as well as that of international courts and tribunals, first among them the International Court of Justice;

(*c*) There was general agreement with the view that the outcome of the work on the topic should be of a practical nature, and should be a set of "conclusions" with commentaries. Moreover, there was general agreement that, in drafting conclusions, the Commission should not be overly prescriptive;

(*d*) There was general agreement that the Commission would need to deal to some degree with the relationship between customary international law and other sources of international law, in particular treaties and general principles of law. In addition, there was interest in looking into "special" or "regional" customary international law;

(*e*) Most members of the Commission were of the view that *jus cogens* should not be dealt with as part of the present topic.

4. During the Sixth Committee debate in 2013, delegations welcomed the "two-element" approach, while stressing the need to address the question of the relative weight to be accorded to State practice and *opinio juris*. There were differing views on whether to include a detailed study of *jus cogens* within the present topic. The Commission's intention to consider the relationship between customary international law and other sources of international law was generally welcomed, though it was noted that the question of the hierarchy of sources was for separate consideration. The importance of looking at "special" or "regional" customary international law, including "bilateral custom", was stressed.[8]

5. Delegations reaffirmed the importance, when identifying customary international law, of having regard as far as possible to the practice of States from all regions, while noting, however, that relatively few States systematically compiled and published their practice. Caution was expressed concerning the analysis of State practice, in particular with respect to decisions of domestic and regional courts. It was further suggested that the practice of international organizations should be considered.[9]

6. One or two delegations proposed that the form of the final outcome of the Commission's work on the topic should be considered at a later stage; nevertheless, the Commission's present intention that the outcome should take the form of "conclusions" with commentaries was widely supported. The importance of not being overly prescriptive was emphasized, as was the notion that the flexibility of customary international law must be preserved.[10]

7. At its sixty-fifth session, in 2013, the Commission requested States

to provide information, by 31 January 2014, 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:

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[1] See *Yearbook … 2012*, vol. II (Part One), document A/CN.4/653, para. 1.

[2] General Assembly resolution 67/92 of 14 December 2012, para. 7.

[3] *Yearbook … 2013*, vol. I, 3181st–3186th meetings; see also *ibid.*, vol. II (Part Two), paras. 66–107.

[4] See *ibid.*, vol. II (Part One), document A/CN.4/663.

[5] See *ibid.*, document A/CN.4/659.

[6] *Ibid.*, vol. I, 3186th meeting. It is worthwhile to recall in this context Jennings' observation that "in international law the questions of whether a rule of customary law exists, and how customary law is made, tend in practice to coalesce" (Jennings, "What is international law and how do we tell it when we see it?", p. 60). See also Wolfke, *Custom in Present International Law*, p. 116: "The ascertainment and formation of customary international law are of necessity closely interrelated, since, on the one hand, the process of formation determines the means of identification of customary rules, and on the other, the action of ascertaining custom or its elements influences its further development. This interdependence is already evident from the content of Article 38.1 (*b*) of the Statute of the [International Court of Justice]."

[7] *Yearbook … 2013*, vol. I, 3186th meeting.

[8] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session, document A/CN.4/666, paras. 43–44.

[9] *Ibid.*, paras. 45–46.

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

(*a*) official statements before legislatures, courts and international organizations; and

(*b*) decisions of national, regional and subregional courts.[11]

As of the date of writing the present report, written contributions had been received from nine States,[12] for which the Special Rapporteur was very grateful. Further contributions would be welcome at any time.

8. The Special Rapporteur also welcomes the contribution that can be made by academic bodies to thinking on the subject. Over the last year or two, various institutions have organized meetings on aspects of the topic, which were both encouraging and stimulating. Since the Commission's sixty-fifth session, there have also been some new relevant writings, as well as judgments of international courts and tribunals, which have been taken into account in the present report.

9. The first report[13] sought to describe the basic materials to be consulted for the purposes of the present topic, and considered certain preliminary issues. This second report covers central questions concerning the approach to the identification of rules of "general" customary international law, in particular the two constituent elements and how to determine whether they are present. In chapter I of the report, which covers the scope and outcome of the topic, it is explained that the draft conclusions concern the method for identifying rules of customary international law, and do not enter upon the actual substance of such rules. Chapter II, concerning the use of terms, includes a definition of customary international law which is inspired by the wording of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice, but does not refer directly to that provision. Chapter III describes the basic "two-element" approach in general terms, these elements being "a general practice" and "accepted as law" (commonly referred to as "State practice" and "*opinio juris*", respectively). Chapters IV and V contain the more detailed inquiry into the two elements, which (as explained in chapter VI on the future programme of work) will be continued in the third report.

10. It seems desirable to cover in the same report both practice and *opinio juris*, given the close relationship between the two. At the same time, doing so necessarily means that a large amount of ground had to be covered in the present report without the benefit of detailed discussions within the Commission and Sixth Committee. Chapters IV and V are thus necessarily of a rather preliminary nature; the Special Rapporteur may need to review and further refine both the text and the proposed conclusions in the next report.

11. The present report proposes 11 draft conclusions, which appear together in the annex. As indicated there, it is proposed that the draft conclusions should be divided into four parts: introduction; two constituent elements; a general practice; and accepted as law. This division indicates the general structure envisaged by the Special Rapporteur. Further draft conclusions will be proposed in the next report, but—subject always to the views of members of the Commission—they are unlikely to affect the structure.

[11] *Yearbook … 2013*, vol. II (Part Two), para. 26.

[12] Belgium, Botswana, Cuba, the Czech Republic, El Salvador, Germany, Ireland, the Russian Federation and the United Kingdom.

[13] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663.

Chapter I

Scope and outcome of the topic

12. The debates in the Commission and in the Sixth Committee in 2013 confirmed the utility of the present topic, which aims particularly to offer practical guidance to those, in whatever capacity, called upon to identify rules of customary international law, especially those who are not necessarily specialists in the general field of public international law. It is important that there be a degree of clarity in the practical application of this central aspect of international law, while recognizing of course that the customary process is inherently flexible. As is widely recognized:

> The question of sources is … of critical importance; and the jurisprudential and philosophical debates that continue to rage have much more than an academic significance. It is right and proper to find them absorbing, and to participate in the intellectual exchanges. But we should not ignore that the need for them is a damaging acknowledgment of inadequacies in a legal system.[14]

13. It is not, of course, the object of the present topic to determine the substance of the rules of customary international law, or to address the important question of who is bound by particular rules (States, international organizations or other subjects of international law). The topic deals solely with the methodological question of the identification of customary international law.

14. The present topic is and its conclusions are intended to be without prejudice to ongoing work on other topics. It will also be important, as work on the topic proceeds, to avoid entering into matters relating to other sources of international law, including general principles of law (Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice). The work will also be without prejudice to questions relating to *jus cogens*, which could be the subject of a separate topic.

15. In light of the foregoing, the following draft conclusion is proposed:

"Draft conclusion 1. Scope

"1. The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.

"2. The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (*jus cogens*). "

[14] Higgins, *Problems and Process: International Law and How We Use It*, p. 17.

Chapter II

Use of terms

16. In his first report, the Special Rapporteur proposed a definition of "customary international law" that consisted of a simple cross-reference to Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice.[15] A number of members of the Commission felt that a cross-reference was not entirely satisfactory, both because it was not self-contained and because it might be seen as relying too heavily on the Statute, which was in terms only applicable to the International Court of Justice.[16]

17. The Special Rapporteur therefore proposes that the Commission adopt a definition of customary international law that draws upon the language of the Statute of the International Court of Justice, without referring directly to it. This would have the advantage of maintaining the key concepts ("a general practice", "accepted as law"), which are the basis of the approach not only of the International Court of Justice itself, but also of other courts and tribunals and of States.[17] The language of Article 38, paragraph 1 (*b*), now almost a century old, continues to be widely relied upon and has lost none of its relevance. Indeed, compared with what are perhaps the terms in more common use today ("State practice" and "*opinio juris*"), the wording of the Statute seems less problematic and more modern. In any event, the division into two distinct elements mandated by the language of the Statute "constitutes an extremely useful tool for 'discovering' customary rules".[18]

18. Another term that it may perhaps be useful to define is "international organization". It would seem appropriate to adopt the definition used in article 1, paragraph 1 (1), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, as well as article 2, paragraph 1 (*i*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, that is, that "international organization" means an "intergovernmental organization". As is clear from the Commission's commentary, the more elaborate definition employed in the draft articles on the responsibility of international organizations was devised for the particular circumstances of that topic.[19] In the present context, the more general and broader definition would seem preferable.

19. It will be for consideration, as the topic proceeds, whether further terms need to be defined. If there is eventually a "use of terms" provision, it may be desirable to include a saving clause along the lines of those contained in earlier texts based on the Commission's drafts, such as article 2, paragraph 3, of the United Nations Convention on Jurisdictional Immunities of States and Their Property.[20]

20. In light of the above, the following draft conclusion is proposed:

"Draft conclusion 2. Use of terms

"For the purposes of the present draft conclusions:

"(*a*) 'Customary international law' means those rules of international law that derive from and reflect a general practice accepted as law;

"(*b*) "International organization" means an intergovernmental organization;

"(*c*) …"

[15] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663, para. 45.

[16] *Ibid*., para. 32: "Article 38, paragraph 1, has frequently been referred to or reproduced in later instruments. Although in terms it only applies to the International Court of Justice, 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." The chapeau of Article 38, paragraph 1, as adopted in 1945 ("The Court, whose function is to decide *in accordance with international law**, such disputes as are submitted to it, shall apply:") strongly suggests that this provision of the Statute is intended to state the sources of international law.

[17] See paragraphs 24–25 below.

[18] Pellet, "Article 38", p. 813. See also Danilenko, "The theory of international customary law", pp. 10–11: "the definition of custom provided by Article 38 of the Statute is extremely important for the theory and practice of customary international law. In the first place, Article 38 reaffirms the recognition by all States of international custom as one of the main sources of international law … Secondly, Article 38 reflects the agreement of all members of the international community on basic constituent elements required for the formation and operation of customary rules of international law, namely, practice, on the one hand, and acceptance of this practice as law, on the other"; Arangio-Ruiz, "Customary law: a few more thoughts about the theory of 'spontaneous' international custom", p. 105.

[19] *Yearbook … 2011*, vol. II (Part Two), para. 88, paras. (1)–(15) of the commentary to draft article 2.

[20] The article reads: "The provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State."

Chapter III

Basic approach: two constituent elements

21. The present report proceeds on the basis that the identification of a rule of customary international law requires an assessment of both practice and the acceptance of that practice as law ("two-element" approach).[21] There was widespread support for this approach within the Commission in the course of its debate in 2013, as well as in the Sixth Committee.[22] As explained below, the two-element approach is indeed generally adopted in the

[21] See also paragraph 3 (*a*) above.

[22] See also paragraph 24 below.

practice of States and the decisions of international courts and tribunals, including the International Court of Justice. It is widely endorsed in the literature.

22. Under this approach, a rule of customary international law may be said to exist where there is "a general practice" that is "accepted as law". These two requirements, "the criteria which [the International Court of Justice] has repeatedly laid down for identifying a rule of customary international law",[23] must both be identified in any given case to support a finding that a relevant rule of customary international has emerged. Thus, for a persuasive analysis of whether a rule of customary international law exists, "it would be necessary to be satisfied that such a rule meets the conditions required for the birth of an international custom".[24]

23. The two elements are indeed indispensable for any rule of customary international law properly so called. As one author has explained:

> Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear.[25]

24. The two-element approach is widely supported in State practice. To mention just a few recent examples, Rwanda, the United States of America and Uruguay have stated, in bilateral investment treaties, "their shared understanding" that customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation".[26] The Netherlands and the United Kingdom of Great Britain and Northern Ireland have similarly stated that "the two constituent elements of customary international law [are] the widespread and consistent practice of States (State practice) and the belief that compliance is obligatory under a rule of law (*opinio juris*)".[27] Such a position was adopted by States members of the European Union as a whole in 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".[28] The Supreme Court of Singapore has ruled that "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 [customary international law]",[29] and in Slovenia the Constitutional Court has likewise held that norms "can become international customary rules when they are applied by a great number of States with the intention of respecting a rule in international law".[30] The Constitutional Court and Supreme Court of the Czech Republic have also recognized the two elements as essential,[31] as has the New Zealand Court of Appeals, which observed that "customary international law, the (unwritten) rules of international law binding on all States … arise when States follow certain practices generally and consistently out of a sense of legal obligation".[32] That both general practice and acceptance as law are required for the formation and identification of customary international law has been acknowledged, moreover, by, among others, Austria, India, Israel, the Islamic Republic of Iran, Malaysia, the Nordic countries, Portugal, the Russian Federation, South Africa, and Viet Nam in their interventions in the Sixth Committee debates on the 2012 and 2013 reports of the Commission.[33] In recent pleadings before the International Court of Justice, States continue to base their arguments upon the two-element approach.[34]

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[23] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 122, para. 55; the International Court of Justice went on, in the same paragraph, to specify that "[i]n particular … the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*"; see also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77 ("Two conditions must be fulfilled. 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"); *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 29, para. 27 ("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"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 97, para. 183 ("The Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States"); Tomka, "Custom and the International Court of Justice", p. 197 ("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' ").

[24] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 47 (joint separate opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda).

[25] Wolfke, *Custom in Present International Law*, pp. 40–41.

[26] See annex A of the Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (Kigali, 19 February 2008) (*Treaties and Other International Acts Series* 12-0101); and annex A of the Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (Montevideo, 4 November 2005) (*ibid.*, 06-1101), in which the parties "confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation."

[27] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *amici curiae* in support of the respondents in the case of *Esther Kiobel et al. v. Royal Dutch Petroleum Co. et al.* (3 February 2012) before the United States Supreme Court, p. 8.

[28] *Official Journal of the European Union,* vol. 52, No. C 303, 15 December 2009, p. 13, para. 7.

[29] *Yong Vui Kong v. Public Prosecutor* (Supreme Court of Singapore—Court of Appeal, 14 May 2010), para. 96, ILR, vol. 143, p. 374.

[30] Decision No. U-I-146/07, 13 November 2008, para. 19, footnote xix; see also case No. Up-13/99-24, decision of 8 March 2001, para. 14.

[31] *Succession of States and Individuals*, file No. II. US 214/98 (30 January 2001); and *Diplomatic Privileges and Immunities of a Visiting Prince Case*, file No. 11 Tcu 167/2004 (16 December 2004).

[32] *Zaouvi v. Attorney General*, CA20/04, Court of Appeal, Wellington, Judgment (30 September 2004), para. 34.

[33] *Yearbook … 2012*, vol. II (Part Two); and *Yearbook … 2013*, vol. II (Part Two). The statements by the various States during these debates may be found in the *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 18th–25th meetings (A/C.6/67/SR.18–A/C.6/67/SR.25), and *ibid., Sixty-eighth Session*, 17th–26th and 29th meetings (A/C.6/68/SR.17–A/C.6/68/SR.26 and A/C.6/68/SR.29).

[34] For example, in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Germany argued that "[n]o general practice, supported by *opinio juris*, exists as to any enlargement of the derogation from the principle of State immunity in respect of violations of humanitarian law committed by military forces during an armed

25. Other international courts and tribunals likewise accept that the identification of rules of customary international law requires an inquiry into the two elements. As noted in the first report, notwithstanding the specific contexts in which these other courts and tribunals work, overall there is substantial reliance on the approach and case law of the Permanent Court of International Justice and the International Court of Justice, including the constitutive role attributed to the two elements of State practice and *opinio juris*.[35]

26. Most authors also adopt the two-element approach. It is to be found in both textbooks and treatises on public international law[36] and in monographs on or dealing with custom, whether specifically on sources[37] or on some other topic of international law.[38] For example, *Oppenheim* states that "the terms of Article 38 (1) (*b*) … make it clear that there are two essential elements of custom, namely practice and *opinio juris*".[39] And the recent edition of *Brierly's Law of Nations: An Introduction to the Role of Law in International Relations* states:

> Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it as obligatory … in the words of Article 38 (1) (*b*) of the Statute, we must examine whether the alleged custom shows a "general practice accepted as law".[40]

27. As was noted in the first report, certain authors have sought to devise alternative approaches, often emphasizing one constituent element over the other, be it practice or *opinio juris*, or even excluding one element altogether.[41] This was also the case, to a degree, with the work of the International Law Association that culminated in its London Statement of Principles Applicable to the Formation of General Customary International Law (hereinafter the "London Statement of Principles"),[42] which tended to downplay the role of the subjective element.[43] While such writings are always interesting and provocative, and have been (and should be) duly taken into account, it remains the case that they do not seem to have greatly influenced the approach of States or courts. The two-element approach remains dominant.[44]

28. The first report raised the question as to whether there might be different approaches to the identification of rules of customary international law in different fields.[45] For example, there have been suggestions in the

conflict" (Memorial of the Federal Republic of Germany, 12 June 2009, p. 33, para. 55); and Italy, which was not relying on customary international law, suggested in its Counter-Memorial that "the question at issue in the present case is not whether there is a widespread and consistent practice, supported by the *opinio juris*, pointing to the existence of an international customary rule permitting in general terms the denial of immunity in cases involving gross violations of international humanitarian law or human rights law" (Counter-Memorial of Italy, 22 December 2009, p. 82, para. 4.108). For another recent example, see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, in particular the questions put to the parties by members of the Court at the close of the public hearing held on 16 March 2012: compilation of the oral and written replies and the written comments on those replies, pp. 20–48, especially at pp. 24–25 (Belgium), the question put to Belgium—Senegal being invited to comment—by Judge Greenwood at the end of the public sitting of 16 March 2012. In other instances as well, just as States have not argued for the existence of a rule of customary international law based on the presence of either practice or *opinio juris* alone, they have not attempted to question the existence of an alleged rule of customary international law arguing that the two-element approach is theoretically flawed.

[35] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663, paras. 66–82.

[36] See, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, pp. 25–31; Cassese, *International Law*, p. 157 ("the fundamental elements constituting custom: State practice (*usus* or *diuturnitas*) and the corresponding views of States (*opinio juris* or *opinio necessitatis*)); Dupuy and Kerbrat, *Droit international public*, p. 364, para. 324 ("The bivalence of custom is directly reflected in its portrayal by the different strands in the doctrine, whether objectivist or voluntarist. For all the strands, bolstered by the aforementioned provision contained in article 38 (*b*) of the Statute of the Hague Court (the Permanent Court of International Justice, later the International Court of Justice), the presence of two elements is necessary in order for custom to become a rule of law"); Bos, *A Methodology of International Law*, p. 109: ("For a custom to exist one merely has to ascertain the existence of the alleged factual aspects of it, i.e. its material and psychological components, and to put these to the test of the definition of custom"); Lowe, *International Law*, pp. 36–63; Shaw, *International Law*, p. 74 ("It is possible to detect two basic elements in the make-up of a custom. These are the material facts, that is, the actual behaviour of States and the psychological or subjective belief that such behaviour is law"); see Damrosch and others, *International Law: Cases and Materials* ("What is clear is that the definition of custom comprises two distinct elements"); Dailler, Forteau and Pellet, *Droit international public*, p. 353 ("It is accepted by all that the customary process is not complete unless two elements are present"); Murphy, *Principles of International Law*, pp. 92–93 ("States through their practice, and international lawyers through writings and judicial decisions, have agreed that customary international law exists whenever two key requirements are met: (1) a relatively uniform and consistent State practice regarding a particular matter; and (2) a belief among States that such practice is legally required"); Clapham, *Brierly's Law of Nations: An Introduction to the Role of Law in International Relations*, pp. 57–63; Crawford, *Brownlie's Principles of Public International Law*, p. 23 ("The existence of custom is … the conclusion of someone (a legal adviser, a court, a government, a commentator) as to two related questions: (*a*) is there a general practice; (*b*) is it accepted as international law?"); Díez de Velasco Vallejo, *Instituciones de derecho internacional público*, p. 136 ("an existing practice among international actors that is generally accepted as law"); Klabbers, *International Law*, p. 26 ("two main requirements: there must be a general practice, and this general practice must be accepted as law"); Santulli, *Introduction au droit international*, p. 45 ("the classic doctrine of the two elements of custom: practice, which is the material element, and compliance or *opinio juris*, which is the voluntary (or 'psychological') element").

[37] See, for example, Millán Moro, *La "Opinio Iuris" en el Derecho Internacional Contemporáneo*; Thirlway, *The Sources of International Law*, pp. 56–57 ("The traditional criteria in international law for the recognition of a binding custom are that there should have been sufficient State practice … and that this should have been accompanied by, or be backed by, evidence of what is traditionally called *opinio juris* or *opinio juris sive necessitatis*.").

[38] For example, Corten, *Le droit contre la guerre*, chap. 1; for an earlier edition in English, see Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, chap. 1.

[39] Jennings and Watts (eds.), *Oppenheim's International Law*, p. 27.

[40] Clapham, *Brierly's Law of Nations: An Introduction to the Role of Law in International Relations*, p. 57.

[41] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663, paras. 97–101.

[42] *Report of the Sixty-ninth Conference held in London 25–29 July 2000*, pp. 712–777 (London Statement of Principles); resolution 16/2000 (Formation of General Customary International Law) (*ibid.*, p. 39); see also *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663, paras. 89–91.

[43] The London Statement of Prinicples referred to "the alleged necessity for the 'subjective' element" (London Statement of Principles (see previous footnote), p. 718, para. 10).

[44] See also Sender and Wood, "The emergence of customary international law: between theory and practice" ("The two-element approach has … enabled the formation and identification of rules of international law that have for the most part won wide acceptance, while allowing customary international law to retain its characteristic flexibility. It has proven to be both useful and stable, and it remains authoritative through the ICJ Statute, which is binding on 193 States. Other theories on how a rule of customary international law emerges are, essentially, policy approaches; as such they may be instructive, but they remain policy, not law.").

[45] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663, para. 19.

literature,[46] occasionally echoed in practice,[47] that in such fields as international human rights law, international humanitarian law and international criminal law, among others, one element may suffice in constituting customary international law, namely *opinio juris*.[48] However, the better view is that this is not the case.[49] There may, nonetheless, be a difference in application of the two-element approach in different fields (or, perhaps more precisely, with respect to different types of rules): for example, it may be that "for purposes of … [a specific] case the most pertinent State practice"[50] would be found in one particular form of practice that would be given "a major role".[51] But the underlying approach is the same: both elements are required. Any other approach risks artificially dividing international law into separate fields, which would run counter to the systemic nature of international law.[52] In any case, as will be illustrated below, it is often difficult to consider the two elements separately.[53]

[46] *Ibid.*, footnotes 31−33; see also Kolb, "Selected problems in the theory of customary international law", p. 128: "The time has come to put *à plat* the theory of custom and to articulate different types (and thus elements) of it in relation to different subject matters and areas. There is not one international custom; there are many international customs whose common family-bond is still to be shown. Consequently, a new map of international customary law has to be drawn, reflecting the various contours of international life, instead of artificially pressing the growing diversity of that experience into the Procrustean bed of traditional practice and *opinio juris*"; Cassese, *International Law*, pp. 160−161: "*Usus* and *opinio*, as elements of customary law, play a different role in a particular branch of international law, the humanitarian law of armed conflict … In consequence [of the wording of the Martens Clause] it is logically admissible to infer (and is borne out by practice) that the requirement of State *practice* may not need to apply to the formation of a principle or a rule based on the laws of humanity or the dictates of public conscience."

[47] See, for example, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T (International Tribunal for the Former Yugoslavia Trial Chamber), Judgment, 14 January 2000, pp. 1742–1743, para. 527: "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"; see also Appeal Judgement of the Extraordinary Chambers in the Courts of Cambodia (Supreme Court Chamber), Case No. 001/18-07-2007-ECCC/SC (3 February 2012), p. 48, para. 93 ("With respect to customary international law, the Supreme Court Chamber considers that in evaluating the emergence of a principle or general rule concerning conduct that offends the laws of humanity or the dictates of public conscience in particular, the traditional requirement of 'extensive and virtually uniform' State practice may actually be less stringent than in other areas of international law, and the requirement of *opinio juris* may take pre-eminence over the *usus* element of custom.").

[48] It has similarly been suggested that "a sliding scale" by which consistent State practice may establish a rule of customary international law even without any evidence of acceptance of the practice as law, and a clearly established acceptance as law may establish a rule of customary international law without any evidence of a settled practice, could be utilized "depend[ing] on the activity in question and on the reasonableness of the asserted customary rule": see Kirgis, "Custom on a sliding scale", p. 149 (the model also refers to situations where not "much" of either element, respectively, exists).

[49] See also the statements on behalf of China, Israel, the Islamic Republic of Iran, Poland, the Russian Federation, Singapore and South Africa in the 2013 Sixth Committee debate on the work of the Commission (see footnote 33 above), all calling for a unified approach to be applied; Treves, "Customary international law", p. 938, para. 3 ("The essential characteristic which customary international law rules have in common is the way they have come into existence and the way their existence may be determined"; Kammerhofer, "Orthodox generalists and political activists in international legal scholarship".).

[50] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 132, para. 73.

[51] *Ibid.*, p. 162, para. 4 (separate opinion of Judge Keith); see, for example, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 614, para. 88 ("In contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and [the Convention on the settlement of investment disputes between States and nationals of other States], which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative"); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (International Tribunal for the Former Yugoslavia Appeals Chamber), 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 lawmaking 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"); see also *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (International Tribunal for the Former Yugoslavia Appeals Chamber), 15 July 1999, p. 157, para. 194; Conforti and Labella, *An Introduction to International Law*, p. 32 ("The weight given to the acts depends on the content of the international customary rule. For example, treaties have great importance in matters of extradition, while domestic court decisions have more weight in questions of the jurisdictional immunities of foreign States and foreign State organs, etc."); cf. *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 175–176 and 178 (dissenting opinion of Judge Tanaka) ("To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter … The appraisal of factors must be relative to the circumstances and therefore elastic; it requires the teleological approach … In short, the process of generation of a customary law is relative in its manner according to the different fields of law, as I have indicated above. The time factor, namely the duration of custom, is relative; the same with factor of number, namely State practice. Not only must each factor generating a customary law be appraised according to the occasion and circumstances, but the formation as a whole must be considered as an organic and dynamic process. We must not scrutinize formalistically the conditions required for customary law and forget the social necessity, namely the importance of the aims and purposes to be realized by the customary law in question").

[52] As was stressed at the outset of the 2006 fragmentation study, "International law as a legal system" (*Yearbook … 2006*, vol. II (Part Two), pp. 177–178, para. 251, conclusion (1)). In addition, "When courts ignore the traditional requirements for customary international law or fail to subject them to any strict scrutiny they risk giving tacit weight to what has been called 'the rush to champion new rules of law'… [In such cases] [s]cant regard is given to the niceties of State consent or the likelihood of compliance with such easily pronounced norms" (Boyle and Chinkin, *The Making of International Law*, p. 285).

[53] See also Thirlway, *The Sources of International Law*, p. 62: "Practice and *opinio juris* together supply the necessary information for it to be ascertained whether there exists a customary rule, but the role of each—practice and *opinio*—is not uniquely focused; they complement one another"; and London Statement of Principles (footnote 42 above), p. 718, para. 10 (*c*) ("It is in fact often difficult or even impossible to disentangle the two elements.").

29. All evidence must be considered in light of its context.[54] In assessing the existence or otherwise of the two constituent elements, be it by reviewing primary evidence or by looking to subsidiary means, great care is required. While "evidence can be taken [from a variety of sources] … the greatest caution is always necessary".[55] Much depends on the particular circumstances in determining what the relevant practice actually is, and to what extent it is indeed accepted as law,[56] and different weight may be given to different evidence. For example, "Particularly significant are manifestations of practice that go against the interest of the State from which they come, or that entail for them significant costs in political, military, economic, or other terms, as it is less likely that they reflect reasons of political opportunity, courtesy, etc."[57] In a similar manner, the care with which a statement is made is a relevant factor; less significance may be given to off-the-cuff remarks made in the heat of the moment.

30. Ascertaining whether a rule of customary international law exists is a search for "a practice, which … has gained so much acceptance among States that it may now be considered a requirement under general international law".[58] Such an exercise may be an "arduous and complex process",[59] not least because "any alleged rule of customary law must [of course] be proved to be a valid rule of international law, and not merely an unsupported proposition".[60] As elaborated below, for this task:

> caution and balance are indispensable, not only in determining the right mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught.[61]

31. In light of the above, the following draft conclusions are proposed:

> "*Draft conclusion 3. Basic approach*
>
> "To determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law.
>
> "*Draft conclusion 4. Assessment of evidence*
>
> "In assessing evidence for a general practice accepted as law, regard must be had to the context, including the surrounding circumstances."

[54] See also *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 200 ("There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgements of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court can not ignore the general tenor of the correspondence.").

[55] Kunz, "The nature of customary international law", p. 667.

[56] See also Treves, "Customary international law", pp. 943–944, para. 28: "[Manifestations of practice] help in ascertaining what is customary international law in a given moment. In performing such a task, caution and balance are indispensable, not only in determining the right mix of what States say and do, want and believe, but also in being aware of the ambiguities with which many elements of practice are fraught."

[57] *Ibid.*, p. 944, para. 30.

[58] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 83, para. 204.

[59] Petrič, "Customary international law in the case law of the Constitutional Court of the Republic of Slovenia". See also the Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *amici curiae* in support of the respondents in the case of *Esther Kiobel et al. v. Royal Dutch Petroleum Co. et al.* (3 February 2012) before the United States Supreme Court, p. 13 ("The methodology of determining what constitutes a new rule of international law is therefore … no straightforward matter and requires painstaking analysis to establish whether the necessary elements of State practice and *opinio juris* are present"); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 100, para. 9 (separate opinion of Judge De Castro) ("It is not easy to prove the existence of a general practice accepted as law"); Kunz, "The nature of customary international law", p. 667 ("The ascertainment whether the two conditions of the custom procedure have been fulfilled in a concrete case … is a difficult task.").

[60] Shaw, *International Law*, p. 144.

[61] Treves, "Customary international law", pp. 943–944, para. 28. See also Boyle and Chinkin, *The Making of International Law*, p. 279 ("Applying the criteria for establishing custom is not a scientific process, the accuracy of which can be measured. Rather it requires an evaluation of the facts and arguments"); Birnie and Boyle, *International Law and the Environment*, p. 16 ("The identification of customary law has always been, and remains, particularly problematical, requiring the exercise of skill, judgment, and considerable research.").

Chapter IV

A general practice

32. Practice,[62] often referred to as the "material" or "objective" element, plays an "essential role" in the formation and identification of customary international law.[63] It may be seen as the "raw material" of customary international law, as the latter emerges from practice, which "both defines and limits it".[64] Such practice consists of "material and detectable"[65] acts of subjects of interna-

[62] Practice has also been referred to as, *inter alia* and at times interchangeably, "usage", "*usus*", "*consuetude*", or "*diuturnitas*".

[63] As the International Court of Justice observed, "Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 97–98, para. 184).

[64] See Judge Sir Percy Spender's dissenting opinion in *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 99 ("The proper way of measuring the nature and extent of any such custom, if established, is to have regard to the practice which itself both defines and limits it. The first element in a custom is a constant and uniform practice which must be determined before a custom can be defined.").

[65] Gény, *Méthode d'interprétation et sources en droit privé positif*, pp. 318 *et seq.*, referring to "usage" as a constitutive element of customary international law, quoted in D'Amato, *The Concept of Custom in International Law*, p. 49.

tional law, and it is these "instances of conduct"[66] that may form "a web of precedents"[67] in which a pattern of conduct may be observed.

33. *From "a general practice" to "State practice"*. States continue to be the primary subjects of international law.[68] State practice plays a number of important roles in international law, including subsequent practice as an element (or means) for the interpretation of treaties under articles 31, paragraph 3 (*b*), and 32 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[69] It is the conduct of States which is of primary importance for the formation and identification of customary international law, and the material element of customary international law is thus commonly referred to as "State practice", that is, conduct which is attributable to States.[70] "The actual practice of States … is expressive, or creative, of customary rules."[71] As the International Court of Justice has consistently made clear, it is "State practice from which customary international law is derived".[72]

34. *Attribution of practice to a State*. As in other cases, such as State responsibility and subsequent practice in relation to the interpretation of treaties, for practice to be relevant for the formation of customary international law, it must be attributable to the State.[73] For this purpose, the actions of all branches of Government (whether exercising executive, legislative, judicial or other functions) may be relevant.[74] The conduct of *de facto* organs of a State, that is, "those individuals or entities which are to be considered as organs of a State under international law, although they are not so characterized under municipal

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[66] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 108, para. 207; see also Weisburd's definition: "various types of activity … practice means just that" ("Customary international law: the problem of treaties", p. 7).

[67] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 329 (separate opinion of Judge Ammoun); see also *Corfu Channel case, Merits, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at pp. 83 and 99 (dissenting opinion of Judge Azevedo): ("Custom is made up of recognized precedents … [Customary international law requires] significant or constant facts which could justify the assumption that States have agreed to recognize a customary [rule]"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 175 (dissenting opinion of Judge Tanaka), referring to "a usage or a continuous repetition of the same kind of acts … It represents a quantitative factor of customary law"; Stern, "Custom at the heart of international law", p. 95 ("It is very generally admitted that the material element is constituted by the repetition of a certain number of facts for a certain length of time, these different variables being modulated according to different situations.").

[68] See also Walter, "Subjects of international law", p. 636, para. 5.

[69] Currently under consideration by the Commission in the topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties": see in particular draft conclusions 4, paragraph 2, and 5 (*Yearbook … 2013*, vol. II (Part Two), p. 17, para. 38). See also Weisburd, "The International Court of Justice and the concept of State practice", p. 299 (observing that "the significance of State practice in international law is difficult to overstate"); Aceves, "The economic analysis of international law: transaction cost economics and the concept of State practice"; Parry, "The practice of States", p. 165 ("One looks to the practice of States, that is to say, for evidence of new rules on new topics of international law, or of changes in the earlier law.").

[70] See also Wood and Sender, "State practice"; Dinstein, "The interaction between customary law and treaties", p. 266: "The general practice constituting the *font et origo* of customary international law is, in essence, that of States"; Mendelson, "The formation of customary international law", p. 201 ("What is conveniently and traditionally called State practice … is, more precisely, the practice of subjects of international law"). On the historical development of the doctrine of State practice as the basis of customary international law, see Carty, "Doctrine versus State practice".

[71] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 46, para. 43.

[72] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 143, para. 101. When used, the term "international practice" has thus referred to the practice of States: see, for example, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 221, at p. 242 (dissenting opinion of Judge Read); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 261 (separate opinion of Judge Padilla Nervo), and p. 344 (dissenting opinion of Judge Riphagen); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 83 (separate opinion of Judge De Castro); *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 236 (dissenting opinion of Judge Skubiszewski); *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, at p. 554 (dissenting opinion of Judge Ranjeva); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 75–76 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 170 (separate opinion of Judge Keith); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457.

[73] See the Commission's draft articles on responsibility of States for internationally wrongful acts (2001), Part One, chapter II (*Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76); and the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (draft conclusion 5, *Yearbook … 2013*, vol. II (Part Two), p. 17, para. 38). See also Brownlie, "Some problems in the evaluation of the practice of States as an element of custom", p. 318, referring to the 2001 articles 4, 5, and 8, when suggesting, "no doubt analogous principles should apply to the identification of organs and persons competent to produce statements or materials which qualify as State practice". It is not necessarily the case that the rules on attribution will be identical in different contexts. See, for example, Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, p. 1190 ("The practice supportive of the existence of a rule of customary law must be State practice, that is to say the practice of organs of the State, though the test is not the same as that for establishing the responsibility of a State.").

[74] Article 4 of the draft articles on responsibility of States for internationally wrongful acts states that "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function" (*Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76); see also Crawford, *State Responsibility. The General Part*, Part II (attribution to the State), especially pp. 113−126; see also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 87 ("According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State"); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at pp. 242–243, para. 216; German Federal Constitutional Court, Order of the Second Senate of 5 November 2003, *2 BvR 1506/03*, para. 51 ("For this purpose [consulting the relevant State practice], the Court focuses on the conduct of the organs of State authority that are competent for legal relations under international law … as a general rule, this will be the government or the head of State. Apart from this, State practice can also result from the acts of other organs of State authority such as acts of the legislature or of the courts to the extent that their conduct is directly relevant under international law"); Bos, *A Methodology of International Law*, p. 229 ("Practice can be anything within the scope of a State's jurisdiction. All actions or, more generally, forms of behaviours so qualified are eligible to become the basis of a customary rule"); London Statement of Principles (see footnote 42 above). The older position, according to which only the actions of those designated to represent the State externally ("international organs of a State") may count as State practice (voiced, for example, by Strupp, "Regles générales du droit de la paix", pp. 313−315) is no longer generally accepted.

law",[75] may also count as State practice.[76] This may be so "whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[77]

35. One significant difficulty is ascertaining the practice of States. The dissemination and location of practice remain an important practical issue in the circumstances of the modern world, notwithstanding the development of technology and information resources.[78] As indicated in chapter VI below, this issue—which the Commission considered several decades ago under the title "Ways and means of making the evidence of customary international law more readily available" (first and second sessions, held in 1949 and 1950)—will be revisited in the Special Rapporteur's third report.

36. The following draft conclusions are proposed:

"Draft conclusion 5. Role of practice

"The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.

"Draft conclusion 6. Attribution of conduct

"State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function."

37. *Manifestations of practice*. It has occasionally been suggested that State "practice" should only qualify as such for the purposes of customary international law when it relates to a type of situation falling within the domain of international relations,[79] or to some actual incident or episode of claim-making (as opposed to assertions *in abstracto*).[80] This approach is too narrow; it may indeed be said that "in the international system … every act of State is potentially a legislative act".[81] Such acts may comprise both physical and verbal (written and oral) conduct: views to the contrary, according to which "claims themselves, although they may *articulate* a legal norm, cannot constitute the material component of custom",[82] are too restrictive.[83] Accepting such views could also be seen as

[75] Palchetti, "De facto organs of a State", p. 1048, para. 2.

[76] See also Zemanek, "What is 'State practice' and who makes it?", p. 305 ("The constitutional authority of the organs performing the acts is immaterial as long as the conduct appears to foreign States, assessing it with due diligence and good faith, as attributable to the State in question and expressing or implementing its attitude towards a rule of customary law.").

[77] See article 4 of the draft articles on responsibility of States for internationally wrongful acts (*Yearbook … 2001*, vol. II (Part Two), p. 26, para. 76). The International Law Association Committee's suggestion—that in States organized under a federal structure, "the activities of territorial governmental entities within a State which do not enjoy separate international legal personality do not as such normally constitute State practice, unless carried out on behalf of the State or adopted ('ratified') by it" (London Statement of Principles (footnote 42 above), p. 727, conclusion 8)—does not seem accurate.

[78] Rosenne, *Practice and Methods of International Law*, p. 56 ("The evidence of customary law [remains] … scattered, elusive and on the whole unsystematic.").

[79] Kunz, "The nature of customary international law", p. 666; London Statement of Principles (footnote 42 above), p. 720 (suggesting correctly, however, that "whether a matter concerns a State's international legal relations, or is solely a matter of domestic jurisdiction, depends on the stage of development of international law and relations at the time"); Rosenne, *Practice and Methods of International Law*, p. 56.

[80] See, for example, Thirlway, *International Customary Law and Codification*, p. 58 ("State practice as the material element in the formation of custom is, it is worth emphasizing, *material*: it is composed of acts by States with regard to a particular person, ship, defined area of territory, each of which amounts to the assertion or repudiation of a claim relating to a particular apple of discord").

[81] Weisburd, "Customary international law: the problem of treaties", p. 31. See also Brownlie, "Some problems in the evaluation of the practice of States as an element of custom", p. 314, suggesting, *inter alia*, that "the materials not related to sudden crises are more likely to represent a mature and consistent view of the law"; Degan, *Sources of International Law*, p. 149 (noting that, while some older scholars had confined the evidence of custom to those able to bind the State internationally, "nevertheless … customary rules can emerge from concordant legislative or other unilateral acts of a number of States, or that even some decisions of municipal courts can influence practice").

[82] D'Amato, *The Concept of Custom in International Law*, p. 88 (explaining that "a State has not done anything when it makes a claim; until it takes enforcement action, the claim has little value as a prediction of what the State will actually do"). See also *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 116, at p. 191 (dissenting opinion of Judge Read) ("[Customary international law] cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships … The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration"); D'Amato, "Custom and treaty: a response to Professor Weisburd", p. 465: ("what governments *say* is at best *a theory about* international law, and not international law itself"); Wolfke, *Custom in Present International Law*, p. 42 ("customs arise from acts of conduct and not from promises of such acts"); Van Hoof, *Rethinking the Sources of International Law*, p. 108. For a dated and extreme position, see J. Conradie in *S. v. Petane, The South African Law Reports 1988* (3) SA 51 (C) pp. 59, paras. F-G and p. 61, paras. D-E (Cape Provincial Division, South Africa) ("Customary international law is founded on practice, not on preaching … One must … look for State practice at what States have done on the ground in the harsh climate of a tempestuous world, and not at what their representatives profess in the ideologically overheated environment of the United Nations where indignation appears frequently to be a surrogate for action").

[83] See also Villiger, *Customary International Law and Treaties*, pp. 19–20 ("There is much merit in qualifying verbal acts as State practice. First, and most important … States themselves as well as courts regard comments at conferences as constitutive of State practice"); Parry, "The practice of States", p. 168 ("Very often there is very little difference between what a State does and what it says because its actions may consist only in pronouncements"); Akehurst, "Custom as a source of international law", p. 53 ("State practice means any act or statement by a State from which views about customary law can be inferred"); Müllerson, "On the nature and scope of customary international law", p. 342 ("Even if one would be eager to make a clear-cut distinction between 'actual' practice and other forms of practice (non-actual?) it is not easy and sometimes it is simply impossible"); Bernhardt, "Custom and treaty in the law of the sea", p. 267 ("It has also sometimes been said that only factual deeds and not words are relevant State practice … Words, declarations, communications, even signals must be included in the great variety of practices which can be constitutive for customary law … it is legally unacceptable to exclude communications, written and spoken words, from the world of State practice. There is no *numerus clausus* of State acts and State practice which are exclusively necessary or decisive for the creation and coming into force of customary law. On the other hand, it must be admitted that verbal declarations cannot create customary rules if the real practice is different"); Skubiszewski, "Elements of custom and the Hague Court", p. 812 ("The practice of States is built of their actions and reactions. It is 'a process of reciprocal interaction'. This does not mean

(*Continued on next page.*)

encouraging confrontation and, in some cases, even the use of force.[84] In any event, it appears undeniable that "the method of communication between States has widened. The beloved 'real' acts become less frequent because international law, and the Charter of the United Nations in particular, place more and more restraints on States in this respect".[85] Moreover, "the term 'practice' (as per Article 38 of the Statute of the International Court of Justice) is general enough—thereby corresponding with the flexibility of customary law itself—to cover *any act or behaviour of a State*, and it is not made entirely clear in what respect verbal acts originating from a State would be lacking, so that they cannot be attributed to the behaviour of that State".[86] At the same time, as will be suggested below, caution is needed in assessing what States (and international organizations) say: words cannot always be taken at face value.

38. Once both physical and verbal acts are accepted as forms of practice for purposes of identification of customary international law, it appears that "distinctions between 'constitutive acts' and 'evidence of constitutive acts' … are artificial and arbitrary".[87] Such distinctions will be avoided in the present report. As was stated in the Commission's debate in 2013, the material that needs to be consulted to identify customary international law can be evidence of the existence of the customary rule and in other situations it can also be the source of practice itself.[88] Accordingly

(*Footnote 83 continued.*)

that the picture of State practice is composed exclusively of actions *sensu stricto*. Words and inaction are also evidence of the conduct of States"); Baxter, "Multilateral treaties as evidence of customary international law", p. 300: ("The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts"). It is also worthwhile to recall in this context the words of the London Statement of Principles (footnote 42 above), which accepts that "verbal acts, and not only physical acts, of States count as State practice" (p. 725, conclusion 4); and "when defining State practice … it is necessary to take account of the distinction between what conduct counts as State practice, and the weight to be given to it … Discussion of the objective element in custom has been bedeviled by a failure to make this distinction" (p. 724, conclusion 3).

[84] See also Müllerson, "The interplay of objective and subjective elements in customary law", p. 162: "if only seizures, invasions, genocide and other similar acts were State practice then in some areas of international law (e.g. international humanitarian law) only so-called rogue States would contribute to the development of customary law … it would [also] increase even more the role of powerful States in the process of international law-making. Finally … in many … areas of international relations only a few States may have such ['actual'] practice or States may become involved in 'actual' practice only occasionally."

[85] Zemanek, "What is 'State practice' and who makes it?", p. 306.

[86] Villiger, *Customary International Law and Treaties*, p. 21.

[87] Zemanek, "What is 'State practice' and who makes it?", p. 292, explaining that "one may disguise the other" and adding that "furthermore, one might never know of a 'constitutive' act if it were not recorded." See also D'Amato, *The Concept of Custom in International Law*, p. 268 ("a rule of law is not something that exists in the abstract, nor is *opinio juris* something that we can lay our hands upon. Rules of law and states of mind appear *only* as manifestations of conduct; they are generalizations we make when we find recurring patterns of behavior or structured legal arguments. If the term 'evidence' must be used, we may say that rules of law are expressed *only* in 'evidence'; if the evidence is truly evidence of the rule of law, then it is an outward expression of the rule itself. Evidence is a necessary, and not a dispensable, component of the rule. But because of the confusions resulting from its use, the term 'evidence', along with the term 'sources', is best relegated to the domain of counterproductive terminology.").

[88] *Yearbook … 2013*, vol. I, 3183rd meeting, 19 July 2013 (Hmoud).

the evidence [for ascertaining whether a rule of customary international law has emerged or otherwise] may take a variety of forms, *including** conduct—What is significant is that the source must be reliable and unequivocal, and should reflect the consistent position of the State concerned.[89]

39. Practice (and evidence thereof) takes a great variety of forms, as "in their interaction and communication … States do not confine themselves to dogmatically determined types of acts. They use all forms which serve their purpose".[90] The Commission itself has relied upon various materials in assessing practice for the purpose of identifying rules of customary international law.[91]

40. Several authors have drawn up lists of the main forms that practice may take. For example, *Brownlie's Principles of Public International Law* contains the following non-exhaustive list:

diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to military forces (e.g. rules of engagement), comments by governments on ILC drafts and corresponding commentaries, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in "all States" form), an extensive pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly.[92]

[89] Brownlie, "Some problems in the evaluation of the practice of States as an element of custom", p. 318. See also Clapham, *Brierly's Law of Nations: An Introduction to the Role of Law in International Relations*, p. 58 ("Such evidence [for an alleged custom] will obviously be voluminous and also diverse. There are multifarious occasions on which persons who act or speak in the name of a State, do acts, or make declarations, which either express or imply some view on a matter of international law. Any such act or declaration may, so far as it goes, be some evidence that a custom, and therefore that a rule of international law, does or does not exist. But, of course, its value as evidence will altogether be determined by the occasion and the circumstances.").

[90] Zemanek, "What is 'State practice' and who makes it?", p. 299. In addition, "no rule of international law describes what the facts are whose occurrence leads to the formation of a custom … there are no specific factual elements whose only occurrence prove the existence of a rule" (Fumagalli, "Evidence before the International Court of Justice: issues of fact and questions of law in the determination of international custom", p. 146).

[91] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, observation 7, paras. 23–25 ("The Commission has relied upon a variety of materials in assessing State practice for the purpose of identifying a rule of customary international law.").

[92] Crawford, *Brownlie's Principles of Public International Law*, p. 24; the author adds that "the value of these sources varies and will depend on the circumstances". Other lists may be found, for example, in Ferrari Bravo, "Méthodes de recherche de la coutume international dans la pratique des États", pp. 257−287; Villiger, *Customary International Law and Treaties*, p. 17; Pellet, "Article 38", pp. 815−816. Ireland has a similar list on its Ministry of Foreign Affairs website: "In the absence of a treaty governing relations between two or more States as to what the law should be, or, in other words, State practice combined with recognition that a certain practice is obligatory, if sufficiently widespread and consistent, such practice and consensus may constitute customary international law. Evidence of custom may be found among the following sources: diplomatic correspondence; opinions of official legal advisers, statements by governments; United Nations General Assembly resolutions; comments by governments on drafts produced by the International Law Commission; the decisions of national and international courts" (available from www.dfa.ie/our-role-policies/international-priorities/international-law/statements-by-ireland-on-international-law/). See also Greece, Special Supreme Court, *Margellos and Others v. Federal Republic of Germany*, Judgment No. 6/2002, 17 September 2002, ILR, vol. 129, p. 528, para. 9; Wolfke, "Some persistent controversies regarding customary international law", p. 15 ("As regards these ways and means of proving whether a custom already exists no full list of guidelines can be drawn up.").

41. Given the inevitability and pace of change, political and technological, it is neither possible nor desirable to seek to provide an exhaustive list of these "material sources" of customary international law: it remains impractical for the Commission, as it was in 1950, "to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations".[93] At the same time, it may be helpful to indicate some of the main types of practice that have been relied upon by States, courts and tribunals, and in writings. The following list is therefore non-exhaustive; moreover, some of the categories below overlap, so that a particular example or type of State practice may well fall under more than one:

(*a*) *Physical actions of States*, that is, the conduct of States "on the ground".[94] Examples of such practice may include passage of ships in international waterways;[95] passage over territory;[96] impounding of fishing boats; granting of diplomatic asylum;[97] battlefield or operational behaviour; or conducting atmospheric nuclear tests or deploying nuclear weapons;[98]

(*b*) *Acts of the executive branch*. These may include executive orders and decrees,[99] and other "administrative measures",[100] as well as official statements by Government such as declarations,[101] proclamations,[102] Government statements before parliament,[103] positions expressed by States before national or international courts and tribunals (including in *amicus curiae* briefs of States),[104] and statements on the international plane;[105]

(*c*) *Diplomatic acts and correspondence*.[106] This includes protests against the practice of other States and other subjects of international law. Diplomatic correspondence may take a variety of forms, including *notes verbales*, circular notes, third-party notes, and even "non-papers";

(*d*) *Legislative acts*. From constitutions to draft bills,[107] "legislation is an important aspect of State practice".[108] As the Permanent Court of International Justice observed in 1926, "From the standpoint of

[93] *Yearbook … 1950*, vol. II, p. 368, para. 31.

[94] Judge Read referred to "actual assertion of sovereignty" in his dissenting opinion in the *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 116, at p. 191; see also footnote 82 above.

[95] *Corfu Channel case, Merits, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at p. 99 (dissenting opinion of Judge Azevedo).

[96] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at pp. 40–41.

[97] *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 277.

[98] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (separate opinion of Judge Petrén); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (dissenting opinion of Vice-President Schwebel).

[99] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104, 107 (separate opinion of Judge Fouad Ammoun).

[100] See, for example, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 280 (separate opinion of Judge Sepúlveda-Amor).

[101] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 295 (separate opinion of Judge Ranjeva); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 104 (separate opinion of Judge Fouad Ammoun); *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, at p. 43 (dissenting opinion of Judge Padilla Nervo); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 84 (separate opinion of Judge De Castro).

[102] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104–105, 107 and 126 (separate opinion of Judge Fouad Ammoun); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 84 (separate opinion of Judge De Castro).

[103] See, for example, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 197 (separate opinion of Judge Jessup).

[104] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55; see also Brownlie, "Some problems in the evaluation of the practice of States as an element of custom", p. 315: "it seems obvious that statements made by Agents and Counsel before international tribunals constitute State practice".

[105] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (dissenting opinion of Vice-President Schwebel).

[106] See, for example, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 197 (separate opinion of Judge Jessup), and pp. 298, 299 (separate opinion of Judge Ammoun).

[107] See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 24; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55; *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 220 (dissenting opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 105, 107, 129 (separate opinion of Judge Fouad Ammoun, in which he says, *inter alia*, "The bill [that was submitted to the Belgian Chamber of Representatives] … expresses the official point of view of the Government. It constitutes one of those acts within the municipal legal order which can be counted among the precedents to be taken into consideration, where appropriate, for recognizing the existence of custom"; *ibid.*, p. 228 (dissenting opinion of Judge Lachs); *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, at p. 44 (dissenting opinion of Judge Padilla Nervo), and *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 51 (joint separate opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda), and p. 84 (separate opinion of Judge De Castro); Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, pp. 51, 55–63, paras. 87 and 91–98; *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Special Court of Sierra Leone Appeals Chamber), 31 May 2004, p. 13, para. 18; Brazil, Supreme Federal Court, *Genny de Oliviera v. Embaixada da República Democrática Alemã*, Apelação Civel No. 9.696-3/SP, 31 May 1989, pp. 4–5; *Democratic Republic of the Congo v. FG Hemispheric Associates LLC*, Court of Final Appeal of the Hong Kong Special Administrative Region, Final Appeal Nos. 5, 6 and 7 of 2010 (Civil), 8 June 2011, p. 402, para. 68 ("However that may be, a rule of domestic law in any given jurisdiction may happen to result from a rule of customary international law or it may happen to precede and contribute to the crystallisation of a custom into a rule of customary international law.") (ILR, vol. 147, pp. 402–403). On constitutional provisions in particular as State practice (and as evidence of *opinio juris*), see Crootof, "Constitutional convergence and customary international law".

[108] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 310, para. 3 (dissenting opinion of Judge *ad hoc* Gaja). Judge Gaja went on to say: "It is significant also when the object of a rule of international law is the conduct of judicial authorities, as with regard to the exercise of jurisdiction by courts" (*ibid.*).

[i]nternational [l]aw and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."[109] It is worthwhile to recall the view expressed by the Commission in this context in 1950, according to which

> [t]he term legislation is here 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.[110]

(*e*) *Judgments of national courts*. Judicial decisions and opinions of municipal courts may serve as State practice,[111] and "are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law" itself.[112] When assessing the decisions of domestic courts, however, the position of customary international law within the law to be applied by the various courts and tribunals, and special provisions and procedures that may exist at the various domestic levels for identifying rules of customary international law, must be borne in mind.[113] Moreover, "the value of these decisions varies considerably, and individual decisions may present a narrow, parochial outlook or rest on an inadequate use of sources".[114] Judgments of the highest courts naturally carry more weight. Cases that have been reversed on the particular point are no longer likely to be considered as practice;

(*f*) *Official publications in fields of international law*. Such publications include military manuals or instructions to diplomats;[115]

(*g*) *Internal memorandums by State officials*. Such memorandums are, however, often not made public. It should be borne in mind, however, that as was said in a different but analogous context, these "do not necessarily represent the view or policy of any Government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment; it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made";[116]

(*h*) *Practice in connection with treaties*. Negotiating, concluding and entering into, ratifying and implementing bilateral or multilateral treaties (and putting forward objections and reservations to them) are another form of practice.[117] Such practice does not concern the law of trea-

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[109] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

[110] *Yearbook … 1950*, vol. II, p. 370, para. 60.

[111] See, for example, *The Case of the S.S. "Lotus" (France/Turkey), Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, pp. 28–29; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 24; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 292 (separate opinion of Judge Guillaume); *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, at p. 63 (separate opinion of Vice-President Wellington Koo); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 88 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (International Tribunal for the Former Yugoslavia Appeals Chamber), 15 July 1999, paras. 255–270; Appeal Judgment of the Extraordinary Chambers in the Courts of Cambodia (Supreme Court Chamber), Case number 001/18-07-2007-ECCC/SC, 3 February 2012, p. 101, paras. 223, 224; *Prosecutor v. Šainović and Others*, Case No. IT-05-87-A, Judgment (International Tribunal for the Former Yugoslavia Appeals Chamber), 23 January 2014, pp. 649–658, paras. 1627–1642; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment (International Tribunal for the Former Yugoslavia Appeals Chamber), 21 July 2000, Declaration of Judge Robinson, p. 2149, para. 281; Slovenia, Case No. Up-13/99-24 (Constitutional Court), Decision of 8 March 2001, para. 14; Austria, *Dralle v. Republic of Czechoslovakia* (Austrian Supreme Court), Judgment of 10 May 1950, ILR, vol. 17, pp. 157–161. See also Lauterpacht, "Decisions of municipal courts as a source of international law"; Moremen, "National court decisions as State practice: a transnational judicial dialogue?", pp. 265–290; Roberts, "Comparative international law? The role of national courts in creating and enforcing international law", p. 62; and the lecture by Judge Greenwood before the British Institute of International and Comparative Law entitled "The contribution of national courts to the development of international law" (4 February 2014), available from www.biicl.org/newsitems/6044/summary-and-video-of-biicl-annual-grotius-lecture-2014.

[112] *Yearbook … 1950*, vol. II, p. 370, para. 54; in this regard, Crawford, *Brownlie's Principles of Public International Law*, states that some decisions of national courts "provide indirect evidence of the practice of the forum State on the question involved" (p. 41).

[113] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663, para. 84. See also Moremen, "National court decisions as State practice: a transnational judicial dialogue?", pp. 290–308.

[114] Crawford, *Brownlie's Principles of Public International Law*, p. 41.

[115] See, for example, *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment (International Tribunal for the Former Yugoslavia Appeals Chamber), 30 November 2006, para. 89; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment (International Tribunal for the Former Yugoslavia Trial Chamber), 16 November 1998, p. 126, para. 341.

[116] *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)*, decision of 9 October 1998 (UNRIAA, vol. XXII, part III (Sales No. E/F.00.V.7)), pp. 235–236, para. 94; see also Brownlie, "Some problems in the evaluation of the practice of States as an element of custom", pp. 316–317.

[117] See, for example, *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at pp. 22–23; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at pp. 24–25; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43; *ibid.*, at pp. 104–105, 126, 128 (separate opinion of Judge Fouad Ammoun); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 347 (dissenting opinion of Judge Riphagen); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 26; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 79; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 38, 48; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 138, para. 89, and p. 143, para. 100; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 221, at pp. 241–242 (dissenting opinion of Judge Read); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 292 (separate opinion of Judge Guillaume), and pp. 312, 314 (dissenting opinion of Vice-President Schwebel); *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 116, at pp. 163–164 (dissenting opinion of Judge Sir Arnold McNair); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 220 (dissenting opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at pp. 41–42, and also pp. 55–56 (separate opinion of Judge Wellington Koo), and p. 104 (dissenting opinion of Judge Sir Percy Spender); *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192, at p. 223 (dissenting opinion of Judge Urrutia Holguín); *Prosecutor v. Norman*, Case

ties alone; it may also relate to the obligations assumed through the relevant international legal instrument;[118]

(*i*) *Resolutions of organs of international organizations, such as the General Assembly, and international conferences.*[119] This mainly concerns the practice of States in connection with the adoption of resolutions of organs of international organizations or at international conferences, namely, voting in favour or against them (or abstaining), and the explanations (if any) attached to such acts.[120] At the same time, it must be borne in mind that the final text of a decision of an international organization will always be incapable of reflecting all propositions and alternatives formulated by each and every party to the negotiations … One should, therefore, not overly rely on the shortcuts provided by the decision-making processes of international organizations in order to identify State practice.[121]

This matter will be addressed more fully in in the third report.

42. *Inaction as practice*. Abstention from acting, also referred to as a "negative practice of States",[122] may also count as practice.[123] Inaction by States may be central to

No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Special Court of Sierra Leone Appeals Chamber), 31 May 2004, p. 13, paras. 18−21; Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, pp. 51–55, paras. 87−89; *The Paquete Habana, United States Reports*, vol. 175, p. 677, at pp. 686−700 (United States Supreme Court, 1900); see also Weisburd, "Customary international law: the problem of treaties", p. 6 ("Treaties are simply one more form of State practice"); Human Rights Council report of the Working Group on Arbitrary Detention, A/HRC/22/44, para. 43.

[118] See also D'Amato, "Custom and treaty: a response to Professor Weisburd", p. 462 ("What makes the content of a treaty count as an element of custom is the fact that the parties to the treaty have entered into a binding commitment to act in accordance with its terms. Whether or not they subsequently act in conformity with the treaty, the fact remains that they have so committed to act. The commitment itself, then, is the 'State practice' component of custom"); Barboza, "The customary rule: from chrysalis to butterfly", pp. 2−3 ("Texts express with more precision than actions the contents of a practice, particularly when those texts are carefully written by groups of technical and legal experts"); but see Wolfke, "Treaties and custom: aspects of interrelation", p. 33 ("A treaty *per se* is, therefore, not any element of practice [of course with the exception of the customary law of treaties]. It can, however, contribute to the element of acceptance as law by the parties.").

[119] See, for example, *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 26; *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 302−303 (separate opinion of Judge Ammoun) ("I would observe, in addition, that the positions taken up by the delegates of States in international organizations and conferences, and in particular in the United Nations, naturally form part of State practice … it cannot be denied, with regard to the resolutions which emerge therefrom, or better, with regard to the votes expressed therein in the name of States, that these amount to precedents contributing to the formation of custom"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (dissenting opinion of Vice-President Schwebel, who lists "action of the United Nations Security Council under 'State practice' "); *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 188 (dissenting opinion of Judge Weeramantry) ("The various resolutions of the General Assembly relating to this right in general terms, which have helped shape public international law … are an important material source of customary international law in this regard."). Security Council resolution 2125 (2013) implicitly recognizes this potential role of resolutions as well by underscoring "that this resolution shall not be considered as establishing customary international law" (para. 13).

[120] See also Higgins, *The Development of International Law through the Political Organs of the United Nations*, p. 2 ("The United Nations is a very appropriate body to look to for indications of developments in international law, for international custom is to be deduced from the practice of States, which includes their international dealings as manifested by their diplomatic actions and public pronouncements. With the development of international organizations, the votes and views of States have come to have legal significance as evidence of customary law. Moreover, the practice of States comprises their collective acts as well as the total of their individual acts … The existence of the United Nations … now provides a very clear, very concentrated, focal point for State practice"); Conforti and Labella, *An Introduction to International Law*, pp. 35, 42−43 ("The resolutions of international organizations are also relevant to the ascertainment of custom as *acts of States*, i.e., as aggregates of expressions of the volition of States which have voted in favour of the resolutions … international organizations are endowed with some elements of international personality. However, with regard to customary law making the resolutions of organizations must be considered as the collective action of all the States that voted for their adoption rather than the action of the organizations themselves. This explains why such resolutions play a role on the development of custom only where they are adopted unanimously, by consensus, or at least by a wide majority"); Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, pp. 19−20: "The process of synthesizing State practice is assisted by several mechanisms. First, the resolutions of the General Assembly of the United Nations, when they touch upon legal matters, constitute evidence of State practice. So also do resolutions of Conferences of Heads of State"; London Statement of Principles (footnote 42 above), p. 730, paragraph (*b*) to the commentary on conclusion 11 ("In the context of the formation of customary international law … [a resolution by an organ of an international organization, containing statements about customary international law] is probably best regarded as a series of verbal acts by the individual member States participating in that organ."). But see MacGibbon, "Means for the identification of international law: General Assembly resolutions: custom, practice and mistaken identity", p. 19 ("While a General Assembly resolution (although difficult to envisage as being, in itself, State practice in any meaningful sense) embodies, or rather is the result of, various forms of State conduct in the General Assembly, and so reflects State practice of a kind, it is nevertheless a peripheral kind and—in the context of the development of international custom—of a somewhat artificial kind"); Meijers, "On international customary law in the Netherlands", p. 84 ("Does a State, when voting on the acceptance of a resolution, for instance in the General Assembly of the United Nations, act as a State, or as part of an organ of the United Nations, a separate subject of international law? The answer seems evident: as part of the UN organ … [only when] it states its reasons for voting in the way it did, or gives its point of view *vis-à-vis* that resolution, we may identify an act of State."

[121] Wouters and De Man, "International organizations as law-makers", p. 208. See also Higgins, *Problems and Process: International Law and How We Use It*, p. 23−24 ("Resolutions are but one manifestation of State practice. But in recent years there has been an obsessive interest with *resolutions* as an isolated phenomenon. Intellectually, this is hard to understand or justify. We can only suppose that it is easier—that is, that it requires less effort, less rigour, less by way of meticulous analysis—to comment on the legal effect of a resolution than to look at a collective practice on a certain issue in all its complex manifestations. The political bodies of international organizations engage in debate; in the public exchange of views and positions taken; in expressing reservations upon views being taken by others; in preparing drafts intended for treaties, or declarations, or binding resolutions, or codes; and in decision-making that may or may not imply a legal view upon a particular issue. But the current fashion is often to examine the resolution to the exclusion of all else.").

[122] See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 144–145 (dissenting opinion of Judge *ad hoc* Van den Wyngaert); Tomka, "Custom and the International Court of Justice", p. 210.

[123] See, for example, *The Case of the S.S. "Lotus" (France/Turkey), Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, pp. 28–29; *Nottebohm Case (second phase), Judgment of April 6th, 1955, I.C.J. Reports 1955*, p. 4, at p. 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 99, para. 188 (abstentions from the threat of use of force against the territorial integrity or political independence of any State as practice); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 253, para. 65 (the Court referring to proponents of a prohibition attempting to rely on

(*Continued on next page.*)

the development and ascertainment of rules of customary international law, in particular when it qualifies (or is perceived) as acquiescence.[124] It is intended to examine this matter further in the third report, in light of the debate in the Commission in 2014.

43. *The practice of international (intergovernmental) organizations*. This is an important field that will be covered in greater detail in the third report.[125] Bearing in mind that "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community",[126] the acts of international organizations on which States have conferred authority may also contribute or attest to the formation of a general practice in the fields in which those organizations operate.[127] In assessing the practice of such organizations, one ought to distinguish between practice relating to the internal affairs of the organization on the one hand, and the practice of the organization in its relations with, *inter alia*, States and international organizations, on the other.[128] It is the latter practice that is relevant for present purposes, and which mostly consists of "operational activities", defined by one author as "the programmatic work of international organizations carried out as part of their overall mission or in fulfilment of a specific mandate".[129] Another important distinction should be drawn in this context between the practice of organs or other bodies composed of the representatives of States and that of organs composed of individuals serving in their personal capacity, as the latter cannot be said to represent States.[130] A distinction should, moreover, be made between products of the secretariats of international organizations and products of the intergovernmental organs of international organizations. While both can provide materials that can be consulted, the greater weight is to be given to the products of the latter, whose authors are also the primary authors of State practice.[131] While it has been suggested that "IOs [international organizations] provide shortcuts to finding custom",[132] considerable caution is required in assess-

(*Footnote 123 continued.*)

"a consistent practice of non-utilization of nuclear weapons by States"); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 135, para. 77 ("The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States"); *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, at p. 134 (separate opinion of Judge Petrén, referring to the practice of non-recognition when saying that the term "implies not positive action but abstention from acts signifying recognition"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 221 (dissenting opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 198–199 (separate opinion of Judge Jessup, referring to the United States Department of State declining to make representation on behalf of an American company, and to the United States not raising a certain argument as a basis for resisting a claim in an inter-State dispute). For support in scholarly writing, see, for example, London Statement of Principles (footnote 42 above); Tunkin, "Remarks on the juridical nature of customary norms of international law", p. 421 ("The practice of States may consist in their taking definitive action under certain circumstances or, on the contrary, abstaining from action"); Séfériadès, "Aperçus sur la coutume juridique internationale et notamment sur son fondement", p. 143 ("Even negative acts—omissions—repeated consecutively, are likely to end up becoming customs, resulting in the legal obligation not to do them … Also, in the law, we cannot, it seems to us, fail to recognize the customary origin to the obligation of States to refrain from making against representatives of foreign countries any act likely to impair their personal liberty or their administrative offices, and the obligation of the occupying armies to respect the enemy's private property"); Meijers, "How is international law made?—the stages of growth of international law and the use of its customary rules", pp. 4–5 ("The inactive are carried along by the active … lack of protest—lack of open objection to the development of the new rule—is sufficient for the creation of a rule of customary law (and for the obligation to abide by it)"); Kunz, "The nature of customary international law", p. 666; Mendelson, "The subjective element in customary international law", p. 199 ("Omissions are perfectly capable, if they are sufficiently unambiguous, of constituting acts of State practice.").

[124] See also Kolb, "Selected problems in the theory of customary international law", p. 136 ("There is hardly any exaggeration in saying that custom is mainly silence and inaction, not action"); Weisburd, "Customary international law: the problem of treaties", p. 7 ("If generality in the sense of affirmative acts by most States is not necessary, it must at least be possible to infer acquiescence in a rule by the very large majority of States"). Danilenko ("The theory of international customary law", p. 28) differentiates between "active and passive customary practice", suggesting that the latter "increases the precedent value of active practice and thus becomes a major factor in the process of creating generally accepted customary rules".

[125] A leading work in this field is Cahin, *La coutume internationale et les organisations internationales*.

[126] *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 178.

[127] See, for example, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25; *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 95 (separate opinion of Vice-President Weeramantry, who refers to "the practice of international financial institutions"); see also *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, para. 29, 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"); Jennings and Watts (eds.), *Oppenheim's International Law*, p. 31 ("The concentration of State practice now developed and displayed in international organisations and the collective decisions and the activities of the organisations themselves may be valuable evidence of general practices accepted as law in the fields in which those organisations operate"); London Statement of Principles (footnote 42 above), p. 730, conclusion 11 ("The practice of intergovernmental organizations in their own right is a form of 'State practice'"). But see Villiger, *Customary International Law and Treaties*, pp. 16–17. On this topic more generally, see Klabbers, "International organizations in the formation of customary international law" (also raising the question whether *ultra vires* practice of such organizations may count as "practice"); and Hannikainen, "The collective factor as a promoter of customary international law". Of course, international organizations vary greatly from one another, and this needs to be borne in mind when assessing the significance of their practice (see also paragraph (8) of the commentary to article 6 of the Commission's draft articles on the responsibility of international organizations (*Yearbook … 2011*, vol. II (Part Two), para. 88)).

[128] For example, administration of territory or peacekeeping operations. Indeed, such practice is no longer thought of as confined to "States' relations to the organizations" (*Yearbook … 1950*, vol. II, p. 372, para. 78).

[129] Johnstone, "Law-making through the operational activities of international organizations", p. 94, discussing such activities, however, in a somewhat different context; and adding that these activities "are distinguished from the more explicitly normative functions of international organizations, such as treaty making or adopting resolutions, declarations, and regulations by intergovernmental bodies" (*ibid.*).

[130] Accordingly, the work of the Commission as well, often employed as subsidiary means for determining the existence or otherwise of a rule of customary international law, "cannot be equated with State practice, or evidence an *opinio juris*" (Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (Part Two)", pp. 59–60).

[131] As suggested by Mr. Tladi in his intervention during last year's debate in the Commission (*Yearbook … 2013*, vol. I, 3182nd meeting).

[132] Alvarez, *International Organizations as Law-makers*, p. 592 ("The modern resort to [international organization]–generated forms

ing their practice.[133] Considerations that apply to the practice of States may also be relevant to the practice of international organizations, and the present report should be read in that light.

44. The practice of those international organizations (such as the European Union) to which member States sometimes have transferred exclusive competences, may be equated with that of States, since in particular fields such organizations act in place of the member States.[134] This applies to the actions of such organizations, whatever forms they take, whether executive, legislative or judicial. If one were not to equate the practice of such international organizations with that of States, it would in fact mean that, not only would the organization's practice not count for State practice, but its member States would be deprived or reduced of their ability to contribute to State practice in cases where the member States have conferred some of their public powers to the organization.

45. *The role of other non-State actors*. It has sometimes been suggested that the conduct of other "non-State actors", such as non-governmental organizations and even individuals, ought to be acknowledged as contributing to the development of customary international law.[135] Some have recalled in this context that "according to Article 38 of the ICJ statute, custom … [is] not required to be followed or acknowledged 'by States' only, as it is actually required by the same norm when referring to conventions. So that, in principle, practices may emanate from State and non-State actors."[136] The better view, however, is that, while individuals and non-governmental organizations can indeed "play important roles in the promotion of international law and in its observance"[137] (for example, by encouraging State practice by bringing international law claims in national courts or by being relevant when assessing such practice), their actions are not "practice" for purposes of the formation or evidencing of customary international law.[138]

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of evidence for custom might be seen … as a relatively more egalitarian approach to finding this source of law, even if it comes, as critics charge is the case with respect to G[eneral] A[ssembly] resolutions for example, at the expense of sometimes elevating the rhetoric of States over their deeds.").

[133] See also Wouters and De Man, "International organizations as law-makers", p. 208 ("One should thus be mindful not to equate the practice of international organizations with State practice. Whether actions of international organizations can be attributed to the State community as a whole is a complex question and the answer depends on … divergent factors.").

[134] See also statement on behalf of the EU, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 23rd meeting (A/C.6/68/SR.23), para. 37 ("The Union acted on the international plane on the basis of competences conferred upon it by its founding treaties. It was a contracting party to a significant number of international agreements, alongside States. Moreover, in several areas covered by international law it had exclusive competences. Those special characteristics gave it a particular role in the formation of customary international law, to which it could contribute directly through its actions and practices"); see also Hoffmeister, "The contribution of EU practice to international law"; Wood and Sender, "State practice", p. 512, paras. 20–21; Paasivirta and Kuijper, "Does one size fit all? The European Community and the responsibility of international organizations", pp. 204–212. Ms. Jacobsson likewise suggested that one could not disregard the practice of an international organization if that organization had the competence to enact legislation in respect of a particular question. Such practice could not be described solely as the view on customary international law by the organization. It could also be equalled to State practice (*Yearbook … 2013*, vol. I, 3184th meeting). But see Vanhamme, "Formation and enforcement of customary international law: the European Union's contribution", pp. 127 and 131 ("EC acts constitute EU practice. To depict them as State practice [that is, to attribute them to the member States] would deny one of the main features of the European Community, i.e. its autonomous functioning on the basis of the legislative, executive and judicial powers delegated to it by the member States. Moreover, the EC's international legal practice does faithfully represent the *opinio juris* of all 27 member States [who gave a permanent commitment to accept its decisions as binding law].").

[135] For such a dynamic view of "participation" in international law-making or the call to make such processes "inclusive", see, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 155 (dissenting opinion of Judge *ad hoc* Van den Wyngaert) ("The opinion of *civil society* … cannot be completely discounted in the formation of customary international law today"); *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, at pp. 69–70, 74 (separate opinion of Vice-President Ammoun) ("The primary factor in the formation of the customary rule whereby the right of peoples to self-determination is recognized … [may be] the struggle of peoples [for such cause], before they [now members of the international community] were recognized as States … If there is any 'general practice' which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1(*b*), of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle"); *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 100 (separate opinion of Vice-President Ammoun); Chen, *An Introduction to Contemporary International Law: A Policy-oriented Perspective*, p. 344 ("the focus on 'States' is unrealistic … the relevant patterns in behavior extend … also to those of private individuals and representatives of non-governmental organizations"); Bodansky, "Customary (and not so customary) international environmental law", p. 108, footnote 17, referring to the behaviour of States and of "international organizations, transnational corporations and other non-governmental groups"; 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"); Steer, "Non-State actors in international criminal law" (arguing that in international criminal law non-State actors such as non-governmental organizations, judges and lawyers are those who determine the normative content); Paust, "Nonstate actor participation in international law and the pretense of exclusion"; Roberts and Sivakumaran, "Lawmaking by nonstate actors: engaging armed groups in the creation of international humanitarian law"; and Reisman, "The democratization of contemporary international lawmaking processes and the differentiation of their application".

[136] Bohoslavsky, Li and Sudreau, "Emerging customary international law in sovereign debt governance?", p. 63. Baron Descamps' original proposal with regard to the rules to be applied by the Permanent Court of International Justice referred to custom as "being practice between nations accepted by them as law"; see Wolfke, *Custom in Present International Law*, p. 3.

[137] Buergenthal and Murphy, *Public International Law in a Nutshell*, p. 75.

[138] Cf. conclusion 5, paragraph 2, of the Commission's draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (*Yearbook … 2013*, vol. II (Part Two), para. 38) ("Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty"). See also the statements on behalf of Israel and the Islamic Republic of Iran in the 2013 Sixth Committee debate on the work of the Commission (Israel, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19) and 25th meeting (A/C.6/68/SR.25); and the Islamic Republic of Iran, *ibid.*, 19th meeting (A/C.6/68/SR.19), 22nd meeting (A/C.6/68/SR.22) and 26th meeting (A/C.6/67/SR.26)); Arend, *Legal Rules and International Society*, p. 176: "Even though nonstate actors exist, and, in some cases, these nonstate actors have entered into international agreements, these actors do not enter into the process of creating general international law in an unmediated fashion. In other words, the interactions of nonstate actors with each other and with States do not produce customary

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46. While the decisions of international courts and tribunals as to the existence of rules of customary international law and their formulation are not "practice",[139] such decisions serve an important role as "subsidiary means for the determination of rules of law".[140] The pronouncements of the International Court of Justice in particular may carry great weight.[141]

(*Footnote 138 continued.*)

international law"; D'Aspremont, "Inclusive law-making and law-enforcement processes for an exclusive international legal system", p. 430; Mendelson, "The formation of customary international law", p. 203 (suggesting that the contribution of non-State actors to the formation of customary international law is "in a *broader* sense … [an] indirect contribution"); Dinstein, "The interaction between customary law and treaties", pp. 267–269; London Statement of Principles (footnote 42 above). With regard to the suggestion by some that the practice of individuals, such as fishermen, has been recognized as giving rise to customary international law (see, for example, Wolfke, "Some persistent controversies regarding customary international law", p. 4), it is probably more accurate to say that while "it cannot be denied, of course, that actions of individuals may create certain facts which may subsequently become the subject matter of inter-State dialogue. However, in such circumstances the actions of individuals do not constitute a law-creating practice: they are just simple facts giving rise to international practice of States" (Danilenko, *Law-making in the International Community*, p. 84). See also Wolfke, *Custom in Present International Law*, p. 58 ("Whose behaviour contributes to the practice is not important; what is important is to whom the practice may be attributed, and above all, who it is who has 'accepted it as law'"); Santulli, *Introduction au droit international*, pp. 45–46 ("To be relevant for the development of customary rules, the precedent must be attributed to a or an international organization. Only States and international organizations, in fact, participate in the customary phenomenon. The conduct of internal subjects is no less important, but it is not legally relevant in assessing the formation of customary international law with regard to the reaction—tolerance or disapproval.").

[139] See also Mendelson, "The formation of customary international law", p. 202; but see *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 315 (separate opinion of Judge Ammoun) ("international case-law … [is] considered an element of [custom]"); Danilenko, *Law-making in the International Community*, p. 83 ("The decisions of tribunals, and especially the judgments of the I.C.J., are an important part of community practice"). Cf. Kopelmanas, "Custom as a means of the creation of international law", p. 142 ("The creation of legal rules by custom by the action of the international judge is an incontestable positive fact"); Bernhardt, "Custom and treaty in the law of the sea", p. 270 ("This formula [of Article 38 of the Statute of the International Court of Justice, awarding judicial decision the status of subsidiary means for determining rules of law] underestimates the role of decisions of international courts in the norm-creating process. Convincingly elaborate judgments often have a most important influence on the norm-generating process, even if in theory courts apply existing law and do not create new law.").

[140] Article 38, paragraph 1 (*d*) of the Statute of the International Court of Justice; see also *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, 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"); and 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"); and *ibid.*, para. 31, 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.").

[141] Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, p. 20: "The judgments of the International Court and other international tribunals have a role in the recognition and authentication of rules of customary international law." For a recent example, see the judgment of the European Court of Human Rights in *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, ECHR 2014, para. 198; Wolfke, *Custom in Present International Law*, p. 145 ("Judgments and opinions of international courts, especially of the Hague Court, are of decisive importance as evidence of customary rules. The Court has invoked them almost as being positive law.").

47. *Confidential practice*. Much State practice, such as classified exchanges among Governments, is not publicly available, at least not for some time.[142] It is difficult to see how practice can contribute to the formation or identification of general customary international law unless and until it has been disclosed publicly.[143] At the same time, a practice known among only some or even two States may contribute to the development of a regional, special or local (rather than general) rule of customary international law, opposable to them alone.[144]

48. The following draft conclusion is proposed:

"*Draft conclusion 7. Forms of practice*

"1. Practice may take a wide range of forms. It includes both physical and verbal actions.

"2. Manifestations of practice include, among others, the conduct of States 'on the ground', diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties, and acts in connection with resolutions of organs of international organizations and conferences.

"3. Inaction may also serve as practice.

"4. The acts (including inaction) of international organizations may also serve as practice."

49. *No predetermined hierarchy*. No one manifestation of practice is *a priori* more important than the other; its weight depends on the circumstances as well as on the

[142] Such confidential practice is to be distinguished from practice that is simply hard to access. Practice may go largely unnoticed, for a variety of reasons. This is, for example, the case where the practice of particular States is not published in some widely accessible form. There is a special problem, to which members of the Commission and States have drawn attention, with practice that is primarily available in languages that are not widely read (which is in fact the case with most languages).

[143] See also Dinstein, "The interaction between customary law and treaties", p. 275 ("Another condition for State conduct—if it is to count in assessing the formation of custom—is that it must be transparent, so as to enable other States to respond to it positively or negatively"); London Statement of Principles (footnote 42 above), p. 726, conclusion 5 ("Acts do not count as practice if they are not public"). On the "representational function of doctrine [coming] up against the *secret de l'État*" more generally, see Carty, "Doctrine versus State practice", pp. 979–982. Meijers stresses that "States concur in the creation of law by not protesting, that is to say, by not reacting. If that is so, the States concerned must get an opportunity to react. From this … flow two further requirements for the formation of law: it must be possible to indicate at least one express manifestation of the will to create a law, and this express manifestation of will must be cognoscible for all States which will be considered as wishing to concur in the creation of the new rule if they do not protest" ("How is international law made?—The stages of growth of international law and the use of its customary rules", p. 19). But see Bos, "The identification of custom in international law", p. 30 ("Even if facilitated, the discovery of evidence [of State practice] at times may be a problem, for not every bit of practice will find its way to digests and collections. It is asking too much, therefore, to say that in addition to the qualifications … [of virtual uniformity, attribution to the State and generality] practice should also be sufficiently perceptible to other States on which the customary rule-to-be may be binding in future.").

[144] The issue of regional/special/bilateral custom will be dealt with in the Special Rapporteur's third report.

nature of the rule in question.[145] For example, while in common parlance "actions speak louder than words", that will obviously not be the case when it is acknowledged that the action is unlawful.[146] At the same time, in many cases it is ultimately the executive that speaks for the State in international affairs.[147]

50. *A State's practice should be "taken as a whole"*.[148] This implies, first, that account has to be taken of all available practice of a particular State. Secondly, it may be the case that the various organs of the State do not speak with one voice. For example, a court, or the legislature, may adopt a position contrary to that of the executive branch, and even within the same branch different positions may be taken. This may be particularly likely with the practice of sub-State organs (for example, in a federal State); it may be necessary to look cautiously at that practice, in the same way one would approach lower court decisions. Where a State speaks in several voices, its practice is ambivalent, and such conflict may well weaken the weight to be given to the practice concerned.[149]

51. The following draft conclusion is proposed:

"Draft conclusion 8. Weighing evidence of practice

"1. There is no predetermined hierarchy among the various forms of practice.

"2. Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice."

52. *Generality of practice*. "It is of course clear from the explicit terms of Article 38, paragraph 1 (*b*), of the Statute of the [International] Court [of Justice], that the practice from which it is possible to deduce a general custom is that of the generality of States and not of all of them".[150] Indeed, for a rule of general customary international law to emerge or be identified, the practice need not be unanimous (universal),[151] but it must be "extensive"[152] or, in other words, sufficiently widespread.[153] This is not a

[145] See also Conforti and Labella, *An Introduction to International Law*, p. 32 ("These diverse actions are not governed by a set hierarchy: acts of domestic courts and executive organs, organs conducting foreign relations, and representatives at international organizations, are all on an equal footing. The weight given to the acts depends on the content of the international customary rule"); Akehurst, "Custom as a source of international law", p. 21 ("There is no compelling reason for attaching greater importance to one kind of practice than to another"); Wolfke, *Custom in Present International Law*, p. 157 ("The absence of any appropriate indication in the Statute of the [International] Court [of Justice], and the freedom enjoyed by the Court in the choice and evaluation of evidence of customary law, do not give any ground for admitting any formal hierarchy of the kinds of such evidence.").

[146] See, for example, the International Court of Justice's consideration of the principle of non-intervention in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 108–109, para. 207. See also Müllerson, "On the nature and scope of customary international law", p. 344 ("Of course, different categories of State practice may have different weight in the process of custom formation. Usually it matters more what States do than what they say, but on the other hand, at least in official inter-State relations, saying is also doing. 'Actual' practice may be weightier in the process of custom formation but diplomatic practice usually conveys more clearly the international legal position of States. Often only a few States may be engaged in 'actual' practice, while other States' practice may be only diplomatic or even completely absent.").

[147] See also Roberts, "Comparative international law? The role of national courts in creating and enforcing international law", p. 62 ("Where inconsistencies emerge, the conflicting practice must be weighed, considering factors such as which branch of government has authority over the matter"); but see Wuerth, "International law in domestic courts and the *Jurisdictional Immunities of the State* case", p. 827 ("Privileging the executive branch is unsatisfactory because a national court decision invokes the responsibility of the State as a matter of international law and it often provides clearer evidence of the *opinio juris* than executive branch practice.").

[148] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 136, para. 83.

[149] See, for example, *Yong Vui Kong v. Public Prosecutor*, [2010] 3 S.L.R. 489 (Supreme Court of Singapore—Court of Appeal, 14 May 2010), para. 96. For a different argument, according to which only once differences between the practice followed by different organs of a State disappear can the practice of that State become "consistent and thus capable of contributing to the development of customary law", see Akehurst, "Custom as a source of international law", p. 22.

[150] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 330 (separate opinion of Judge Ammoun).

[151] See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 104 (separate opinion of Judge Fouad Ammoun) ("[Proving the existence of customary international law] is therefore a question of enquiring whether such a practice is observed, not indeed unanimously, but … by the generality of States with actual consciousness of submitting themselves to a legal obligation"); *ibid.*, p. 229 (dissenting opinion of Judge Lachs) ("To become binding, a rule or principle of international law need not pass the test of universal acceptance. This is reflected in several statements of the Court … Not all States have, as I indicated earlier in a different context, an opportunity or possibility of applying a given rule. The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 435 (dissenting opinion of Judge Sir Garfield Barwick) ("Customary law among the nations does not, in my opinion, depend on universal acceptance"); *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 95 (separate opinion of Vice-President Weeramantry) ("The general support of the international community does not of course mean that each and every member of the community of nations has given its express and specific support to the principle—nor is this a requirement for the establishment of a principle of customary international law."). For scholarly support see, for example, Dugard, *International Law: A South African Perspective*, p. 28 ("For a rule to qualify as custom, it must receive 'general' or 'widespread' acceptance. Universal acceptance is not necessary"); Thirlway, *The Sources of International Law*, p. 59 ("One thing that can be stated with certainty is that unanimity among all States is not a requirement, either in the sense that all States must have been shown to have participated in [the practice], or in the sense that there is evidence that the *opinio*, the view that it is a binding custom, is held by all States.").

[152] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74.

[153] See, for example, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 102, para. 205 (referring to "[a uniform and] widespread State practice"); *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 299, para. 111 (referring to "a sufficiently extensive and convincing practice"); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at pp. 45, 52 (joint separate opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) (referring to "sufficiently widespread" and "sufficiently general and uniform" State practice), and p. 161 (dissenting opinion of Judge Petrén) (referring to the need for a "sufficiently large" number of States); South Africa, *Samuel Kaunda and Others v. The President of the Republic of South Africa and Others*, Judgment of the Constitutional Court of South Africa (4 August 2004), para. 29 ("Presently this is not the general practice of States … It must be accepted, therefore, that the applicants cannot base their claims on customary international law") (ILM, vol. 44 (2005), p. 173); German Federal Constitutional Court, Order of the Second Senate (footnote 74 above), para. 59 ("Such practice, however, is not sufficiently widespread as to be regarded as consolidated practice that creates customary international law."). Generality has indeed been described as "the key concept to the essence of a universal customary rule" (Barboza, "The customary rule: from

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purely quantitative test, as the participation in the practice must also be broadly representative,[154] and include those States whose interests are specially affected.

53. The exact number of States required for the "kind of 'head count' analysis of State practice"[155] leading to the recognition of a practice as "general" cannot be identified in the abstract.[156] In essence, what is important is that "the practice must have been applied by the overwhelming majority of States which hitherto had an opportunity of applying it"[157] (including, in appropriate cases, through inaction), and that "the available practice … [will be] so widespread that any remaining inconsistent practice will be marginal and without direct legal effect".[158] At times, even a "respectable" number of States adhering to the practice may not necessarily be sufficient;[159] yet it very well may be that only a relatively small number of States engage in a practice, and the inaction of others suffices to create a rule of customary international law.[160]

54. *Specially affected States*. Due regard should be given to the practice of "States whose interests [are] specially affected",[161] where such States may be identified. In other words, any assessment of international practice ought to take into account the practice of those States that are "affected or interested to a higher degree than other States"[162] with regard to the rule in question, and such practice should weigh heavily (to the extent that, in appropriate circumstances, it may prevent a rule from emerging).[163]

(*Footnote 153 continued.*)

chrysalis to butterfly", p. 7). See also *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, paras. 18–19, 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.").

[154] See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 ("a very widespread and representative participation"); and *ibid.*, p. 227 (dissenting opinion of Judge Lachs) ("This mathematical computation, important as it is in itself, should be supplemented by, so to speak, a spectral analysis of the representativity of the States … For in the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that States with different political, economic and legal systems, States of all continents, participate in the process"); ICSID, Award, 11 October 2002, *Mondev International Ltd. v. United States of America* ("Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law" (ILM, vol. 42 (2003), p. 107, para. 117)); German Federal Constitutional Court, Order of the Second Senate of 5 November 2003, *2 BvR 1506/03*, para. 50 (referring to "conduct that is continuous in time and as uniform as possible, and which takes place with a broad and representative participation of States and other subjects of international law with law-making authority"); London Statement of Principles (footnote 42 above), p. 734, conclusion 14 (*i*) ("For a rule of general customary international law to come into existence, it is necessary for the State practice to be both extensive and representative"); Danilenko, *Law-making in the International Community*, p. 94 ("The requirement of generality means that customary practice must acquire a broad and representative character.").

[155] To borrow the words of Judge Dillard in his separate opinion in *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 56.

[156] See also Clapham, *Brierly's Law of Nations: An Introduction to the Role of Law in International Relations*, pp. 59–60 ("This test of *general* recognition [among States of a certain practice as obligatory] is necessarily a vague one; but it is of the nature of customary law, whether national or international, not to be susceptible to exact or final formulation"); Barboza, "The customary rule: from chrysalis to butterfly", p. 8 (" 'Generality' seems to be a rather flexible notion").

[157] Kunz, "The nature of customary international law", p. 666; and see para. 54 below on "specially affected States". See also Higgins, *Problems and Process: International Law and How We Use It*, p. 22 ("We must not lose sight of the fact that it is the practice of the vast majority of States that is critical, both in the formation of new norms and in their development and change and possible death"). The German Federal Constitutional Court has held that it suffices if a rule is recognized as binding by an overwhelming majority of States, which need not necessarily include Germany (see *Argentine Necessity Case*, Order of the Second Senate of 8 May 2007, *2 BvM 1-5/03*, 1, 2/06, pp. 9–10: "A rule of international law is 'general' within the meaning of Article 25 of the Basic Law if it is recognised by the vast majority of States (see BVerfGE 15, 25 (34)). The general nature of the rule relates to its application, not to its content, recognition by all States not being necessary. It is equally not necessary for the Federal Republic of Germany in particular to have recognised the rule.").

[158] Villiger, *Customary International Law and Treaties*, p. 30.

[159] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73; see also Singapore, *Nguyen Tuong Van v. Public Prosecutor* (Court of Appeal), ILR, vol. 134, p. 684, para. 92.

[160] See, for example, Akehurst, "Custom as a source of international law", p. 18 ("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.").

[161] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 ("With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected"); *ibid.*, p. 43, para. 74 ("State practice, including that of States whose interest are specially affected"); and *ibid.*, pp. 175–176 (dissenting opinion of Judge Tanaka) ("It cannot be denied that the question of repetition is a matter of quantity … What I want to emphasize is that what is important … [is] the meaning which [a number or figure] would imply in the particular circumstances. We cannot evaluate the ratification of the Convention [on the Continental Shelf] by a large maritime country or the State practice represented by its concluding an agreement on the basis of the equidistance principle, as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf."); see also *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 90 (separate opinion of Judge De Castro) ("For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform"); and *ibid.*, p. 161 (separate opinion of Judge Petrén) ("Hence another element which is necessary for the formation of a new rule of customary law is missing, namely its acceptance by those States whose interests it affects"); Bellinger and Haynes, "A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", p. 445, footnote 4; Treves, "Customary international law", p. 945, para. 36 ("While, for instance, it would be difficult to determine the existence of a rule on the law of the sea in the absence of corresponding practice of the main maritime powers, or of the main coastal States, or, as the case may be, of the main fishing States, the silence of less involved States would not be an obstacle to such determination. Similarly, rules on economic relations, such as those on foreign investment, require practice of the main investor States as well as that of the main States in which investment is made.").

[162] Worster, "The transformation of quantity into quality: critical mass in the formation of customary international law", p. 58. Meijers ("How is international law made?—The stages of growth of international law and the use of its customary rules", p. 7) refers to "[t]he States which have a predominant share in a given activity"; Danilenko (*Law-making in the International Community*, p. 95) refers to "a special interest in the relevant principles and rules".

[163] See, for example, *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 47 (joint separate opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("Those claims have generally given rise to protests or objections by a number of important maritime and distant-water fishing

Which States are "specially affected" will depend upon the rule under consideration, and indeed "not all areas … allow a clear identification of 'specially affected' States".[164] In many cases, all States are affected equally. Admittedly, some States will often be "specially affected";[165] as mandated by the principle of sovereign equality; however, it is only in such capacity that their practice may be assessed and attributed particular weight.[166]

55. *Consistency of the practice*. For a rule of customary international law to become established, the relevant practice must be consistent.[167] While the specific circumstances surrounding each act may naturally vary, "a core of meaning that does not change" common to them is required: it is then that a regularity of conduct may be observed.[168] Where, by contrast, the practice demonstrates "that each specific case is, in the final analysis, different from all the others … this precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law".[169] In other words, where the facts reveal that there is

> so much uncertainty and contradiction, so much fluctuation and discrepancy … so much inconsistency … and the practice has been so much influenced by considerations of political expediency in the various cases, … it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule.[170]

States, and in this respect they cannot be described as being 'generally accepted'").

[164] Danilenko, *Law-making in the International Community*, p. 95. See also Mendelson, "The subjective element in customary international law", p. 186 ("The notion of 'specially affected States' is not very precise"); Aznar, "The contiguous zone as an archaeological maritime zone", p. 12. One example for such a challenge may be found in the International Court of Justice's *Legality of the Threat or Use of Nuclear Weapons* case, in which Judge Shahabuddeen, in his dissenting opinion, suggested, "Where what is in issue is the lawfulness of the use of a weapon which could annihilate mankind and so destroy all States, the test of which States are specially affected turns not on the ownership of the weapon, but on the consequences of its use. From this point of view, all States are equally affected, for, like the people who inhabit them, they all have an equal right to exist" (Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 414). For the same point, see also *ibid.*, pp. 535−536 (dissenting opinion of Judge Weeramantry).

[165] De Visscher (*Theory and Reality in Public International Law*, p. 154) compares the growth of customary international law to the "formation of a road across vacant land". Also, "[a]mong the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in the world, or because their interests bring them more frequently this way" (*ibid.*, p. 155).

[166] See also London Statement of Principles (footnote 42 above), p. 737: "There is no rule that major powers have to participate in a practice in order for it to become a rule of general customary law. Given the scope of their interests, both geographically and *ratione materiae*, they often will be 'specially affected' by a practice; and *to that extent and to that extent alone*, their participation is necessary"; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 278 (declaration of Judge Shi) ("Any undue emphasis on the practice of this 'appreciable section' [of 'important and powerful members of the international community [that] play an important role on the stage of international politics'] would not only be contrary to the very principle of sovereign equality of States, but would also make it more difficult to give an accurate and proper view of the existence of a customary rule"); and p. 533 (dissenting opinion of Judge Weeramantry) ("From the standpoint of the creation of international custom, the practice and policies of five States out of 185 seem to be an insufficient basis on which to assert the creation of custom, whatever be the global influence of those five"). But see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 312 (dissenting opinion of Vice-President Schwebel) ("This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a Pariah government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas. That is to say, it is the practice of States—and practice supported by a large and weighty number of other States—that together represent the bulk of the world's military and economic and financial and technological power and a very large proportion of its population"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 306 (separate opinion of Judge Petrén) ("It would be unrealistic to close one's eye to the attitude, in that respect, of the State with the largest population in the world"); Buergenthal and Murphy, *Public International Law in a Nutshell*, p. 28 ("That it [practice] does not have to be universal seems to be clear. Equally undisputed is the conclusion that, in general, the practice must be one that is accepted by the world's major powers and by States directly affected by it.").

[167] See, for example, *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at pp. 276 ("a constant and uniform usage"); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 40 ("a constant and uniform practice"); *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at p. 30 (dissenting opinion of Judge Klaestad); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74 (the practice must be "virtually uniform"); *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 90 (separate opinion of Judge De Castro) ("For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform"); and *ibid.*, p. 50 (joint separate opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("Another essential requirement for the practice of States to acquire the status of customary law is that such State practice must be common, consistent and concordant. Thus contradiction in the practice of States or inconsistent conduct, particularly emanating from these very States which are said to be following or establishing the custom, would prevent the emergence of a rule of customary law"). See also *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, para. 17, 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"). One scholar has written that in practice the two requirements of generality and uniformity "meld together in a unitary analytical process. International lawyers cannot, for example, analyse whether State practice is general without having identified a practice that is uniform" (Fidler, "Challenging the classical concept of custom: perspectives on the future of customary international law", p. 202).

[168] Barboza, "The customary rule: from chrysalis to butterfly", p. 7 ("The repetition of conduct is of the essence of custom. Of course, the facts are never the same: Heraclitus used to say that we never bathe twice in the same river. The facts may change, the subjects may be different, the circumstances may vary, but there is a core of meaning that does not change. Whenever there is a repetition, there are individual facts that belong to a common genus; to speak of repetition implies a previous abstraction and elimination of a number of data belonging to the individual facts, the facts that occurred in real life. At the same time, a core of *generic meaning* is kept, i.e. a meaning that can be applied to the other situations … That *generic meaning* repeats itself in every precedent and establishes the content of the accepted by States concerned as law between them"). See also Danilenko, *Law-making in the International Community*, p. 96 ("Any customary rule is a normative generalization from individual precedents").

[169] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 290, para. 81.

[170] *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 277; see also *Corfu Channel case, Merits, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at p.74 (dissenting opinion by Judge Krylov) ("The practice of States in this matter is far from uniform, and it is impossible to say that an international custom exists in regard to it"); *ibid.*, p. 128 (dissenting opinion by Dr. Ečer) ("The practice of States was so varied that no proof of the existence of such a rule [of customary international law] was to be found"); *Fisheries* case, *Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 116, at p. 131 (finding that where "certain States" adopted or applied one rule and "other States" have adopted a different practice, "consequently, the … rule has not acquired the authority of a general rule of international law"); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 56−57 (separate opinion of President Bustamante y Rivero)

(*Continued on next page.*)

56. In establishing the consistency of practice, it is, of course, important to consider situations that are in fact comparable, where the same or similar issues have arisen.[171] And while frequent repetition of a consistent practice would naturally lend it greater weight, "the degree of frequency has to be weighed against the frequency with which the circumstances arise in which the action constituting practice has to be taken, or is appropriate".[172]

57. *Some inconsistency is not fatal*. Complete uniformity of practice is not required: "too much account should not be taken of superficial contradictions and inconsistencies".[173] In the words of the International Court of Justice:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect … The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[174]

58. *Duration of the practice*. Although rules of customary international law have traditionally emerged as a result of a practice extending over a lengthy period of time, it is widely acknowledged that there is no specific requirement with regard to how long a practice must exist before it can ripen into a rule of customary international law.[175] As the International Court of Justice held in the *North Sea Continental Shelf* case:

> 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 … [yet] 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 … 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.[176]

(*Footnote 170 continued.*)

(asserting that where practice is of a "sporadic nature [that] stands in the way of any systemization" the emergence of customary international law is "hardly likely in the circumstances"); *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at p. 212 (declaration of Judge Nagendra Singh) ("a widely divergent and, discordant State practice [would prevent a rule from crystallizing]"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 117−118 (separate opinion of Judge Bula-Bula) ("Many inconsistencies and equivocations fundamentally characterizing a practice both unilateral and solitary … [mean that] no customary norm has emerged.").

[171] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 45, para. 79; German Federal Constitutional Court, Order of the Second Senate (footnote 74 above), para. 42 ("It must be particularly taken into account that the relevant State practice and the doctrines that the Higher Regional Court has taken into consideration, in their overriding majority refer to situations that involve only two States. In the present case, however, legal relations exist between the Republic of Yemen, as the complainant's State of origin, the United States of America, as the requesting State of the forum, and the Federal Republic of Germany as the requested State of residence. Accordingly, the legal consequences of the alleged violation of international law do not directly refer to criminal proceedings in the State of the forum … but to extradition proceedings in the requested State of residence"); *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Judgment (Special Court for Sierra Leone Appeals Chamber), 28 May 2008, para. 406.

[172] Thirlway, *The Sources of International Law*, p. 65.

[173] G. Fitzmaurice, "The law and procedure of the International Court of Justice, 1951−54: general principles and sources of law", p. 45. See also Villiger, *Customary International Law and Treaties*, p. 44 ("An overly strict test … would jeopardize the formation of customary international law. For example, it would mean neglecting the necessarily general character of customary law when examining the instances of practice in too much detail. Furthermore, what appears at first glance to be inconsistent practice may well contain as a common denominator a general rule, or there may at least be uniformity on partial or special rules. Once the rule has become established, it may well permit various options … Divergence from the rule may, in reality, point to an admissible exception"); Crawford, *Brownlie's Principles of Public International Law*, p. 24 ("Complete uniformity of practice is not required, but substantial uniformity is"); Bodansky, "Customary (and not so customary) international environmental law", p. 109 ("Customary rules represent regularities, but not necessarily uniformities, of behaviour … mistakes and violations of rules are possible"); Müllerson, "The interplay of objective and subjective elements in customary law", p. 167 (making the general point that "legal regulation is needed only where there are deviations from desired patterns of practice"). In Briggs' words, "[v]ariations from the concordance, generality, or consistency of a practice are grist for judicial interpretations" ("*Colombian–Peruvian asylum case* and proof of customary international law", p. 45). According to *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, paras. 21–22, observation 5: "Where there was a unifying thread or theme underlying international practice, a certain variability in practice has often not precluded the Commission from identifying a rule of customary international law."

[174] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 98, para. 186. The Court added, "If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule" (*ibid.*); see also *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 336 (dissenting opinion by Judge Azevedo); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 40, and also at pp. 104, 107 (dissenting opinion of Judge Sir Percy Spender); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 229 (dissenting opinion of Judge Lachs). In the *Fisheries* case, the Court said that it "considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may easily be understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court" (*Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 116, at p. 138).

[175] See, for example, Dugard, *International Law: A South African Perspective*, p. 27 ("In most cases some passage of time is required for a practice to crystallize into a customary rule. In some cases, however, where little practice is needed to establish a rule, it may come into existence very rapidly"); Corten, *Méthodologie du droit international public*, pp. 150−151 ("If, before, the doctrine seemed to require a very old practice, recent evolution of case law has made this condition obsolete. *Ratione temporis*, a custom could very well be the result of a limited practice in the time provided, it is added generally, be it particularly intense and unique"); Kunz, "The nature of customary international law", p. 666 ("International law contains no rules as to how many times or for how long a time this practice must be repeated"); Wolfke, "Some persistent controversies regarding customary international law", p. 3 ("This practice no longer needs to occur for any great length of time"); London Statement of Principles (footnote 42 above), p. 731, conclusion 12 (*i*): "No precise amount of time is required." But see the separate opinion of Judge Sepúlveda-Amor in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 279 ("Time is another important element in the process of creation of customary international law … To claim the existence of a customary right, created in such a short span of time, clearly contradicts the Court's previous jurisprudence on the matter" (citing to the *Right of Passage* case)); Jennings, "The identification of international law", p. 5 ("Certainly practice over a more or less long period is an essential ingredient of customary law.").

[176] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74; see also p. 124 (separate opinion of Judge Fouad Ammoun), p. 230 (dissenting opinion of Judge Lachs) ("With regard to the time factor, the formation of law by State practice has in the

While some rules may inevitably take longer to emerge,[177] provided that the practice shows sufficient generality and consistency, no particular duration is required.[178] It ought to be borne in mind in this context, however, that "all States which could become bound by their inaction must have the time necessary to avoid implicit acceptance by resisting the rule".[179]

59. The following draft conclusion is proposed:

"*Draft conclusion 9. Practice must be general and consistent*

"1. To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.

"2. The practice must be generally consistent.

"3. Provided that the practice is sufficiently general and consistent, no particular duration is required.

"4. In assessing practice, due regard is to be given to the practice of States whose interests are specially affected. "

past frequently been associated with the passage of a long period of time. There is no doubt that in some cases this may be justified. However, the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge: one it must meet, lest it lag even farther behind events than it has been wont to do … the short period within which the law on the continental shelf has developed and matured does not constitute an obstacle to recognizing its principles and rules, including the equidistance rule, as part of general law"); and *ibid.*, p. 244 (dissenting opinion of Judge Sørensen) ("The possibility has thus been reserved of recognizing the rapid emergence of a new rule of customary law based on the recent practice of States. This is particularly important in view of the extremely dynamic process of evolution in which the international community is engaged at the present stage of history."). The Inter-American Court of Human Rights has held, with regard to "customary practice", that "the important point is that the practice is observed without interruption and constantly, and that it is not essential that the conduct should be practiced over a specific period of time" (*Baena Ricardo et al. v. Panama*, Judgment of November 28, 2003, *Inter-American Yearbook on Human Rights 2003*, vol. II, para. 104).

[177] See Thirlway, *The Sources of International Law*, p. 64 ("If the issue to be resolved arises frequently, and is regulated in essentially the same way on each occasion, the time required may be short; if the issue arises only sporadically, it may take a longer time for consistency of handling to be observable … It is in fact the consistency and repetition rather than the duration of the practice that carries the most weight"). See also Lauterpacht, "Sovereignty over submarine areas", p. 393 ("The 'evidence of a general practice as law'—in the words of Article 38 of the Statute—need not be spread over decades. Any tendency to exact a prolonged period for the crystallization of custom must be proportionate to the degree and the intensity, of the change that it purports, or is asserted, to effect"); Li, *Guoji Fa De Gainian Yu Yuanyuan (Concepts and Sources of International Law)* p. 91 (cited in Cai, "International investment treaties and the formation, application and transformation of customary international law rules", p. 661).

[178] See also Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, p. 19; Jiménez de Aréchaga, "International law in the past third of a century", p. 25 ("The Court's acceptance of a quickly maturing practice shows that the traditional requirement of duration is not an end in itself but only a means of demonstrating the generality and uniformity of a given State practice"); Sohn, "Unratified treaties as a source of customary international law", p. 234 ("The length of time over which a practice has endured is not crucial for formation of custom. More important is the strength of other factors—frequency and repetition of the practice, number of States that have engaged in the practice, and the relative strength of opposing practice"); Rosenne, *Practice and Methods of International Law*, p. 55 ("It is not necessary that this line of conduct should have been pursued over a long period of time, although assertions of 'quickie' or spontaneous production of customary rules must be treated with reserve. It is more important to establish that there is widespread acceptance of the view that such conduct is in conformity with the law and is required by the law, together with experience of actual conduct consonant therewith"). Cf. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*.

[179] Meijers, "How is international law made?—The stages of growth of international law and the use of its customary rules", pp. 23–24 ("All States that fall within the potential reach of the nascent rule must get an opportunity to protest against its emergence"). But see Arangio-Ruiz, "Customary law: a few more thoughts about the theory of 'spontaneous' international custom", p. 100 ("Particularly nowadays any action or omission of a State is known all over the world with the immediateness of a ray of light.").

Chapter V

Accepted as law

60. The second element necessary for the formation and identification of customary international law—acceptance of the "general practice" as law—is commonly referred to as *opinio juris* (or "*opinio juris sive necessitatis*"). This "subjective element" of customary international law requires, in essence, that the practice in question be motivated by a "conception … that such action was enjoined by law".[180] States are to "believe … themselves to be applying a mandatory rule of customary international law",[181] or, in other words, "[feel] legally compelled to … [perform the relevant act] by reason of a rule of customary law obliging them to do so".[182] It is this "internal point of view"[183] through which regularities of conduct may harden into a rule of law, and which enables a distinction to be made between law and non-law.[184] As Judge Chagla put it,

[180] Hudson, *The Permanent Court of International Justice, 1920–1942—A Treatise*, p. 609.

[181] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 76.

[182] *Ibid.*, at pp. 44–45, para. 78.

[183] Bodansky, "Customary (and not so customary) international environmental law", p. 109.

[184] A practice unaccompanied by such a sense of obligation does not contribute to customary international law. See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77 ("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. 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*"); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 123, para. 55 ("While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for

(*Continued on next page.*)

Custom under international law requires much more than [a piling up of a large number of instances]. It is not enough to have its external manifestation proved; it is equally important that its mental or psychological element must be established. It is this all-important element that distinguishes mere practice or usage from custom. In doing something or in forbearing from doing something, the parties must feel that they are doing or forbearing out of a sense of obligation. They must look upon it as something which has the same force as law … there must be an overriding feeling of compulsion—not physical but legal.[185]

61. *Other motives for action.* "Acceptance as law" is to be distinguished from other, extralegal considerations that a State may have with regard to the practice in question. In ascertaining whether a rule of customary international law exists, it ought to be established, therefore, that the relevant practice was not motivated (solely) by considerations such as "courtesy, good-neighbourliness and political expediency",[186] as well as "convenience or tradition".[187] States must have accorded deference to a rule "as a matter of legal obligation and not merely as a matter of reciprocal tolerance or comity".[188] "Acceptance as law" is not to be confused with considerations of a social or economic nature either,[189] although these may very well be present, especially at the outset of the development of a practice.

62. Nor may practice motivated (solely) by the need to comply with treaty (or some other extracustomary) obligations be taken as indicating "acceptance as law":[190] when the parties to a treaty act in fulfilment of their conventional obligations, this does not generally demonstrate the existence of an *opinio juris*.[191] By

(*Footnote 184 continued.*)

present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court"); see also Thirlway, *International Customary Law and Codification*, p. 48 ("While the requirement of *opinio juris* does undoubtedly give rise to many problems in practice … it is admittedly difficult to distinguish between usage which has become binding as customary law and usage which has not … without allowing the psychological element in the creation of custom to creep back into the discussion by a devious route and under another name"). On the important function of *opinio juris* in preventing generally unwanted general practice from becoming customary international law, see Dahlman, "The function of *opinio juris* in customary international law". Villiger has remarked, "In addition, the *opinio* serves in particular to distinguish violations of the customary rule from subsequent modifications to the rule—a test not without its significance in view of the dynamic nature of customary international law. As long as the previous *opinio* has not been eroded, and the new *opinio* is not established, the diverging practice remains a form either of persistent or subsequent objection." (*Customary International Law and Treaties*, p. 48).

[185] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 120 (dissenting opinion of Judge Chagla), referring to local custom but relying in this context on the general language of Article 38.1(*b*) of the Statute of the International Court of Justice.

[186] *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at pp. 285–286 (adding that "considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation"); see also *Case concerning Right of Passage over Indian Territory, Preliminary Objections, Judgment of 26 November 1957, I.C.J. Reports 1957*, p. 125, at p. 177 (dissenting opinion of Judge Chagla) ("[The State] must go further and establish that … [the practice was] enjoyed … as a matter of right and not as a matter of grace or concession"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at pp. 305–306 (separate opinion of Judge Petrén) ("[Refraining from a conduct must be] motivated not by political or economic considerations but by a conviction that … [that certain conduct is] prohibited by customary international law"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 109 (where the Court contrasted "statements of international policy" from "an assertion of rules of existing international law"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at p. 221 (dissenting opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau) (referring to "asserting usage as at least one basis of its rights … [and thus] it was not, therefore, a case of mere 'gracious tolerance'"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 423−424 (dissenting opinion of Judge Shahabuddeen) ("It is also important to have in mind that bare proof of acts or omissions allegedly constituting State practice does not remove the need to interpret such acts or omissions. The fact that States may feel that realities leave them no choice but to do what they do does not suffice to exclude what they do from being classified as part of State practice, provided, however, that what they do is done in the belief that they were acting out of a sense of legal obligation"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 145 (dissenting opinion of Judge *ad hoc* Van den Wyngaert) ("A 'negative practice' of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical concerns and lack of extraterritorial criminal jurisdiction. Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law"); De Visscher, *Theory and Reality in Public International Law*, p. 149 ("Governments attach importance to distinguishing between custom, by which they hold themselves bound, and the mere practices often dictated by considerations of expediency and therefore devoid of definite legal reasoning. The fact that this is often a political interest is no reason for denying its significance.").

[187] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77 ("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 sense of legal duty"); see also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 69 (separate opinion of Vice-President Sette-Camara) ("In support of the distance principle political and diplomatic convenience can be invoked—but this is hardly *opinio juris sive necessitatis*.").

[188] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 58 (separate opinion of Judge Dillard).

[189] See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 23, para. 23, where the International Court of Justice said of the equidistance method of maritime delimitation: "In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise … Juridically, if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be"; *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 34 ("Humanitarian considerations may constitute an inspirational basis for rules of law … Such considerations do not, however, in themselves amount to rules of law. All States are interested—have an interest—in such matters. But the existence of an 'interest' does not of itself entail that this interest is specifically juridical in nature.").

[190] See also Schachter, "Entangled treaty and custom", p. 729; Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, p. 81 ("Practice in compliance with some other extracustomary rule will not be independent evidence of customary *opinio juris*, as was established in the *North Sea* case"). Baxter pointed to a paradox in this context, according to which "as the express acceptance of the treaty increases, the number of States not parties whose practice is relevant diminishes" ("Treaties and custom", p. 73); see also Cryer, "Of custom, treaties, scholars and the gavel: the influence of the international criminal tribunals on the ICRC customary law study", p. 244 ("In some ways, it can be more difficult to appraise practice in relation to a norm that has a pre-existing treaty basis, as the practice of parties to the treaties *inter se* can be attributed to the existence of the treaty.").

[191] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 76 ("Over half the States concerned, whether acting unilaterally or conjointly, were or shortly

contrast, where States act in conformity with a treaty by which they are not (yet) bound or towards States not parties to the treaty, the existence of "acceptance as law" may indeed be established.[192] This may also be the case where non-parties to a treaty act in accordance with rules embodied therein, as for example with certain non-parties to the United Nations Convention on the Law of the Sea.[193]

63. Where States "freely have recourse [to a set of different methods] in order to reconcile their national interests", there is usually no indication of "any *opinio juris* based on the awareness of States of the obligatory nature of the practice employed".[194] In other words, "the practice of States does not justify the formulation of any general rule of law" where such States are in a position to select a practice appropriate to their individual circumstances (and thus have not recognized a specific practice as obligatory).[195]

64. Acceptance as law is generally to be sought with respect to the interested States, both those that carry out the practice in question and those in a position to respond to it:

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".[196]

In the modern reality of multiple multilateral forums, such inquiry into what some refer to as "individual *opinio juris*" may be complemented or assisted by a search for "coordinated or general *opinio juris*",[197] that is, acceptance of a certain practice as law (or otherwise) by a general consensus of States.[198] Much like the convenience afforded by examining practice undertaken jointly by States, this may make it easier to identify whether the members of the international community are indeed in agreement or are divided as to the binding nature of a certain practice.

65. While the idea that acceptance as law is necessary for the transformation of habitual practice into a legal

became parties to the [Convention on the Continental Shelf], and were therefore presumably so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law"); *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 176, at pp. 199–200 ("Throughout this whole period [of 150 years], the United States consular jurisdiction was in fact based, not on custom or usage, but on treaty rights … [there is] not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 531 (dissenting opinion of Judge Sir Robert Jennings) ("There are obvious difficulties about extracting even a scintilla of relevant 'practice' on these matters from the behaviour of those few States which are not parties to the Charter; and the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself"); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 479 (separate opinion of Judge Abraham) ("Such an approach does not demonstrate the existence of an *opinio juris*, that is to say, a belief that there exists an obligation … outside of any conventional obligation"); *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T (footnote 115 above), p. 111, para. 302. The United States Supreme Court has likewise referred in *The Paquete Habana* case (footnote 117 above) to a rule of international law existing "independently of any express treaty or other public act": p. 708. See also Tomka, "Custom and the International Court of Justice", p. 204 ("This will not often be a problem in regard to determining whether the convention codified a pre-existing rule of law, given the extensive preparatory work and opportunities for explicit comments throughout the process of adopting a codification convention, as well as the circumstances of the adoption, which will shed light on this issue.").

[192] See, for example, the reference to Venezuelan practice in *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 370 (dissenting opinion of M. Caicedo Castilla).

[193] In *Peru v. Chile* before the International Court of Justice, the Agent of Peru stated, "Peru accepts and applies the rules of the customary international law of the sea, as reflected in the [United Nations Convention on the Law of the Sea]": *Maritime Dispute (Peru v. Chile)*, CR 2012/34, p. 43, para. 10 (Wagner).

[194] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 127 (separate opinion of Judge Fouad Ammoun). Unless, of course, the rule itself permits several courses of action.

[195] *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 116, at p. 131.

[196] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 109, para. 207; see also *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 121 (dissenting opinion of Judge Chagla) ("There must be an equally clear realization on the other side of an obligation"); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 315 (separate opinion of Judge Ammoun) ("a practice only contributes to the formation of a customary rule if … both the State which avails itself thereof or seeks to impose it and the State which submits to or undergoes it regard such practice as expressing a legal obligation which neither may evade"); Thirlway, *The Sources of International Law*, pp. 70–71. By contrast, authors have sometimes suggested that it is mainly the *opinio juris* of either group of States which is most important: for the view that the *opinio juris* of the "receiving" States is most important, see, for example, Wolfke, *Custom in Present International Law*, pp. 44 and 47 ("For a typical custom it suffices that the acceptance of the practice as law should be presumed upon all circumstances of the case in question, above all on the attitude, hence conduct, of the accepting States to be bound by the customary rule … It should be added that the requirement of any 'feeling of duty' or 'conviction' on the part of the acting State is even somewhat illogical, since what is legally important is only the reaction of other States to the practice, in particular, whether they consider it as required by law or legally permitted"); MacGibbon, "Customary international law and acquiescence", p. 126 ("The *opinio juris* is, of course, relevant to the formation of customary rights, but only from the standpoint of the States affected by the exercise of the right in question.").

[197] See, for example, Danilenko, *Law-making in the International Community*, pp. 102–107.

[198] See also Pellet, "Article 38", p. 819 (citing several cases while suggesting that "in parallel with practice, [the International Court of Justice] will usually rely on a general opinion, not that of States individually"); Jiménez de Aréchaga, "International law in the past third of a century", p. 11 ("[the International Court of Justice] has searched for the general consensus of States instead of adopting a positivist insistence on strict proof of the consent of the defendant State"); Casella, "Contemporary trends on *opinio juris* and the material evidence of customary international law" ("*Opinio juris* is no longer to be viewed as individual opinion of one or of certain States, but presently as collective statements, issued by the international community, as a whole, or a substantial part of it"); Charney, "The contemporary role of customary international law", p. 21 ("Some maintain that individual States must choose to accept the norm as law. But clearly acceptance is required only by the international community and not by every individual State and other international legal persons"). Judge Meron, in his partly dissenting opinion in *Nahimana et al. v. Prosecutor* (International Tribunal for Rwanda Appeals Chamber), suggests that where a "consensus among States has not crystallized, there is clearly no norm under customary international law" (Case No. ICTR-99-52-A, 28 November 2007, p. 376, para. 5); see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 315 (dissenting opinion of Vice-President Schwebel): ("vehement protest and reservation of rights, as successive resolutions of the General Assembly show … abort the birth or survival of *opinio juris* to the contrary.").

rule dates back to the ancient world,[199] the Latin phrase *opinio juris sive necessitatis* is of far more recent origin. Literally meaning "belief (or opinion) of law or of necessity",[200] this "technical name"[201] for the subjective element is usually shortened to "*opinio juris*", a fact that may well have "its own significance. What is generally regarded as required is the existence of an *opinio* as to the law, that the law is, or is becoming, such as to require or authorize a given action."[202]

66. Scholars attempting to expound on the meaning and function of the concept of *opinio juris* have wrestled not only with its linguistic indeterminacy and uncertain provenance,[203] but also with long-standing theoretical problems associated with attempting to capture in exact terms the amorphous process by which a pattern of State conduct acquires legal force.[204] In particular, some have debated whether the subjective element does indeed stand for the belief (or opinion) of States, or rather, for their consent (or will).[205] Others have deliberated the *opinio juris* "paradox", that "vicious cycle argument" which questions how a new rule of customary international law can ever emerge if the relevant practice must be accompanied by a conviction that such practice is already law.[206] Still others have questioned whether States may be capable at all of having a belief,[207] and whether such inner motivation can ever be proved.[208] Several writers have argued that *opinio juris* ought to be understood as embodying ethical principles and morality,[209] while others deny the relevance of such considerations in this context.[210] These academic debates and others, referred to by one author as "formidable",[211] often reflect deeper controversies on (international) law more broadly.[212]

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[199] Crawford refers to Isidore of Seville's *Etymologiae, Liber V: De Legibus et Temporibus*, where it is said that "Custom is law established by moral habits, which is accepted as law when written law is lacking: it does not make a difference whether it exists in writing or reason, since reason too commits to law … Custom is so called also because it is in common usage" (*Brownlie's Principles of Public International Law*, p. 26, footnote 32). For an "intellectual genealogy" of the "extra ingredient" of customary international law, see Kadens and Young, "How customary is customary international law?"

[200] Thirlway has proposed the following translation "in light of its application in law": "the view (or conviction) that what is involved is (or, perhaps, should be) a requirement of the law, or of necessity" (*The Sources of International Law*, p. 57).

[201] Rosenne, *Practice and Methods of International Law*, p. 55.

[202] Thirlway, *The Sources of International Law*, p. 78. See also Millán Moro, *La "Opinio Iuris" en el Derecho Internacional Contemporáneo*; Huesa Vinaixa, *El Nuevo Alcance de la "Opinio Iuris" en el Derecho Internacional Contemporáneo*. Some have suggested for *opinio juris* an additional role beyond the one commonly accorded to it with regard to customary international law: see, for example, the dissenting opinion of Judge Cançado Trindade in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 283, para. 290 ("One should not pursue a very restrictive view of *opinio juris*, reducing it to the subjective component of custom and distancing it from the general principles of law.").

[203] See, for example, Mendelson, "The subjective element in customary international law", pp. 194 and 207 ("It is submitted that the linguistic incoherence of the phrase *opinio juris sive necessitatis* reflects a certain incoherence of the thought behind it … for its part, [it] is a phrase of dubious provenance and uncertain meaning.").

[204] See also Kadens and Young, "How customary is customary international law?" p. 907 ("The central problem of custom concerns the 'extra ingredient' necessary to transform a repetitive practice into a binding norm. And a central lesson of our historical discussion is that this has *always* been the central problem.").

[205] As has been noted by scholars, the Permanent Court of International Justice and the International Court of Justice have referred to both notions of will and belief (see, respectively, *The Case of the S.S. "Lotus" (France/Turkey), Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18; and *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77). For attempts to reconcile the two approaches, see, for example, London Statement of Principles (footnote 42 above), p. 741, para. 3 ("It is possible to achieve an elision or apparent reconciliation of these two approaches by using such terms as 'accepted' or 'recognized' as law"); and Elias, "The nature of the subjective element in customary international law".

[206] See, for example, Kelsen, "Théorie du droit international coutumier"; see also Taki, "*Opinio juris* and the formation of customary international law: a theoretical analysis", p. 450. On some of the proposed solutions to the "paradox" see Maluwa, "Custom, authority and law: some jurisprudential perspectives on the theory of customary international law"; Verdross, "Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts"; Tasioulas, "*Opinio juris* and the genesis of custom: a solution to the 'paradox'"; Lefkowitz, "(Dis)solving the chronological paradox in customary international law: a Hartian approach"; D'Amato, *The Concept of Custom in International Law*, pp. 52−53; Lepard, *Customary International Law: A New Theory with Practical Implications*, p. 112; Elias and Lim, *The Paradox of Consensualism in International Law*, pp. 3−21.

[207] See, for example, D'Amato, "Custom and treaty: a response to Professor Weisburd", p. 471 ("It is an anthropomorphic fallacy to think that the entities we call States can 'believe' anything; thus, there is no reason to call for any such subjective and wholly indeterminate test of belief when one is attempting to describe how international law works and how its content can be proved"); Cheng, "Custom: the future of general State practice in a divided world", p. 530 ("In the first place, there is the question whether States, being legal entities, can 'think', but this is a simple matter of imputability in international law. If States can 'act' and 'commit illegal acts' through their agents, why can they not 'think'? Are theirs all mindless acts? The next question is, can we really establish the thought of man, let alone that of a legal person? This is an old chestnut. In law, one has no difficulty in ascertaining the 'intention of the parties', the 'intention of the legislator,' *mens rea*, 'willfulness,' and a host of other psychological elements everyday. In law, these psychological elements need not correspond to reality. They are simply what, in lawyers' logic, are deductible from what has been said or done.").

[208] Akehurst, "Custom as a source of international law", p. 36 ("The traditional view seeks evidence of what States believe; the present author prefers to look for statements of belief by States"); Taki, "*Opinio juris* and the formation of customary international law: a theoretical analysis", p. 449 ("it is possible to solve the 'problem of proof' by means of inferring the inner consciousness of the acting individual from some external phenomena (for example observable conduct)") ; Slama, "*opinio juris* in customary international law", p. 656 ("A State's actions, express statements, consent, acquiescence, protests, or lack of protests, are all objective factors capable of *manifesting opinio juris.*").

[209] See, for example, Wolfrum, "Sources of international law", p. 304, para. 25 ("*Opinio iuris*, the belief that a certain conduct is required or permitted under international law, is in fact a conviction that such conduct is just, fair, or reasonable and for that reason is required under law.").

[210] See, for example, Skubiszewski, "Elements of custom and the Hague Court", p. 838: ("The assertion of a right by one State or States, the toleration or admission by others that the former are entitled to that right, the submission to the obligation—these are phenomena that are evidence of the States' opinion that they have moved from the sphere of facts into the realm of law. For rights and duties here have a strictly and exclusively *legal* connotation, and not moral, ethical, or one dictated by courtesy or convenience"); Akehurst, "Custom as a source of international law", p. 37 ("A statement that something is morally obligatory may help to create rules of international morality; it cannot help to create rules of international law.").

[211] MacGibbon, "Customary international law and acquiescence", p. 125.

[212] See also Mendelson, "The subjective element in customary international law", p. 177 ("One reason why the controversies have continued for so long without resolution is that the holders of different theories are able to find in the phenomenon what they want to see, thereby strengthening their pre-conceptions"); Wolfke, *Custom in Present International Law*, p. 44 ("The differences of opinion on this subjective element of custom are closely combined with endless disputes on

The subjective element of customary international law has, however, "created more difficulties in theory than in practice",[213] and the theoretical torment which may accompany it in the books has rarely impeded its application in practice.[214]

67. The International Court of Justice has used a range of different expressions to refer to the subjective element imported by the words "accepted as law" in its Statute. These include a "feeling of legal obligation";[215] "a belief that [the] practice is rendered obligatory by the existence of a rule of law requiring it … [a] sense of legal duty";[216] a "recognition of necessity";[217] a "conviction of necessity";[218] "a belief in the respect due to this long-established practice";[219] "a deliberate intention … a common awareness reflecting the conviction … as to [a] right";[220] "the general feeling … regarding the obligatory character of [the practice]";[221] an "actual consciousness of submitting … to a legal obligation" or a "consciousness of the binding nature of the rule";[222] "a conviction that they [the parties] are applying the law";[223] and "a conviction, a conviction of law, in the minds of [States], to the effect that they have … accepted the practice as a rule of law, the application whereof they will not thereafter be able to evade".[224] Other courts and tribunals, as well as States, have likewise drawn upon a rich fund of vocabulary in referring to this "psychological"/"qualitative"/"immaterial"/"attitudinal" requirement of customary international law.[225] In general, however, all such references appear to express a common meaning: acceptance by States that their conduct or the conduct of others is in accordance with customary international law:

> Belief, acquiescence, tacit recognition, consent have one thing in common—they all express subjective attitude of States either to their own behaviour or to the behaviour of other States in the light of international law.[226]

what is international law in general and on the so-called 'basis of binding force' of that law"); Klabbers, "International organizations in the formation of customary international law", p. 180 ("More importantly perhaps, the very idea of customary law provokes all sorts of debates not just because of the practical relevance combined with the inherent indeterminacy of the notion, but also because of its acute political relevance. It is through the sources of international law (and custom still ranks as one of the two main sources of that particular legal order) that political values are being distributed, which renders sources doctrine in general highly volatile … Small wonder then that sources doctrine continues to provoke debate, and small wonder then that most of the debate tends to be methodological in nature"); Fidler, "Challenging the classical concept of custom: perspectives on the future of customary international law", p. 199 ("The problems associated with [customary international law] ultimately stem from competing perspectives on international relations."). Many of the difficulties and debates owe to a temporal analysis of the subjective element, that is, of its role in a rule's early formative stage as opposed to later emergence and identification; see also Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, pp. 80–84. Cheng's observation is most relevant here: "Contrary to a rather prevalent view, *opinio juris* is not necessarily the recognition of the binding character of a pre-existing rule in which case the question arises as to the origin of the pre-existing rule itself. In a horizontal legal system like international law, where the subjects are also the law-makers, *opinio juris* is simply what the subject/law-maker at any given moment accepts as law, as general law" ("On the nature and sources of international law", p. 223).

[213] Briggs, "*Colombian–Peruvian asylum case* and proof of customary international law", pp. 729–730 ("Theoretical difficulties involved in the determination of these elements [required for the establishment of a rule of customary international law] or of the methods and procedures by which customary rules of international law are created or evolve from non-obligatory practice often receive more attention than the fact that in a given case courts have relatively little difficulty in determining whether or not an applicable rule of customary international law exists"); see also London Statement of Principles (footnote 42 above), p. 741, para. 2 ("In the real world of diplomacy the matter [of the subjective element in customary international law] may be less problematic than in the groves of Academe"); Yee, "The news that *opinio juris* 'is not a necessary element of customary [international] law' is greatly exaggerated", p. 230 ("The idea of *opinio juris* remains the chief culprit in creating confusion among scholars and practitioners of international law in general, but this is probably more so among legal theorists"); De Visscher, *Theory and Reality in Public International Law*, p. 149, footnote 29 ("Proving the existence of the psychological element of custom does not present the insurmountable difficulties sometimes alleged"); Jiménez de Aréchaga, "International law in the past third of a century", p. 24 (referring to the argument that obtaining evidence of the existence of *opinio juris* in concrete cases is difficult when saying, "This difficulty may be somewhat exaggerated"); Thirlway, *International Customary Law and Codification*, p. 47 ("The precise definition of the *opinio juris*, the psychological element in the formation of custom, the philosopher's stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules, has probably caused more academic controversy than all the actual contested claims made by States of the basis of alleged custom, put together"); Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, p. 21 ("In practice the question of proof does not present as much difficulty as the writers have anticipated"); *Restatement of the Law (Third): the Foreign Relations Law of the United States*, para. 102, reporter's note 2 ("Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation … Such conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined.").

[214] For the argument that pure theorizing, for example about what requirements customary international law should or could have, does not change the law, see Kammerhofer, "Law-making by scholars".

[215] *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 286.

[216] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

[217] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 60 (separate opinion of Judge Wellington Koo).

[218] *Ibid.*, p. 121 (dissenting opinion of Judge Chagla).

[219] *Ibid.*, p. 82 (dissenting opinion of Judge Armand-Ugon).

[220] *Ibid.*

[221] *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 370 (dissenting opinion by M. Caicedo Castilla).

[222] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 104 and 130 (separate opinion of Judge Fouad Ammoun).

[223] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 90 (dissenting opinion of Judge Moreno Quintana).

[224] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at pp. 305–306 (separate opinion of Judge Ammoun).

[225] See, for example, *United Parcel Service of America Inc. v. Government of Canada* (Award on Jurisdiction, 22 November 2002), p. 31, para. 97 ("a general sense of obligation"); Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, 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 ("*Opinio juris*, meaning that what States do and say represents the law"); see also *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, paras. 26–27 ("The Commission has often characterized the subjective element as a sense among States of the existence or non-existence of an obligatory rule … in certain instances the Commission has referred to the subjective element by employing different terminology.").

[226] Müllerson, "The interplay of objective and subjective elements in customary law", p. 163. See also Waldock, "General course on public international law", p. 49 ("The ultimate test [in ascertaining a rule of customary international law] must always be: 'is the practice accepted as law?' This is especially true in the international community, where those who participate in the formation of a custom are sovereign States who are the decision-makers, the law-makers within the community. Their recognition of the practice as law is in a very direct way the essential basis of customary law.").

68. The so-called "subjective element" constitutive of customary international law thus refers to the requirement that the practice in question has "occurred in such a way as to show a general recognition that a rule of [customary international] law or legal obligation is involved".[227] While the term *opinio juris* has undoubtedly become established in referring to this element,[228] it is suggested that "accepted as law" may be the better term.[229] The International Court of Justice, reflecting the language of its Statute, has employed this language in the *Right of Passage* case, one of the first cases in which the Court elaborated on the methodology for ascertaining customary international law, when concluding that "in view of all the circumstances of the case, [it was] satisfied that that practice was accepted as law".[230] Use of this term from the Statute goes a long way towards overcoming the *opinio juris* "paradox" referred to above.

69. The following draft conclusion is proposed:

"Draft conclusion 10. Role of acceptance as law

"1. The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.

"2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage."

70. *Evidencing "acceptance as law"*. The motivation behind a certain practice must be discernible in order to identify a rule of customary international law: "only by objectifying the concept of *opinio* can it have a practical impact on the difficult task of differentiating 'legal' custom from nonlegal 'usage' ".[231] In practice, acceptance as law has indeed been indicated by or inferred from a variety of relevant conduct undertaken by States. Some practice may thus in itself be evidence of *opinio juris*, or, in other words, be relevant both in establishing the necessary practice and its "acceptance as law".[232] In that sense:

> Whatever States do … is State practice which has two facets or aspects to it: a visible, observable behaviour of States (or other subjects of international law) and their subjective attitude to this behaviour which may be implicitly present in the very act or behaviour or which may be conveyed to other States through different acts of behaviour constituting, in turn, State practice of a different kind.[233]

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[227] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 43, para. 74. See also Wolfke, *Custom in Present International Law*, p. 44 ("Such practice must give sufficient foundation for at least the presumption that the States concerned have accepted it as legally binding.").

[228] "Perhaps regrettably" so, writes Crawford (*Brownlie's Principles of Public International Law*, p. 25); Wolfke refers to the Latin term as "still widely applied, but misleading", explaining that "misunderstandings arise because this term, having a definite meaning in the history of legal theory, is applied by contemporary authors and, as has been seen, even by [the International Court of Justice], with different connotations or shades of meaning" (*Custom in Present International Law*, pp. 45–46). But see Müllerson, "The interplay of objective and subjective elements in customary law", p. 164 ("Depending on a context we may speak of will, consent, consensus, belief, acquiescence, protest, estoppel, or maybe even something else. However, as the term *opinio juris* is so well entrenched in international legal practice and literature, it would hardly be wise to try to get rid of it.").

[229] See also MacGibbon, "Customary international law and acquiescence", p. 129 ("[As compared with the term '*opinio juris*',] the phrase 'accepted as law', however, may admit of interpretation in senses which more accurately reflect the actual processes of evolution from practice or usage to custom, whether viewed from the standpoint of the exercise of rights or that of the performance of obligations"); Santulli, *Introduction au droit international*, p. 50 ("The Statute of the International Court of Justice considers in its Article 38 that the custom is an 'accepted' practice. And the Statute breaks with a tradition that presented *opinio iuris sive necessitatis* as the 'conscience' to obey a rule of law"); Pellet, "Article 38", p. 819 (referring to the *travaux préparatoires* of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice and to the practice of the Court when suggesting that " 'acceptation' is not necessarily restricted to the will of the States but to an 'acceptance', which can be interpreted less strictly"); Skubiszewski, "Elements of custom and the Hague Court", pp. 839–840.

[230] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 40 ("This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.").

[231] Slama, "*Opinio juris* in customary international law", p. 656. See also Villiger, *Customary International Law and Treaties*, p. 48.

[232] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 299 ("[The] presence [of customary rules] 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"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (separate opinion of Judge Petrén) ("The conduct of these States [that have conducted nuclear atmospheric tests] proves that their Governments have not been of the opinion that customary international law forbade atmospheric nuclear tests"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 147 (dissenting opinion of Judge *ad hoc* Van den Wyngaert); Jiménez de Aréchaga, "International law in the past third of a century", p. 24 ("A large amount of what is described as the material element of State practice contains in itself an implicit subjective element, an indication of *opinio juris*"); Bos, "The identification of custom in international law", p. 30 ("In general, it may be said that anything within the bracket of State practice may serve as evidence of the 'general practice *accepted as law*' "); Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective*, p. 63 ("In one sense, all that States do or omit to do can be classified as 'State practice', because their behaviour is what they do. State behaviour in a wider sense, however, is also our only guide to what they want or believe to be the law"); Koskenniemi, "Theory: implications for the practitioner", p. 15 ("In legal practice, there exists no way to ascertain the presence or absence of the subjective element which would be separate from the ascertainment of the existence of consistent conforming behaviour"); Conforti and Labella, *An Introduction to International Law*, p. 32 ("The subjective element … ties together all the many different types of State conduct"); Zemanek, "What is 'State practice' and who makes it?", p. 292–293 ("Separating material recording 'State practice' from material recording *opinio juris*, though theoretically perhaps desirable, is practically impossible because the first may, through its language, evidence the second"); Thirlway, *The Sources of International Law*, p. 70 ("Since the *opinio juris* is a state of mind, there is an evident difficulty in attributing it to an entity such as a State; and it is thus to be deduced from the State's pronouncements and actions, particularly the actions alleged to constitute the 'practice' element of the custom.").

[233] Müllerson, "On the nature and scope of customary international law", p. 344. The International Court of Justice has also referred to, for example, "a practice illustrative of belief" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 108, para. 206). But see Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, p. 437 ("We cannot automatically infer anything about State wills or beliefs—the presence or absence of custom—by looking at the State's external behaviour. The normative sense of behaviour can be determined only once we first know the 'internal aspect'—that is, how the State itself understands its conduct … doctrine about customary law is indeterminate because circular. It assumes behaviour to be evidence of the *opinio juris* and the latter to be evidence of which behaviour is relevant as custom.").

In any case, it is important that the court or tribunal should nevertheless in fact have separately identified the two elements.

71. How to determine the evidence of "acceptance as law" may depend on the nature of the rule and the circumstances in which the rule falls to be applied. There may, for example, be a distinction to be drawn between cases involving the assertion of a legal right and those acknowledging a legal obligation, and between cases where the practice concerned consists of conduct "on the ground" as opposed to verbal practice.

72. Mere adherence to an alleged rule does not generally suffice as evidence of *opinio juris*: "such usage does not necessarily prove that actors see themselves as subject to a legal obligation".[234] In the words of the International Court of Justice, "acting, or agreeing to act in a certain way, does not itself demonstrate anything of a juridical nature".[235]

73. Similarly, although some have suggested that a large number of concordant acts,[236] or the fact that such cases have been occurring over a considerable period of time,[237] may suffice to establish the existence of *opinio juris*, this is not so. While these facts may indeed *give rise* to the acceptance of the practice as law,[238] they do not embody such acceptance in and of themselves. As the International Court of Justice observed:

> Even if these instances of action … were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris* … The frequency, or even habitual character of the acts is not in itself enough.[239]

74. "Acceptance as law" should thus generally not be evidenced by the very practice alleged to be prescribed by customary international law. This provides, moreover, that the same conduct should not serve in a particular case as evidence of both practice and acceptance of that practice as law.[240] Applying this rule to "non-actual" practice may also serve to guarantee that abstract statements could not, by themselves, create law.[241]

75. Manifestations of "acceptance as law". "The task of ascertaining the opinio, although difficult, is feasible (and is considerably alleviated in the framework of the modern drafting process)."[242] An express statement by a State that a given rule is obligatory *qua* customary international law, for a start, provides "the clearest proof" that it "believes itself bound by, or that from now on it will adhere to, [that] certain principle or rule".[243] Conversely, when a State says that something is not a rule of customary international law, that is evidence of the absence of an *opinio juris*. Such assertions by States of rights or

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[234] Weisburd, "Customary international law: the problem of treaties", p. 9. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 423–424 (dissenting opinion of Judge Shahabuddeen) ("It is also important to have in mind that bare proof of acts or omissions allegedly constituting State practice does not remove the need to interpret such acts or omissions. The fact that States may feel that realities leave them no choice but to do what they do does not suffice to exclude what they do from being classified as part of State practice, provided, however, that what they do is done in the belief that they were acting out of a sense of legal obligation.").

[235] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 76.

[236] See, for example, *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 336 (dissenting opinion by Judge Azevedo) ("Concordant cases, by their number, would clearly reveal an *opinio juris*"); Portugal's contention in the *Right of Passage* that "it would be impossible to contend that unanimity and uniformity [of practice of States] do not bear witness to a conviction of the existence of a legal duty (*opinio juris sive necessitatis*)" (*Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 11); Lauterpacht, *The Development of International Law by the International Court*, p. 380 ("Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention"), quoted with concurrence in *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 246–247 (dissenting opinion of Judge Sørensen).

[237] *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 83 (dissenting opinion of Judge Armand-Ugon) ("A fact observed over a long period of years … acquires binding force and assumes the character of a rule of law").

[238] See, for example, *ibid.*, p. 40 ("This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the parties and has given rise to a right and a correlative obligation"); and *ibid.*, p. 82 (dissenting opinion of Judge Armand-Ugon) ("The continual repetition of an act over a long period does not weaken this usage; on the contrary, it strengthens it; a relationship develops between the act and the will of the States which have authorized it. The recurrence of these acts over so long a period engenders, both in the State which performs them and in the State which suffers them, a belief in the respect due to this long-established practice (Article 38 (1) (*b*) of the Statute of the Court)").

[239] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77. See also *The Case of the S.S. "Lotus" (France/Turkey), Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28; Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, 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 ("A wealth of State practice does not usually carry with it a presumption that *opinio juris* exists.").

[240] See also Mendelson, "The formation of customary international law", pp. 206–207 ("What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element. If one adheres to the 'mainstream' view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by 'real' practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will)"); Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, p. 136–141.

[241] See also Villiger, *Customary International Law and Treaties*, p. 19 ("Since such fears [that one body, or conference, could 'make' law through abstract statements of State representatives] are justified, we may first attempt a synthesis of views, proceeding from Judge Read's argument that 'claims may be important as starting points'. Clearly, the conditions for the formation of customary law are such that one instance of practice, or a few instances in one occasion, cannot create law. Rather, a qualified series of instances is required, and statements at a conference would lose any value if they were not followed by uniform and consistent practice. Equally clearly however, these conditions serve as adequate safeguards, and the fear of instant customary law hardly warrants attaching further conditions to the single instances of practice.").

[242] *Ibid.*, p. 50.

[243] Sohn, "Unratified treaties as a source of customary international law", p. 235; see also, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122–123, para. 55; Villiger, *Customary International Law and Treaties*, p. 50 ("The *express statement* of a State that a given rule is obligatory (or customary, or codificatory), furnishes the clearest evidence as to the State's legal conviction.").

obligations under (customary) international law (or lack thereof) could, *inter alia*, take the form of an official statement by a Government or a minister of that Government,[244] claims and legal briefs before court and tribunals, transmittal statements by which Governments introduce draft legislation in parliament,[245] a joint declaration of States through an official document, or statements made in multilateral conferences such as codification conventions or debates in the United Nations.[246] Diplomatic protests, in particular, "may, and frequently do, indicate the view of the law on the matters in questions entertained by the protesting States: to this extent they may afford evidence of the acceptance of a practice as law".[247]

76. Evidence of "acceptance as law" (or lack thereof) may also be found in a wide range of other practice,[248] depending upon the particular case and considering that "for a typical custom it suffices that the acceptance of the practice as law should be presumed upon all circumstances of the case in question, above all on the attitude, hence conduct, of the accepting States to be bound by the customary rule".[249] As was the case with practice (see para. 41 above), the following list is non-exhaustive: it is intended to suggest the kind of materials where the subjective element may be found:

(*a*) *Intergovernmental (diplomatic) correspondence*,[250] such as a memorandum from a diplomatic mission to the minister for foreign affairs of the State to which it is accredited,[251] or notes exchanged between Governments. Here the language used needs to be carefully analysed in context to determine whether the State is expressing an opinion as to the existence of a legal rule;

(*b*) *The jurisprudence of national courts*[252] clearly embodies a sense of legal obligation. Care must be taken, however, as it "may be difficult to tell … whether this sense of legal obligation derives from international law, from domestic law, or from domestic auto-interpretation of international law".[253] Only when such judgments apply the rule in question in a way which demonstrates, mostly by way of its reasoning, that it is accepted as required under customary international law, could they be relevant as evidence of "acceptance as law";

(*c*) *The opinions of Government legal advisers when they say that something is or is not in accordance with customary international law*,[254] and such opinion has been adopted by the Government as legally mandated;[255]

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[244] See, for example, *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 367 (dissenting opinion by M. Caicedo Castilla); *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, at pp. 74–75 (separate opinion of Vice-President Ammoun); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (International Tribunal for the Former Yugoslavia Appeals Chamber), 2 October 1995, paras. 100, 105, 113−114, and 120−122.

[245] See also *Mondev International Ltd. v. United States of America* (ICSID, Award, 11 October 2002), p. 106, para. 111 ("Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux préparatoires* of the treaty for purposes of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris.*").

[246] See, for example, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 26; *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 48 (joint separate opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("On a subject where practice is contradictory and lacks precision, is it possible and reasonable to discard entirely as irrelevant the evidence of what States are prepared to claim and to acquiesce in, as gathered from the positions taken by them in view of or in preparation for a conference for the codification and progressive development of the law on the subject? … The least that can be said … is that such declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law on fisheries jurisdiction and their *opinio iuris* on a subject regulated by customary international law"); *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. 43, at p. 329 (separate opinion of Judge Tomka); Jiménez de Aréchaga, "International law in the past third of a century", pp. 14 and 24 ("The deliberations in a plenipotentiary conference itself, even before and independently of the adoption of a convention, may themselves result in the emergence of a consensus of States which, followed by their actual practice, crystallizes in a customary rule … The express or implicit indications of *opinio juris* are particularly significant and frequent when a State participates in the process of a codification and progressive development of international law under United Nations auspices.").

[247] MacGibbon, "Customary international law and acquiescence", p. 124.

[248] See also *Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, para. 29, 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"); Restatement of the Law (Third): Foreign Relations Law of the United States, para. 102, comment (*c*) ("Explicit evidence of a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.").

[249] Wolfke, *Custom in Present International Law*, p. 44.

[250] See, for example, *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 116, at pp. 135−136; *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960*, p. 6, at p. 42.

[251] See, for example, *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 371 (dissenting opinion by M. Caicedo Castilla).

[252] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 135, para. 77 (where the subjective element was "demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 76 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal); Special Tribunal for Lebanon, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011, pp. 63–65, para. 100.

[253] Moremen, "National court decisions as State practice: a transnational judicial dialogue?", p. 274; see also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 171−172 (dissenting opinion of Judge *ad hoc* Van den Wyngaert) ("And even where national law requires the presence of the offender, this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law. National decisions should be read with much caution."). Mr. Hmoud highlighted this point as well in his intervention last year, saying that national judicial decisions were an important source of material but they had to be well scrutinized, as *national* courts usually implemented the internal legal processes of the State involved and were not necessarily experienced or well-resourced to identify the rules of customary international law" (*Yearbook … 2013*, vol. I, 3183rd meeting, 19 July 2013).

[254] See, for example, *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment (International Tribunal for the Former Yugoslavia Appeals Chamber), 30 November 2006, para. 89.

[255] Indeed, it ought to be remembered that such opinions do not necessarily become those of the Government, and that at times, as the Commission has previously considered, "the efforts of legal advisers are necessarily directed to the implementation of policy" (*Yearbook …*

(*d*) *Official publications in fields of international law*, such as military manuals or instructions to diplomats;

(*e*) *Internal memorandums by State officials*, such as instructions of a ministry for foreign affairs to its diplomats;[256]

(*f*) *Treaties* (and their *travaux préparatoires*) may potentially demonstrate the existence of "acceptance as law" as well,[257] given that "conventions continue to be a very important form for the expression of the juridical conscience of peoples".[258] For present purposes, such juridical consciousness (with regard to the convention as a whole or certain provisions therein) must exist *outside the treaty*, not just within: for a treaty to serve as evidence of *opinio juris*, States (and international organizations), whether parties or not, must be shown to regard the rule(s) enumerated in the treaty as binding on them as rules of law regardless of the treaty.[259] This may well be the case when a treaty purports to be *declaratory* of customary international law, explicitly or implicitly:[260] then "the treaty is clear evidence of the will of States [parties to the treaty], free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice that is normally employed in proving the state of international law".[261] In other words, when States accept (within the treaty or in the negotiations leading up to it or upon or after its adoption) that the treaty or certain provisions in it are declaratory of existing customary international law, this may serve as clear evidence of "acceptance as law".[262] Still, "the evidence of the practice of the parties consolidated in the treaty must be weighed in the balance with all other [consistent and inconsistent] evidence of customary international law according to the normal procedure employed in the proof of customary international law", in particular "past practice or declarations of the asserting State[s]".[263] Whether the States concerned have indeed signed and/or ratified the treaty, and the ability of parties to make reservations to articles of the treaty, may also be relevant in assessing the existence of *opinio juris*,[264] yet these considerations do not necessarily

1950, vol. II, p. 372, para. 76, where it was added that "nor would a reproduction of such opinions be of much value unless it were accompanied by an adequate analysis of the history leading up to the occasion with reference to which they were given").

[256] See, for example, *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at p. 372 (dissenting opinion by M. Caicedo Castilla).

[257] See also *Camuzzi International S.A. v. The Argentine Republic* (ICSID case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005), p. 38, para. 144 ("There is no obstacle in international law to the expression of the will of States through treaties being at the same time an expression of practice and of the *opinio juris* necessary for the birth of a customary rule if the conditions for it are met"); *Colombian–Peruvian asylum case, I.C.J. Reports 1950*, p. 266, at pp. 369–370 (dissenting opinion by M. Caicedo Castilla) ("This article in the Bolivarian Agreement [on Extradition] has a special meaning as regards custom in matters of asylum, namely, that it demonstrates the existence in both Colombia and Peru of one of the elements which are necessary for the existence of a custom—the psychological element, the *opinio juris sive necessitatis*. The Bolivarian Extradition Agreement recognizes asylum, recognizes the value of the principles applied in America; hence it includes these principles as binding. Consequently, their acceptance by governments or by one individual government implies their acceptance by that government as 'being the law', that is to say, that they are the applicable law. This is a matter of the utmost importance, since the psychological element of custom, which is always so difficult to prove, is here entirely proved"); *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Judgment (Special Court for Sierra Leone Appeals Chamber), 28 May 2008, para. 403; *Derecho, René Jesús s/incidente de prescripción de la acción penal* (Argentinian Supreme Court), case No. 24.079, 11 July 2007, para. III-A (of the State Attorney-General's brief); Appeal Judgment of the Extraordinary Chambers in the Courts of Cambodia (Supreme Court Chamber), Case number 001/18-07-2007-ECCC/SC (3 February 2012), p. 48, para. 94.

[258] *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 116, at p. 148 (individual opinion of Judge Alvarez); see also Guzman and Meyer, "Customary international law in the 21st century", p. 207 ("Looking to treaties as evidence of [customary international law] can remain a valuable practice … because treaties can send credible signals as to what rules States believe to be binding on non-parties.").

[259] This is bearing in mind that, as Weisburd asserts, "it does not follow that conclusion of a treaty necessarily implies *opinio juris*, that is, that the parties believe that the treaty's provisions would legally bind them outside the treaty"("Customary international law: the problem of treaties", p. 24). Of course, treaties may serve as evidence of customary international law or contribute to the formation thereof not only with regard to rules enshrined in them, but also with regard to the customary law of treaties.

[260] As Baxter explains, "The declaratory treaty is most readily identified as such by an express statement to that effect, normally in the preamble of the instrument, but its character may also be ascertained from preparatory work for the treaty and its drafting history" ("Treaties and custom", p. 56). See also Wolfke, "Treaties and custom: aspects of interrelation", p. 36 ("If a treaty contains an express, or even an indirect, recognition, of an already existing customary rule, such recognition constitutes additional evidence of the customary rule in question"). Weisburd correctly explains that "even when this type of statement [that the treaty is declarative of custom] is an inaccurate description of the state of the law as of the date of the treaty's conclusion, it amounts to an explicit acknowledgment by the parties to the treaty that they would be legally bound to the treaty's rules even if the treaty did not exist" ("Customary international law: the problem of treaties", p. 23). Importantly, however, "complex considerations … have to be taken into account in determining whether, and if so to what extent, a new rule embodied in a codification convention may be regarded as expressive of an existing or emerging norm of customary law. Any such rule has to be analysed in its context and in the light of the circumstances surrounding its adoption. It also has to be viewed against the background of what may be a rapidly developing State practice in the sense of the new rule" (Sinclair, "The impact of the unratified codification convention", p. 220).

[261] Baxter, "Treaties and custom", p. 36.

[262] See also Weisburd, "Customary international law: the problem of treaties", p. 25 ("A treaty is not evidence of *opinio juris* if the parties expressly deny in the treaty text and *opinio juris* as to the legal status of the treaty's rules outside the instrument [i.e. the treaties declare themselves as entered into by the parties purely as an act of grace]. The issue is one of the parties' beliefs. But if belief is the key issue, it would seem to follow that a treaty may deny *opinio juris* even without an express statement to that effect if the treaty contains other evidence demonstrating that the parties would not see the treaty's rules as binding but for the treaty. This is not to say that such treaties are not binding as treaties, or to say that such denials of *opinio juris* in the treaty would preclude the emergence of a customary rule on the subject outside the treaty. It is only to say that one cannot consider such a treaty itself to be evidence of the customary law status of the rules it establishes.").

[263] Baxter, "Treaties and custom", pp. 43, 44. See also Danilenko, *Law-making in the International Community*, p. 154 ("It should be emphasized that codifying conventions, even those which expressly state that they embody existing customary law, can never be considered as conclusive evidence of customary law."). As the International Court of Justice opined in a different context, "In the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 98, para. 184).

[264] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63, and p. 42, para. 72; and see p. 130 (separate opinion of Judge Fouad Ammoun) ("The power to subject the implementation of … [a treaty provision to reservations] implies the absence, in the minds of the signatories to the Convention, of the *opinio juris sive necessitatis*. The latter requires consciousness of

(*Continued on next page.*)

signal a lack of it given that custom and treaty may coexist independently of one another.[265] In any case, "Whether a treaty rule is good evidence of *opinio juris* for purposes of customary law is essentially a question of fact. One has to look at the statements, claims, and State conduct"[266] in order to determine it.

Another issue is whether the repetition of similar or identical provisions in a large number of bilateral treaties may be evidence of "acceptance as law". Here too, the provision (and the treaty in which it is incorporated) would need to be analysed in their context and in the light of the circumstances surrounding their adoption. This is particularly so as "the multiplicity of … treaties … is as it were a double-edged weapon":[267]

> The concordance of even a considerable number of treaties *per se* constitutes neither sufficient evidence nor even a sufficient presumption that the international community as a whole considers such treaties as evidence of general customary law. On the contrary, there are quite a few cases where such treaties appear to be evidence of exceptions from general regulations.[268]

(*g*) *Resolutions of deliberative organs of international organizations, such as the General Assembly and Security Council of the United Nations, and resolutions of international conferences*. *Opinio juris* may be deduced from the attitudes of States *vis-à-vis* such non-binding texts that purport, explicitly or implicitly, to declare the existing law, as may be expressed by voting (in favour, against or abstaining) on the resolution, by joining a consensus, or by statements made in connection with the resolution.[269] Such deduction is to be done, however, "with

(*Footnote 264 continued.*)

the binding nature of the rule, and it is self-evident that a rule cannot be felt to be binding when the right not to apply it is reserved"); see also *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (separate opinion of Judge Petrén) (observing that by a treaty which allows for denunciation the signatories "show … that they [are] still of the opinion that customary international law [does] not prohibit [the obligation enumerated in the treaty]"); *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgment (International Tribunal for Rwanda Appeals Chamber), 28 November 2007 (Partly dissenting opinion of Judge Meron), p. 376, para. 5 ("The number and extent of the reservations reveal that profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited, indicating that Article 4 of the [International Convention on the Elimination of All Forms of Racial Discrimination] and Article 20 of the [International Covenant on Civil and Political Rights] do not reflect a settled principle. Since a consensus among States has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech"); *Diplomatic Immunity of Domestic Servants Case* (Austrian Supreme Court), OGH 6 Ob 94/71, judgment of 28 April 1971, SZ 1971 No. 44/56, 204.

[265] With regard to reservations (and, similarly, denunciation) see also Baxter, "Treaties and Custom", pp. 47−53; See also London Statement of Principles (footnote 42 above), p. 755, conclusion 22 ("The fact that a treaty permits reservations to all or certain of its provisions does not of itself create a presumption that those provisions are not declaratory of existing customary law"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 197−198 (dissenting opinion of Judge Morelli). On ratifying (or not) codification conventions as evidence of acceptance as law see, for example, Sinclair, "The impact of the unratified codification convention", p. 227 ("It is fair to say that even sparsely ratified codification conventions may well be looked upon, in general, as providing some evidence of *opinio juris* on the subject-matter involved. The *quality* of the evidence will depend on the provenance of the particular provision which may be in issue. If the *travaux préparatoires* of a specific codification convention demonstrate that a particular provision was adopted at the codification conference on a sharply divided vote, and that the controversy thus engendered may have led a number of States to refuse to participate in the convention, there is clearly a strong case for discounting the value of that provision in the context of later codification efforts.").

[266] Schachter, "Entangled treaty and custom", p. 735.

[267] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 306 (separate opinion of Judge Ammoun).

[268] Wolfke, "Treaties and custom: aspects of interrelation", p. 36; see also *Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at p. 615, para. 90 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary"); Kunz, "The nature of customary international law", p. 668 ("Treaties may, under different circumstances, be evidence for the fulfillment of both conditions, and, under other circumstances, evidence against it"); Wolfke, "Some persistent controversies regarding customary international law", pp. 9−10; Thirlway, *The Sources of International Law*, p. 71; London Statement of Principles (footnote 42 above), p. 758, conclusion 25 : "There is no presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content."

[269] See, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 99−101, paras. 188 and 191 ("This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions … The effect of consent to the text of such resolutions … may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves … [T]he adoption by States of … [a resolution] affords an indication of their *opinio juris* as to customary international law on the question"); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (International Tribunal for the Former Yugoslavia Appeals Chamber), 2 October 1995, paras. 111–112; *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, Arbitral Award (1977), 62 ILR, p. 140, at p. 188 ("The said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources"); *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Arbitral Award 1977), 53 ILR, pp. 491−495; Tomka, "Custom and the International Court of Justice", pp. 210−211; Thirlway, *International Customary Law and Codification*, p. 65 ("It is suggested … that in fact the discussions, and the statements made on behalf of member States in the discussions, will almost always be of greater relevance than the resolution"); Pellet, "Article 38", pp. 817, 825 ("In the case of ascertaining a customary rule of general international law … it is suggested that … [resolutions adopted by the organs of international organizations] belong more to the manifestation of the *opinio juris* than to the formation of a practice … in assessing their legal value, the important element is not what *they* say, but what *the States* have had to say about them"); Alvarez, *International Organizations as Law-makers*, p. 260 ("[General Assembly] resolutions can be an efficient mechanism for finding … *opinio juris*, especially as compared to the annoying tendency of States to omit any discussion of the concept in their bilateral diplomatic discourse"); Human Rights Council report of the Working Group on Arbitrary Detention, A/HRC/22/44 of 24 December 2012, para. 43. See also the conclusions of the Commission of the Institute of International Law on "the elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective" with regard to resolutions of the United Nations General Assembly (Session of Cairo 1987, vol. 62, part II (Paris, Pedone, 1987), pp. 65–71: "A law-declaring resolution purports to state an existing rule of law. In particular, it can be a means for the determination or interpretation of international law, it can constitute evidence of international custom, or it can set forth general principles of law" (conclusion 4); "A resolution may constitute evidence of customary law or of one of its ingredients (custom-creating practice, *opinio juris*), when, in particular, such has been the intention of States in adopting the resolution or the procedures applied have led to the elaboration of a statement of law" (conclusion 21); "Evidence [of international custom] supplied by a resolution is rebuttable" (conclusion 22). Rosenne has observed, "To establish whether a given State has in fact consented to that resolution, in whole or in part, close examination of all the proceedings in the body which adopted the resolution is needed" (*Practice and Methods of International Law*, p. 112).

all due caution",[270] as States may, in fact, have various motives when consenting to (or disapproving of) the text of a resolution: indeed, "support for law-declaring resolutions … would have to be appraised in the light of the conditions surrounding such action. It is far from clear that voting for a law-declaring resolution is in itself conclusive evidence of a belief that the resolution expresses a legal rule".[271] As the International Court of Justice had observed with regard to United Nations General Assembly resolutions:

> Even if they are not binding, [such resolutions] may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character.[272]

While an investigation into the language and specific circumstances of adopting a given resolution is indeed indispensable, it may be suggested that, in general, where "substantial numbers of negative votes and abstentions" by States are to be found, a generally held *opinio juris* as to the normative character of the resolution is missing; in other words, such resolution would "fall short of establishing the existence of an *opinio juris*".[273] Similarly, a resolution adopted unanimously (or by an overwhelming and representative majority) may be evidence of a generally held legal conviction.[274] In addition, where a State not only refrains from voicing any objections to the adoption of a law-declaring resolution, but also takes an active part in bringing that about, "acceptance as law" of its normative content may very well be attributed to it.[275] Finally, "a series of resolutions [containing consistent statements] may show the gradual evolution of the *opinio juris* required for the establishment of a new rule";[276] this too, of course, depends on the particular circumstances.[277]

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[270] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 99, para. 188; and see at p. 184, para. 7 (separate opinion of Judge Ago) ("There are, similarly, doubts which I feel bound to express regarding the idea … that the acceptance of certain resolutions or declarations drawn up in the framework of the United Nations or the Organization of American States, as well as in another context, can be seen as proof conclusive of the existence among the States concerned of a concordant *opinio juris* possessing all the force of a rule of customary international law"); see also guidelines 3.1.5.3 (Reservations to a provision reflecting a customary rule) and 4.4.2 (Absence of effect on rights and obligations under customary international law) of the Commission's Guide to Practice on Reservations to Treaties (*Yearbook … 2011*, vol. II (Part Three), para. 1).

[271] Schachter, "Entangled treaty and custom", p. 730. See also Rosenne, *Practice and Methods of International Law*, p. 112 ("As often as not a vote is an indication of a political desideratum and not a statement of belief that the law actually requires such a vote or contains any element of *opinio juris sive necessitatis* … or that the resolution is a statement of law"); Hannikainen, "The collective factor as a promoter of customary international law", p. 138 ("The overwhelming majority of resolutions of international organizations are formally recommendations only. This is well known to States—they may have very different reasons to vote for a resolution. Those reasons may include political expediency and the desire not to be singled out as a dissenter. Even if a resolution employs legal terminology and speaks of all States' obligations, a State's affirmative vote cannot be taken as a definitive proof of *opinio juris*.").

[272] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 254−255, para. 70; see also the synthesized view of the Iran–United States Claims Tribunal in *Sedco, Inc., v. National Iranian Oil Company and the Islamic Republic of Iran* (27 March 1986): "United Nations General Assembly resolutions are not directly binding upon States and generally are not evidence of customary law. Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute—among other factors—to the creation of such law" (ILM, vol. 25 (1986), pp. 633−634).

[273] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 71.

[274] See also *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, at p. 79 (separate opinion of Vice-President Ammoun); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 235–236 (separate opinion of Judge Al-Khasawneh); Barboza, "The customary rule: from chrysalis to butterfly", p. 5 ("The probability of such type of [General Assembly normative resolutions] to serve as a declaration of customary law, or as the basis for the formation of a custom depends, precisely, on the majority behind it. If obtained by unanimity, or by consensus, they represent the international opinion better than multilateral treaties, having a relatively restricted membership.").

[275] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 133, para. 264.

[276] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 255, para. 70; see also at p. 532 (dissenting opinion of Judge Weeramantry) ("The declarations of the world community's principal representative body, the General Assembly, may not themselves make law, but when repeated in a stream of resolutions … [they may] provide important reinforcement [to a view of what a rule of customary international law is]"); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 236 (separate opinion of Judge Al-Khasawneh) ("[A very large number of resolutions adopted by overwhelming majorities or by consensus repeatedly making the same point,] while not binding, nevertheless produce legal effects and indicate a constant record of the international community's *opinio juris*"); *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 292 (dissenting opinion of Judge Tanaka) ("Of course, we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the [international] organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly. Parallel with such repetition, each resolution, declaration, etc., being considered as the manifestation of the collective will of individual participant States, the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method of the normative process. This collective, cumulative and organic process of custom-generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law. In short, the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Article 38, paragraph 1(*b*)"); Suy, "Innovations in international law-making processes", p. 190 ("[*Opinio juris*] may also arise … through the mere repetition of principles in subsequent resolutions to which States give their approval"). But see Rosenne, *Practice and Methods of International Law*, p. 112 ("There is a tendency today for the agendas of international organs to be excessively repetitive, and the repeated voting is an inert reflex from a policy decision when the issue was first brought up for discussion"). Cf. *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 99 (separate opinion of Vice-President Ammoun) ("The General Assembly has affirmed the legitimacy of that struggle [for liberation from foreign domination] in at least four resolutions … which taken together already constitute a custom"); and *ibid.*, p. 121 (separate opinion of Judge Dillard) ("Even if a particular resolution of the General Assembly is not binding, the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law.").

[277] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 254−255, and at

(*Continued on next page.*)

77. *Inaction as evidence of the subjective element*. "Acceptance as law" may also be established by inaction or abstention, when these represent concurrence or acquiescence in a practice.[278] In Sir Gerald Fitzmaurice's words:

> Clearly, absence of opposition is relevant only in so far as it implies consent, acquiescence or toleration on the part of the States concerned; but absence of opposition *per se* will not necessarily or always imply this. It depends on whether the circumstances are such that opposition is called for because the absence of it will cause consent or acquiescence to be presumed. The circumstances are not invariably of this character, particularly for instance where the practice or usage concerned has not been brought to the knowledge of other States, or at all events lacks the notoriety from which such knowledge might be presumed: or again, if the practice or usage concerned takes a form such that it is not reasonably possible for other States to infer what its true character is.[279]

78. Contradictory practice (that is, practice inconsistent with the alleged rule of customary international law) may evidence a lack of "acceptance as law",[280] just as it may serve to prevent a certain practice from being regarded as settled. However, the practice that is not in accordance with a rule may be an occasion that reaffirms an *opinio juris*, if the action is justified in terms that support the customary rule.[281]

79. Evidence of "acceptance as law" by a particular State (or international organization) may be inconsistent; for example, "Governments and national courts in the same State may hold different opinions on the same question, which makes it even more difficult to identify the *opinio juris* in that State".[282] As with practice, such ambivalence might undermine the significance of the *opinio juris* of that State (or intergovernmental organization) in attempting to identify the existence or not of a rule of customary international law.

80. The following draft conclusion is proposed:

"*Draft conclusion 11. Evidence of acceptance as law*

"1. Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.

"2. The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of Government legal advisers, official publications in fields of international law, treaty practice, and action in connection with resolutions of organs of international organizations and of international conferences.

"3. Inaction may also serve as evidence of acceptance as law.

"4. The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law."

(*Footnote 277 continued.*)

pp. 319–320 (dissenting opinion of Vice-President Schwebel) ("[General Assembly resolutions] adopted by varying majorities, in the teeth of strong, sustained and qualitatively important opposition … consisting as it does of States that bring together much of the world's military and economic power and a significant percentage of its population, more than suffices to deprive the [General Assembly] resolutions in question of legal authority … [T]he repetition of resolutions of the General Assembly in this vein … rather demonstrates what the law is not. When faced with continuing and significant opposition, the repetition of General Assembly resolutions is a mark of ineffectuality in law formation as it is in practical effect"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at pp. 435–436 (dissenting opinion of Judge Sir Garfield Barwick) ("[It may be that] resolutions of the United Nations and other expressions of international opinion, however frequent, numerous and emphatic, are insufficient to warrant the view that customary international law now embraces [a certain rule]"). See also Rosenne, *Practice and Methods of International Law*, p. 112 ("Consensus is a particularly misleading notion, as frequently the formal element of no vote will conceal the many reservations buried away in the records, and it often only means agreement on the words to be used and on their place in the sentence, and absence of agreement, or even disagreement, on their meaning and on the intent of the document as a whole"); London Statement of Principles (footnote 42 above).

[278] See, for example, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 221, at p. 242 (dissenting opinion of Judge Read) ("The fact that no State has adopted this position [that a State party to a dispute may prevent its arbitration by the expedient of refraining from appointing a representative on the Commission] is the strongest confirmation of the international usage or practice in matters of arbitration which is set forth above"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 232 (dissenting opinion of Judge Lachs); *Priebke, Erich s/ solicitud de extradición* (Argentinian Supreme Court), case No. 16.063/94, 2 November 1995, para. 90. See also Wolfke, *Custom in Present International Law*, p. 48 ("Toleration of a practice by other States, considering all relevant circumstances, justifies the presumption of its acceptance as law"); Charney, "Universal international law", p. 536. Hudson wrote of "the failure of other States to challenge that conception [of the State that acted, that practice was required by law] at the time" as one of the elements of customary international law (*The Permanent Court of International Justice, 1920–1942—A Treatise*, p. 609).

[279] G. Fitzmaurice, "The law and procedure of the International Court of Justice, 1951–54: general principles and sources of law", p. 33. See also *The Case of the S.S. "Lotus" (France/Turkey), Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28 ("Only if such abstentions were based on [those States'] being conscious of having a duty to abstain would it be possible to speak of an international custom"); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 73 ("That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain"). Danilenko highlights that "under existing international law, absence of protest implies acquiescence only if practice affects interests [(direct or indirect)] and rights of an inactive State" (*Law-making in the International Community*, p. 108).

[280] See, for example, *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 305 (separate opinion of Judge Petrén) ("The conduct of these States [that have conducted nuclear atmospheric tests] proves that their Governments have not been of the opinion that customary international law forbade atmospheric nuclear tests.").

[281] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 106 and 108–109, paras. 202 and 207.

[282] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 171 (dissenting opinion of Judge *ad hoc* Van den Wyngaert).

Chapter VI

Future programme of work

81. As already announced,[283] the third report, in 2015, will continue the discussion of the two elements of customary international law ("a general practice", "accepted as law"), and the relationship between them in the light of progress with the topic in 2014. It will address in more detail certain particular aspects touched on in the present report, in particular the role of treaties, resolutions of international organizations and conferences, and international organizations generally. The third report will also cover the "persistent objector" rule, and "special" or "regional" customary international law, as well as "bilateral custom".

82. As was recalled in the first report, at its first and second sessions in 1949 and 1950, respectively, the Commission, in accordance with the mandate in article 24 of its statute, had on its agenda a topic entitled "Ways and means of making the evidence of customary international law more readily available".[284] This led to a series of recommendations, which were adopted by the General Assembly and which are still of importance today.[285]

83. As mentioned above, the dissemination and location of practice (and *opinio juris*) remains an important practical issue in the circumstances of the modern world.[286] It is therefore proposed that the draft conclusions should be supplemented by indications as to where and how to find practice and acceptance as law. Such indications would describe the various places where practice and *opinio juris* may be found, for example in digests and other publications of individual States, as well as publications of practice in specific areas of international law.

84. The Special Rapporteur still aims to submit a final report in 2016, with revised draft conclusions and commentaries in light of the debates and decisions of 2014 and 2015, but acknowledges, as some members of the Commission have said, that this is an ambitious work programme.

[283] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663, para. 102.

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

[285] See also *ibid.*, document A/CN.4/659, paras. 9–11; and *ibid.*, document A/CN.4/663, para. 9.

[286] See, for example, Rosenne, *Practice and Methods of International Law*, pp. 58–61; Corten, *Méthodologie du droit international public*, pp. 149–178.

Annex

Proposed draft conclusions on the identification of customary international law

Part One

INTRODUCTION

Draft conclusion 1. Scope

1. The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.

2. The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (*jus cogens*).

Draft conclusion 2. Use of terms

For the purposes of the present draft conclusions:

(*a*) "Customary international law" means those rules of international law that derive from and reflect a general practice accepted as law;

(*b*) "International organization" means an intergovernmental organization;

(*c*) …

Part Two

TWO CONSTITUENT ELEMENTS

Draft conclusion 3. Basic approach

To determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law.

Draft conclusion 4. *Assessment of evidence*

In assessing evidence for a general practice accepted as law, regard must be had to the context, including the surrounding circumstances.

Part Three

A GENERAL PRACTICE

Draft conclusion 5. Role of practice

The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.

Draft conclusion 6. Attribution of conduct

State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function.

Draft conclusion 7. Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal actions.

2. Manifestations of practice include, among others, the conduct of States "on the ground", diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties, and acts in connection with resolutions of organs of international organizations and conferences.

3. Inaction may also serve as practice.

4. The acts (including inaction) of international organizations may also serve as practice.

Draft conclusion 8. Weighing evidence of practice

1. There is no predetermined hierarchy among the various forms of practice.

2. Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice.

Draft conclusion 9. Practice must be general and consistent

1. To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.

2. The practice must be generally consistent.

3. Provided that the practice is sufficiently general and consistent, no particular duration is required.

4. In assessing practice, due regard is to be given to the practice of States whose interests are specially affected.

Part Four

ACCEPTED AS LAW

Draft conclusion 10. Role of acceptance as law

1. The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.

2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.

Draft conclusion 11. Evidence of acceptance as law

1. Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.

2. The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of Government legal advisers, official publications in fields of international law, treaty practice, and action in connection with resolutions of organs of international organizations and of international conferences.

3. Inaction may also serve as evidence of acceptance as law.

4. The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law.

PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

[Agenda item 10]

DOCUMENT A/CN.4/674*

Preliminary report on the protection of the environment in relation to armed conflicts, by Ms. Marie G. Jacobsson, Special Rapporteur

[*Original: English*]
[*30 May 2014*]

CONTENTS

* Incorporating document A/CN.4/674/Corr.1.

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	Source
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General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, *Treaty Series*, vol. 55, No. 814, p. 187.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	*Ibid.*, vol. 75, Nos. 970–973, p. 31.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949)	*Ibid.*, No. 970, p. 31.
Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) (Geneva, 12 August 1949)	*Ibid.*, No. 971, p. 85.
Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949)	*Ibid.*, No. 972, p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949)	*Ibid.*, No. 973, p. 287.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	*Ibid.*, vol. 1125, No. 17512, p. 3.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid.*, No. 17513, p. 609.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	*Ibid.*, vol. 213, No. 2889, p. 221.
Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)	*Ibid.*, vol. 249, No. 3511, p. 215.
Protocol for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)	*Ibid.*
Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999)	*Ibid.*, vol. 2253, No. 3511, p. 172.
Treaty on the Functioning of the European Union (Rome, 25 March 1957)	Consolidated version, *Official Journal of the European Union*, C 326/47, 26 October 2012.
Treaty establishing the European Economic Community (Rome, 25 March 1957)	United Nations, *Treaty Series*, vol. 298, No. 4300, p. 3. See also the consolidated version of the Treaty establishing the European Community, *Official Journal of the European Communities*, No. C 340, 10 November 1997, p. 173.
Convention (No. 107) concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries (Geneva, 26 June 1957)	United Nations, *Treaty Series*, vol. 328, No. 4738, p. 247.

	Source
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	*Ibid.*, 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.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid.*, vol. 1144, No. 17955, p. 123.
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") (San Salvador, 17 November 1988)	OAS, *Treaty Series*, No. 69, document OEA-Ser. A-44.
Convention for the protection of the world cultural and natural heritage (Paris, 16 November 1972)	United Nations, *Treaty Series*, vol. 1037, No. 15511, p. 151.
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.
Convention on the prohibition of military or any other hostile use of environmental modification techniques (New York, 10 December 1976)	*Ibid.*, vol. 1108, No. 17119, p. 151.
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 (Geneva, 10 October 1980)	*Ibid.*, vol. 1342, No. 22495, p. 137.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	*Ibid.*, vol. 1520, No. 26363, p. 217.
Convention (No. 169) concerning indigenous and tribal peoples in independent countries (Geneva, 27 June 1989)	*Ibid.*, vol. 1650, No. 28383, p. 383.
Convention on environmental impact assessment in a transboundary context (Espoo, 25 February 1991)	*Ibid.*, vol. 1989, No. 34028, p. 309.
Convention on biological diversity (Rio de Janeiro, 5 June 1992)	*Ibid.*, vol. 1760, No. 30619, p. 79.
Convention for the protection of the marine environment of the North-East Atlantic (Paris, 22 September 1992)	*Ibid.*, vol. 2354, No. 42279, p. 67.
Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994)	*Ibid.*, vols. 1867–1869, No. 31874, p. 3.
Agreement on the Application of Sanitary and Phytosanitary Measures (Marrakesh, 15 April 1994)	*Ibid.*, vol. 1867, No. 31874, annex 1A, p. 493.
Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	General Assembly resolution 51/229 of 21 May 1997.
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, 25 June 1998)	United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	*Ibid.*, vol. 2187, No. 38544, p. 3.

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Introduction

1. It has long been recognized that environmental effects that occur both during and after an armed conflict have the potential to pose a serious threat to the livelihoods and even the existence of individual human beings and communities. Unlike many of the other consequences of armed conflict, environmental harm may be long term and irreparable and has the potential to prevent an effective rebuilding of society, destroy pristine areas and disrupt important ecosystems.[1]

2. The protection of the environment in armed conflicts to date has been viewed primarily through the lens of the law of armed conflict. However, this perspective is too narrow, as modern international law recognizes that the international law applicable during an armed conflict may be wider than the law of armed conflict. This has also been recognized by the International Law Commission, including in its recent work on the effects of armed conflicts on treaties. This work takes, as its starting point, the presumption that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.[2]

3. Since the applicable law in relation to armed conflict clearly extends beyond the realm of the law of armed conflict, it is sometimes not sufficient to refer to international humanitarian law as *lex specialis* in the hope of finding a solution to a specific legal problem. Other areas of international law may be applicable, such as international human rights and international environmental law. The International Court of Justice has recognized as much—albeit without elaborating on when one set of rules takes precedence over the other:

> More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[3]

4. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court has also recognized that environmental considerations must be taken into account in wartime:

> The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.[4]

In arriving at this finding, the Court recalled its conclusion in the order related to the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, where the Court stated that its conclusion was "without prejudice

[1] See the syllabus of the topic contained in *Yearbook … 2011*, vol. II (Part Two), annex V.

[2] *Ibid*., para. 100, draft article 3 on the effects of armed conflicts on treaties.

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 178, para. 106.

[4] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 4 above), p. 243, para. 33. It should be underlined that it is the Court's general conclusion that "important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict" that is of interest for the present topic and not its consideration of any particular weapon.

to the obligations of States to respect and protect the natural environment".[5] The Court indicated that "[a]lthough that statement was made in the context of nuclear testing, it naturally also applies to the actual use of nuclear weapons in armed conflict".[6] It should also be noted that the underlying assumption of the Court's reasoning has also been recognized by the Commission, *inter alia*, in its work on fragmentation.[7]

5. Even if one were to assume that only the law of armed conflict is applicable during an armed conflict, that law contains rules relating to measures taken before and after an armed conflict. The law of armed conflict is therefore not confined to the situation of an armed conflict as such. Accordingly, applicable rules of the *lex specialis* (the law of armed conflict) coexist with other rules of international law.[8]

6. It appears as if no State or judicial body questions the parallel application of different branches of international law, such as human rights law, refugee law and environmental law. It also seems as if States and judicial bodies are undecided as to the precise application of those areas of the law. The caution on the part of States and judicial bodies to determine exactly how parallel application may work or when the *lex specialis* clearly prevails as the only applicable law may be understandable. At the same time, there is a need to analyse and reach conclusions with respect to this uncertainty.

7. The legal and political landscape has changed since specific rules for the purpose of protecting the environment during armed conflict were adopted almost 40 years ago, namely, the Convention on the prohibition of military or any other hostile use of environmental modification techniques (hereinafter the "Environmental Modification Convention") and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). At that time, international environmental law was in its infancy. Moreover, armed conflicts back then were of a different character. That is to say, most conflicts were classified as being of an international character or a liberation war, whereas non-international armed conflicts of a different character are most common today. This new reality may pose a challenge when applying existing law.

[5] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *Case, I.C.J. Reports 1995*, p. 288, at p. 306, para. 64.

[6] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 4 above), p. 226, at p. 243, para. 32.

[7] See the report of the Study Group on the fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), paras. 241–251, and document A/CN.4/L.682 and Corr.1 and Add.1 (mimeographed; available from the Commission's website, documents of the fifty-eighth session; the final text will appear as an addendum to *Yearbook … 2006*, vol. II (Part One)).

[8] A/CN.4/L.682 (see preceding footnote), para. 173.

Chapter I

Inclusion of the topic in the programme of work of the Commission and previous consultations in the Commission

8. It is against the background outlined above that the Commission, at its sixty-third session in 2011, decided to include the topic "Protection of the environment in relation to armed conflicts" in its long-term programme of work.[9] The topic was included on the basis of the proposal reproduced in annex V to the report of the Commission on the work of that session.[10] The General Assembly, in paragraph 7 of its resolution 66/98 of 9 December 2011, took note of the inclusion of the topic in the Commission's long-term programme of work.

9. At its sixty-fifth session in 2013, the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work and decided to appoint Ms. Marie G. Jacobsson as Special Rapporteur for the topic.

10. Upon its inclusion in the long-term programme of work, consideration of the topic proceeded to informal consultations, which began during the sixty-fourth session of the Commission in 2012. The informal consultations in 2012 offered members the opportunity to present their views on the topic. The informal consultations demonstrated that members favoured the inclusion of the topic on the agenda of the Commission—no member expressed opposition to the inclusion of the topic.

11. At its sixty-fifth session in 2013, the Commission held more substantive informal consultations. These initial consultations offered members of the Commission an opportunity to reflect and comment on the road ahead. The elements of the work discussed included scope and the general methodology, including the division of work into temporal phases, as well as the timetable for future work. The time frame envisaged was three years, with one report to be submitted for consideration by the Commission each year.

12. On the basis of the informal consultations, the Special Rapporteur presented an oral report to the Commission, of which the Commission took note.[11] The Commission also agreed to formulate a request to States to provide examples of when international environmental law, including regional and bilateral treaties, had continued to apply in times of international or non-international armed conflict.[12]

[9] *Yearbook … 2011*, vol. II (Part Two), paras. 365–367. This implies that the topic had met the criteria for the selection of topics recommended by the Commission. See *Yearbook … 1998*, vol. II (Part Two), p. 110, para. 553.

[10] See footnote 1 above.

[11] *Yearbook … 2013*, vol. II (Part Two), p. 72, para. 133. The consultations took place on 6 June and 9 July 2013.

[12] *Ibid*., chap. III, Specific issues on which comments would be of particular interest to the Commission, p. 15, para. 28.

Chapter II

Debate in the Sixth Committee of the General Assembly at its sixty-eighth session

13. Some 28 States addressed the topic in the Sixth Committee during the sixty-eighth session of the General Assembly in 2013, and they did so on the basis of the report of the Commission on the work of its sixty-fifth session (2013).[13] A large majority of States explicitly welcomed the inclusion of the topic, and several States made substantive statements.[14] Of the 28 States that spoke during the debate, only 2 expressed doubts concerning the decision to include the topic.[15] There were also some concerns expressed as to the scope of the topic and the risk of ramifications far beyond the topic of environmental protection in relation to armed conflict.[16] One State was of the opinion that progressive development was needed in this area of the law.[17]

14. In general, States welcomed the temporal approach and the general methodology. Some underlined the difficulties in separating the different phases.[18] While some expressed their preference as to which phase should be the focus of the work, it is not possible to draw a general conclusion. A few States explicitly underlined that phase II (on measures during armed conflict) should not be the main focus of the work, since there already exist rules and principles addressing situations of armed conflict. Some States[19] welcomed and underscored the importance of addressing both international and non-international armed conflicts. A few States indicated that refugee law or consequences for the environment in the context of refugees and internally displaced persons should be addressed.[20] Some States discussed whether weapons should be addressed and divergent views were expressed.[21] One State wanted the Commission to address demining.[22] Another State underlined the importance of considering questions of liability in connection with environmental damage.[23] Some States also emphasized the impact of warfare on sustainable development.[24] One State wanted the protection of cultural property to be included.[25]

15. A few States addressed the possible outcome of the work on the topic and expressed the preference for draft guidelines rather than draft articles.[26] Two States asserted that the topic was not suited for a draft convention.[27] On the other hand, one State believed that draft articles would be a fruitful outcome of the work on this issue by the Commission.[28]

[13] These were: Austria, Belgium, Cuba, Czech Republic, Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), France, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Japan, Malaysia, Mexico, New Zealand, Peru, Portugal, Romania, Russian Federation, Singapore, Slovenia, South Africa, Spain, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.

[14] E.g. Austria, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 23rd meeting (A/C.6/68/SR.23), para. 68; Cuba, *ibid*., 25th meeting (A/C.6/68/SR.25), para. 70; Finland (on behalf of the Nordic countries), *ibid*., 23rd meeting (A/C.6/68/SR.23), para. 44; Greece, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 46; Iran (Islamic Republic of), *ibid*., 26th meeting (A/C.6/68/SR.26), para. 8; Italy, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 2; Malaysia, *ibid*., 25th meeting (A/C.6/68/SR.25), para. 29; Mexico, *ibid*., para. 17; New Zealand, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 102; Portugal, *ibid*., 17th meeting (A/C.6/68/SR.17), para. 86; and South Africa, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 24.

[15] The Russian Federation was of the view that "sufficient regulation already existed under international humanitarian law" and that "the period before and after an armed conflict was considered to be peacetime, during which the general rules applicable to the protection of the environment were fully applicable", *ibid*., 25th meeting (A/C.6/68/SR.25), para. 47. France "reaffirmed the doubts expressed earlier on the feasibility of work on such an issue", *ibid*., 17th meeting (A/C.6/68/SR.17), para. 105.

[16] United States, *ibid*., 23rd meeting (A/C.6/68/SR.23), para. 54.

[17] Malaysia, *ibid*., 25th meeting (A/C.6/68/SR.25), para. 29.

[18] This view is in line with the position taken by the Special Rapporteur in her oral report to the Commission in 2013, in which it was suggested that there could not be a strict dividing line between the different phases; see *Yearbook … 2013*, vol. II (Part Two), para. 137.

[19] Austria, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 23rd meeting (A/C.6/68/SR.23), para. 68; South Africa, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 28; and Switzerland, *ibid*., 23rd meeting (A/C.6/68/SR.23), para. 61.

[20] Iran (Islamic Republic of), *ibid*., 26th meeting (A/C.6/68/SR.26), para. 9; and South Africa, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 28.

[21] Cuba (*ibid*., 25th meeting (A/C.6/68/SR.25), para. 70), Malaysia (*ibid*., para. 30) and Portugal (*ibid*., 23rd meeting (A/C.6/68/SR.23), para. 82) were of the view that weapons should be addressed, whereas Austria (*ibid*., 23rd meeting (A/C.6/68/SR.23), para. 69), Romania (*ibid*., 24th meeting (A/C.6/68/SR.24), para. 87), Singapore (*ibid*., 25th meeting (A/C.6/68/SR.25), para. 114) and the United Kingdom (*ibid*., 23rd meeting (A/C.6/68/SR.23), para. 89) were of the view that weapons should not be included.

[22] Iran (Islamic Republic of), *ibid*., 26th meeting (A/C.6/68/SR.26), para. 9.

[23] New Zealand, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 103.

[24] Peru, *ibid*., 18th meeting (A/C.6/68/SR.18), para. 27, and South Africa, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 24.

[25] Italy, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 4.

[26] India, *ibid*., 19th meeting (A/C.6/68/SR.19), para. 21; Italy, *ibid*., 24th meeting (A/C.6/68/SR.24), para. 5; and Singapore, *ibid*., 25th meeting (A/C.6/68/SR.25), para. 114.

[27] United States, *ibid*., 23rd meeting (A/C.6/68/SR.23), para. 55, and Spain, *ibid*., 25th meeting (A/C.6/68/SR.25), para. 2. That the topic was likely better suited for non-binding guidelines was also suggested in the statement of the Special Rapporteur in her presentation of the topic to the Commission in 2013, see *Yearbook … 2013*, vol. II (Part Two), para. 143.

[28] Czech Republic, *Official Records…*, 25th meeting (A/C.6/68/SR.25), para. 95.

Chapter III

Responses to specific issues on which comments would be of particular interest to the Commission

16. In its report on the work of its sixty-fifth session, in accordance with established practice, the Commission sought information on specific issues on which comments would be of particular interest to the Commission.[29]

[29] *Yearbook … 2013*, vol. II (Part Two), para. 28.

The Commission expressed its wish to

have information from States on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. The Commission would particularly appreciate receiving examples of:

(*a*) treaties, particularly relevant regional or bilateral treaties;

(*b*) national legislation relevant to the topic, including legislation implementing regional or bilateral treaties;

(*c*) case law in which international or domestic environmental law was applied to disputes arising from situations of armed conflict.[30]

17. The following States responded to the Commission's request: Botswana, Czech Republic,[31] El Salvador, Germany and Mexico.

18. Botswana informed the Commission that it was not a party to treaties dealing with the protection of the environment in armed conflict, nor had it implemented any domestic legislation dealing with the matter. In addition, Botswana informed the Commission that no domestic court had dealt with the matter.[32]

19. El Salvador's response[33] was divided into three sections: (*a*) action at the domestic level; (*b*) action at the international level; and (*c*) action at the regional level. The Constitution of El Salvador enshrines a duty of the State to protect natural resources as well as the diversity and integrity of the environment as a means of ensuring sustainable development. Furthermore, it provides that the protection, conservation, rational use, restoration or replacement of natural resources is a matter of public interest. This is further reflected in the Environment Act of 1998,[34] the intention of which is to deal comprehensively with environmental issues by means of modern legal provisions consistent with the principle of the sustainability of economic and social development. El Salvador emphasized that the obligation established is a basic obligation of the State, municipalities and the general population and ensures the implementation of international conventions or treaties to which El Salvador is a party in this area. While the Environmental Act does not explicitly refer to environmental protection during armed conflicts, it does have a broad purpose, which encompasses the obligations contained in various normative texts. Furthermore, as the duties of the State in this regard stem directly from the Constitution, it may be said that the obligation to protect the environment is applicable at all times, since there are no exceptions or provisions for suspension, even during armed conflicts.

20. El Salvador concluded that this reflects an indissoluble relationship between security and environmental protection which remains even in situations not defined as armed conflict in the strictest sense. The relationship also operates in reverse: threats to the environment, especially natural disasters, have potentially adverse effects on security, since they create tensions and exclude persons who might have no other option but to join armed groups or commit various crimes.

21. Mexico indicated that the bilateral and multilateral environmental agreements to which it was a party had no particular obligation in respect of protection of the environment in relation to armed conflict.[35] Mexico recalled that the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) prohibited the usage of means of combat that might cause severe and lasting damage to the environment and reiterated Principle 24 of the Rio Declaration on Environment and Development.[36]

22. Germany submitted information on bilateral agreements and information on a 2001 study made by the Federal Environmental Agency on the legal regulation of the effects of military activity on the environment, noting for example that "[e]xisting international law provides limited protection against the contemporary threats posed by war to the environment".[37] It also informed the Commission that methods and means of warfare affecting the environment were addressed in the *Federal Armed Forces 2013 Joint Service Manual of the Law of Armed Conflict*.[38] Furthermore, Germany submitted quotations from bilateral agreements constituting State practice on the issue, namely one agreement between Germany and the Kosovo Force (KFOR)/NATO, as well as an agreement between Germany and Afghanistan.[39] Both agreements concerned the export of waste generated during a deployment of KFOR and the Federal Armed Forces, respectively.

[30] *Ibid.*

[31] Note verbale of 31 January 2014 from the Permanent Mission of the Czech Republic to the United Nations addressed to the Secretary-General.

[32] Note verbale of 24 January 2014 from the Permanent Mission of Botswana to the United Nations addressed to the Secretary-General.

[33] Note verbale of 29 January 2014 from the Permanent Mission of El Salvador to the United Nations addressed to the Office of Legal Affairs of the Secretariat.

[34] *Diario Oficial de la República de El Salvador*, vol. 339, No. 79, 4 May 1998.

[35] Note verbale of 26 February 2014 from the Permanent Mission of Mexico to the United Nations addressed to the Secretary of the International Law Commission.

[36] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (A/CONF.151.26/Rev.1 (Vol. I)) (United Nations publication, Sales No. E.93.I.8), resolution 1, annex I.

[37] Bodansky, *Legal Regulation of the Effects of Military Activity on the Environment*, Executive Summary, para. 2.

[38] Note verbale of 30 December 2013 from the Permanent Mission of Germany to the United Nations addressed to the Secretary-General.

[39] Agreement dated 3 December 1999 and 15 February 2000 between the Government of Germany and KFOR/NATO on the supervision and control of shipments of waste within, into and out of the European Community with regard to shipments generated by the KFOR/NATO troops to Germany. The latter agreement of 6 July and 9 November 2002 was between Germany and the Transitional Islamic State of Afghanistan on the export from Afghanistan of waste generated during the deployment of the Federal Armed Forces in order to dispose of it in an environmentally sound way, as cited in the note verbale of 30 December 2013 from the Permanent Mission of Germany.

Chapter IV

Practice of States and international organizations

23. In addition to the information provided by States in direct response to the invitation by the Commission, the Special Rapporteur has obtained information through communication with States and international organizations.

Since it will assist with the reading of the present report, this information is set out in the following sections.

24. Despite the limited number of responses from States on the questions posed by the Commission in its 2013 report, the Special Rapporteur remains convinced that a considerable number of States have legislation or regulations in force aimed at protecting the environment in relation to armed conflict. First, military forces are subject to national legislation applicable in peacetime situations. The armed forces as a State entity are most likely subject to the same law as any other State entity, although special regulations may exist for the purpose of the specific tasks of the armed forces. Second, international law obligations and national restrictions are most often reflected in the rules of engagement for the armed forces of States. Third, following the cessation of hostilities, peacetime regulations are, again, applicable by default. This is in addition to specific regulations on cleaning up and restoration (for example, the clearing of minefields).

25. It is the hope of the Special Rapporteur that States will provide further information to questions posed by the Commission. In the meantime, it is interesting to look at a few examples of national legislation.

26. During the debate in the Sixth Committee in 2013, some States referred to their legislation and/or environmental policy considerations. For example, the United States stated that its "military had long made it a priority to protect the environment, not only to ensure the availability of the land, water and airspace needed to sustain military readiness, but also to preserve irreplaceable resources for future generations", reaffirming that "[p]rotection of the environment during armed conflict was desirable *as a matter of policy** for a broad range of military, civilian, health and economic reasons, in addition to purely environmental reasons".[40]

27. The Regulation of the Chinese People's Liberation Army on the Protection of the Environment (2004) contains provisions on the prevention and reduction of pollution and damage to the environment. It also contains an obligation to ensure that environmental protection requirements are met in studying and producing military equipment and to ensure that in the testing, use and destruction of such equipment, measures must be taken to eliminate or reduce any pollution and harm to the environment. The army should practice (adopt) a system of environmental impact assessments, which aims to cover a variety of activities such as organizing military exercises, testing military equipment, handling (military) waste and engineering construction. The measures prescribed in the Regulation appear to address pre-conflict situations, including weapons testing. They also seem to (partly) meet the requirement 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).

28. Denmark, Finland, Norway and Sweden have a long engagement in environmental issues in general, as well as in the specific protection of the environment during armed conflict. These countries made a pledge at the 31st International Conference of the Red Cross and Red Crescent in 2011, *inter alia*, "to undertake and support a concerted study highlighting the relevance of the existing legal framework for the protection of the natural environment in contemporary armed conflicts, and identifying any gaps in that context".[41] Such a study is presently being undertaken by Norway.[42]

29. The armed forces of Denmark comply, as a general rule, with national legislation on such areas as urban planning, energy and environment. There are, nonetheless, certain exceptions and particular regulations pertaining to the military. Examples of these include the placement of wind turbines in the proximity of airbases and training areas,[43] and exceptions for military compounds or camps from the ordinance relating to the control of dangerous substances.[44] Among national legislation of interest to environmental protection, the law on compensation for environmental damage should be mentioned,[45] as well as the general law on environmental protection, which, according to its first article, aims to contribute to the protection of nature and the environment, so that society can develop on a sustainable basis with respect for human life and the preservation of animal and plant life.[46]

30. In addition to national legislation, the Ministry of Defence of Denmark also has a number of strategies and policy provisions on environmental matters. The strategy on the environment states that Denmark is striving to ensure that its policies are in line with the environmental standards established by the International Organization for Standardization (ISO).[47] Before the end of 2018, all divisions of the Ministry of Defence should adhere to these standards for the implementation of environmental management.[48] In international operations, the armed forces abide by a number of international standards and provisions regarding the protection of the environment, such as those established by NATO.[49]

31. The majority of environmental legislation in Finland, at both the European Union and national levels, includes some special regulations concerning the military.

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[40] *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 23rd meeting (A/C.6/68/SR.23), para. 54.

[41] Pledge P1290, submitted by Denmark, Finland, Norway and Sweden and the National Red Cross Societies of Denmark, Finland, Norway and Sweden. Available from www.icrc.org/pledges.

[42] The Ministry of Foreign Affairs of Norway has commissioned the International Law and Policy Institute in Oslo to conduct the study.

[43] Air Navigation Act No. 1036 of 28 August 2013, paras. 67–68 (in Danish). Available from www.retsinformation.dk/Forms/R0710.aspx?id=158058.

[44] Risk Executive Order (in Danish). Available from www.retsinformation.dk/Forms/R0710.aspx?id=13011.

[45] Ministry of Justice Law No. 225 of 6 April 1994 on compensation for environmental damage (in Danish). Available from www.retsinformation.dk/Forms/R0710.aspx?id=59346.

[46] Environmental Protection Act No. 879 of 26 June 2010. Available from www.retsinformation.dk/Forms/R0710.aspx?id=132218.

[47] Denmark, Ministry of Defence, *Environment and Nature Strategy of the Ministry of Defence 2012–2015* (Copenhagen, 2012), p. 17. Available from www.fmn.dk/eng/news/Documents/Miljoe_og_natur strategi_2012-2015_english.pdf. For more information regarding ISO standards on environmental protection, see ISO, *Environmental Management: The ISO 14000 Family of International Standards*, available from www.iso.org/iso/theiso14000family_2009.pdf.

[48] Denmark, Ministry of Defence, *Environment and Nature Strategy of the Ministry of Defence 2012–2015* (see preceding footnote), p. 17.

[49] For further information on the environmental standards and policies of NATO, see, *inter alia*, www.nato.int/cps/en/natolive/topics_80802.htm.

The Finnish Defence Forces adhere to environmental legislation whenever possible. In theory, exemptions are vital in order to ensure that environmental legislation does not undermine their operability and flexibility. However, in practice, such exemptions are seldom used. Examples of exemptions include noise emissions from fighter aircraft and exemptions in the Waste Act.[50] Special regulations include acts and decrees on individual nature protection areas that allow the military to use these areas as well.[51] An important exemption at the European Union level is to allow exemptions for substances used by the military as part of the European Union regulation on registration, evaluation, authorization and restriction of chemicals.[52]

32. Also in Finland, environmental issues and impact are assessed as part of the operational planning procedure, prior to any operations or important military training taking place, and Finland adheres to the existing NATO Standardization Agreements, which is a document detailing how such planning shall be carried out.[53] In addition, environmental baseline studies are conducted before international deployment operations.[54]

33. The Ministry of Defence of Finland has a policy to publish and periodically renew its Community and Environment Strategy. Both the Finnish Defence Forces and the Construction Establishment of Finnish Defence Administration have their own environmental policies that are in accordance with ISO guidelines. Some of the garrisons have ISO-certified environmental management systems and the whole administration follows ISO standards. The Finnish Defence Forces also have a strategic environmental protection implementation plan[55] and, more recently, have systematically developed measures for environmental protection of shooting ranges and heavy weapons shooting areas.[56] Furthermore, the Ministry of Defence periodically publishes an environmental report.[57]

34. Norway has published a handbook regarding environmental protection in the armed forces,[58] as well as an action plan on the same topic.[59] In the latter publication, the Ministry of Defence of Norway notes that, because many environmental problems are of a transboundary character, it is important to find common solutions across State borders.[60] Taking part in international peacekeeping operations also necessitates cooperation with respect to the development of frameworks and targets for environmental protection.[61]

35. In accordance with the policy on environmental management in the Norwegian Armed Forces, environmental considerations shall be integrated into all planning and decision-making processes.[62] The armed forces have based their environmental policy on ISO standards on the topic.[63] Furthermore, the armed forces have established an environmental database to which all units shall continuously report all activities, products or services that may affect the environment.[64]

36. The Norwegian Armed Forces have operated in areas where conflicts have arisen owing to scarcity of resources; they remark in the handbook that it is likely that changes in climate will continue to affect their work in the future, either in operations in areas affected by scarcity of resources or in connection with the flows of refugees from such areas.[65] Therefore, sufficient knowledge about global and local environmental changes and conditions within the armed forces is crucial in order to understand the background to the conflict at hand, as well as to avoid worsening environmental conditions in these areas.[66]

37. Referring to the many studies that have been conducted by UNEP regarding the detrimental effects of war on the environment, the handbook notes that the Norwegian Armed Forces shall not decrease the value of local environmental and natural resources during their service abroad. When there are differences between the Norwegian provisions and those governing the area of operations, the highest standard shall apply as far as possible, taking into consideration operative needs and other relevant conditions. However, the handbook also notes the difficulty in fully comprehending local environmental conditions in a foreign country and therefore recommends that local environmental agencies or other actors with relevant information on the topic be consulted, so that the mission can be adapted to best fit the local conditions and to avoid damage to the environment.[67]

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[50] Waste Act 646/2011. Available from www.finlex.fi/en/laki/kaannokset/2011/en20110646.

[51] E-mail communication between the Ministry of Defence of Finland and the Special Rapporteur.

[52] See Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (*Official Journal of the European Union* L 396, 30 December 2006), art. 2, para. 3 (regarding the exemptions allowed from the Regulation in specific cases for certain substances, where necessary in the interests of defence).

[53] See NATO, *Standard Agreement STANAG 7141: Joint NATO Doctrine for Environmental Protection During NATO-led Military Activities, Edition 6* (Brussels, 2014).

[54] E-mail communication between the Ministry of Defence of Finland and the Special Rapporteur. It should also be noted that, in addition, the Ministry of Foreign Affairs of Finland has been a major financier of the work of UNEP in the area of environmental protection in relation to peacekeeping operations.

[55] Warsta, "Towards sustainable defence—the strategic environmental protection plan of the Finnish defence forces."

[56] The Ministry of Defence of Finland estimates that recent investment in environmental protection has been around 6 or 7 million euros annually for research and development and facilities development only (e-mail communication between the Ministry of Defence of Finland and the Special Rapporteur).

[57] See e.g. the report covering the period between 2010 and 2012 (in Finnish). Available from www.defmin.fi/files/2585/Puolustushallinnon_ymparistoraportti2010_2012.pdf.

[58] Norwegian Armed Forces, *Håndbok, Miljøvern i Forsvaret* (Oslo, 2013).

[59] Norway, Ministry of Defence, *Handlingsplan-Forsvarets miljøvernarbeid*.

[60] *Ibid.*, p. 27.

[61] *Ibid.*

[62] Norwegian Armed Forces, *Bestemmelser for miljøvern til bruk i Forsvaret* (Oslo, 2011), para. 3.1.

[63] For more information regarding ISO standards on environmental protection, see ISO, *Environmental Management: The ISO 14000 Family of International Standards* (footnote 47 above).

[64] Norwegian Armed Forces, *Bestemmelser for miljøvern til bruk i Forsvaret* (see footnote 62 above), para. 3.3.

[65] Norwegian Armed Forces, *Håndbok. Miljøvern i Forsvaret* (see footnote 58 above), p. 17.

[66] *Ibid.*

[67] *Ibid.*, pp. 48–49.

38. As part of its work to reduce toxic chemicals, Norway prohibited the use of lead-based bullets in 2005, and a voluntary agreement has been concluded with respect to the phasing out of ammunition containing lead on military practice grounds.[68]

39. The Swedish Armed Forces are regulated by Swedish national legislation, that is to say, the Environmental Code,[69] other national legislation, environmental permits and internal rules. Environmental permits can be granted in accordance with the Environmental Code and are generally administered by the appropriate county administrative board.[70] Each unit commander is personally responsible for ensuring that the conditions in the environmental permit are correctly adhered to.[71]

40. The armed forces of Sweden, Finland and the United States have published a guidebook, as well as a joint toolbox, on environmental protection.[72] In these materials, emphasis is placed on the importance of preventing damage to the environment, for example by undertaking risk assessments of the potential damage to the natural environment. The toolbox focuses on the following technical subject matter: solid waste management, hazardous material and hazardous waste management, water and wastewater management, spill prevention and response planning, cultural property protection, and natural resource protection.[73] The armed forces of Sweden are also collaborating with the Norwegian Armed Forces and other actors in Cold Response, a joint military exercise in the northern part of Norway. This has resulted in a considerable decrease in the cost of damage to the territory affected by the drill.[74]

41. Since 2006, the Swedish Defence Research Agency has been working on adapting United Nations peacekeeping missions as regards environmental issues and on increasing awareness of the importance of environmental considerations both as a cause of conflict and as a factor in achieving a successful mission.[75] It contributed to the report *Greening Peace Operations—Policy and Practice*.[76]

42. In addition to information provided by States, the Special Rapporteur also obtained information directly from, and in relation to, international organizations.

A. United Nations peacekeeping operations

43. Environmental considerations are also prominent within the context of United Nations peacekeeping operations. Both the Department of Peacekeeping Operations and the Department of Field Support explicitly recognize the potential damage by peacekeeping operations to the local environment. They are, therefore, actively working together towards ensuring environmental sustainability. They have jointly developed an overarching policy to deal with environmental issues. The two departments and their partners have recently noted the need for clearer and more systematic approaches to environmental assessments, and monitoring and evaluation, as part of overall operations management.

44. The work completed is part of the Secretary-General's Greening the Blue initiative. In May 2012, UNEP released *Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations*. The report, among other things, clarifies the important role that United Nations peacekeeping operations can play in investigating and preventing concerns, such as ensuring that the sanitary conditions at the United Nations stabilization missions are adequate to avoid contamination of local waterways,[77] as well as preventing deforestation and illicit trade in natural resources in the Democratic Republic of the Congo.[78]

B. North Atlantic Treaty Organization

45. All operational plans of NATO include environmental considerations as an integral part of planning. These considerations are based on the NATO Military Principles and Policies for Environmental Protection,[79] which note that concerns for environmental protection have "grown in importance" worldwide, observing that "[l]egal and regulatory emphasis to the protection of the environmental impacts during planned activities and mitigations of high risk behaviour is continuously increasing".[80] With respect to implementation, the Principles state that the Strategic Commands are responsible for integrating these principles and policies into concepts, directives and procedures in agreement with nations, and that NATO nations and partner nations are encouraged to adapt such standards accordingly.[81]

46. The extensive list of other references and documents produced by NATO on this and related subjects indicates the depth and breadth of its consideration of these matters.[82] For example, the NATO status-of-forces agreements and other similar arrangements also contain provisions on the protection of the environment. In addition, NATO also has a number of Standardization

[68] *Ibid.*, p. 101.

[69] Sweden, Code of Statutes, Environmental Code (SFS 1998:808).

[70] Environmental Code, chap. 9, sect. 8.

[71] E-mail communication between the Ministry of Defence of Sweden and the Special Rapporteur.

[72] *Environmental Guidebook for Military Operations* (2008). Available from www.defmin.fi/files/1256/Guidebook_final_printing_version.pdf.

[73] *Environmental Toolbox for Deploying Forces*, developed through the trilateral cooperation of defence environmental experts from Finland, Sweden and the United States. See www.defmin.fi/files/2505/02_Heikkila_Sami.pdf.

[74] Over the years, the cost is estimated to have decreased from around SKr 10 million to between SKr 1 million and SKr 2 million, owing to a greater awareness of environmental costs and damage and the possibilities of preventing them.

[75] The engagement of Sweden dates back a number of decades to the predecessor of the Defence Research Agency.

[76] Waleij and others, *Greening Peace Operations—Policy and Practice*. The Defence Research Agency is a partner to the Department of Peacekeeping Operations and the Department of Field Support.

[77] Jensen and Halle, *Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations*, pp. 8 and 33.

[78] *Ibid.*, p. 37.

[79] NATO Military Principles and Policies (MC 0469/1), October 2011.

[80] Para. 1.

[81] Para. 9.

[82] For more information on the environmental protection policy of NATO, see www.nato.int/cps/en/natolive/topics_80802.htm.

Agreements related to various areas of environmental protection.[83]

C. Conclusions and disclaimer

47. It is obvious that the limited information obtained from States thus far with respect to the practice and policies in peacetime and during international peace operations is not enough to claim that a general universal practice exists. Nor is it possible to establish evidence of customary international law. Yet, it signals an awareness and clear ambition on the part of States and international organizations to take environmental considerations into account when planning and conducting military operations in peacetime. On the basis of the dates of these sources of law and policies, this is a new development that mirrors the general cognizance that environmental concerns cannot be disregarded. It is not possible to imagine that international military cooperation and peacekeeping operations could be pursued without having been preceded by environmental considerations. Of particular interest is the fact that the examples come from different regions. The detailed information obtained from the Nordic States serves as an example, but similar information could likely be obtained from other regions.

48. The Special Rapporteur remains convinced that more States have moved or are moving in the same direction and she would, therefore, appreciate it if those States that have not yet responded to the invitation by the Commission could provide information accordingly. States and organizations are also welcome to contact the Special Rapporteur directly.

[83] E-mail communication between the Office of Legal Affairs of NATO and the Special Rapporteur.

Chapter V

Purpose of the present report

49. The present preliminary report will provide an introductory overview of phase I of the topic, namely the relevant rules and principles applicable to a potential armed conflict (peacetime obligations). As the report will focus its attention on phase I, it will not address measures to be taken during an armed conflict or post-conflict measures *per se*, even if preparatory acts necessary to implement such measures may need to be undertaken prior to the outbreak of an armed conflict.

50. The present report does not contain a general background to and rationale for the topic. The Special Rapporteur is of the view that this would be unnecessarily repetitious and prefers to refer to the syllabus contained in the report of the Commission on the work of its sixty-third session.[84] This means that references to work by other bodies, such as ICRC, will not be dealt with in the present report. Likewise, important documents such as the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[85] and the Rio Declaration on Environment and Development are not discussed in the present report.[86]

51. In framing the present report, the Special Rapporteur has taken into account the following:

(*a*) the views expressed during the informal consultations in the Commission;

(*b*) the views expressed by States in the Sixth Committee;

(*c*) the written information submitted by States in response to the request by the Commission included in chapter III of the report of the Commission on the work of its sixty-fifth session; and

(*d*) the information obtained through direct communication with States and international organizations.

52. The present report will examine some aspects relating to scope and methodology, as well as the use of certain terms and the sources to be considered, before proceeding to a discussion of how this topic relates to some other topics previously addressed by the Commission, such as:

(*a*) the effects of armed conflicts on treaties;

(*b*) non-navigational uses of international watercourses;

(*c*) shared natural resources;

(*d*) prevention of transboundary harm from hazardous activities and the allocation of loss in the case of transboundary harm arising out of hazardous activities.[87]

53. The present report will also refer to ongoing work of the Commission that may be of specific relevance to the topic. The intention is not to restate the work of the Commission. Rather, it will serve as a reminder of the work that has already been done with a view to ensuring consistency, as appropriate.

54. Thereafter, the present report will begin to develop the content of phase I by identifying existing legal obligations and principles arising under international environmental law that could guide preventive measures taken to reduce negative environmental effects resulting from a potential armed conflict. Principles and rules on

[84] See footnote 1 above.

[85] See *Report of the United Nations Conference of the Human Environment, Stockholm 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), chap. I.

[86] For a compilation of treaties and political declarations, see *Yearbook … 2011*, vol. II (Part Two), p. 216, annex V, appendix I.

[87] The Special Rapporteur has, with the assistance of the Secretariat, identified the issues previously considered by the Commission that might be relevant to the present topic.

precaution and prevention are especially important and will be introduced in greater depth. In addition, existing legal obligations of relevance to this topic that arise in the context of other areas of international law, such as human rights, will also be briefly introduced. This will include the concept of sustainable development.

55. Since peacetime law is fully applicable in situations where no armed conflict is ongoing, the challenge is to identify those rules and principles in peacetime that are relevant to the present topic. At this stage of the work, it would be premature to attempt to evaluate the extent to which these rules may continue to apply (or be influential) in situations of armed conflict and post-armed conflict. For example, although the precautionary principle and the obligation to undertake environmental impact assessments have comparable obligations under international humanitarian law, such rules under the law of armed conflict are far from identical to peacetime obligations. That said, parts of the underlying object and purpose of such wartime and peacetime obligations are arguably quite similar, and a comparison of such rules will be undertaken in a later report on phase II of the topic.

56. It is the aim of the Special Rapporteur to confine the present report to the most important principles, concepts and obligations, rather than trying to identify which conventions continue to apply during an armed conflict. Accordingly, the Special Rapporteur has not endeavoured to chart every single international or bilateral agreement that regulates the protection of the environment or human rights.[88] These treaties are fully applicable in peacetime, which is the focus of the present report.

57. It is worth recalling that the period starting from 1976 until the present day is of particular relevance to this topic. In 1976 the Environmental Modification Convention was adopted, followed one year later by the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). These two legal instruments are important because they were the first legal instruments that expressly provided for the protection of the environment in armed conflicts.[89] The provisions of those instruments, which address environmental protection, are the products of their time in the sense that they reflect the interests and environmental concerns of the international community emerging at that time.[90]

[88] An overview of relevant treaties and non-treaty practice is found in the syllabus to the topic; see footnote 86 above.

[89] At the time of writing this report, there are 174 States parties to the Protocol, and 76 to the Convention.

[90] This is described in the syllabus of the topic; see footnote 1 above.

Chapter VI

Some reflections on scope, methodology and outcome of the topic, based on the previous discussions in the Commission and at the United Nations

58. Issues concerning the scope, methodology and intended outcome of the work to be conducted on this topic were discussed during the consultations at the sixty-fifth session of the Commission (2013).[91] The Special Rapporteur maintains her proposal, first advanced at that session, that the topic be approached from a temporal perspective, rather than from the perspective of particular regimes of international law, such as environmental law, the law of armed conflict and human rights law. It is thus proposed that the Commission proceed to consider the topic in three temporal phases: before, during and after an armed conflict (phases I, II and III, respectively). The proposed approach is intended to make the topic more manageable and easier to delimit. Such an approach would enable the Commission to clearly identify particular legal issues relating to this topic that are likely to arise during the different stages of armed conflict. In addition, such an approach is likely to facilitate the development of concrete conclusions or guidelines.

59. The Special Rapporteur also maintains that the main focus of the work should be on phase I, that is, those peacetime obligations relevant to a potential armed conflict, as well as phase III, post-conflict measures. When looking at phase II, it would be particularly interesting to focus on situations of non-international armed conflicts.

[91] See footnote 1 above. The discussions were held on the basis of an informal working paper by the Chairperson, which was to be read together with the syllabus of the topic presented in 2011.

60. While members of the Commission during the sixty-fifth session generally welcomed the approach of addressing the topic in temporal phases, different views were expressed with respect to the relative weight that should be accorded to each of the phases. Several members emphasized that phase II (rules applicable during an armed conflict) was the most important phase. Other members were of the opinion that the most important phases were either phase I, phase III, or both. The divergence in opinions within the Commission was similar to that expressed by States during the debate in the Sixth Committee.

61. As the Special Rapporteur has indicated previously, however, while conceptualizing the topic in phases will assist the Commission in its work, there cannot be a strict dividing line between the different phases. Such a dividing line would be artificial and would not be an accurate reflection of how the relevant legal rules operate. The law of armed conflict, for example, consists of rules applicable before, during and after an armed conflict. The temporal phases approach makes the topic more manageable and helps with delimiting its scope. As the work progresses, it will also become evident how the legal rules pertaining to the different temporal phases blend into each other.

62. Ultimately, regardless of the relative weight accorded to each of the phases, the departure point for the Commission's work on this topic should remain the same: the Commission has no intention of, nor is it in a position to, modify the law of armed conflict. Instead, it is

proposed that the work of the Commission focus on identifying and clarifying the guiding principles and/or obligations relating to the protection of the environment that arise under international law in the context of (*a*) preparation for potential armed conflict; (*b*) the conduct of armed conflict; and (*c*) post-conflict measures in relation to environmental damage.

63. Before proceeding, it is also useful to enumerate certain particular topics that the Special Rapporteur suggests should not be included in the scope of this topic. In working towards the formulation of concrete guidelines or conclusions (or whatever final form the outcome of this topic may take), the Special Rapporteur has always been aware of the need to restrict the scope of the topic for practical, procedural and substantive reasons, and it is thus necessary that certain topics be excluded or approached cautiously.

64. To begin with, it is proposed that work on this topic not address situations where environmental pressure, including the exploitation of natural resources, causes or contributes to the outbreak of armed conflict. It is the Special Rapporteur's position that discussions concerning the root causes of armed conflict fall outside the present topic. That is not to say, however, that these issues are not important topics in and of themselves.[92]

65. In addition, the Special Rapporteur is reluctant to address the protection of cultural heritage as part of this topic. The protection of cultural property is highly regulated by specific international conventions, primarily through conventions adopted by UNESCO, and such regulations cover both peacetime and situations of armed conflict.[93] It should be noted, however, that one State[94] and some members of the Commission have encouraged the Special Rapporteur to include cultural heritage in the topic.

66. During the informal consultations in the Commission in 2013, some members cautioned against addressing the issue of weapons, whereas a few members took the view that it should be addressed. A similar pattern emerged during the debate in the Sixth Committee.[95] The Special Rapporteur retains her view that addressing the effect of particular weapons should not be the focus of the topic. Nor should "weapons" be addressed as a separate issue. The law of armed conflict, applicable in situations of armed conflict, deals with all weapons on the same legal basis, namely, the fundamental prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. It is also prohibited to use weapons that are incapable of discriminating between civilian and military objects and whose effects cannot be limited. Questions relating to the specific weapons that fall under this prohibition have always been subject to divergent views. As a result, States have chosen to conclude specific treaties with respect to individual weapons, such as expanding bullets, chemical weapons, landmines and blinding laser weapons. Furthermore, States' reasoning for concluding these agreements is not always identical. For example, views may differ on how to regard agreements and particular provisions: as a disarmament measure, a law of armed conflict measure or both? This flexible understanding has proved highly valuable in achieving the ultimate goal, that is, prohibitions or restrictions on the use of a specific weapon.

67. Finally, it is the Special Rapporteur's position that the issue of refugee law, more specifically the consequences for the environment of refugees and internally displaced persons, should be approached cautiously. Individuals may have become refugees and internally displaced persons for a variety of reasons, some of which may have nothing to do with armed conflict. Refugee camps may shelter an individual irrespective of his or her refugee status claim. At the same time, it must be acknowledged that millions of people have to leave their homes because of an armed conflict and may become refugees or internally displaced persons. The environmental impact caused by fleeing persons, as well as camps for refugees and internally displaced persons, can be considerable and has led to claims for compensation for destroyed land.[96] Some members of the Commission and a few States are of the view that such matters should be addressed, and the Special Rapporteur agrees that the question cannot be entirely ignored. Nevertheless, given the complexities of the subject and the legal protections accorded to victims of war, the Special Rapporteur is of the view that such questions must be approached in a cautious manner.

[92] For an updated discussion, see Das, *Environmental Protection, Security and Armed Conflict: A Sustainable Development Perspective*, in particular his discussion on early warning, early action and preventing environmental security threats (chap. 3, p. 66 *et seq.*).

[93] Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols (1954 and 1999). One of the tasks of the Committee for the Protection of Cultural Property in the Event of Armed Conflict is to supervise the implementation of the Second Protocol. UNESCO has a solid structure to assist in protecting cultural heritage in time of armed conflict, including emergency actions. Information on UNESCO activities can be found at www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage.

[94] Italy, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 24th meeting (A/C.6/68/SR.24), para. 4.

[95] See chapter II above.

[96] This was acknowledged in the syllabus to the topic (*Yearbook … 2011*, vol. II (Part Two), annex V, para. 10).

Chapter VII

Use of terms

68. One preliminary matter that requires attention at this stage is the definition of key terms such as "armed conflict" and "environment". For the purpose of facilitating discussion, draft definitions have been suggested below. At this stage of the work, these draft suggestions are not made with the aim of obtaining the Commission's approval to send the definitions to the Drafting Committee. This would be premature. It is often the case that definitions need to be refined and adopted once the work has developed into a more mature stage and when it is possible to have a more informed understanding of the direction of the work. At the same time, it is important to hear

the preliminary views of the Commission on the draft suggestions put forward in the present report. In addition, it seemed important to illustrate some questions that might arise when defining these terms. The suggestions are based on definitions previously adopted by the Commission. Needless to say, those definitions were adopted in their specific context and for the purpose of the work in which they were included. Yet they are helpful, particularly in the light of the considerable effort to which the Commission went in formulating them.

A. "Armed conflict"

69. The Commission has defined "armed conflict" in the draft articles on the effects of armed conflicts on treaties as follows:

> "armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.[97]

70. The definition was developed for the purposes of the draft articles. The commentaries make it clear that it reflects the definition employed by the International Tribunal for the Former Yugoslavia in the *Tadić* decision.[98] However, the concluding words of the "definition" provided by the Tribunal are omitted. In the *Tadić* decision, the Tribunal describes the existence of an armed conflict as follows:

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups *or between such groups within a State*.*

71. In its work on the effects of armed conflict on treaties, the Commission decided to delete the last words of the definition ("or between such groups within a State") because the draft articles were conceived as applying only to situations involving at least one State party to the treaty.[99] The definition was adopted after profound analysis and lengthy discussions. Nevertheless, it deviates from interpretations of the term "armed conflict" contained in other treaties.[100] One prominent example is the Rome Statute of the International Criminal Court. The Court has jurisdiction, *inter alia*, over serious violations of the laws and customs applicable in armed conflicts not of an international character. As such, article 8, paragraph 2 (*f*), of the Rome Statute applies to "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups". It does not cover "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature".[101] The Rome Statute's use of the term is thus almost identical to that of the International Tribunal for the Former Yugoslavia used in the *Tadić* case. The Tribunal's definition differs, however, from an ICRC proposal[102] and from a definition suggested by the Institute of International Law.[103]

72. This brief description of the use of the term "armed conflict" indicates that it might not be sufficient to use the definition in the draft articles on the effects of armed conflicts on treaties. For the purpose of the current topic, the definition needs to be modified so as to include those conflicts that take place between organized armed groups or between such groups within a State. This modification would bring the definition in line with, or close to, the definition used in the *Tadić* case, which is now contained in the Rome Statute.

73. This leaves the Commission with the following pertinent options:

(*a*) adopt the definition in draft article 2 of the draft articles on the effect of armed conflicts on treaties, then modify it to include situations in which an armed conflict takes place without the involvement of a State;

(*b*) provide for two separate definitions, one for international and one for non-international armed conflicts;

(*c*) provide for a new definition for the purpose of the work on this topic; or

(*d*) abstain from defining "armed conflict" at all.

74. The Special Rapporteur suggests that the Commission depart from the definition contained in draft article 2 of the draft articles on the effects of armed conflicts on treaties to encompass those situations when an armed conflict takes place without the involvement of a State. This would ensure that non-international armed conflicts are covered. It should be noted that there exists a close connection between the draft articles on the effects of armed conflicts on treaties and the present work. It is on this basis that any deviation from those draft articles should be both justified and explained.

75. The second option would be to provide for two definitions, one for international armed conflicts and one for non-international armed conflicts. The ICRC-proposed definition of non-international armed conflict is more precise than the "definition" from the *Tadić* case. This is

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[97] *Ibid*., para. 100, draft article 2 (*b*).

[98] International Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Judicial Reports 1994-1995*, vol. I, p. 429, para. 70.

[99] *Yearbook … 2011*, vol. II (Part Two), para. (4) of the commentary to draft article 1 of the draft articles on the effects of armed conflicts on treaties.

[100] See e.g. common articles 2 and 3 of the Geneva Conventions for the protection of war victims, and article 1 of 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).

[101] Art. 8, para. 2 (*f*).

[102] ICRC has proposed the following definitions in "How is the term 'armed conflict' defined in international humanitarian law?", ICRC Opinion Paper, March 2008 (available from www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf):

"1. International armed conflicts exist whenever there is *resort to armed force between two or more States*.

"2. Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organisation*."

[103] Resolution of 28 August 1985 on the effects of armed conflicts on treaties (Institute of International Law, *Yearbook*, vol. 61, Part II, Session of Helsinki (Paris, Pedone, 1986)). Available from www.idi-iil.org.

primarily due to the thresholds embedded in the ICRC definition. For the purpose of the present topic, it should suffice to embrace both categories in one definition.

76. The third option, namely, to provide for an entirely new definition for the purpose of the work on this topic, is less attractive to the Special Rapporteur. It is far more meaningful to build on definitions that have been previously negotiated and to try to align the work of the Commission on definitions that have already been adopted. To add yet another definition would risk creating confusion.

77. The last option, that is, to abstain from defining "armed conflict" at all, is another possibility. The outcome of this topic will depend on previous established definitions, as well as any further refinement arising out of new treaties and case law.

78. After considering the foregoing, the following use of the term is suggested:

> " 'Armed conflict' means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups or between such groups within a State."

B. "Environment"

79. The Commission has previously defined "environment" in its work on the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities as follows:

> "environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape.[104]

80. The Commission noted that there was no internationally accepted definition of environment, but found it useful to adopt a "working definition".[105] In doing so, the Commission opted for a broader definition. This means that the definition is not limited to natural resources, such as air, soil, water, fauna and flora, and their interaction. The broader definition adopted by the Commission also embraces environmental values. The Commission opted to include "non-service values such as aesthetic aspects of the landscape".[106] This includes the enjoyment of nature because of its natural beauty and the recreational attributes and opportunities associated with it. The broader approach was regarded as justified by the general and residual character of the draft principles.[107]

81. Notably, the Commission referred to the Convention for the protection of the world cultural and natural heritage in elaborating the definition mentioned above. For the purposes of that Convention, "natural heritage" is defined as:

> – natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
>
> – geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
>
> – natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.[108]

82. In taking a holistic approach, the Commission was also inspired by the reasoning of the International Court of Justice in the *Gabčíkovo-Nagymaros* case:

> mindful that, 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 of this type of damage.[109]

83. The Commission's definition of environment is well analysed, well argued and understandable. Therefore, the Special Rapporteur proposes that it be used as a starting point for this topic. At the same time, it should be noted that one of the most important provisions on the protection of the environment in the realm of the law of armed conflict refers to the "natural environment" rather than simply to the "environment". According to paragraph 3 of article 35 ("Basic rules") of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), it "is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the *natural environment*".* The ICRC commentary to that article offers some explanation of the use of the qualifying word "natural". The "natural environment" is distinguished from the "human environment". The "natural environment" refers to the "system of inextricable interrelations between living organisms and their inanimate environment", whereas effects on the "human environment" are understood as effects on "external conditions and influences which affect the life, development and the survival of the civilian population and living organisms".[110] The previously adopted Environmental Modification Convention refers to "environment" without any definition.[111]

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[104] *Yearbook … 2006*, vol. II (Part Two), p. 58, para. 66, draft principle 2 (*b*).

[105] *Ibid.*, p. 69, para. (19) of the commentary to draft principle 2.

[106] *Ibid.*, para. (20) of the commentary to draft principle 2. It is worth quoting the references made as a rationale for a philosophical analysis underpinning regimes for damage to biodiversity. They include Bowman, "Biodiversity, intrinsic value and the definition and valuation of environmental harm". For differing approaches to the definition of environmental damage, see e.g. Sands, *Principles of International Environmental Law*, pp. 876–878.

[107] *Yearbook … 2006*, vol. II (Part Two), p. 69, para. (20) of the commentary to draft principle 2.

[108] Article 2 of the Convention.

[109] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at para. 140. The Court in this connection also alluded to the need to keep in view the intergenerational and intragenerational interests and the contemporary demand to promote the concept of sustainable development.

[110] ICRC commentary to article 35 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), para. 1451. The reference to "natural environment" is picked up in the preamble of the 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.

[111] The wider meaning of "environment" in the Convention was discussed in connection with the adoption of article 35; see in particular the ICRC commentary to article 35 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), paras. 1450–1452.

84. As is the case with the definition of "armed conflict", the Commission is thus faced with the following options:

(*a*) use the definition contained in the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities;

(*b*) adapt the definition contained in the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities if the forthcoming work so requires;

(*c*) provide for a new definition for the purpose of the work on this topic; or

(*d*) not define "environment" at all.

85. Notably, the Commission did not define "environment" in the draft articles on the law of the non-navigational uses of international watercourses. That said, the term is frequently used. The same is true for the draft articles on the law of transboundary aquifers. Within the context of the present topic, a definition is likely to be a valuable tool in framing the scope of the conclusions reached by the Commission.

86. As the Special Rapporteur believes that the definition contained in the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities is a meaningful point of departure, the following definition of the term "environment" is therefore suggested:

> " 'Environment' includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristics of the landscape."

Chapter VIII

Sources and other material to be consulted

87. The work on this topic will necessarily draw upon, *inter alia*, treaty law, State and international organization practice, customary international law, general principles of international law, decisions of courts and tribunals, and legal writings. A few words should be said about each of these sources in the particular context of this topic.

88. With respect to treaty law, only a limited number of treaties directly regulate the protection of the environment in armed conflict. Such treaties can likely be categorized as arising under the law of armed conflict (international humanitarian law, and the law on occupation and neutrality). In contrast, there is an abundance of treaties and national legislation that regulate environmental matters. Some of these treaties and legislative instruments contain exemptions for military forces, military operations or military materiel. Such exemptions may be directly formulated, such as in the Convention on the prevention of marine pollution by dumping of wastes and other matter (London Dumping Convention), which clearly states that it is not applicable to "vessels and aircraft entitled to sovereign immunity under international law" while placing an obligation on the flag States to "ensure by the adoption of appropriate measures that such vessels and aircraft owned or operated by it act in a manner consistent with the object and purpose of this Convention" and to "inform the [International Maritime Organization] accordingly".[112]

89. With respect to customary international law, it should be noted that the identification of customary rules relevant to this topic may be particularly difficult given the nature of military planning and military operations. The abundance of practice and internal regulations must not automatically be interpreted as expressions of custom, since the element of *opinio juris* may well be missing. Both States themselves and the documents that they publish emphasize that they draw upon soft law instruments such as handbooks, guidelines and best practices,[113] yet these instruments exist in parallel to binding national legislation and international legal instruments. Sometimes, however, there is a convergence of norms reflected in the soft and hard law instruments, and handbooks, guidelines and best practices, as well as other similar documents, have a real influence on the planning and conduct of military operations. Such influence is particularly significant to the extent that it reveals development in the awareness or positions of States on such matters. Best practices may also set standards that courts or arbitrators take into account.

90. The Special Rapporteur is of the view that judgments and decisions from international courts and tribunals are particularly relevant to this topic. The practice of national courts, however, will be far more difficult to ascertain. As there is undoubtedly a wealth of national case law involving domestic legislation, it would be beneficial to obtain further information on such cases.

91. The work will also draw upon the efforts of international and regional organizations in this area. Several United Nations organs and international organizations are involved in the protection of the environment in relation to armed conflicts, such as UNEP, UNESCO and UNHCR, as well as ICRC. The same is true for regional bodies, such as the African Union, the European Union, the League of Arab States and the Organization of American States. Members of the Commission supported and encouraged consultations with such organs, international organizations and regional bodies.[114] The Special Rapporteur is of the view that such consultations are of great assistance. As such, most of these consultations have already taken place and will continue as the work progresses. It goes without saying that work done by such bodies, as well

[112] Article VII, paragraph 4. Provisions providing for exemptions are of another legal character than provisions providing for immunity.

[113] See e.g. statement of 4 November 2013 by the United States in the Sixth Committee, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 23rd meeting (A/C.6/68/SR.23), paras. 47 *et seq.*

[114] *Yearbook … 2013*, vol. II (Part Two), para. 142.

as relevant international law institutes and professional organizations,[115] will be an important contribution.

92. Lastly, it should be noted that the issues raised by the topic have been subject to extensive legal analysis and writings by learned scholars. The Special Rapporteur is faced with two main challenges: the first is to place constraints on the use of scholarly writings; the second is to ensure that views from the major legal systems in the world are appropriately taken into account. These are two diametrical challenges: one is to limit the scope of material; the other is to expand the search for material. To meet these challenges, the Special Rapporteur will systematically seek out legal analyses and commentaries from different regions and refrain from referring to all material ever published on the topic. This means that not all the literature studied is included in the footnotes of the present report. Instead, the Special Rapporteur has attached a bibliography to the present report that is comprehensive, though not exhaustive.

93. Notwithstanding the Special Rapporteur's active search, locating writings from different regions presents more of a challenge. The Special Rapporteur has encouraged colleagues in the Commission and delegates in the Sixth Committee to provide the Special Rapporteur with information. With few exceptions, the Special Rapporteur has not been successful, and she therefore maintains her appeal.

[115] The work of other bodies, such as the International Law Association, the Institute of International Law, the International Union for Conservation of Nature, the International Council of Environmental Law and the Environmental Law Institute, have been, and will continue to be, taken into account.

Chapter IX

Relationship with other topics addressed by the Commission, including those on the present agenda[116]

94. In its previous work, the Commission has addressed issues that are of relevance to the present topic, including:

- effects of armed conflicts on treaties;
- non-navigational uses of international watercourses;
- shared natural resources (law of transboundary aquifers);
- fragmentation of international law;
- responsibility of States for internationally wrongful acts;
- jurisdictional immunities of States and their property;
- law of the sea.

95. Furthermore, the topics of prevention of transboundary harm from hazardous activities (2001) and allocation of loss in the case of transboundary harm arising out of hazardous activities (2006) are also of relevance in this context.

96. In the present report, the Special Rapporteur wishes to reiterate some of the conclusions and commentaries previously adopted by the Commission that are of direct relevance here. Other topics, such as the draft code of crimes against the peace and security of mankind, fragmentation of international law and responsibility of States will not be addressed in the present report, as the Special Rapporteur wishes to revert to those topics in subsequent reports.

A. Convention on the Law of the Non-navigational Uses of International Watercourses

97. The Convention on the Law of the Non-navigational Uses of International Watercourses ("1997 Watercourses Convention") expressly provides for the protection of international watercourses and installations in time of armed conflict. Specifically, article 29 of that Convention makes it clear that "[i]nternational watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules".

98. The commentary to draft article 29 on the law of the non-navigational uses of international watercourses prepared by the Commission confirmed that the draft article was not providing for any new rule, but rather was to serve as "a reminder that the principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning international watercourses and related works".[117] The Commission was careful not to encroach on the already existing laws of armed conflict[118] while asserting that "the articles themselves remain in effect even in time of armed

[116] The Special Rapporteur has chosen to limit the descriptions of and comments on the previous work of the Commission, since it can be found in its official documentation. In addition, there exist valuable Secretariat memorandums on several of these topics. See e.g. the memorandum on the effect of armed conflicts on treaties—an examination of practice and doctrine (A/CN.4/550 and Corr.1–2) (available on the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2005*, vol. II (Part One)), the memorandums concerning a draft code of offences against the peace and security of mankind (*Yearbook … 1950*, vol. II, document A/CN.4/39) and a draft code of offences against the peace and security of mankind—compendium of relevant international instruments (document A/CN.4/368 and Add.1, mimeographed), a supplement, prepared by the Secretariat, to the "Digest of the decisions of international tribunals relating to State responsibility" (*Yearbook … 1969*, vol. II, document A/CN.4/208) and a study prepared by the Secretariat on "*force majeure*" and "fortuitous event" as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine (*Yearbook … 1978*, vol. II (Part One), document A/CN.4/315).

[117] See *Yearbook … 1994*, vol. II (Part Two), p. 131, para. (1) of the commentary to draft article 29 on the law of the non-navigational uses of international watercourses.

[118] Detailed regulation of the subject matter is considered to be beyond the scope of the instrument; see, *ibid.*

conflict. The obligation of watercourse States to protect and use international watercourses and related works in accordance with the articles remains in effect during such times".[119]

99. As reflected in the commentary, armed conflict may "affect an international watercourse as well as the protection and use thereof by watercourse States".[120] In these circumstances, the rules and principles that regulate armed conflict apply. The commentary specifies examples of such rules and principles embodied in various conventions. These examples include: the Hague Convention of 1907 (IV) respecting the laws and customs of war on land; the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I); and the "Martens clause".[121] While these Conventions are not directly applicable in non-international armed conflicts, the Commission seemed to suggest that the obligation to protect, however unspecified, is germane in non-international armed conflict.

100. It was recognized by the Commission that States may face serious obstacles when attempting to fulfil their obligation to cooperate through direct contacts in times of armed conflict. These difficulties, however, do not negate the fact that States remain under an obligation to cooperate.[122] It was for this very reason that the Commission inserted a general saving clause specifically providing for indirect procedures.[123] These procedures are intended to address those issues associated with the direct exchange of data and information and other procedures during armed conflict, or when there is an absence of diplomatic relations between States. Relevantly, the savings clause provides that the watercourse State is not obliged to provide data and information vital to national defence or security, but the obligation to cooperate in good faith is still applicable.[124]

101. In case of a conflict concerning the use of an international watercourse, special consideration shall be given to "the requirements of vital human needs".[125] The Commission interprets this provision as expressing the same rule as the Martens clause.[126]

B. Draft articles on the law of transboundary aquifers

102. The draft articles on the law of transboundary aquifers also provide specific protection during armed conflict under draft article 18. Of particular relevance here, the article asserts:

> Transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.[127]

103. Draft article 18 is modelled on article 29 of the Convention on the Law of the Non-navigational Uses of International Watercourses. The texts of the two articles are almost identical.[128] Moreover, the commentary to draft article 18 is somewhat similar to the wording contained in the commentary to draft article 29 of the draft articles on the law of the non-navigational uses of international watercourses.[129] The references to applicable law, such as the Hague Convention of 1907 (IV) respecting the laws and customs of war on land, 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 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), and the Martens clause are identical in both commentaries.[130] Furthermore, the commentary to the draft articles on the law of transboundary aquifers makes it clear that the obligation of the aquifer States to protect and utilize transboundary aquifers and related works "should remain in effect even during the time of armed conflict".[131] This serves as a reminder to States of the applicability of the law of armed conflict.

104. Similar to the 1997 Watercourses Convention, the articles on the law of transboundary aquifers provide for an exception from the obligation to provide data or information vital to its national defence or security. At the same time, it obliges States to "cooperate in good faith with other States with a view to providing as much information as possible under the circumstances".[132]

105. Importantly, both the Convention on the Law of the Non-navigational Uses of International Watercourses and the articles on the law of transboundary aquifers are applicable in situations of both international and non-international armed conflict. Notwithstanding the fact that the law of armed conflict applies, the duty to cooperate remains. Both conventions make it clear that human needs take priority over other uses.

C. Draft articles on the effects of armed conflicts on treaties

106. The draft articles on the effects of armed conflicts on treaties[133] take as their starting point the presump-

[119] *Ibid.*, p. 131, para. (3) of the commentary to draft article 29.

[120] *Ibid.*

[121] *Ibid.*

[122] *Ibid.*, p. 108, para. (3) of the commentary to draft article 9. Note that the obligation to cooperate goes beyond draft article 9.

[123] See *ibid.*, commentary to draft article 9. Similar exceptions appear in other treaties, such as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), art. 4, para. 4 (*b*).

[124] *Yearbook … 1994*, vol. II (Part Two), p. 132, draft article 31 on the law of the non-navigational uses of international watercourses.

[125] *Ibid.*, p. 109, draft article 10, para. 2.

[126] *Ibid*., p. 131, para. (3) of the commentary to draft article 29.

[127] *Yearbook … 2008*, vol. II (Part Two), p. 42.

[128] The only difference is the use of the term "non-international armed conflict" instead of "internal armed conflict".

[129] *Yearbook … 1994*, vol. II (Part Two), p. 131.

[130] *Yearbook … 2008*, vol. II (Part Two), pp. 42–43, para. (3) of the commentary to draft article 18 of the draft articles on the law of transboundary aquifers.

[131] *Ibid.*, p. 42.

[132] *Ibid.*, p. 43, draft article 19. The Commission discussed whether to qualify the word "confidentiality" by using the word "essential", but "decided that there was no compelling reason to deviate from the language of the 1997 Watercourses Convention" (*ibid.*, para. (1) of the commentary to draft article 19).

[133] *Yearbook … 2011*, vol. II (Part Two), pp. 107–108.

tion that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties, as provided for in draft article 3. In those draft articles, however, the Commission chose not to identify the specific treaties that would continue to operate. Instead, it elaborated an indicative list of treaties "the subject-matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict" and included this list of treaties in the annex to the draft articles (draft art. 7).[134]

107. However, the Commission addressed the factors indicating whether a treaty is susceptible to termination, withdrawal or suspension, in draft article 6. According to the Commission, regard shall be had to all relevant factors, including:

(*a*) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty;

(*b*) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.

108. The combined effect of draft articles 3, 6 and 7 and the annex containing the indicative list of treaties is that, because of their subject matter, several categories of treaties relevant to the protection of the environment may continue in operation during periods of armed conflict.

109. The most significant conclusion, which can be found in draft article 3, is as follows:

The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties:

(*a*) as between States parties to the conflict;

(*b*) as between a State party to the conflict and a State that is not.

110. This finding has two implications: the first is that treaties are not automatically terminated or suspended during an armed conflict. That is to say, States that are parties to a conflict are not automatically devoid of those rights and obligations conferred by various treaties. The second is that a treaty may well be terminated or suspended.

111. While the work on the effects of armed conflicts on treaties is of particular importance, it does have its limitations. First, it regulates only treaty relations between States. Second, it does not answer what customary international law rules, as well as principles of international law, continue to be applicable in times of armed conflict. Furthermore, save for one exception, the draft articles address situations during armed conflict.[135]

[134] *Ibid.*, pp. 107 and 108, draft article 7 on the effects of armed conflicts on treaties ("Continued operation of treaties resulting from their subject-matter") and the indicative list of treaties annexed. The list includes treaties relating to the international protection of the environment, international watercourses and related installations and facilities, aquifers and related installations and facilities, human rights, international criminal justice and, for obvious reasons, the law of armed conflict, including international humanitarian law.

[135] See *ibid.*, p. 117, draft article 13, which addresses the revival or resumption of treaty relations subsequent to an armed conflict.

D. Draft articles on prevention of transboundary harm from hazardous activities

112. The draft articles on prevention of transboundary harm from hazardous activities[136] do not discuss their application in times of armed conflict. According to draft article 1 on scope, the draft articles apply to "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences". Neither the articles nor their commentaries expressly exclude situations of armed conflict. The commentaries do, however, contain an important discussion on the principle of due diligence provided in draft article 3 on prevention.[137] This discussion included a reference to the *Alabama* case.[138] That said, it is not possible to draw the conclusion that the articles were intended to regulate the behaviour of States in armed conflict. The focus seems to have been peacetime regulation.

E. Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

113. The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities[139] define "damage" as including significant damage caused to persons, property or the environment. This includes loss or damage by impairment of the environment; the costs of reasonable measures of reinstatement of the property, or environment, including natural resources; and the costs of reasonable response measures.[140] Relevantly, the commentary to principle 4 provides an exception to liability for prompt and adequate compensation if the damage was the result of an act of armed conflict, hostilities, civil war or insurrection.[141]

F. Other work of the Commission

114. Other relevant prior work by the Commission, such as the draft articles on jurisdictional immunities of States and their property, and those concerning the law of the sea, will be dealt with in the context in which they are relevant.

115. Furthermore, the Commission will benefit from the work undertaken and conclusions made in the ongoing work on the protection of persons in the event of disasters. The work on the draft articles on human dignity, human rights, humanitarian principles and the duty to cooperate (including forms of cooperation) will be of particular relevance.[142]

[136] *Yearbook … 2001*, vol. II (Part Two), para. 97.

[137] *Ibid.*, p. 154, para. (9) of the commentary to draft article 3.

[138] *Ibid.* Due diligence is a legal norm applicable both in peacetime and in situations of armed conflict. For the *Alabama* case, see Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, pp. 4144 *et seq.*

[139] *Yearbook … 2006*, vol. II (Part Two), para. 66.

[140] *Ibid.*, p. 58, principle 2 (*a*) (iii)–(v). See also *ibid.*, p. 66, para. (10) of the commentary to draft principle 2 on the protection of cultural property in times of war.

[141] *Ibid.*, p. 81, para. (27) of the commentary to draft principle 4. See, in particular, the examples given in footnote 439.

[142] See *Yearbook … 2011*, vol. II (Part Two), para. 288, draft articles 5 to 10 of the draft articles on the protection of persons in the event of disasters.

116. The Commission will also benefit from the ongoing work on the protection of the atmosphere, since both topics address the protection of the environment. However, it is unlikely that the two topics will overlap, given that the topic on the protection of the atmosphere is more comprehensive and of a different character than the current topic. Other topics on the Commission's current programme of work, in particular subsequent agreements and subsequent practice in relation to the interpretation of treaties and the identification of customary international law, will also be of assistance to this topic.

Chapter X

Environmental principles and concepts

117. It should be said from the outset that the aim of the present chapter is to recall principles and concepts in international law that are candidates for continuing application during armed conflict. The extent to which they may be applicable is not addressed. It is not intended that the present report reach any final conclusions at this preliminary stage. Rather, it is to assist in facilitating forthcoming discussions in the Commission.

118. The references to environmental law principles or human rights are made for the purpose of convenience. They are not meant to assert that they are self-contained regimes. As formulated by the Commission's study on fragmentation:

> The question whether "international environmental law" designates a special branch of international law within which apply other interpretative principles than apply generally, or merely an aggregate of treaty and customary rules dealing with the environment, may perhaps seem altogether too abstract to be of much relevance. The standard designation of the laws of armed conflict, for instance, as *lex specialis* and a self-contained regime—or even "a deviant body of rules of public international law"—leaves it wide open to which extent the general rules of, say, the law of treaties are affected.[143]

119. Treaties are, of course, applicable without restriction and to the extent that parties have agreed to be bound in times of peace, that is, before and after armed conflict. Furthermore, customary international law applies as well. Viewed from this perspective, it may seem like a redundant exercise to even address the pre- and post-conflict phases.[144] However, this is not the case. The pre- and post-conflict phases are addressed precisely because of the uncertainty relating to their application in parallel to the law of armed conflict. As recalled on several occasions, certain provisions of treaties on the law of armed conflict are applicable in peacetime.

120. It is, for obvious reasons, unmanageable to list all "environmental" and "human rights" treaties that exist and address their applicability in peacetime. An even more difficult task would be to attempt to comprehensively chart the interplay between these instruments, the States parties to these treaties and their reservations and so forth. Such an exercise would not be meaningful since it would attempt to hit a moving target. In addition, it would give only part of the legal picture since both customary law and case law would be excluded.

121. At this stage of the work, a more constructive exercise may be to try to trace the general development of principles and concepts, many of which have found their way into treaties or have obtained, or are likely to obtain, customary international law status.

122. It must be said that the environmental law principles and concepts that are of relevance to the present topic are imprecise and vague and seldom offer clear-cut answers and solutions. Yet they exist. The purpose of the present section is to recall the most prominent lines of development that have taken place since the adoption of the Environmental Modification Convention and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

123. Whether a political concept such as sustainable development or precaution has turned into a legal principle is often subject to debate among States and scholars. It is not uncommon for courts and tribunals to take different views on the status of a particular concept. The divergence in views does not prevent them from applying their understanding of the law. The precautionary principle is a good example of this. The Special Rapporteur therefore refers to both "principles" and "concepts" in the present report.

124. As stated above, the Special Rapporteur is of the view that judgments and decisions from international courts and tribunals are of particular relevance. The practice of national courts has been more difficult to ascertain. Obviously, there must be a wealth of national case law with respect to domestic legislation, but this is not necessarily useful in ascertaining whether it reflects the position of a particular State on international law. States have not provided such information. The present report therefore refers to international judgments.

A. Sustainable development

125. Sustainable development is the necessary link between the protection of the environment and its resources and the needs of human beings. It has a clear intergenerational element. Whatever resources are to be used, they are supposed to be used in a manner that ensures that such resources last for longer than a limited period of time, that is, for more than one generation.

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[143] Report of the Study Group on the fragmentation of international law, document A/CN.4/L.682 and Corr.1 and Add.1 (see footnote 7 above), para. 133.

[144] During the debate in the Sixth Committee, the Russian Federation stated that: "On the topic of protection of the environment in relation to armed conflicts, sufficient regulation already existed under international humanitarian law, since the period before and after an armed conflict was considered to be peacetime, during which the general rules applicable to the protection of the environment were fully applicable" (*Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 25th meeting (A/C.6/68/SR.25)), para. 47.

126. It is often emphasized that "sustainable development" is more of a political and socioeconomic concept[145] than a legal principle. The legal status of this concept is therefore subject to debate. References to the "principle of sustainability" do not necessarily imply that the user of the term is specifically referring to a legal principle—it may well be that the reference has political connotations. In sum, divergent views exist as to whether it has legal implications, whereas others are more doubtful.

127. The International Court of Justice addressed this in the *Gabčíkovo-Nagymaros* case:

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[146]

128. The Court did not take a position on the legal status of sustainable development, but in his separate opinion, Vice-President Weeramantry takes the clear position that sustainable development is a legal principle and "an integral part" of international law.[147]

129. More than 10 years later, the Court addressed sustainable development in the *Pulp Mills* case, in which it referred to the "interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development".[148] While the Court did not refer to sustainable development as a principle of general international law, Judges Al-Khasawneh and Simma referred to the principle of sustainable development in their joint dissenting opinion.[149] In addition, Judge Cançado Trindade devoted his entire separate opinion to principles of international law, with a specific discussion on sustainable development as a principle of international law.[150]

130. As formulated by former Judge Koroma, "sustainable development has evolved to play a significant role in the Court's jurisprudence, despite the fact that the Court has not yet found it to be a general principle of law within the meaning of article 38 (1) of the Court's Statute".[151] Judge Koroma continues:

> Overall, the international law on sustainable development has rapidly evolved and coalesced in the past three decades to the point that it is widely accepted by nearly all States. The International Court of Justice now makes references to sustainable development when adjudicating disputes between States, and has also helped to further develop and refine the concept through its jurisprudence. Going forward, it is clear that the concept of sustainable development will continue to play an increasingly important role in the development of international norms, treaties and judicial decisions.[152]

131. The WTO Panel and Appellate Body have also remarked on the concept of sustainable development. For example, in *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, the Appellate Body noted that the concept was one of the objectives that member States may pursue in accordance with the preamble to the Marrakesh Agreement establishing the World Trade Organization.[153] In *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body remarked that the preambular language "demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development".[154] It also noted that the State concerned should seek to find a cooperative solution with affected States.[155]

132. The Permanent Court of Arbitration addressed sustainable development in the *Iron Rhine Railway* arbitration. There, it was observed that "emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations".[156]

B. Prevention and precaution

133. The principle of prevention is the fundamental tenet on which international environmental law rests, with its roots tracing back to the *Trail Smelter* case.[157] It is closely linked to the principle of precaution.

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[145] French, "Sustainable development", p. 51.

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

[147] *Ibid.*, Separate Opinion of Vice-President Weeramantry, pp. 88–119; see his very clear views, e.g., on pages 89, 95 and 110. Other judges viewed the concept in a different way. In his dissenting opinion, Judge Oda views economic development and sustainable development as "conflicting interests", pp. 153–169, at pp. 160–161.

[148] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 75, para. 177.

[149] *Ibid.*, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, p. 120, para. 26.

[150] *Ibid.*, Separate Opinion of Judge Cançado Trindade; see e.g. p. 187, para. 139 and footnote 118, referring to e.g. Sands, *Principles of International Environmental Law*, pp. 252, 260 and 266, and Voigt, *Sustainable Development as a Principle of International Law*, pp. 145, 147, 162, 171 and 186. As States cannot rely on scientific uncertainties to justify inaction, in the face of possible risks of serious harm to the environment, the precautionary principle has a role to play, as much as "the principle of sustainable development" (Birnie, Boyle and Redgwell, *International Law and the Environment*, p. 163).

[151] Koroma, "Law of sustainable development in the jurisprudence of the International Court of Justice", p. 201.

[152] *Ibid.* former Judge Koroma refers to the *Nuclear Weapons* case (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226) and the *Armed Activities* case (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168), as two cases where the Court has indirectly addressed the issue of sustainable development.

[153] WTO, Appellate Body report, WT/DS246/AB/R, adopted 20 April 2004, para. 94.

[154] WTO, Panel report, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body report WT/DS58/AB/R, para. 153.

[155] *Ibid.*, para. 168.

[156] *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, Decision of 24 May 2005*, UNRIAA, vol. XXVII (United Nations publication, Sales No. E/F.06.V.8), pp. 35–125, at p. 68, para. 58.

[157] UNRIAA, vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905–1982.

134. The principle of prevention is recognized as customary international law and is applied mostly in a transboundary context. It is included in international treaties and recognized in case law (including the *Pulp Mill* and *Gabčikovo-Nagymaros* cases referred to above). For example, the European Union has codified the precautionary principle along with the preventive principle in article 191, paragraph 2, of the Treaty on the Functioning of the European Union.[158] While the principle of prevention is a self-standing principle, it does not really function in an operative manner if it is not supported by more precise regulations in specific treaties. In essence, there cannot be any liability unless the obligations stemming from the principle are clearly set out. The Convention for the protection of the marine environment of the North-East Atlantic serves as a good example of this. The aim of the Convention is to prevent and eliminate pollution of the marine environment. The starting point is an obligation for parties to apply the "precautionary principle" and the "polluter pays principle".[159] In addition, the Convention contains more detailed obligations so as to achieve its object and purpose.

135. In the *Iron Rhine Railway* case, the tribunal held that "growing emphasis is being put on the duty of prevention",[160] and furthermore observed that

> Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm …. This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties.[161]

136. The preventive principle has also been addressed by the European Court of Justice in *United Kingdom v. Commission of the European Communities*, where the Court observed that "[a]rticle 130r(2) [of the Treaty establishing the European Community] provides that that policy is to aim at a high level of protection and is to be based in particular on the principles that preventive action should be taken and that environmental protection requirements must be integrated into the definition and implementation of other Community policies."[162]

137. Whereas the principle of prevention focuses on harm based on knowledge or the ability to know, the precautionary principle demands action even without scientific certainty on any harm.[163] The aim of the precautionary principle is to account for potential risks that have yet to be fully explored by scientific research and analysis. If the environmental effects of a particular activity are known, then the measures taken to avoid them are preventative only; if the effects are unknown, then the same measure can be labelled as precautionary. Several instruments refer to them as two distinct principles, but in practice it is not so straightforward, since a separation of the two concepts is difficult to maintain when applying the principles.[164] There are references to the precautionary principle in the sense of a preventive and precautionary approach. There is still no universal agreement as to whether the obligation to take precautionary measures means that the obligation has been elevated to a principle. A little over 10 years ago, Philippe Sands observed that "[s]ome international courts have now been willing to apply the precautionary principle, and others have been willing to do so with stealth."[165] It is interesting to note that the Commission has taken divergent views on this. Within the context of the work on the law of transboundary aquifers, the Commission used the "precautionary approach". The commentary, however, makes it clear that "[t]he Commission was well aware of the differing views on the concept of a 'precautionary approach' as opposed to that of 'precautionary principle'." Despite this, it decided to opt for the term "precautionary approach" because it was the least controversial formulation. It was adopted on the understanding that "the two concepts lead to similar results in practice when applied in good faith".[166] This stands in contrast to the view that the Commission had previously taken in its work on the draft articles on the prevention of transboundary harm from hazardous activities. There, it seemed that the Commission referred to the principle of precaution without hesitation.[167]

138. In his separate opinion in the *MOX Plant* case before the International Tribunal for the Law of the Sea, Judge Wolfrum remarks that "[i]t is still a matter of discussion whether the precautionary principle or the precautionary approach in international environmental law has become part of customary international law" and that "[t]his principle or approach applied in international environmental law reflects the necessity of making environment-related decisions in the face of scientific uncertainty about the potential future harm of a particular activity".[168]

139. The principle of precaution is aimed at preventing those risks that are not foreseeable or scientifically ascertained. Its application can vary because it is dependent on contextual considerations. Different techniques can be applied to meet the requirements of the precautionary

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[158] As Nicolas de Sadeleer points out, most academics regard the principles in article 191, paragraph 2, of the Treaty as binding (de Sadeleer, *EU Environmental Law and the Internal Market*, p. 41, footnote 180, referring to e.g. Winter, Epiney, Hilson, Krämer, Fisher and Doherty).

[159] Art. 2, paras. 2 (*a*) and (*b*), respectively.

[160] UNRIAA, vol. XXVII (see footnote 156 above), para. 222.

[161] *Ibid.*, para. 59.

[162] Case C-180/96, judgment of 5 May 1998, *European Court Reports 1998*, p. I-2265, para. 100. See also *The Queen v. Ministry of Agriculture, Fisheries and Food, Commissioners of Customs and Excise* (C-157/96) (1998), *ibid.*, p. I-2211, para. 64.

[163] Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, see e.g. pp. 36–37.

[164] Prevention and precaution may be two sides of the same coin in the context of environmental law. As will be shown in a future report, the distinction between "knowing" and "not knowing and not being able to foresee" as a ground for a decision may be the difference between a breach of the laws of armed conflict and a legally acceptable action.

[165] Sands, *Principles of International Environmental Law*, p. 290.

[166] *Yearbook … 2008*, vol. II (Part Two), p. 35, para. (5) of the commentary to draft article 12 of the draft articles on the law of transboundary aquifers.

[167] *Yearbook … 2001*, vol. II (Part Two), pp. 162–163, paras. (6)–(7) of the commentary to draft article 10 of the draft articles on prevention of transboundary harm from hazardous activities.

[168] *The MOX Plant Case (Ireland v. United Kingdom)*, provisional measures, order of 3 December 2001, Case No. 10, Separate Opinion of Judge Wolfrum, *ITLOS Reports 2001*, pp. 133–136, at p. 134.

principle, such as prohibition of substances or techniques, applying the best technology available, performing environmental impact assessments or imposing environmental quality standards, conservation measures or integrated environmental regulation.[169] Alternatively, to use the words of the Commission, the precautionary principle "implies the need for States to review their obligations of prevention in a continuous manner to keep abreast of the advances in scientific knowledge".[170]

140. WTO has dealt with the principle in several cases. In *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, the European Community proposed that the precautionary principle should be regarded as a "general customary rule of international law or at least a general principle of law".[171] While the Appellate Body remarked in its ruling that the principle "still awaits authoritative formulation",[172] it also noted that the principle was reflected in article 5, paragraph 7, of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and that "there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle".[173] In *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, the Appellate Body of WTO once more observed that the precautionary principle is reflected in article 5, paragraph 7, of the Agreement.[174] Furthermore, the Appellate Body noted in *Japan—Measures Affecting Agricultural Products* that article 5, paragraph 7, of the Agreement creates an obligation upon members to "seek to obtain the additional information necessary for a more objective risk assessment".[175] In the *EC—Hormones* case, the Appellate Body observed that "responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources".[176]

141. In *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, the Panel referred to the decision of the Appellate Body in *EC—Hormones* and observed that the "legal debate over whether the precautionary principle constitutes a recognized principle of general or customary international law is still ongoing".[177] The Panel remarked that "[s]ince the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so."[178]

142. The dissenting opinion of seven judges of the European Court of Human Rights in *Balmer-Schafroth v. Switzerland*[179] speaks to the legal importance of the principle. Because of the lack of any means to review the safety of the operating conditions of a nuclear power station when the operating licence was renewed, the dissenting judges argued that article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("The right of effective remedy") had been violated. The dissenting judges argued that the article had been violated as the "applicants were not even afforded the opportunity of establishing before a court how serious the danger was and how great the resulting risk to them".[180] The dissenting judges remarked that "[t]he majority appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of the common heritage" and "would have preferred it to be the judgment of the European Court that caused international law for the protection of the individual to progress in this field by reinforcing the 'precautionary principle' and full judicial remedies to protect the rights of individuals against the imprudence of authorities".[181]

143. Similarly, in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* before the International Tribunal for the Law of the Sea, the principle was described by Malaysia as one "which under international law must direct any party in the application and implementation of those obligations".[182] The European Court of Justice has also granted importance to the issue of precaution in cases such as *Pfizer Animal Health SA*, where the Court stated that "under the precautionary principle the Community institutions are entitled, in the interests of human health to adopt, on the basis of as yet incomplete scientific knowledge, protective measures which may seriously harm legally protected positions, and they enjoy a broad discretion in that regard",[183] and *Alpharma Inc.*, in which the Court stated that "[a]lthough it is common ground that the Community institutions may, in the context of Directive 70/524,[184] adopt a measure based on the precautionary principle, the parties nevertheless fail to agree on either the interpretation of that principle or whether the Community institutions correctly applied it in the present case."[185] Furthermore, in *Association Greenpeace France and Others v. Ministère de l'Agriculture et de la Pêche and Others*, the Court stated

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[169] Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, see e.g. p. 52.

[170] *Yearbook … 2001*, vol. II (Part Two), p. 163, para. (7) of the commentary to draft article 10 of the draft articles on prevention of transboundary harm from hazardous activities.

[171] WTO, Appellate Body report, WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998, para. 16.

[172] *Ibid.*, para. 123.

[173] *Ibid.*, para. 124.

[174] WTO, Appellate Body report, WT/DS321/AB/R, adopted 14 November 2008, para. 680.

[175] *Ibid.*, WT/DS76/AB/R, adopted 19 March 1999, para. 92.

[176] *Ibid.*, WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998, para. 194.

[177] *Ibid.*, WT/DS291/R, WT/DS292/R and WT/DS293/R, Add.1–9 and Corr.1, adopted 21 November 2006, para. 7.88.

[178] *Ibid.*, para. 7.89.

[179] *Balmer-Schafroth and Others v. Switzerland*, 26 August 1997, no. 22110/93, *Reports of Judgments and Decisions* 1997-IV, Dissenting Opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek, pp. 1361 *et seq.*

[180] *Ibid.*, p. 1362.

[181] *Ibid.*, pp. 1364 and 1366.

[182] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures*, order of 8 October 2003, Case No. 12, *ITLOS Reports 2003*, para. 74.

[183] Case No. T-13/99, *European Court Reports 2002 II*, para. 170.

[184] Council Directive of 23 November 1970 concerning additives in feeding-stuffs, *Official Journal of the European Communities*, L 270, 14 December 1970 (footnote added to the original quotation).

[185] *Alpharma Inc. v. Council of the European Union*, Case T-70/99, *European Court Reports 2002 II*, p. 3506, at p.3558, para. 137.

that "observance of the precautionary principle is reflected in the notifier's obligation, laid down in Article 11(6) of Directive 90/220".[186]

144. As demonstrated by the *Waddenzee* case, European Union member States are obliged to abide by the principle even where it is not specifically mentioned in a particular directive or regulation.[187] In *Waddenzee*, a Dutch environmental impact assessment regulation concerning fishing activities in special protection areas for birds in the sea of Wadden was brought before the European Court of Justice. The Court remarked that the matters at hand were to be interpreted "[i]n the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment".[188]

145. Generally, the institutions of the European Union have been granted a certain amount of discretion with respect to the means used when devising specific measures aimed at implementing these principles owing to their general nature.[189] Nonetheless, discretion may be limited, or even non-existent, when the principle in question is specified within a thorough authorization scheme.[190]

146. Similarly, the European Parliament and the Council have both held that environmental impact assessments are one way of respecting the preventive principle. This is demonstrated by the following: (*a*) Directive 2001/42/EC of the European Parliament and the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment;[191] (*b*) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;[192] and (*c*) other measures, such as the obligation to exchange data on the impact of harmful activities.[193]

147. Interestingly, the European Court of Justice, in the 2011 case of *European Commission v. Kingdom of Spain*, stressed the fact that a preventive approach is more cost-effective than taking measures *a posteriori*.[194] This line of argument is also evident in military handbooks on the topic (such as in the joint military guidebook created by Finland, Sweden and the United States).

C. Polluter pays

148. The polluter-pays principle dates back to the *Trail Smelter* and *Factory at Chorzów*[195] cases. Its purpose is remedial. It is probably an accurate reflection to state that the principle was "originally devised to allocate the cost of pollution prevention and control measures [and] has matured into a formidable strategy for the protection of the environment, human health and safety, resource management and generally ensuring environmentally sustainable activities".[196] The polluter-pays principle is applicable both in inter-State relations and in the context of civil liability regimes.

149. The *United States—Taxes on Petroleum and Certain Imported Substances* case, before the GATT Dispute Settlement Panel in 1987, held that GATT rules on tax adjustment allow for parties to apply the principle but do not require it. The Panel stated that while the regulation would "give the contracting party … the possibility to follow the Polluter-Pays Principle", it did not oblige States to do so.[197] The European Court of Justice also took note of this principle in the *Standley* case, where the Court observed that "the polluter pays principle reflects the principle of proportionality".[198]

D. Environmental impact assessment

150. Environmental impact assessment is part of the work to prevent environmental harm from occurring. As has been pointed out, it is a procedure that should be undertaken. It does not impose substantive environmental standards or indicate what results are to be achieved.[199] Despite this, the obligation to undertake an environmental impact assessment has become part of both national and international law. One of the most prominent conventions in this respect is the Convention on environmental impact assessment in a transboundary context.

151. In the *Maffezini* case, ICSID confirmed that environmental impact assessments are "basic for the adequate protection of the environment and the application of

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[186] Case C-6/99, judgment of 21 March 2000, *European Court Reports 2000 I*, p. 1676, at p. 1698, para. 44. For the Council Directive 90/220 of 23 April 1990 on the deliberate release into the environment of genetically modified organisms, see *Official Journal of the European Communities*, L 117, 8 May 1990.

[187] *Landelijke Vereniging tot Behoud van de Waddenzee* and *Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, Case C-127/02, *European Court Reports 2004 I-07405*, para. 44: "In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted". See also de Sadeleer, *EU Environmental Law and the Internal Market*, p. 44.

[188] *Waddenzee*, para. 44.

[189] De Sadeleer, *EU Environmental Law and the Internal Market*, p. 42.

[190] *Waddenzee*, para. 44. *Kingdom of Sweden v. Commission of the European Communities*, Case T-229/04, *European Court Reports 2007 II*, see e.g. paras. 163–164:

"163. It should be pointed out, however, that it can be seen from Article 4 (1) (*a*) of Directive 91/414 that in order to fulfil the requirements laid down in Article 4 (1) (*b*) of that directive, the uniform principles provided for in Annex VI must be applied. Moreover, the second recital in the preamble to Directive 97/57, fixing the content of Annex VI, states that that annex must lay down uniform principles to ensure the application of the requirements of Article 4 (1) (*b*), (*c*), (*d*) and (*e*) of Directive 91/414 in a uniform manner and as stringently as is sought by the directive.

"164. It follows that Article 4(1) (*b*) (iv) of Directive 91/414, to which Article 5 (1) (*b*) of that directive expressly refers, requires compliance with the uniform principles laid down in Annex VI."

[191] *Official Journal of the European Communities*, L 197, 21 July 2001.

[192] *Ibid.*, L 206, 22 July 1992.

[193] Directive 2001/42/EC, art. 7.

[194] Case C-400/08, *European Court Reports 2011 I*, para. 92.

[195] *Case concerning the Factory at Chorzów*, jurisdiction, judgment No. 8 of 26 July 1927, *P.C.I.J. Series A*, No. 9.

[196] Schwartz, "The polluter-pays principle", pp. 256–257.

[197] Panel report adopted on 17 June 1987 (L/6175-34S/136), in GATT, *Basic Instruments and Selected Documents: Thirty-fourth Supplement* (Geneva, 1988), p. 161, para. 5.2.5.

[198] *The Queen. v. Secretary of State for the Environment, Minister of Agriculture, Fisheries and Food*, ex parte *H. A. Standley and Others and D.G.D. Metson and Others*, Case C-293/97, *European Court Reports 1999 I*, para. 52.

[199] Elias, "Environmental impact assessment", p. 227.

appropriate preventive measures".[200] The arbitrators also noted that this was the case "not only under Spanish … law, but also increasingly so under international law".[201]

152. In the *Iron Rhine Railway* arbitration, the tribunal noted that the "reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line. These measures are to be fully integrated into the project and its costs".[202] The case provides support for the imposition of a general requirement for an environmental impact assessment under international law, as well as underscoring the increasing importance that is being placed on the duty of prevention. The requirement for environmental impact assessments has also been described as "very prevalent" in the previous work of the Commission.[203]

153. In their first report of 2014, the International Law Association Study Group on due diligence in international law claims that such EIAs can be a way for a State to live up to a standard of due diligence.[204]

E. Due diligence

154. Due diligence is a multifaceted concept in international law that is both applicable in peacetime and in situations of armed conflict. There is a considerable amount of case law that refers to "due diligence"[205] and its historical roots date back centuries. The substance of the obligation is wide-ranging in that it applies to multiple fields of international law. For example, its application is not merely limited to circumstances involving aliens in State territory. It is relevant in international investment law, human rights law, and even in the context of the laws of armed conflict.

155. It is this multifaceted function of due diligence that has led the International Law Association to set up a Study Group on due diligence in international law. The aim is "to consider the extent to which there is a commonality of understanding between the distinctive areas of international law in which the concept of due diligence is applied".[206]

156. The standard of due diligence constitutes an obligation of conduct rather than an obligation of result, as has been noted by the Commission previously in its work on the draft articles on prevention of transboundary harm from hazardous activities, as well as by the Study Group on due diligence in international law.[207] In this regard, it is interesting to note that the International Tribunal for the Law of the Sea held that taking precautionary measures was a part of due diligence in their seabed mining advisory opinion.[208]

[200] *Emilio Agustín Maffezini v. Kingdom of Spain*, 2001, ICSID Case No. ARB/97/7, award, 13 November 2000, para. 67.

[201] *Ibid.*

[202] UNRIAA, vol. XXVII (see footnote 156 above), para. 223.

[203] *Yearbook … 2001*, vol. II (Part Two), p. 158, para. (4) of the commentary to draft article 7 of the draft articles on prevention of transboundary harm from hazardous activities.

[204] International Law Association, First report of the Study Group on due diligence in international law, 7 March 2014, p. 28.

[205] The Special Rapporteur will return to this issue at a later stage.

[206] International Law Association, First report of the Study Group… (see footnote 204 above), p. 1.

[207] *Ibid.*, p. 17.

[208] *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)*, advisory opinion of 1 February 2011, Case No. 17, *ITLOS Reports 2011*, p. 46, para. 131.

Chapter XI

Human rights and the environment

157. It is often emphasized that human rights cannot be enjoyed in a degraded environment. However, it does not automatically follow that there exists a customary law rule establishing an individual human right to a clean environment. The link between a clean environment and the enjoyment of human rights is indirect and secured through other established rights, such as the right to health, food and acceptable living conditions.[209]

158. Examination of the relationship between the environment and international human rights law has been undertaken in several regional contexts. As exemplified below, the treatment of human rights norms in certain regional instruments and human rights bodies suggests that such norms are of potential relevance to this topic.

159. As an example, the European Convention on Human Rights does not contain a general right of protection of the environment as such, but environmental issues have been found to implicate other rights.[210] For example, the European Court of Human Rights has previously held that certain acts constitute a violation of the right to life or health, as well as the right to respect one's home and one's private and family life.[211]

160. The European Convention on Human Rights also does not expressly provide for an individual right to a clean

[209] But see also the African Charter on Human and Peoples' Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. The Conventions codify these so-called third-generation rights as collective rights: article 24 of the African Charter provides that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development". Hence there is a clear reference to "peoples" rather than to an individual (a person). Yet it is the individual person that enjoys this right within its group (peoples). Moreover, article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights establishes both an individual right "to a healthy environment" and imposes an obligation on States to "promote the protection, preservation, and improvement of the environment".

[210] *Di Sarno and Others v. Italy*, no. 30765/08, 10 January 2012, para. 80; and *Kyrtatos v. Greece*, no. 41666/98, ECHR 2003-VI (extracts), para. 52.

[211] *López Ostra v. Spain*, no. 16798/90, 9 December 1994, Series A no. 303-C; and *Guerra and Others v. Italy* [GC], no. 14967/89, ECHR 1998-I.

environment, but other provisions of the Convention are capable of achieving a similar result. On more than one occasion, the European Court of Human Rights has held there to be a positive obligation on the State to take reasonable and appropriate measures[212] aimed at protecting the environment. It could be said that these obligations are similar to that reflected in the preventive and precautionary principle. There are conflicting views as to the extent of the margin of appreciation to be afforded to States that can be resolved only by reference to the context of a particular case.[213] However, it is recognized that States must balance the general interests of the community as regards environmental objectives with the rights of individuals.[214]

161. Moreover, some decisions in the context of the inter-American system refer to the disclosure of information to the peoples concerned. The obligation to disclose information[215] derived from human rights law is well reflected in the procedural content of the due diligence principle.[216] Inherent in the requirement to consult the public is an obligation to disclose information. Decisions relating to the environment within the inter-American system (Court or Commission) refer to a series of rights belonging to the American people, such as the right to property, to freedom of movement and residence, to humane treatment, to judicial guarantees, and to judicial protection.[217] As far as it was possible to investigate those judgments, they do not appear to implicitly reference principles of environmental law.

162. The communication of the African Commission on Human and Peoples' Rights in the *Ogoniland* case[218] clarifies the obligation of States to take reasonable measures to prevent environmental harm. In addition to the obligation to avoid direct participation in the contamination of air, water and soil, the African Commission's communication also outlines the obligation to protect the population from environmental harm.[219] The communication emphasizes the importance of performing the following measures in order to fulfil the right to health and a clean environment. Such measures include: "independent scientific monitoring of threatened environments"; public "environmental and social impact studies prior to any major industrial development"; and "monitoring and providing information to those communities exposed to hazardous materials and activities".[220] It should be mentioned that these requirements from the *Ogoniland* case are almost identical to those required by an environmental impact assessment under environmental law.

163. The fact that the legal character of human rights differs from the norms of international environmental law makes it difficult to perform a neat comparison. That is to say, human rights guarantee those rights belonging to an individual, while international environmental law focuses on inter-State relations.[221] This explains why it is uncommon to find references to principles of environmental law in human rights and, on the rare occasion that one can, such references are often only fleeting.

Indigenous people and environmental rights

164. Indigenous people have a special relationship with their traditional land. They hold their own diverse concepts of development that are based on their traditional values, visions, needs and priorities.[222] Their ancestral land is of fundamental significance for their collective physical and cultural survival as peoples.[223] The link between indigenous people and their land is evident in the fact that 95 per cent of the top 200 areas with the greatest and most threatened biodiversity are indigenous territories.[224]

165. Indigenous peoples' rights arise from the "recognition that their special relationship with the environment, and the importance of this relationship for their survival as distinct peoples, sets them aside from the remainder of the population and requires special legal status".[225] The rights of indigenous peoples are recognized in several treaties and instruments, as well as in case law.[226]

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[212] *Băcilă v. Romania*, no. 19234/04, 30 March 2010, para. 60; and *Di Sarno and Others v. Italy*, no. 30765/08, 10 January 2012, para. 80.

[213] *Hatton and Others v. United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII, para. 86.

[214] *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C, para. 51; and *Hatton and Others v. United Kingdom*, no. 36022/97, 2 October 2001, paras. 96–97. See also *Balmer-Schafroth and Others v. Switzerland*, no. 22110/93, *Reports of Judgments and Decisions* 1997-IV, Dissenting Opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek, pp. 1361 *et seq*.

[215] *Guerra and Others v. Italy* [GC], no. 14967/89, ECHR 1998-I, para. 60.

[216] International Law Association Study Group on due diligence in international law (see footnote 204 above), p. 28.

[217] See e.g. *Raposa Serra Do Sol Indigenous Peoples v. Brazil*, decision on admissibility, 23 October 2010, report No. 125/10 of the Inter-American Commission on Human Rights; *Case of the Saramaka People v. Suriname*, judgment of 28 November 2007, Inter-American Court of Human Rights Series C No. 172; and other cases cited as part of the collection of regional decisions on the website of the United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, available from http://ieenvironment.org/regional-decisions.

[218] African Commission on Human and Peoples' Rights, Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, 27 October 2001.

[219] *Ibid.*, para. 50.

[220] *Ibid.*, para. 53.

[221] The difference is described in the following way by the International Law Association Study Group on due diligence in international law in its first report (see footnote 204 above): "International human rights law … differs from most other fields of international law to the extent that it primarily addresses the internal affairs of States. In other fields, such as international environmental law, the principle of sovereignty leaves the internal affairs of States largely unexamined, and focuses instead on *transboundary* (inter-*nation*-al) injuries of moral or material nature" (p. 14).

[222] United Nations Permanent Forum on Indigenous Issues, "Who are indigenous peoples?", Fact Sheet. Available from https://unstats.un.org/UNSD/geoinfo/UNGEGN/docs/26th-gegn-docs/UN%20PFII%205session_factsheet1.pdf.

[223] *Ibid.*

[224] Oviedo, Maffi and Larsen, *Indigenous and Traditional Peoples of the World and Ecoregion Conservation: An Integrated Approach to Conserving the World's Biological and Cultural Diversity*.

[225] Plant, *Land Rights and Minorities*, p. 7.

[226] They include the Convention on Biological Diversity, the International Covenant on Economic, Social and Cultural Rights, the Rio Declaration on Environment and Development and Agenda 21 (*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.8 and corrigendum), resolution 1, annexes I and II), the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (General Assembly resolution 47/135 of 18 December 1992, annex) and the United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 61/295 of 13 September 2007, annex).

166. Indigenous peoples may be particularly affected by armed conflict. Therefore, it is important to note that article 16 of ILO Convention (No. 169) concerning indigenous and tribal peoples in independent countries[227] deals explicitly with the displacement of indigenous peoples.[228] One of the most important rules in the Convention is found in article 16, which states that indigenous peoples shall not be removed from their lands (para. 1). This is the basic principle that should be applied under all normal circumstances. However, acknowledging that there may be circumstances where this becomes unavoidable, this should be done only as an exceptional measure (para. 2). In cases where relocation was necessary, indigenous peoples should have the right to return as soon as the reason for which they had to leave is no longer valid (para. 3). For example, in the case of a war or natural disaster, they can go back to their lands when it is over. In cases where such unavoidable relocation becomes a permanent situation, indigenous peoples have the right to lands of an equal quality, in addition to legal rights relating to the land they previously occupied. This may include rights relating to the agricultural potential of the lands and legal recognition of ownership of that land (para. 4).

[227] This Convention revised ILO Convention (No. 107) concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries.

[228] ILO, *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (Geneva, 2009), pp. 97–98.

Chapter XII

Future programme of work

167. The second report will focus on the law applicable during both international and non-international armed conflict. It will discuss in more detail particular aspects only briefly touched upon in the present report, including issues of human and indigenous rights relevant to this topic. The second report will contain both an analysis of any existing rules of armed conflict considered relevant to the topic, as well as their relationship to the relevant law applicable during peacetime. The character of the second report will be different from the present report. It is likely to be both more analytical and concrete, since it will contain proposals for guidelines (conclusions/recommendations). The third report (2016) will focus on post-conflict measures. It is likely to contain a limited number of guidelines, conclusions or recommendations.

168. In the presentation made by the Special Rapporteur in 2013, it was envisaged that the time frame would be three years, with one report to be submitted for consideration by the Commission each year. The Special Rapporteur believes that this time frame is realistic, provided that the outcome of the work takes the form of guidelines, conclusions or recommendations.

169. With respect to the content of the guidelines (conclusion/recommendations) themselves, the Special Rapporteur in her second report intends to propose that they address, *inter alia*, general principles, preventive measures, cooperation, examples of rules of international law that are candidates for continued application during armed conflict and protection of the marine environment. The third report will include proposals on post-conflict measures, including cooperation, sharing of information and best practices, and reparative measures.

170. In the view of the Special Rapporteur, such a plan of work is desirable. It will allow the Commission to obtain a comprehensive overview of the legal challenges raised by the increasing concern for the environmental implications of activities that occur in the context of armed conflict. Most importantly, it will create favourable conditions in which the Commission may draw appropriate conclusions and recommend practical guidelines.

171. Should there be a need to continue with enhanced progressive development or codification as a result of the work undertaken, a decision would need to be taken by the Commission, or by States, at a later stage. It may seem as if this approach is overly cautious, or even lacks ambition, but the effect of small steps must not be underestimated. In addition, it would be well within the scope of article 1 of the statute of the Commission, namely, that the Commission "shall have for its object the promotion of the progressive development of international law and its codification".

172. The Special Rapporteur acknowledges that different views have been expressed both within the Commission and in the General Assembly concerning the final outcome of the work, which has yet to be decided. While the Special Rapporteur has expressed her initial view, she remains in the hands of a future decision by the Commission.[229]

173. The Special Rapporteur will continue consultations with other entities, such as ICRC, UNESCO and UNEP, as well as regional organizations. However, it would also be of great value if the Commission were to repeat its request to States to provide examples of when rules of international environmental law, including regional and bilateral treaties, have continued to apply in times of international or non-international armed conflict. Furthermore, it would also be of assistance if States were to provide examples of national legislation relevant to the topic and case law in which international or domestic environmental law has been applied.

[229] *Yearbook … 2013*, vol. II (Part Two), para. 143.

Annex

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PROTECTION OF THE ATMOSPHERE

[Agenda item 11]

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First report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur*

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CONTENTS

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Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.
General Agreement on Tariffs and Trade (GATT) (Geneva, 30 October 1947)	*Ibid.*, vol. 55, No. 814, p. 187.
Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces (London, 19 June 1951)	*Ibid.*, vol. 199, No. 2678, p. 67.
Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions (Geneva, 20 March 1958)	*Ibid.*, vols. 335, 516, 609, 1059 and 1891, No. 4789. See also ECE, TRANS/WP.29/409.
Convention on the Continental Shelf (Geneva, 29 April 1958)	*Ibid.*, vol. 499, No. 7302, p. 311.
Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (Moscow, 5 August 1963)	*Ibid.*, vol. 480, No. 6964, p. 43.
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United Nations Framework Convention on Climate Change (New York, 9 May 1992)	*Ibid.*, vol. 1771, No. 30822, p. 107.
Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997)	*Ibid.*, vol. 2303, No. 30822, p. 162.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	*Ibid.*, vol. 1760, No. 30619, p. 79.
United Nations Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa (Paris, 14 October 1994)	*Ibid.*, vol. 1954, No. 33480, p. 3.
Comprehensive Nuclear-Test-Ban Treaty (New York, 10 September 1996)	A/50/1027, annex.
Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	*Official Records of the General Assembly, Fifty-first Session, Supplement No. 49* (A/51/49), vol. III, resolution 51/229, annex.
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Introduction

A. Inclusion of the topic in the programme of work of the Commission

1. At its sixty-third session, held in 2011, the International Law Commission endorsed the inclusion of the topic "Protection of the atmosphere" in its long-term programme of work.[1] The syllabus, containing a brief outline of the topic and a selected bibliography, was annexed to the report of the Commission submitted to the General Assembly at its sixty-sixth session.[2]

2. At its sixty-sixth session, the General Assembly, in its resolution 66/98 of 9 December 2011 on the report of the Commission on the work of its sixty-third session, *inter alia*, took note of the inclusion by the Commission of the topic "Protection of the atmosphere" in its long-term programme of work (para. 7).

3. During the consideration by the Sixth Committee of the report of the Commission, a number of States welcomed the inclusion of the topic in the Commission's programme of work. These States expressed their keen interest in the subject.[3] Some also expressed a desire for the Commission to give priority to the topic.[4] The view was also expressed that the "topic of protection of the atmosphere addressed a growing global concern" and that an "effort by the Commission to take stock of rules under existing

[1] *Yearbook … 2011*, vol. II (Part Two), para. 32.

[2] *Ibid*., annex II.

[3] For example: Algeria, *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 28th meeting (A/C.6/66/SR.28), para. 50; Denmark (on behalf of the Nordic countries), *ibid*., 18th meeting (A/C.6/66/SR.18), para. 30; Canada, *ibid*., 19th meeting (A/C.6/66/SR.19), para. 46; China, *ibid*., para. 15; Nigeria, *ibid*., 20th meeting (A/C.6/66/SR.20), para. 85; Poland, *ibid*., para. 64; Slovenia, *ibid*., para. 9; Spain, *ibid*., 27th meeting (A/C.6/66/SR.27), para. 37; and Sri Lanka, *ibid*., para. 29.

[4] Denmark (on behalf of the Nordic countries), *ibid*., 18th meeting (A/C.6/66/SR.18), para. 30, and Poland, *ibid*., 20th meeting (A/C.6/66/SR.20), para. 64.

conventions and to elaborate a new legal regime would be commendable".[5] Another delegation expressed a concurring view, going on further to state that the "deteriorating state of the atmosphere made its protection a pressing concern".[6] It was hoped that the Sixth Committee would give strong endorsement to the topic to be taken up by the Commission. Support was given in respect of the Commission's foray into new areas of international law, with one State stating that the Commission was now entering some areas of international law that it had never addressed before, such as the environment, humanitarian law and investment law and that the policy reflecting the current development of international law and the interests of the international community promised to bring very useful results.[7] It was noted that the protection of the atmosphere was "most deserving of consideration as [it] addressed fundamental aspects of environmental protection", a field in which there was no lack of international instruments or scholarly attention, but where there was "a need for further review and systematization in order to respond to the growing concerns of the international community".[8] Some States, however, expressed concerns as to the feasibility of the topic owing to its "highly technical issues".[9] With regard to codification and progressive development, it was hoped that the topic's "highly technical nature would not render the exercise futile".[10] The view was also expressed that since "the current structure of law in that area was treaty-based, focused and relatively effective, and in light of the ongoing negotiations designed to address evolving and complex circumstances, it would be preferable not to attempt to codify rules in that area at present".[11] The Special Rapporteur takes such criticisms very seriously and has tried to address the concerns in the present report. It is his sincere hope that the Member States will be convinced that the protection of the atmosphere is an important and appropriate topic for the Commission to address.

4. At its sixty-fifth session, held in 2013, the Commission decided to include the topic in its current programme of work and appointed Mr. Shinya Murase as Special Rapporteur for the topic.[12]

5. The Commission included the topic on the following understanding:

(*a*) Work on this topic will proceed in a manner so as not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as the liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights;

(*b*) the topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to "fill" the gaps in the treaty regimes;

(*c*) questions relating to outer space, including its delimitation, are not part of the topic;

(*d*) the outcome of the work on the topic will be a set of draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

The Special Rapporteur's reports would be based on such understanding.[13]

6. During the Sixth Committee's consideration of the Commission's report on the work of its sixty-fifth session, held in 2013, a number of delegates welcomed the inclusion of the topic,[14] while a few States expressed the same concerns as had been expressed in previous years.[15]

7. The Special Rapporteur has undertaken to establish contacts with representatives of interested intergovernmental and international organizations, including the United Nations Environment Programme (UNEP), the World Meteorological Organization (WMO) and the United Nations Economic Commission for Europe (ECE).[16]

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[5] Austria, *ibid*., 19th meeting (A/C.6/66/SR.19), para. 4.

[6] Japan, *ibid*., 18th meeting (A/C.6/66/SR.18), para. 63.

[7] Czech Republic.

[8] Italy, *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 26th meeting (A/C.6/66/SR.26), para. 43. Slovenia also noted that the topic was of particular relevance (*ibid*., 20th meeting (A/C.6/66/SR.20), para. 9).

[9] It was noted that the topic appeared to be a highly technical topic, many aspects of which lay outside the areas of expertise of the Commission (France, *ibid*., 20th meeting (A/C.6/66/SR.20), para. 48). A similar concern was expressed by the Netherlands, which stated that the "question of protection of the atmosphere seemed more suited for discussion among specialists" (*ibid*., 28th meeting (A/C.6/66/SR.28), para. 64).

[10] Islamic Republic of Iran, *ibid*., 27th meeting (A/C.6/66/SR.27), para. 52.

[11] United States of America, *ibid*., 20th meeting (A/C.6/66/SR.20), para. 15. Similar remarks were made in 2012: China, *ibid*., *Sixty-seventh Session, Sixth Committee*, 19th meeting (A/C.6/67/SR.19), para. 52; France, *ibid*., para. 91; Netherlands, *ibid*., para. 31; Russian Federation, *ibid*., 22nd meeting (A/C.6/67/SR.22), para. 103; United Kingdom, *ibid*., 19th meeting (A/C.6/67/SR.19), para. 68; and United States, *ibid*., para. 118.

[12] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

[13] *Ibid*. It may be noted that the understanding relates only to "relevant political negotiations" and "the subjects of negotiations"; therefore, such discussion is not prevented in relation to subjects that are not part of the agenda of any ongoing treaty negotiations, although the Special Rapporteur did not intend, from the beginning, to interfere with political processes or to deal with specific substances. That the project will not "deal with, but is also without prejudice to" certain questions mentioned above does not preclude the Special Rapporteur from referring to them in the present study. The project is not intended to fill the gaps in treaty regimes but it will certainly identify such gaps. Furthermore, it should be noted that the understanding indicates no restriction on discussing any matters of customary international law relating to the subject by taking treaty practice into consideration either as State practice or *opinio juris*.

[14] Austria, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17), para. 73; Czech Republic, *ibid*., 18th meeting (A/C.6/68/SR.18), para. 102; Indonesia, *ibid*., 19th meeting (A/C.6/68/SR.19), para. 69; Peru, *ibid*., 18th meeting (A/C.6/68/SR.18), para. 27; Portugal, *ibid*., 17th meeting (A/C.6/68/SR.17), para. 86; Romania, *ibid*., 18th meeting (A/C.6/68/SR.18), para. 116; Singapore, *ibid*., 17th meeting (A/C.6/68/SR.17), para. 78; and as well as Cuba (on behalf of the Community of Latin American and Caribbean States), India, Italy, Malaysia, Slovenia, Spain and Thailand. Austria suggested a redefinition of the understanding, stating that "some of the issues currently excluded from the mandate would also have to be taken up … such as liability and the precautionary principle" (*ibid*., 17th meeting (A/C.6/68/SR.17), para. 73). Japan stated that the "protection of atmospheric environment required coordinated action by the international community", expressing hope that "it looked forward to a fruitful outcome of the work on the topic" (*ibid*., para. 81).

[15] China, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19), para. 60; France, *ibid*., 17th meeting (A/C.6/68/SR.17), para. 106; Russian Federation, *ibid*., 19th meeting (A/C.6/68/SR.19), para. 55; United Kingdom, *ibid*., 18th meeting (A/C.6/68/SR.18), para. 21; and United States, *ibid*, 17th meeting (A/C.6/68/SR.17), para. 50. France pointed out that the limits imposed on the scope of the work seem to be "wise precautions" (A/C.6/68/SR.17, para. 106).

[16] A two-day workshop, organized by the Division of Environmental Law and Conventions of UNEP, was held for his benefit at UNEP

B. Purpose of the present report

8. The present report aims to address the general objective of the project in order to ascertain the rationale for work on the progressive development and codification of international law on the topic; and address the general scope of the topic in order to properly circumscribe it. The report is not, however, merely an exploratory study. It will attempt to identify the basic concepts, perspectives and approaches to be taken in connection with the subject. The purpose of the report is to outline the questions the Commission must consider from the outset with respect to the protection of the atmosphere and the corresponding legal problems to which they give rise, while simultaneously providing the basis for a common understanding of the basic concepts, objectives and scope of the project. It is hoped that the report will stimulate discussion within the Commission in order to provide the Special Rapporteur with the requisite guidance as to the approach to be followed and the goal to be achieved.

9. The present report first describes the rationale for the topic and basic approaches. It then traces the historical evolution of protection of the atmosphere in international law. It refers to the sources relevant to the progressive development and codification of the law on the topic and provides relevant information on the physical characteristics of the atmosphere, which will serve as a basis for defining the atmosphere in legal terms. It also provides a broad outline of the various elements comprising the general scope of the project, with a view to identifying the main legal questions to be covered. Lastly, the report discusses the question of the legal status of the atmosphere as a prerequisite for the Commission's consideration of the topic. The Special Rapporteur advances tentative conclusions on these preliminary questions in the form of draft guidelines.

C. Rationale for the topic and basic approaches

1. Rationale

10. While the draft articles of the Commission on the law of non-navigational uses of international watercourses[17] and the law of transboundary aquifers[18] contain some provisions relevant to the protection of the environment, the Commission had not dealt with any topic in the field of international environmental law since concluding its work on international liability for injurious consequences arising out of acts not prohibited by international law, namely, by adopting the draft articles on prevention of transboundary harm from hazardous activities[19] and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[20] This appeared to be a significant oversight at a time when the world was undergoing serious environmental degradation.[21]

11. It may be recalled that the Commission had specified in 1997 and 1998 that, in selecting a new topic, it should be guided by the following criteria in particular: the topic should reflect the needs of States with respect to the progressive development and codification of international law; the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; and the topic should be settled and feasible enough for progressive development and codification.[22] It should be stressed that the Commission further agreed that it should not restrict itself to "traditional topics", and could also consider those that reflect "new developments in international law and pressing concerns of the international community as a whole".[23] The topic of protection of the atmosphere clearly satisfies those tests. First, the deteriorating state of the atmosphere has made its protection a pressing concern for today's international community. Second, there is abundant evidence of State practice including judicial precedents, treaties and other normative documents. Third, it is essentially a legal question rather than a political issue. For those reasons, the Commission and the Sixth Committee approved taking on the proposed topic.

12. As indicated in paragraphs 84 and 85 below, the atmosphere (air mass) is the planet's largest single natural

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headquarters in Nairobi on 17 and 18 January 2011 on the topic "Protection of the atmosphere". The Special Rapporteur wishes to express his deep appreciation to Mr. Masaharu Nagai, Acting Deputy Director of the Division, for organizing the workshop. A similar workshop was organized on the topic at the International Environment House in Geneva on 15 July 2011, and was attended by experts from Geneva-based international environmental organizations, such as the UNEP Regional Office for Europe, WMO and ECE. The Special Rapporteur wishes to thank the organizer of the workshop, Ms. Barbara Ruis of the UNEP Regional Office for Europe. Finally, a workshop on the topic was held in New York on 26 October 2011 at the Permanent Mission of Japan to the United Nations, jointly organized by UNEP and the Government of Japan. The Special Rapporteur wishes to express his deep gratitude to Mr. Tsuneo Nishida for hosting the workshop and to Mr. Chusei Yamada (former member of the Commission) for acting as moderator, as well as to the following for their contributions as speakers: Mr. Donald McRae (University of Ottawa School of Law and member of the Commission); Mr. Richard Stewart (New York University School of Law); and Mr. Masaharu Nagai (UNEP).

[17] See *Yearbook … 1994*, vol. II (Part Two), pp. 89 *et seq.*, para. 222. The draft articles resulted in the Convention on the Law of the Non-navigational Uses of International Watercourses.

[18] *Yearbook … 2008*, vol. II (Part Two), pp. 19 *et seq.*, para. 53.

[19] *Yearbook … 2001*, vol. II (Part Two), pp. 146 *et seq.*, para. 97.

[20] *Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq.*, para. 66.

[21] It was therefore welcomed that the Commission decided, in 2013, to adopt two environmental topics: "Protection of the atmosphere" and "Protection of the environment in relation to armed conflicts" (with Ms. Marie G. Jacobsson as the Special Rapporteur; see *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 167).

[22] *Yearbook … 1997*, vol. II (Part Two), pp. 71–72, para. 238; and *Yearbook … 1998*, vol. II (Part Two), p. 110, para. 553. In the same vein, three criteria have been suggested for topic selection: practical concern, namely, whether there is any pressing need for the topic in the international community as a whole; technical feasibility, namely, whether the topic is "ripe" enough in the light of relevant State practice and literature; and political feasibility, namely, whether dealing with the proposed topic is likely to receive broad support from States. See Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law*, pp. 60–63; and Murase, *Kokusai Rippo: Kokusaiho no Hogenron* (*International Lawmaking: Sources of International Law*), pp. 217–221.

[23] *Yearbook … 1997*, vol. II (Part Two), pp. 71–72, para. 238. Mr. Amrith Rohan Perera, a member of the Commission during the 2006–2011 quinquennium, noted that "over time, the International Law of Co-existence evolved into an International Law of Co-operation, positive in character, to meet the needs and aspirations of the new global community and the accompanying challenges", and in "the final analysis, the ability of the Commission to effectively address these complex and challenging issues in formulating the new legal framework for contemporary international relations … will ensure the continuing relevance and the central role of the International Law Commission" (see Perera, "Role of international law in meeting challenges to contemporary international relations: contribution of the International Law Commission (ILC)", pp. 315 and 325, respectively).

resource; it is indispensable to the survival of humankind. Degradation of the conditions of the atmosphere has long been a matter of serious concern to the international community.[24] While a number of relevant conventions dealing with transnational and global atmospheric issues have been concluded, they remain a patchwork of instruments. Substantial gaps exist in terms of geographical coverage, regulated activities, regulated substances and, most importantly, applicable principles and rules. Such a piecemeal or incremental approach has created particular limitations for the protection of the atmosphere, which by its very nature warrants holistic treatment. There is no legal framework at present that covers the entire range of atmospheric environmental problems in a comprehensive and systematic manner. The Commission can therefore make a significant contribution by identifying the legal principles and rules applicable to the whole range of atmospheric problems on the basis of State practice and jurisprudence.

13. The goal to be achieved by the proposed project of progressive development and codification of international law is fourfold. First, the project aims to identify the status of customary international law, established or emerging, examining the gaps and overlaps, if any, in existing law relating to the atmosphere. Second, it aims to provide appropriate guidelines for harmonization and coordination among treaty regimes within and outside international environmental law. The issue of trade and the environment will prove to be a challenge in that area.[25] Third, the proposed draft guidelines will help to clarify a framework for the harmonization of national laws and regulations with international rules, standards and recommended practices and procedures relating to the protection of the atmosphere. Fourth, the project aims to establish guidelines on the mechanisms and procedures for cooperation among States in order to facilitate capacity-building in the field of transboundary and global protection of the atmosphere. It must be stressed that the purpose of this project is not to mould "shame and blame" matrices for potential polluters but that, on the contrary, it is primarily to explore possible mechanisms of international cooperation to solve the problems of common concern.

14. Last, as a word of reminder, it should be noted that the project does not duplicate the previous work of the Commission. The Commission adopted the draft articles on prevention of transboundary harm in 2001 and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities in 2006. Both drafts contain important provisions potentially applicable to atmospheric damage. However, their scope of application is, on the one hand, too broad (as they are intended to cover all types of environmental harm) and, on the other hand, too limited (as they focus on questions related to the prevention and allocation of loss caused by transboundary harm and hazardous activities). As such, they do not adequately address the protection of the atmosphere. Therefore, it is proposed that the Commission tackle the problem in a comprehensive and systematic manner. The prior work of the Commission should be referred to as important guidelines, where appropriate.

2. Approaches

(a) *Adhering exclusively to a legal approach*

15. Needless to say, the Commission, charged with the work of the progressive development and codification of international law, will adhere exclusively to a legal approach in dealing with the topic. It will attempt to avoid the impassioned political and policy debate associated with certain environmental topics by addressing only the legal principles and rules pertaining to the protection of the atmosphere, as a Commission composed of legal experts. In the work of the Commission, it is critical to distinguish arguments based on *lex lata* (law as it is) from those based on *lex ferenda* (law as it ought to be). In the field of international environmental law, *lex ferenda* proposals and preferences are sometimes smuggled into the process of "interpretation" of *lex lata*, which should be avoided. Thus, the Commission will adopt a cautious approach to elaborating the draft guidelines on the protection of the atmosphere. First, it should seek to clarify the meaning and function of the existing legal principles in their interpretation and application de *lege lata*. Next, should existing law be found lacking, it could explore a reinterpretation of the existing legal concepts, principles and rules. Finally, it may, after careful analysis of the possibilities and boundaries of existing principles, add certain clarifications with regard to the progressive development of emergent rules of international law.

16. Naturally, all issues in international law, including the present topic, have both legal and political aspects. It is important, however, for the Commission to focus on the legal aspects of the issue. It is hoped that clarifying the key concepts from a legal perspective will enable a more disciplined analysis of their legal status, meanings, functions, implications, possibilities and limits within the existing legal regimes and set the stage for a more constructive elaboration and progressive development of international law in the future. The work of the Commission will take the various legal frameworks that have heretofore been set up to handle only discrete and specific atmospheric problems and rationalize them into a single, flexible set of guidelines. As agreed at the time of taking up the present topic, the work of the Commission will proceed in a manner so as not to interfere with relevant political negotiations (see para. 5 above).

(b) *Referring to general international law*

17. It is important for the Commission to consider the legal principles and rules on the subject within the framework of general international law. Obviously, the fundamental issues to be studied by the Commission involve such questions as the basic rights and obligations of States, the jurisdiction of States, the implementation of

[24] See, for example, Kiss and Shelton, *International Environmental Law*, pp. 555–592. See also Sands, *Principles of International Environmental Law*, pp. 317–390; Sands and Peel, *Principles of International Environmental Law*, pp. 238–298; Birnie, Boyle and Redgwell, *International Law and the Environment*, pp. 335–378; Hunter, Salzman and Zaelke, *International Environmental Law and Policy*, pp. 538–733; and Xue, *Transboundary Damage in International Law*, pp. 200–203.

[25] See Murase, "Perspectives from international economic law on transnational environmental issues"; from the same author, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 1–127, and "Conflict of international regimes: trade and the environment".

international obligations through the domestic law of States, the responsibility of States and the settlement of disputes, as well as the sources of international law—classic issues for international lawyers in general and for the Commission in particular. In that regard, the Commission should resist the tendency towards "compartmentalization (or fragmentation)" caused by dominant "single-issue" approaches to international environmental law.[26] In other words, the legal principles and rules applicable to the atmosphere should, as far as possible, be considered in relation to the doctrine and jurisprudence of general international law.[27] It also implies that the work of the Commission should extend to applying the principles and rules of general international law to various aspects of the problem of atmospheric protection. The Commission must look to new topics in international law for progressive development and codification in specialized fields such as human rights, environmental protection, and trade and investment, since most of the significant "traditional" topics in international law have been exhausted. It is true to some extent that the development of those areas of law would be better carried out by specialized law-making bodies and experts with specialized knowledge. However, this would serve to further compartmentalize international law. It is absolutely necessary, therefore, to place each isolated compartment within the framework of general international law in order to establish coherent links among them. The "generalist" or "integrative" approach, which cuts across the boundaries of special regimes, is thus indispensable to today's law-making activities, and efforts to codify and progressively develop international law by the Commission are more important than ever before.

18. Given that the Commission is a body that primarily comprises experts in general international law, some may see it as ill-suited to accommodate new specialized subfields of international law. On the contrary, the Special Rapporteur sees new possibilities and new opportunities for the Commission in the twenty-first century. The enormous growth in the number of treaties in such specialized fields has led to "treaty congestion" or "treaty inflation".[28] The multitude of conventions notwithstanding, they are faced with significant gaps as well as overlaps because there has been little or no coordination or harmonization and, therefore, no coherence among them. The need to enhance synergies among the existing conventions has been emphasized repeatedly;[29] the Commission should seize upon this opportunity. In its exercise of progressive development and codification of international law, the Commission should deal with these proposed new topics in specialized fields from the perspective of general international law, with a view to ensuring coordination among the various subfields (compartments) of international law. The Commission is best placed to play that role.

(c) *Consulting scientific institutions and experts*

19. Taking on a subject such as the protection of the atmosphere requires the Commission to have a certain level of understanding of the scientific and technical aspects of the problem, such as the sources and effects of the damage in question. It is therefore necessary for the Commission to reach out to international environmental organizations and to the scientific community. Its statute authorizes, in article 16 (*e*), the Commission to "consult with scientific institutions and individual experts" for the progressive development of international law. There are also comparable precedents: Mr. Chusei Yamada, as Special Rapporteur for the law of transboundary aquifers, engaged UNESCO experts on the hydrology of aquifers for successful completion of the draft articles on the subject. As the author of the present report indicated above, steps have been taken to reach out to the

[26] Murase, *International Law*, p. 10. Mr. Martti Koskenniemi, a former member of the Commission, challenges the very *raison d'être* of the Commission by stating as follows: "Old law-making bodies such as the UN's International Law Commission find themselves increasingly jobless. Unable to identify stakeholder interests or regulatory objectives, 'generalist' law-making bodies will wither away to the extent that political commitment to that which is merely 'general' seems pointless. If human rights interests can best be advanced in human rights bodies, environmental interests in environmental bodies and trade interests in trade bodies, while transnational activities create *de facto* practices that are as good (or even better) than formal law in regulatory efficiency, why bother with 'the codification and progressive development of international law' (Statute of the International Law Commission, Article 1) beyond tinkering with diplomatic immunities or technical treaty law?" (Koskenniemi, "International law and hegemony: a reconfiguration", p. 212). See also Koskenniemi, *The Politics of International Law*, p. 237. It seems, however, that Koskenniemi's assertion contradicts the general conclusion of the Study Group on Fragmentation of International Law (A/CN/L.682 and Add.1 and Corr.1, available from the Commission's website, documents of the fifty-eighth session; the final text will appear as an addendum to *Yearbook … 2006*, vol. II (Part One)), which he chaired. (See also *The Work of the International Law Comission*, 8th ed., vols. I and II (United Nations publication, Sales No. E.12.V.2), pp. 231–234 and pp. 430–444.) Naturally, human rights bodies will be able to advance human rights interests more efficiently than other bodies; the situation is similar with environmental bodies and environmental interests, and trade bodies and trade interests. However, leaving law-making to specialist bodies results in a fragmentation of international law in an international society where there is neither a supreme legislature nor constitutional courts to ensure coordination among conflicting interests.

[27] For example, the use of the concept of "equity" in the context of climate change—often ambiguous and arbitrary—clearly demonstrates the need to refer to the jurisprudence of the International Court of Justice, including the 1985 Chamber judgment of the Court in the frontier dispute case between Burkina Faso and Mali (*Frontier Dispute, Judgment, I.C.J Reports 1986*, p. 554, at pp. 567–568, para. 28), in which the Court indicated that there were three categories of equity in international law: equity *infra legem* (within the law), equity *praeter legem* (outside, but close to, the law) and equity *contra legem* (contrary to law). The notion of equity *praeter legem* is particularly important for its function in filling gaps in existing law. See, in general, Weil, "L'équité dans la jurisprudence de la Cour Internationale de Justice: un mystère en voie de dissipation?"; Kokott, "Equity in international law", pp. 186–188; and Shelton, "Equity", pp. 653–658. See also the report of the National Committee on Climate Change of Japan, "Legal principles relating to climate change: preliminary issues on the methodology and scope of the work", *Japanese Yearbook of International Law*, vol. 52 (2009), pp. 500–537.

[28] See Brown Weiss, "International environmental law: contemporary issues and the emergence of a new world order", pp. 697–702; Murase and others, "Compliance with international standards: environmental case studies"; and Anton, "'Treaty congestion' in contemporary international environmental law".

[29] UNEP has been emphasizing the need for synergy among multilateral environmental agreements: see the appendix to decision SS.VII/1 of 15 February 2002 on international environmental governance of the seventh special session of the Governing Council entitled "Report of the Open-ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance", sect. III.C entitled "Improved coordination among and effectiveness of multilateral environmental agreements", in particular paragraph 27 (see A/57/25, annex I). The UNEP Governing Council has adopted similar decisions almost every year. The latest is the Nusa Dua Declaration of 26 February 2010 (A/65/25, annex I, decision SS.XI/9, see paras. 10–12). See also Roch and Perrez, "International environmental governance: the strive towards a comprehensive, coherent, effective and efficient international environmental regime".

relevant international organizations as well as the scientific/technical community for their advice and expertise in helping the Commission to understand what has to be regulated. The situation is similar to the one faced by contemporary judges of international courts and tribunals, who, confronted with an increasing number of environmental disputes being filed in their dockets, require experts for proof of scientific evidence in those fact-intensive cases.[30]

[30] Most notably, see *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010,* p. 14, at paras. 160–168 (on the burden of proof and expert evidence), and the joint dissenting opinion of Judges Al-Khasawneh and Simma (*ibid.,* pp. 108–111, paras. 1–6).

Chapter I

Background

A. Evolution of international law on the protection of the atmosphere

20. The gaseous content of the atmosphere (*aër* in Greek and Latin) has been categorized as one of the legal commons since Roman times—as proclaimed in the sixth century in a famous passage in the *Institutes* of Emperor Justinian: "Things can be: everybody's by the law of nature … the things which are naturally everybody's are: air, flowing water, the sea and the sea-shore."[31]

21. Sharia law, which was systematized in the early years of the Muslim era (the eighth and ninth centuries), places importance on "the air" as the element indispensable "for the perpetuation and preservation of life". An authoritative study states that "[t]his element is no less important than water" and "[s]ince the atmosphere performs all these biological and social functions, its conservation, pure and unpolluted, is an essential aspect of the conservation of life itself which is one of the fundamental objectives of Islamic law".[32]

22. For many centuries, oceans were at the centre of modern international law. Meanwhile, neither the atmosphere nor the air were considered objects to be regulated by international law until the twentieth century.[33] Lawyers first started looking to the sky in 1783 when a hot air balloon was launched by the Montgolfier brothers with the authorization of the French police. The authorization, containing clearly defined conditions to be observed, demonstrated the power of the State to regulate activities in what is now called airspace.[34] Development of the notion of airspace since then is well known.[35] However, most international lawyers did not attempt to look at the substances in the atmosphere or the role of the atmosphere in transporting pollutants even into the 1950s.[36] For a long time, the differentiation between airspace and atmosphere was not made clear among international lawyers, and it was generally considered that the highest altitude of an aircraft was the upper limit of airspace. For example, by interpreting the French text "*espace aérien*" in article 1 of the Convention on International Civil Aviation,[37] it was asserted that airspace reached as far as the atmosphere could be found. However, earlier in the twentieth century, a United States domestic court was faced with the air pollution case described below, which was later to have a significant impact on international law.

23. One of the earliest air-pollution cases to be considered in a domestic court was the United States Supreme Court case of the *State of Georgia v. Tennessee Copper Company*[38] in 1907 and 1915. The dispute concerned two copper mining companies located in the State of Tennessee that conducted mining and smelting operations near the border of the State of Georgia. The companies emitted large quantities of sulphur dioxide, which produced sulphuric acid in the atmosphere. Georgia brought an original action in the United States Supreme Court to restrain the two companies from discharging the noxious gas from their works. They alleged that the emissions, carried by the wind, resulted in a wholesale destruction of forests, orchards and crops in Georgia. The Supreme Court found that it was a fair and reasonable demand on the part of a sovereign entity that the air over its territory should not be polluted on a great scale. By 1914, Georgia and the Tennessee Copper Company had come to an agreement, whereby the latter undertook to contribute to

[31] *Justinian's Institutes*, Book Two, 1.1. The classification of things (*de rerum divisione*); see Sand, "Shared responsibility for transboundary air pollution".

[32] Bagader and others, *Environmental Protection in Islam,* p. 4. The Special Rapporteur wishes to express his gratitude to the author of the study, Wolfgang E. Burhenne.

[33] At the local level, legislative action in the face of atmospheric pollution dates back to at least 1273, when an ordinance aimed at the prohibition of coal burning in London was issued (see Rowlands, "Atmosphere and outer space", p. 317).

[34] In the period between 1870 and 1871 during the Franco-Prussian war, balloons were used on both sides, especially during the siege of Paris. Based on the experience of the war, the First Hague Peace Conference in 1899 adopted declaration (IV, 1) to prohibit for the term of five years the launching of projectiles and explosives from balloons, and other new methods of a similar nature (see Sand, Pratt and Lyon, *An Historical Survey of the Law of Flight*, p. 9; and Heere, "Problems of jurisdiction in air and outer space".

[35] At the turn of the twentieth century, Paul Fauchille was the leading advocate of freedom of the air. The gist of his arguments was that real property of the air was impossible because no one could appropriate it and that the same applied to the possibility of the State to "dominate" the air. The result was that airspace was a *res communis omnium,* and therefore free. For reasons of security, however, he proposed a safety zone for the first 1,500 metres above ground. Fauchille, "Le domaine aérien et le régime juridique des aérostats". The Convention relating to the regulation of Aerial Navigation recognized the complete and exclusive sovereignty over the airspace above a State territory (see Mateesco Matte, *Traité de droit aérien-aéronautique,* p. 95 *et seq.*).

[36] See, for example, Hogan, "Legal terminology for the upper regions of the atmosphere and for the space beyond the atmosphere".

[37] The Convention entered into force in 1947; see Cheng, "Air law", and *The Law of International Air Transport,* pp. 120–121.

[38] *State of Georgia v. Tennessee Copper Company and Ducktown Sulphur, Copper and Iron Company, Ltd,* United States Supreme Court, 13 May 1907, 10 May 1915, *United States Reports,* vol. 237, pp. 474 and 477; reproduced in Robb, *International Environmental Law Reports,* pp. 514–523.

a fund to compensate those injured by the fumes from its works, to allow inspections of its plant and to not operate more green ore furnaces than it found necessary. However, no agreement was reached with the Ducktown Company, and a second opinion of the Supreme Court was therefore rendered on 10 May 1915. The Court, while ultimately ruling in favour of Georgia's injunction request, found that it was impossible to ascertain the necessary reduction in sulphur content to Ducktown Company's emissions to prevent injury to the State. The Court imposed certain conditions on the Ducktown Company related to record-keeping, inspection and limiting emission levels.

24. The case was indeed a precursor to the famous *Trail Smelter* case[39] between the United States and Canada (then a Dominion of the United Kingdom) in the 1930s. The *Trail Smelter* case remains the leading case of transboundary air pollution in international law today, affirming the customary principle of "good neighbourliness" in bilateral arrangements between neighbouring countries. Its final judgment in 1941, which cited at length the decision in the *State of Georgia v. Tennessee Copper Company* case,[40] demonstrated that some of the most basic principles in international law are derived from domestic court decisions. The *Trail Smelter* case is representative of the traditional type of international environmental dispute in two ways: the causes and effects of the environmental damage are identifiable, and a territorial State is under an obligation to exercise due diligence over the activities of individuals and companies within its territory in order to ensure that the activities do not cause harm to other States and their nationals. That principle of prevention (or "preventive principle") was later confirmed as principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) in 1972.[41] Transboundary air pollution caused by industrial accidents has become serious and large scale since the 1970s, as seen in the catastrophic accidents at Seveso, Italy (1976), and Bhopal, India (1984).[42] The Convention on the Transboundary Effects of Industrial Accidents[43] was designed to protect humans and the environment from the consequences of industrial accidents through preventive measures and, should accidents occur, to implement efforts to reduce their severity and mitigate their impacts.

25. The 1960s saw not only the repetition of traditional transboundary environmental problems but also the appearance of new challenges in international environmental law. The challenges came from two perspectives. One challenge was the broadening of environmental damage both in terms of its causes and effects, as in the case of acid rain, which made it difficult to identify distinct point-sources of pollution as well as specifically affected locations. The cumulative nature of the damage makes it particularly difficult to allocate blame. The Convention on Long-range Transboundary Air Pollution, of 1979, was concluded within a regional framework in response to such problems.[44] The other challenge was the rapid development of so-called "ultra-hazardous activities", such as the operation of oil tankers, aircraft, nuclear power plants and space objects. While those activities are generally beneficial for the welfare of people, they carry the potential for tremendous damage to human life in the event of accidents, and accidents have occurred. It was therefore necessary to establish a special regime of liability in the relevant conventions.[45]

26. Since the 1980s, the world has witnessed the rapid deterioration of the global environment in the form of ozone depletion and climate change. The initial response by the international legal community comprised the Vienna Convention for the Protection of the Ozone Layer[46] and the Montreal Protocol on Substances that Deplete the Ozone Layer.[47] The United Nations Framework Convention on Climate Change[48] and the Kyoto Protocol to the Convention[49] were later concluded to meet the challenge of climate change. In response to these global issues, international law has developed a number of new techniques to cope with the scientific uncertainty associated with environmental problems, including the adoption of precautionary approaches; a combination of framework conventions and protocols; and unique non-compliance procedures and flexible mechanisms.[50]

27. It may be noted that in the late 1980s there were certain significant movements promoting the idea of a "law of the atmosphere" aimed at the adoption of a comprehensive approach to combating atmospheric problems.[51]

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[39] *Trail Smelter*, UNRIAA, vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905–1982.

[40] *Ibid.*, p. 1965.

[41] See *Report of the United Nations Conference of the Human Environment, Stockholm 5–16 June 1971* (United Nations publication, Sales No. E.73.II.A.14), chap. I.

[42] Murase, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 74–96.

[43] The Convention entered into force in 2000.

[44] The Convention entered into force in 1983; see Sand, "Regional approaches to transboundary air pollution".

[45] See, for example, Goldie, "Liability for damage and the progressive development of international law"; Jenks, "Liability for ultra-hazardous activities in international law", pp. 111–120; Dupuy, *La responsabilité internationale des États pour les dommages d'origine technologique et industrielle*.

[46] The Convention entered into force in 1988.

[47] The Protocol entered into force in 1989.

[48] The Convention entered into force in 1994.

[49] The Protocol entered into force in 2005.

[50] Murase, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 24–30.

[51] For the 1988 and 1989 conferences organized by the Government of Canada, see, "International Conference on Atmosphere", *Environmental Policy and Law*, vol. 18, No. 5 (1988), p. 155 and "Protection of the atmosphere: statement of the International Meeting of Legal and Policy Experts, Ottawa, Ontario, Canada, February 22, 1989", *American University Journal of International Law and Policy*, vol. 5 (1989–1990), pp. 529–542; Bruce, "Law of the air: a conceptual outline"; Sand, "UNCED and the development of international environmental law"; and Soroos, *The Endangered Atmosphere: Preserving a Global Commons*. Mr. Donald McRae recalls that the topic of the protection of the atmosphere has had a link with the Commission since the late 1980s, remarking: "In June 1988 Canada hosted a conference in Toronto on the changing atmosphere, which engaged scientists and officials from Governments, the United Nations and other intergovernmental and non-governmental organizations. That conference called on Governments to work with urgency toward an action plan for the protection of the atmosphere, which would include an international framework convention. The next year in February 1989 a meeting of legal and policy experts was held in Ottawa. The meeting endorsed the idea of a framework convention on the protection of the atmosphere and set out the elements that would be needed in such a framework convention. Of course, events moved on, climate

(*Continued on next page.*)

Chapter 9 of Agenda 21 addressed the "Protection of the atmosphere",[52] and in ensuing years the Commission on Sustainable Development held substantive discussions on the subject in 2001[53] and 2007,[54] focusing on a cluster of thematic issues, including the atmosphere and air pollution. In 2002, the Johannesburg Declaration on Sustainable Development stated that the global environment continued to suffer and that air, water and marine pollution continued to rob millions of a decent life.[55] However, efforts to protect the atmosphere have not yet materialized into a hard-law instrument. Nonetheless, in recent years, there appears to be a revival of enthusiasm for a comprehensive multilateral convention on the atmosphere. For instance, the fifteenth World Clean Air Congress held in Vancouver, Canada, in September 2010 adopted its final declaration entitled "One atmosphere", which sought to encourage the integration of climate and pollution policies and called for a new "law of the atmosphere", which would parallel the United Nations Convention on the Law of the Sea.[56] It may be a little too ambitious to talk about the "law of the atmosphere" just yet. It appears more realistic to consider a "law on the protection of the atmosphere" with a relatively narrower focus. It is nonetheless encouraging to see that momentum appears to be mounting for a comprehensive consideration of the subject.

28. Finally, it may be worth pointing out that one of the outcomes of the workshop held in Gothenburg, Sweden, from 24 to 26 June 2013, on future international air pollution strategies, which was organized by the Swedish Environmental Protection Agency and the Swedish Environmental Research Institute, in close collaboration with the secretariat of the Convention on Long-range Transboundary Air Pollution and the European Commission, was a recommendation to call upon the expertise of the Commission in addressing atmospheric protection. Participants at the workshop stated that the Convention on Long-range Transboundary Air Pollution should invite the Commission "to continue exploring the scope for a *'Law of the Atmosphere'*, which would facilitate integrated action on climate change and tropospheric air pollution".[57] The high expectations of the international community in respect of the Commission should be duly noted.

B. Sources

29. Several sources relevant to the protection of the atmosphere can be cited. The relevant multilateral conventions can be roughly classified into those of, primarily, regional application and those of universal application. In contrast to the number of multilateral conventions, bilateral conventions are few, evincing the essentially regional and global character of the majority of the problems relating to the atmosphere. Principles and rules of customary international law must be ascertained in light of *opinio juris* and the general practice of States. The jurisprudence of international courts and tribunals is no doubt an important source for determining the customary law status of the rules and principles relating to the protection of the atmosphere. Non-treaty instruments, domestic legislation and the jurisprudence of domestic courts are also important sources for ascertaining existing or emergent rules of customary law—the basis for the exercise of codification and progressive development.

1. Treaty practice

30. The following is a non-exhaustive list of binding multilateral and bilateral agreements relevant to atmospheric problems:

(a) *Multilateral agreements relating to air pollution*

— The Convention on Long-range Transboundary Air Pollution and the protocols thereto, including on long-term financing of the co-operative programme for monitoring and evaluation of the long-range transmission of air pollutants in Europe; on the reduction of sulphur emissions or their transboundary fluxes by at least 30 per cent and on Further Reduction of Sulphur Emissions; concerning the control of emissions of nitrogen oxides or their transboundary fluxes; concerning

(*Footnote 51 continued.*)

change became a more major focus and while some of the ideas at that meeting of experts were incorporated into other conventions, no framework convention on the protection of the atmosphere was concluded. I mentioned that one could draw a link between the 1989 meeting and the [International Law Commission]. A leading participant in that meeting of legal and policy experts was Alan Beesley, the Canadian international lawyer and diplomat who had been a central figure in the [Law of the Sea] negotiations and played a role at Stockholm as well, and was at that time a member of the [Commission]. Beesley spoke at the opening of the meeting about the need for creative solutions to be adopted by lawyers and how lawyers had to take a lead in policy development in this field. And on the list of invitees were Julio Barboza, at that time a member of the [Commission], and Vaclav Mikulka, Hanqin Xue and myself, all later to become members of the [Commission]. So, in some sense, Professor Murase's proposal that the Commission take up the topic of the 'Protection of the Atmosphere reaches back to a challenge of twenty years ago. And, if it was ripe as a topic then, it is certainly ripe today." (Donald McRae, paper presented at the workshop on the Protection of the Atmosphere, held on 26 October 2011, at the Permanent Mission of Japan to the United Nations in New York. The workshop was organized jointly by the Government of Japan and UNEP.) See Murase, "Protection of the atmosphere and international law: rationale for codification and progressive development", p. 9, footnote 10.

[52] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992,* vol. I, *Resolutions Adopted by the Conference* (A/CONF.151/26/Rev.1 (Vol 1)) (United Nations publication, Sales No. E.93.I.8), resolution 1, annex II.

[53] Commission on Sustainable Development, Report on the ninth session (5 May 2000 and 16–27 April 2001), *Official Records of the Economic and Social Council, 2001, Supplement No. 9* (E/2001/29).

[54] Commission on Sustainable Development, Report on the fifteenth session (12 May 2006 and 30 April–11 May 2007), *Official Records of the Economic and Social Council, 2007, Supplement No. 9* (E/2007/29).

[55] *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002* (A/CONF.199/20) (United Nations publication, Sales No. E.03.II.A.1), chap. I, para. 13.

[56] Available from www.iuappa.org/newsletters/VancouverDeclaration.pdf. The World Clean Air Congress is organized by the International Union of Air Pollution Prevention and Environmental Protection Associations, which comprises non-governmental organizations from 40 States.

[57] Grennfelt and others, *Saltjöbaden V—Taking International Air Pollution Policies into the Future, Gothenburg, 24–26 June 2013*, p. 14. At its 32nd session, held from 9 to 13 December 2013, the Executive Body for the Convention on Long-range Transboundary Air Pollution took note of the recommendations of the Saltjöbaden V workshop (see ECE/EB.AIR/122). The 16th World Clean Air Congress, held in Cape Town, South Africa, from 29 September to 4 October 2013, made a similar recommendation to the Commission.

the control of emissions of volatile organic compounds or their transboundary fluxes; on Heavy Metals; on Persistent Organic Pollutants; and the Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg Protocol), as amended on 4 May 2012;[58]

— Agreement concerning the adoption of uniform conditions of approval and reciprocal recognition of approval for motor vehicle equipment and parts—later renamed Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions,[59] subsequently "globalized" by the Agreement concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts, which can be fitted and/or used on Wheeled Vehicles;[60]

— Convention on environmental impact assessment in a transboundary context;[61]

— Convention on the Transboundary Effects of Industrial Accidents, with its Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents;[62]

— The directives of the European Union on air pollution,[63] including, in particular, Directive 2001/81/EC on national emission ceilings for certain atmospheric pollutants;[64] Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles,[65] with related annexes and technical regulations implementing/adapting the corresponding ECE agreements for wheeled vehicles;[66] Directive 2008/50/EC on ambient air quality and cleaner air for Europe;[67] and Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control);[68]

— International Standards and Recommended Practices of the International Civil Aviation Organization (ICAO) for aircraft engine emissions: annex 16 (Environmental Protection) of the Convention on International Civil Aviation;[69]

— Protocol of 1997 (new annex VI—Regulations for the prevention of air pollution from ships) to amend the International Convention for the prevention of pollution from ships, 1973, as modified by the Protocol of 1978 relating thereto;[70]

— Association of Southeast Asian Nations (ASEAN) Agreement on Transboundary Haze Pollution;

— Stockholm Convention on Persistent Organic Pollutants;[71]

— Framework Convention for the Protection of the Environment for Sustainable Development in Central Asia;[72]

— Minamata Convention on Mercury.

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[58] Executive Body for the Convention on Long-range Transboundary Air Pollution, decisions 2012/1 and 2012/2. See C.N.171.2013.TREATIES-XXVII.1.h and C.N.155.2013.TREATIES-XXVII.1.h.

[59] The Agreement entered into force in 1959. The title was amended in 1995 upon entry into force of amendments adopted by the Inland Transport Committee of the Economic Commission for Europe at its 103rd session on 18 August 1994 (see E/ECE/324/Rev.2-E/ECE/TRANS/505/Rev.2); it was implemented by a series of technical regulations dealing with pollutant emissions (especially Nos. 40, 41, 47, 49, 51 and 83).

[60] The Agreement entered into force in 2000 and was implemented by a series of technical regulations including the measurement of carbon dioxide and other exhaust gases.

[61] The Convention entered into force in 1997.

[62] The Protocol is not yet in force.

[63] For a current summary, see Jans and Vedder, *European Environmental Law: After Lisbon*, pp. 419–430.

[64] Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, *Official Journal of the European Communities*, L 309, 27 November 2001, p. 22, currently under review.

[65] Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, *Official Journal of the European Union*, L 263, 9 October 2007.

[66] Especially through Regulation 715/2007 of the European Parliament and the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (*ibid.*, L 171, 29 June 2007) (as amended by Regulation (EC) 595/2009 of the European Parliament and the Council of 18 June 2009 on type-approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information and amending Regulation (EC) No. 715/2007 and Directive 2007/46/EC and repealing Directives 80/1269/EEC, 2005/55/EC and 2005/78/EC (*ibid.*, L 188, 18 July 2009); entered into force in 2013.

[67] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, *ibid.*, L 152, 11 June 2008, replacing (as from 11 June 2010) several earlier "substance-specific" directives on ambient air quality (for sulphur dioxide (1980); lead (1982); nitrogen dioxide (1985); ground-level ozone (1992); and volatile organic compounds (1999/2004)), and the related Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (*Official Journal of the European Communities*, L 296, 21 November 1996).

[68] Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control), *Official Journal of the European Union*, L 334, 17 December 2010. This directive will (as from 7 January 2016) replace Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants (*Official Journal of the European Communities*, L 309, 27 November 2001, repealing an earlier 1988 directive), and Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (*Official Journal of the European Communities*, L 332, 28 December 2000).

[69] The first edition of annex 16, vol. II ("Aircraft engine emissions"), was adopted on 30 June 1981 and entered into force in 1982; it is periodically amended by the ICAO Council. See Sand, *Lessons Learned in Global Environmental Governance*, pp. 18–20.

[70] Annex VI entered into force in 2005 and has been periodically amended by the IMO Marine Environment Protection Committee.

[71] The Convention entered into force in 2004.

[72] The Convention is not yet in force. The following States have signed the Convention: Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. Article 8 deals with "air protection".

(b) *Bilateral agreements on transboundary air pollution*

— Treaty between Czechoslovakia and Poland concerning protection of the atmosphere against pollution;[73]

— Memorandum of Intent between the United States of America and Canada concerning transboundary air pollution;[74]

— Agreement between the United Mexican States and the United States of America on cooperation for the protection and improvement of the environment in the border area,[75] together with two supplementary agreements;[76]

— Agreement between Canada and the United States of America on air quality;[77]

— Agreements between Germany and the Czech Republic of 1992, 1994, 2000 and 2004.[78]

(c) *Multilateral conventions on global atmospheric problems*

— Vienna Convention for the Protection of the Ozone Layer, with its Montreal Protocol on Substances that Deplete the Ozone Layer;

— United Nations Framework Convention on Climate Change and its Kyoto Protocol.

31. Some of the agreements are briefly highlighted below. They are no doubt important sources from which the Commission can draw inspiration when elaborating draft guidelines on the protection of the atmosphere.

32. **Convention on Long-range Transboundary Air Pollution.**[79] The Convention was formulated under the auspices of ECE in the form of a framework agreement to address the major concerns about acid rain and other dispersed pollutants. According to article 1 (*b*) of the Convention, the term "long-range transboundary air pollution" is defined as pollution having effects at such a distance that "it is not generally possible to distinguish the contribution of individual emission sources or groups of sources". While the Convention did not stipulate specific limits on emissions of industrial pollutants, it did establish a regime for continued consideration of the issue. It has been noted that "[d]espite its evident weaknesses, the Geneva Convention's real value is that it has provided a successful framework for cooperation and the development of further measures of pollution control".[80] A series of eight separate protocols have subsequently been negotiated and agreed upon.

33. **Protocols to the Convention on Long-range Transboundary Air Pollution.** The protocols reveal significant innovations in rule-making. The first Protocol, of 1985, on the reduction of sulphur emissions or their transboundary fluxes by at least 30 per cent, required parties to reduce such emissions or fluxes by at least 30 per cent by 1993, applying a single flat rate to all parties. In contrast, the second Protocol, of 1994, on Further Reduction of Sulphur Emissions, applied the "critical loads" concept to set differentiated emissions targets for each party. Targets ranged from an 80 per-cent reduction for Germany to a 49 per-cent increase for Greece, for an overall collective emissions reduction of 50.8 per cent. While the first Protocol's emissions reduction target of 30 per cent was arrived at essentially arbitrarily, the differentiated national targets of the second Protocol were reached using the critical loads approach, together with cost efficiency, reflecting a high degree of scientific and technical knowledge.[81] The resulting commitments are fairer to all parties, given that they are based on calculations of actual sources and effects. The Protocol of 1988 concerning the control of emissions of nitrogen oxides or their transboundary fluxes required parties to stabilize their nitrogen oxide emissions or their transboundary fluxes at 1987 levels by 1994. The Protocol covered major stationary sources (for example, power plants) and mobile sources (for example, vehicle emissions), and provided for the eventual negotiation of internationally accepted critical loads for nitrogen oxide pollution to take effect after 1996. The approach is considered better suited to regional environmental protection than flat-rate emission reductions.[82] Between 1991 and 1998, three protocols were adopted to regulate emissions from volatile organic compounds, persistent organic pollutants, lead, cadmium and mercury. Finally, in 1999, ECE adopted the Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg Protocol) to abate the adverse effects of acidification, eutrophication and ground-level ozone on human health, natural ecosystems and crops resulting from transboundary air pollution. The Protocol recognizes the need for a precautionary approach and requires

[73] Signed at Warsaw on 24 September 1974 (United Nations, *Treaty Series*, vol. 971, No. 14068, p. 407) and entered into force in 1975. See Sommer, "Transboundary cooperation between Poland and its neighbouring States".

[74] Signed at Washington, D.C., on 5 August 1980 (United Nations, *Treaty Series*, vol. 1274, No. 21009, p. 235).

[75] Signed at La Paz (Baja California) on 14 August 1983 (*ibid.*, vol. 1352, No. 22805, p. 71).

[76] Agreement of cooperation between the United Mexican States and the United States of America regarding transboundary air pollution caused by copper smelters along their common border (annex IV), signed at Washington, D.C., on 29 January 1987 (*ibid.*, vol. 1465, No. 22805, p. 357) and the Agreement of cooperation between the United States of America and the United Mexican States regarding international transport of urban air pollution (annex V), signed at Washington, D.C., on 3 October 1989 (United States of America, TIAS 11269).

[77] Signed at Ottawa on 13 March 1991 (United Nations, *Treaty Series*, vol. 1852, No. 31532, p. 79).

[78] The 1994 Agreement provides for implementation of joint environmental pilot projects for flue gas cleaning in coal-fired power plants; the 2000 and 2004 Agreements provide for joint implementation of a "clean air fund" and other pilot projects in the Czech Republic, aimed at reducing the impact of transboundary air pollution in Germany; the 2004 Agreement specifically refers to "joint implementation" under the Kyoto Protocol of the United Nations Framework Convention on Climate Change.

[79] See Sliggers and Kakebeeke, eds., *Clearing the Air: 25 years of the Convention on Long-range Transboundary Air Pollution*; and Lidskog and Sundqvist, *Governing the Air: The Dynamics of Science, Policy, and Citizen Interaction*.

[80] Birnie, Boyle and Redgwell, *International Law and the Environment*, p. 345.

[81] *Ibid.*, p. 346. For this reason, it has been noted, the need to apply the precautionary principle was obviated in this case, although the Protocol's preamble acknowledges scientific uncertainty and the precautionary principle.

[82] *Ibid.*, p. 347.

that emissions not exceed the critical loads stipulated in the annexes. It should be noted that in May 2012, the parties to the Convention made a historic step by amending the Gothenburg Protocol with regard to certain substances to include black carbon—as a component of particulate matter—in the revision of the Gothenburg Protocol;[83] and black carbon, ozone and methane in the medium and long-term workplans of the Conventions as important air pollutants and short-lived climate forcers.[84]

34. **Convention on the Transboundary Effects of Industrial Accidents.** Like the Convention on Long-range Transboundary Air Pollution, the Convention on the Transboundary Effects of Industrial Accidents was negotiated by ECE as part of its legal framework to protect the environment. The Convention aims to protect both humans and the environment from the far-reaching transboundary effects of industrial accidents such as the mine tailings spill at Baia Mare (Romania). In article 3, paragraph 4, the Convention affirms the principle of State responsibility and obligates Parties to take legislative, regulatory, administrative and financial measures to prevent industrial accidents and improve preparedness and response measures. Parties are to identify hazardous operations within their borders (article 4, paragraph 1) and site new projects where risks for environmental harm are minimal (article 7). The Convention creates a framework for international cooperation that extends beyond assistance in the event of an accident. Parties are required to inform and consult other parties that could potentially suffer from the transboundary effects of hazardous operations and to draw up joint or compatible contingency plans. The Convention also promotes the exchange of information and safety technologies and cooperation in research and development. In order to help States to better respond to accidents, the Convention calls on parties to set up an industrial accident notification system to immediately inform affected parties. The Conference of the Parties, as the governing body, reviews the implementation of the Convention and defines priorities of work.

35. **ASEAN Agreement on Transboundary Haze Pollution.** The Agreement was drafted as a legally binding regional environmental agreement in collaboration with UNEP, in an attempt to remedy some of the compliance problems associated with previous efforts to tackle the problem of heavy haze in the area, such as the Regional Haze Action Plan. Recognizing the transboundary health and environmental effects of haze (largely originating from recurrent forest and land fires in Indonesia and Brunei Darussalam), the Agreement, in article 2, encourages regional and international cooperation to prevent and monitor transboundary air pollution. It adopts the preventive principle and requires States to identify and monitor fire-prone areas and to take the necessary preventative measures, but does not define the measures or provide specific standards. Consistent with the cooperative approach of ASEAN, the Agreement contains provisions for the exchange of information and technology, the development of a regional early warning system and mutual assistance. It establishes an ASEAN Coordinating Centre for Transboundary Haze Pollution Control to facilitate such cooperation and coordination in managing the impact of fires. However, in reflecting a traditional emphasis on sovereignty, the Agreement stipulates that a party must request or consent to such assistance, notwithstanding transboundary effects. Although the Agreement ultimately suffers from compliance problems, owing to a lack of provisions on monitoring and enforcement and to non-participation by the main target actor, it does attempt to overcome some of the barriers to implementation; for example, it establishes an ASEAN Transboundary Haze Pollution Control Fund to address the issue of financial capacity. It also creates an intergovernmental body, the Conference of the Parties, to evaluate implementation and adopt protocols or amendments, as necessary. Overall, it can be said that the Agreement represents a more concrete and law-oriented approach in dealing with the haze problem.[85]

36. **Stockholm Convention on Persistent Organic Pollutants.** The Convention seeks to protect human health and the environment from the risks posed by persistent organic pollutants, which are chemical substances that possess toxic properties, resist degradation and bio-accumulate through the food chain. UNEP initiated negotiations in response to calls for global action in the light of scientific evidence on the harmful effects of such pollutants and their ability to travel long distances through the air and water. The Convention is mindful of the precautionary approach and obligates parties to eliminate or reduce the production and use of 12 persistent organic chemicals (pesticides, industrial chemicals and unintentionally produced persistent organic chemicals). Other key elements include the requirement to prohibit or restrict the import and export of listed persistent organic chemicals, the development and use of safer substitutes, environmentally sound management of stockpiles and wastes, and the promotion of best alternative technologies and best environmental practices. The Convention recognizes that the ability of developing countries to implement their obligations will depend on the transfer of technology, financial resources and technical assistance from industrialized countries, and designates the Global Environment Facility as an interim financial mechanism for providing assistance. The institutions and procedures created by the Convention are of significance since they are the source of its flexibility and dynamism. The meetings of the Conference of the Parties, the governing body of the Convention, allow for regular review of implementation and the adoption of amendments. During the first meeting of the Conference of the Parties, the decision was made to create a Persistent Organic Pollutants Review Committee. The

[83] See Amendment of the text of and annexes II to IX to the Protocol and addition of new annexes X and XI (document C.N.155.2013. TREATIES-XXVII.1.h), annex, article 10, new para. 3.

[84] For a background study, see "Hemispheric transport of air pollution 2010" (ECE/EB.AIR/2010/10 and Corr.1–2). On the need to integrate the regulation of atmospheric pollutants and climate-forcing substances, see also the comprehensive new report *On Thin Ice: How Cutting Pollution Can Slow Warming and Save Lives* (joint report of the World Bank and International Cryosphere Climate Initiative, Washington, D.C., 2013). Available from http://documents.worldbank.org/curated/en/146561468180271158/Main-report.

[85] See Tan, "The ASEAN Agreement on Transboundary Haze Pollution: prospects for compliance and effectiveness in post-Suharto Indonesia"; and Rodziana Mohamed Razali, "The shortcomings of the ASEAN's legal mechanism to address transboundary haze pollution and proposals for improvement", paper submitted to the Third Biennial Conference of the Asian Society of International Law, Beijing, 27–28 August 2011.

scientific body, comprising 31 experts, reviews proposals for new additions to the list of regulated chemicals according to the procedure established by the Convention. First, the Committee applies the screening criteria of the Convention in respect of new persistent organic chemicals. Second, if all the criteria are met, it drafts a risk profile to evaluate whether a substance is likely, as a result of long-range environmental transport, to lead to significant adverse effects on human health or the environment, thereby warranting global action. Third, it develops a risk management evaluation, taking into account socioeconomic considerations, and makes a recommendation to the Conference of the Parties, which makes the final decision. To date, the Conference of the Parties has decided to include 10 new substances: 9 chemicals at the fourth meeting in 2009 and endosulfan at the most recent meeting in April 2011.

37. **Agreement between Canada and the United States of America on air quality.** The Agreement was signed on 13 March 1991 in order to address the issue of transboundary air pollution leading to acid rain. At the heart of the bilateral agreement are commitments by both parties to control transboundary air pollution. Annex 1 of the Agreement establishes specific objectives and deadlines for each country to limit sulphur dioxide and nitrogen oxide emissions, affecting the main chemicals contributing to acid rain. The Agreement reaffirms the decision in the *Trail Smelter* case and principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) and creates a framework for addressing shared concerns. It "applies customary environmental law rules, such as the prior assessment of proposed actions, activities, and projects if they are likely to cause significant transboundary air pollution, the duty to notify the other State concerning such activities or projects as well as those that create the risk of significant transboundary harm, and to consult on request of the other party".[86] It is evident that a great deal of cooperation is envisaged by the system: it calls for scientific and technical cooperation in addition to emissions monitoring and consultation. In order to assist in implementing the Agreement and review progress, a permanent bilateral Air Quality Committee was established. The International Joint Commission, a body created under the 1909 Boundary Waters Treaty,[87] has oversight over the Air Quality Committee. The International Joint Commission has an important function with respect to enforcement: a party may refer a dispute to it. Furthermore, the International Joint Commission solicits/reports on views from the public and exposes the process to public scrutiny.[88] In December 2000, an annex on ozone was added to the Agreement in order to address the issue of transboundary air pollution leading to high levels of ground-level ozone. Pursuant to this annex, both countries commit to controlling and reducing their emissions of nitrogen oxides and volatile organic compounds (precursors to the formation of ground-level ozone), with a view to establishing ozone air quality standards in the long term.[89]

38. **Vienna Convention for the Protection of the Ozone Layer.** This Convention was the second multilateral treaty to address a global atmospheric issue.[90] Together with the Montreal Protocol on Substances that Deplete the Ozone Layer and its subsequent amendments, it comprises the legal regime for the protection of the stratospheric ozone layer. Treaty negotiations were initiated by UNEP in response to scientific evidence that widely used chemical substances, chlorofluorocarbons, were destroying the ozone layer. The resulting treaty, in the form of a framework convention, led to a general obligation on the part of States to take appropriate legislative or administrative measures, as stated in its preamble, "to protect human health and the environment against adverse effects resulting from modifications of the ozone layer". The Vienna Convention does not set specific targets, name particular substances to which the measures would relate (it merely lists in an annex the substances thought to have an effect on the ozone layer) or create a legal obligation to reduce emissions of ozone-depleting substances. The nature of the measures to be taken was left to the discretion of each State party. Instead, it emphasizes cooperation in the exchange of systemic observations, research, information and technology, as well as cooperation in formulating "agreed measures, procedures and standards for the implementation of this Convention" (article 2, paragraph 2 (*c*)). In recognizing the global nature of the problem, the drafters of the Convention tried to ensure participation by all countries. They considered some of the reservations that developing countries might have regarding the costs of implementing the treaty, both in terms of the cost of alternative technologies and in terms of the effect on development. As a result, in addition to a weak transfer of technology clause (article 4), a proviso was added that measures should be taken in accordance with "the means at their disposal and their capabilities" (article 2, paragraph 2). A bare-bones framework, the success of the Convention was in laying the foundation for future cooperation and creating the institutions, namely, the meeting of the parties, which would enable it to adapt in response to new scientific data through reviews of the implementation and adoption of new protocols or amendments. It also signified a more precautionary approach in environmental treaties, given that the effects of ozone depletion and the harmful effects of ultraviolet rays were still speculative.

39. **Montreal Protocol on Substances that Deplete the Ozone Layer.** The Montreal Protocol obligates States parties to limit the production and consumption of chlorofluorocarbons and halons, the key ozone-depleting substances. The Montreal Protocol was adopted in response to an international UNEP/WMO assessment prompted by

[86] Kiss and Shelton, *International Environmental Law*, p. 572.

[87] Signed at Washington, D.C., on 11 January 1909. See Bevans, *Treaties and other International Agreements of the United States of America 1776-1949*, vol. 12, p. 319.

[88] Buhi and Feng, "The International Joint Commission's role in the United States–Canada transboundary air pollution control regime: a century of experience to guide the future", p. 129.

[89] A further supplementary annex on particulate matter is currently under negotiation.

[90] The first multilateral instrument was the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, which was prompted by the global risk of radioactive pollution fallout from the atmosphere. It is noteworthy to recall the historic speech by President of the United States John F. Kennedy (his commencement address at American University, Washington, D.C., on 10 June 1963), announcing his support for the Treaty, in which he said: "we all inhabit this planet. We all breathe the same air. We all cherish our children's futures" (*The Department of State Bulletin*, vol. XLIX, No. 1253, 1 July 1963, p. 4).

the discovery of a "hole" in the ozone layer above Antarctica. The assessment revealed that chlorofluorocarbon production levels would lead to dangerous ozone depletion, indicating a need for firm targets leading to reductions in the emissions of ozone-depleting substances.[91] The Montreal Protocol required industrialized countries to freeze production and consumption of chlorofluorocarbons at 1986 levels (the base year), to reduce them by half by 1999 and to freeze the consumption of halons at 1986 levels. The Montreal Protocol also established a meeting of the parties charged with making systematic observations of the ozone layer and responding to new scientific developments through the introduction, as necessary, of additional legal obligations upon States—a key component of its success. Amendments were made in 1989 (Helsinki), 1990 (London),[92] 1992 (Copenhagen),[93] 1997 (Montreal)[94] and 1999 (Beijing).[95] The amendments not only accelerated the phasing out of various substances and added new substances, they also addressed the important issues of participation by developing countries, non-compliance and non-parties. The London amendment was particularly significant in strengthening the principle of common but differentiated responsibilities. Paragraph 6 of the preamble was amended to include a reference to the need to take into account the "developmental needs of developing countries". Furthermore, old article 5, which contained the provision of a 10-year compliance period for countries whose consumption of chlorofluorocarbons was less than 0.3 kg per capita (basically developing countries), was replaced with a new article 5, which recognized that compliance by developing countries will depend on financial assistance and the transfer of technology.[96] Meanwhile, article 10 established a multilateral fund voluntarily financed by non-article 5 parties to assist developing countries in meeting the costs of compliance. In respect of non-compliance, the Montreal Protocol has relied on soft enforcement, placing emphasis on a facilitative and promotional approach. Parties in difficulty can be brought before an implementation committee either by self-referral, referral by another party or by the secretariat. It employs such measures as the provision of Global Environment Facility funding,[97] technical assistance or the issuing of cautions—mainly in an effort to ensure that parties comply with data reporting requirements. The Montreal Protocol has dealt with the problem of non-parties by taking an enforcement approach. It implements trade-restricting measures, namely, banning trade with non-parties in controlled substances or products containing such substances, and cutting illegal trade in chlorofluorocarbons through a system of export/import licences, which provide incentives to join and comply with the Montreal Protocol. The Montreal Protocol can be considered a success in that it has been widely adopted and implemented and in that global production of chlorofluorocarbons has decreased from the peak year of 1998. At the same time, it must be viewed within the greater scheme of atmospheric protection. Some chlorofluorocarbon substitutes are greenhouse gases, illustrating the need to coordinate efforts with the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[98]

40. **United Nations Framework Convention on Climate Change.** The General Assembly began intensifying its efforts to address climate change in 1988, adopting a resolution stating that climate change was a common concern of mankind (see General Assembly resolution 43/53 of 6 December 1988). The following year, in recognition of the need to adopt measures to control anthropogenic emissions of greenhouse gases, it established the Intergovernmental Negotiating Committee to negotiate a treaty for the 1992 United Nations Conference on the Environment and Development. Much like the Vienna Convention for the Protection of the Ozone Layer, the United Nations Framework Convention on Climate Change does not establish quantitative commitments to limit greenhouse gases. As stated in article 2, its objective is framed in general terms: "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". There is no express commitment to return greenhouse emissions to 1990 levels by the year 2000, only a weakly worded recognition of a goal to that effect. The Convention establishes a number of key principles to guide any international response to climate change (many of the principles are also reflected in the Rio Declaration on Environment and Development[99] and Agenda 21), including the principle of equity and common but differentiated responsibilities, sustainable development, cost-effectiveness, and precautionary measures (article 3). The core of the commitments to be undertaken by parties can be found in article 4. Parties that are developed countries (annex I) are required to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs" (article 4, paragraph 2 (*a*)). In order to promote implementation, article 4 also requires each of those parties to "communicate, within six months of the entry into force of the Convention for it and periodically thereafter, and in accordance with article 12, detailed information on its policies and measures, … as well as on its resulting projected anthropogenic emissions by sources and removal by sinks of greenhouse gases not controlled by the Montreal Protocol" (article 4, paragraph 2 (*b*)). Taken as a whole, the Convention provides a sound framework for future consideration of the issue; it establishes a Conference of the Parties and provides it with

[91] Yoshida, *The International Legal Régime for the Protection of the Stratospheric Ozone Layer, International Law, International Régimes, and Sustainable Development*; and Sands, *Principles of International Environmental Law*, p. 575.

[92] Adjustments and Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted at the second meeting of the parties, London, 27–29 June 1990.

[93] Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted at the fourth meeting of the parties, Copenhagen, 23–25 November 1992.

[94] Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted at the ninth meeting of the parties, Montreal, 15–17 September 1997.

[95] Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted at the eleventh meeting of the parties, Beijing, 29 November–3 December 1999.

[96] See footnote 92 above.

[97] Sand, "Carrots without sticks? New financial mechanisms for global environmental agreements".

[98] See UNEP, *Environmental Effects of Ozone Depletion and its Interactions with Climate Change: 2010 Assessment* (Nairobi, 2010). Available from www.unenvironment.org/resources/report/environmental-effects-ozone-depletion-and-its-interactions-climate-change-2010.

[99] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (see footnote 52 above), resolution 1, annex I.

a wide enough mandate—one that includes review of the implementation and the adoption of protocols—to elaborate specific obligations.

41. **Kyoto Protocol to the United Nations Framework Convention on Climate Change.** The Kyoto Protocol was negotiated after the first Conference of the Parties held in Berlin (the Berlin Mandate), which revealed the inadequacy of the commitments provided for in article 4 of the Convention. The Kyoto Protocol set quantified emission reduction targets and a specific timetable for their achievement. Its major achievement was a commitment by developed countries (annex I parties) to reduce their emissions of six greenhouse gases (carbon dioxide, methane, nitrous oxide, sulphur hexafluoride, hydrofluorocarbons and perfluorocarbons) by a specified amount, with a view to reducing collective emissions by at least 5 per cent below 1990 levels in the commitment period between 2003 and 2012 (article 3, paragraph 1). Parties could meet their commitments in any number of ways, including the enhancement of energy efficiency, the protection and enhancement of sinks and reservoirs of greenhouse gases and the promotion of sustainable forms of agriculture, to name only a few (article 2, paragraph 1 (*a*)). Significantly, developing countries were not assigned emission limitation and reduction commitments, in view of the concept of common but differentiated responsibilities. The principle was also reflected in provisions requiring the transfer of technology and financial assistance. Special consideration was given to countries most vulnerable to climate change, including small island developing States, countries with low-lying coastal areas, countries with areas prone to natural disasters and countries with areas liable to drought and desertification (article 4, paragraph 8, of the Convention itself). The Kyoto Protocol is particularly notable for several of the innovations it introduced. The agreement includes three "flexibility mechanisms", market mechanisms that aim primarily to achieve the cost-effective implementation of emission reduction commitments and secondarily to encourage widespread participation. Article 4 allows annex I parties to fulfil their emission limitation commitments jointly. The first two mechanisms, the joint implementation and the clean development mechanisms, are project-based. Joint implementation enables one developed country to earn emission reduction units by investing in an emission-reduction project in another developed country (article 6). The clean development mechanism, the only flexibility mechanism that engages developing countries, allows developed country parties to earn saleable emission reduction credits by investing in reduction or emission-limitation projects in developing countries with a view to stimulating sustainable development (article 12). The mechanism is overseen by an executive board, and emission reductions from projects must be certified by designated national authorities (article 12, paragraph 4)). The third mechanism concerns international emissions trading. Permits are allocated to each party in accordance with their emission limitation obligations; any unused emission permits can be traded to other parties on the "carbon market" (article 17).[100] Monitoring provisions are important in promoting compliance with the regime. Annex I parties must establish national systems to estimate anthropogenic emissions by source and removal by sinks (article 5), as well as annual inventories to incorporate the supplementary information necessary to demonstrate compliance with the commitments under the Protocol (article 7, paragraph 2). It was agreed at the seventh session of the Conference of the Parties of the Framework Convention, held in Marrakesh, Morocco, in 2001, that the promotional approach established under the Montreal Protocol could not be relied upon to ensure compliance by annex I parties. Consequently, it took an enforcement approach and established a non-compliance mechanism whereby an enforcement branch would examine non-compliance by annex I countries[101] and imposed a penalty equal to 1.3 times the respective non-complying portions of their commitments. The penalty was to be added to their commitments for the second commitment period.[102] Since the first commitment period came to an end in 2012, the seventeenth session of the conference of the parties (Durban Conference), in 2011, decided to work on the content of a second commitment period set to begin in 2013. However, Canada, Japan and the Russian Federation made clear that they had no intention of assuming any obligations in the second commitment period. Canada announced on 12 December 2011 that it would withdraw from the Kyoto Protocol entirely. The Durban Conference also decided to "launch a process to develop a protocol, another legal instrument or agreed outcome with legal force" that would be "applicable to all Parties",[103] and that would be adopted no later than 2015 and come into effect from 2020. The eighteenth conference of the parties (Doha Conference), in 2012, officially adopted an amendment to the Kyoto Protocol that contained the commitments of annex I parties during the second commitment period (2013–2020), but some developed countries decided that their commitments would not be prescribed in the amendment.[104] During the nineteenth session of the conference of the parties (Warsaw Conference), in 2013, parties discussed the elements of an agreement to be adopted at the twenty-first session of the conference of the parties, to be held in Paris in 2015. The Warsaw Conference decided to invite "all Parties" to elaborate their intended nationally determined "contributions" and to communicate them well in advance of the twenty-first session, without prejudice to the legal nature of the contributions.[105]

2. Jurisprudence of international courts and tribunals

42. There are several judicial decisions by international courts and tribunals that should be examined carefully in the course of the study addressed in the present report. The *Trail Smelter* case[106] laid the ground for the law on transboundary air pollution. Following the

[100] Rowlands argues that the introduction of these market-based instruments to environmental regimes is significant, "for it represents further commodification of the international environment" (Rowlands, "Atmosphere and outer space", p. 332).

[101] See FCCC/CP/2001/13/Add.3, decision 24/CP.7, annex. The decision was adopted by the first meeting of the parties to the Kyoto Protocol on 9 and 10 December 2005.

[102] Murase, *International Law: An Integrative Perspective on Transboundary Issues*, p. 174.

[103] See FCCC/CP/2011/9/Add.1, decision 1/CP.17, para. 2. It may be noted here that there is no longer any reference to the principle of "common but differentiated responsibilities".

[104] See FCCC/KP/CMP/2012/13/Add.1, decision 1/CMP.8.

[105] See FCCC/CP/2013/10/Add.1, decision 1/CP.19, para. 2 (*b*).

[106] See footnote 39 above.

arbitration of the case, the 1973/1974 *Nuclear Tests* cases (*Australia v. France* and *New Zealand v. France*)[107] brought before the International Court of Justice sparked heated discussions related to possible atmospheric pollution. The Court also referred to the obligation of States to refrain from causing significant environmental damage beyond their borders through transboundary pollution, including atmospheric pollution, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[108] in 1996. Although not directly related to pollution of the atmosphere, the 1997 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case[109] addressed the issue of environmental harm in a broader perspective. In the judgment of the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*[110] case rendered in April 2010, the Court referred in part to the issue of alleged air pollution (to the extent relevant to the river's aquatic environment). Furthermore, the *Aerial Herbicide Spraying (Ecuador v. Colombia)* case[111] brought to the Court in 2008, although subsequently settled and withdrawn, also concerned the subject. The 1996 World Trade Organization (WTO) case *United States—Standards for Reformulated and Conventional Gasoline*[112] posed the important question of the compatibility of a country's domestic law (in this case, the United States Clean Air Act of 1990) with the trade provisions of the General Agreement on Tariffs and Trade. Another decision of note is the judgment of the European Court of Justice in Luxembourg in December 2011, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*,[113] confirming the validity of the European Union directive to include aviation activities in the European Union emissions trading scheme.[114] The decision could be challenged by the United States (and possibly China) in WTO, illustrating the "trade versus environment" conflicts. A brief preliminary account of each of those cases may be appropriate in the present report to the extent that it is relevant to the topic of atmospheric protection.

43. ***Trail Smelter* case.** The case was concerned with cross-border damage in the State of Washington, United States, caused by smelting operations in Trail, British Columbia, Canada. At the smelting plant, zinc and lead-bearing ores were roasted to extract their metals. In the process, the ores, which also contained sulphur, discharged sulphur dioxide into the atmosphere. Owing to the physical and meteorological conditions prevalent in the area, the smelter's sulphur dioxide clouds moved southwards over the United States, causing extensive damage to crops, timber, pastures, livestock and buildings. The arbitral tribunal established pursuant to the Convention for settlement of difficulties arising from operation of smelter at Trail[115] was required, pursuant to article IV of the Convention, to apply "the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and [to] give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned". A frequently quoted passage of the award reads as follows:

> under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[116]

The *Trail Smelter* case was a traditional type of transboundary air pollution dispute—one in which the cause of the damage as well as its effect was sufficiently identifiable. The decision is frequently cited in support of the view that under international law, States have a duty to ensure that activities within their jurisdiction and control do not cause transboundary damage when the injury is foreseeable, supported by clear and convincing evidence.[117] The standard of proof is to be established on the basis of empirical probability. It is important to note that the tribunal affirmed the preventive principle based on scientific evidence, and that it adopted a corresponding regime to maintain a certain level of emissions. The precedential value of the award, however, cannot be upheld completely without qualification:[118] while the tribunal relied on the principles of United States law in accordance with the compromise, the principles referred to in the award, such as nuisance, trespass and strict liability, cannot easily be equated with what are considered the established principles of international law in all circumstances.[119] The significance in the arbitration lies in the tribunal's ability to achieve a proper balancing of interests between industry and agriculture[120] and, by analogy, between economic development and environmental protection, which is in line with the modern concept of sustainable development.

44. ***Nuclear Tests* cases.** In the *Nuclear Tests* cases, Australia asked the Court in its application "to adjudge and declare that the carrying out of atmospheric nuclear weapon tests in the South Pacific area is not consistent with obligations imposed on France by applicable rules of international law".[121] While the Court indicated provi-

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[107] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253 and *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 457.

[108] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226.

[109] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

[110] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14.

[111] *Aerial Herbicide Spraying (Ecuador v. Colombia),* Application by Ecuador (2008, General List No. 138), 31 March 2008, para. 37.

[112] WTO, Appellate Body, WT/DS2/AB/R, adopted 20 May 1996.

[113] Judgment of the Court (Grand Chamber), 21 December 2011, Case C-366/10, *European Court Reports 2011*.

[114] Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (*Official Journal of the European Union*, L 8, 13 January 2009).

[115] Signed at Ottawa on 15 April 1935 (UNRIAA, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1907).

[116] UNRIAA, vol. III, p. 1965; Kuhn, "The *Trail Smelter* arbitration, United States and Canada"; and Read, "The *Trail Smelter* dispute".

[117] UNRIAA, vol. III, p. 1965.

[118] Madders, "*Trail Smelter* arbitration", p. 903.

[119] Rubin, "Pollution by analogy: the *Trail Smelter* arbitration".

[120] Handl, "Balancing of interests and international liability for the pollution of international watercourses: customary principles of law revisited".

[121] Memorial on Jurisdiction and Admissibility submitted by the Government of Australia, *I.C.J. Pleadings, Oral Arguments, Documents: Nuclear Test Cases*, vol. I (*Australia v. France*), para. 430.

sional measures on 22 June 1973, it rendered a judgment on 20 December 1974. It held that the objective pursued by the applicants, namely, the cessation of the nuclear tests, had been achieved by French declarations not to continue atmospheric tests and that the Court was therefore not called upon to give a decision on the claims put forward by the applicants.[122] It may be noted that Australia filed the case on the grounds of protecting not only its own legal interests but also the interests of other States since it considered French nuclear tests a violation of the freedom of the high seas. Its memorial stated, *inter alia,* that:

> The sea is not static; its life systems are complex and closely interrelated. It is evident, therefore, that no one can say that pollution—especially pollution involving radioactivity—in one place cannot eventually have consequences in another. It would, indeed, be quite out of keeping with the function of the Court to protect by judicial means the interests of the international community, if it were to disregard considerations of this character.[123]

On that point, the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock stated the following:

> With regard to the right to be free from atmospheric tests, said to be possessed by Australia in common with other States, the question of "legal interest" again appears to us to be part of the general legal merits of the case. If the materials adduced by Australia were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests, the Court would at the same time have to determine what is the precise character and content of that rule and, in particular, whether it confers a right on every State individually to prosecute a claim to secure respect for the rule. In short, the question of "legal interest" cannot be separated from the substantive legal issue of the existence and scope of the alleged rule of customary international law. Although we recognize that the existence of a so-called *actio popularis* in international law is a matter of controversy, the observations of this Court in the *Barcelona Traction, Light and Power Company, Limited case* (*Second Phase, I.C.J. Reports 1970*, at p. 32) suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.[124]

45. ***Legality of the Threat or Use of Nuclear Weapons.*** In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* case (as requested by the General Assembly in 1996), the International Court of Justice questioned whether the use of nuclear weapons would lead to damage to the environment, presumably including the atmospheric environment. The Court recognized that

> the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment [and] … that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. 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 part of the corpus of international law relating to the environment.[125]

However, it qualified its position by saying the following:

> The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[126]

The Court noted furthermore that

> Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. These are powerful constraints for all the States having subscribed to these provisions.[127]

In his dissenting opinion, Judge Weeramantry elaborated at length on the effects of nuclear weapons, especially damage to the environment and the ecosystems, and to future generations.[128]

46. ***Gabčíkovo-Nagymaros Project (Hungary/Slovakia).*** This case was essentially concerned with the use of an international watercourse and was not directly related to the atmosphere. Nonetheless, the International Court of Justice touched on several issues relevant to the topic, the findings of which could also be applicable to the protection of the atmosphere. While Hungary essentially relied on a "state of ecological necessity" to justify the suspension or abandonment of certain works necessary for building the planned dams, Slovakia argued that the alleged state of necessity had not existed, and that, regardless, it did not constitute a reason for the suspension of the party's treaty obligations. The Court supported the latter position. With regard to the measures taken by Slovakia to divert water, the Court concluded that they could not be considered a lawful countermeasure, and thus Slovakia was not entitled to put the diversion installations into operation.[129] During the proceedings, Hungary presented several arguments in support of the lawfulness of its action, including the impossibility of performance of the 1977 Agreement[130] (owing in part to ecological imperatives), a fundamental change of circumstances (owing in part to the progress of environmental knowledge) and the development of new norms and prescriptions in international environmental law. However, the Court, in rejecting the contention of Hungary, relied

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[122] *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973,* p. 99, and *Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973,* p. 135, and *Judgment, I.C.J. Reports 1974,* p. 457. See Thierry, "Les arrêts du 20 décembre 1974 et les relations de la France avec la Cour internationale de justice"; Franck, "Word made law: the decision of the ICJ in the nuclear test cases"; Lellouche, "The International Court of Justice—the *Nuclear Tests* cases: judicial silence v. atomic blasts"; McWhinney, "International law-making and the judicial process: the World Court and the French *Nuclear Tests* case"; Sur, "Les affaires des essais nucléaires"; and MacDonald and Hough, "The *Nuclear Tests* case revisited".

[123] Memorial on Jurisdiction and Admissibility submitted by the Government of Australia, *I.C.J. Pleadings, Oral Arguments, Documents: Nuclear Test Cases,* vol. I (Australia v. France), para. 459.

[124] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974,* p. 253, at pp. 369–370, para. 117.

[125] *I.C.J. Reports 1974,* pp. 241–242, para. 29.

[126] *Ibid.*, p. 242, para. 30.

[127] *Ibid*., para. 31.

[128] *Ibid*., pp. 433–555. See Brown Weiss, "Opening the door to the environment and to future generations"; and Momtaz, "The use of nuclear weapons and the protection of the environment: the contribution of the International Court of Justice".

[129] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at pp. 55–57, paras. 82–87.

[130] Agreement between Czechoslovakia and Hungary concerning mutual assistance in the construction of the Gabčíkovo-Nagymaros system of locks, Budapest, 16 September 1977, United Nations, *Treaty Series*, vol. 1724, No. 30074, p. 120.

largely on the law of treaties embodied in the Vienna Convention on the Law of Treaties and the law of State responsibility reflected in the Commission's 2001 draft articles[131] rather than the principles and rules of international environmental law.[132] It may be noted that Judge Weeramantry discussed at length the concept of sustainable development in his separate opinion.[133]

47. ***Pulp Mills on the River Uruguay (Argentina v. Uruguay).*** In this case, which primarily concerned the river's water quality, the International Court of Justice referred in part to the issue of alleged air pollution to the extent relevant to the river's aquatic environment.[134] Argentina contended that emissions from the plant's stacks had deposited substances with harmful effects into the aquatic environment. The Court, however, found that "the record does not show any clear evidence that substances with harmful effects have been introduced into the aquatic environment of the river through the emissions of the … mill into the air".[135] What is striking about the judgment is the Court's dismissal of virtually every argument made by Argentina concerning Uruguay's alleged breach of the latter's substantive obligations, on the ground of lack of evidence, with little elaboration of the substantive issues. The judgment was met with criticism (in a joint dissenting opinion, a separate opinion, as well as a declaration) that the Court should have adopted inquisitorial methods (such as entrusting an enquiry to a commission) and should not have depended solely on evidence produced by the parties.[136] One of the distinctive features of environmental disputes, such as the case at hand, is that they are often fact-intensive. Accordingly, the gathering and evaluation of scientific evidence is crucial. The *Pulp Mills* case thus posed the further question of what role the Court should play in the assessment of technical scientific evidence when settling environmental disputes.

48. ***Aerial Herbicide Spraying (Ecuador v. Colombia).*** This case was squarely concerned with alleged transboundary air pollution. In March 2008, Ecuador instituted proceedings claiming "that by aerially spraying toxic herbicides at locations at, near and over its border with Ecuador, Colombia has violated Ecuador's rights under customary and conventional international law".[137] In its application, Ecuador stated that "[t]he spraying has already caused serious damage to people, to crops, to animals, and to the natural environment on the Ecuadorian side of the frontier, and poses a grave risk of further damage over time", and requested the Court to "adjudge and declare that: (A) Colombia has violated its obligations under international law by causing or allowing the deposit on the territory of Ecuador of toxic herbicides that have caused damage to human health, property and the environment; (B) Colombia shall indemnify Ecuador for any loss or damage caused by its internationally unlawful acts, namely the use of herbicides, including by aerial dispersion".[138] However, the case was removed from the Court's list on 13 September 2013 at the request of Ecuador since agreement had been reached between the parties regarding, *inter alia*, Colombia's discontinuance of aerial spraying and the creation of a joint commission.

49. ***United States—Standards for Reformulated and Conventional Gasoline.*** In this case before the WTO Appellate Body (1996) a number of important issues on the protection of the atmosphere were presented. It was the first ruling in which WTO dispute settlement procedures were employed.[139] In the case, Brazil and Venezuela (Bolivarian Republic of) requested that the Dispute Settlement Body examine the compatibility of the Clean Air Act and the "baseline establishment methods" of the "Gasoline Rule" promulgated by the United States Environmental Protection Agency with the relevant WTO provisions. The Clean Air Act and its regulations are intended to prevent and control air pollution in the United States by setting standards for gasoline quality and motor vehicle emissions. Under the 1990 amendment to the Act, new regulations on vehicular emissions of toxic air pollutants and ozone-forming volatile organic compounds were promulgated to improve air quality in the most polluted areas of the country. These new regulations applied to United States refiners, blenders and importers. In recognizing that clean air was a natural resource that could be depleted, the conclusion was reached that the baseline establishment methods were not consistent with article III, paragraph 4, of the General Agreement on Tariffs and Trade and could not be justified under article XX, paragraphs (*b*), (*d*) and (*g*). The Panel found that imported and domestic gasoline were "like products" and that imported gasoline was treated less favourably than domestic gasoline. The United States appealed to the Appellate Body, arguing that the Panel erred in ruling that the baseline did not constitute a measure relating to the conservation of clean air within the meaning of article XX, paragraph (*g*). The Appellate Body found that the United States Gasoline Rule was within the scope of the article XX, paragraph (*g*), exemption, but that the United States measure constituted "arbitrary" or "unjustifiable" discrimination or a "disguised restriction" on international trade and thus failed to meet the requirements of the chapeau of article XX. Hence, the case demonstrated a conflict between a domestic law for the protection of clean air and an international regime for free trade, on which the Appellate Body decided in favour of the latter.

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[131] Draft articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two), pp. 26 *et seq.*, para. 76.

[132] See "Symposium: the *Case concerning the Gabčíkovo-Nagymaros Project*", *Yearbook of International Environmental Law*, vol. 8 (1997), pp. 3–116; Fitzmaurice, "The *Gabčíkovo-Nagymaros* case: the law of treaties"; Lefeber, "The *Gabčíkovo-Nagymaros Project* and the law of State responsibility".

[133] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at pp. 88–119.

[134] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, pp. 100–101, paras. 263–264. The issue was raised during the oral proceedings, see public sitting on 8 June 2006, CR 2006/47, paras. 22, 28 and 34.

[135] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 101, para. 264.

[136] See the joint dissenting opinion of Judges Al-Khasawneh and Simma, *ibid.*, pp. 108–111, paras. 1–6; the separate opinion of Judge Cançado-Trindade, *ibid.*, p. 191, para. 151; and the declaration of Judge Yusuf, *ibid.*, pp. 216–220.

[137] Application by Ecuador (2008, General List No. 138), 31 March 2008, para. 37.

[138] *Ibid.*, paras. 2 and 38.

[139] See, in general, Murase, "Unilateral measures and the WTO dispute settlement".

50. ***Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change.*** The judgment of the European Court of Justice in this case[140] affirmed the validity of including aviation activities in the European Union emissions trading scheme within Directive 2008/101/EC of the European Parliament and the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community. The decision could potentially be challenged by non-European countries in other forums, illustrating the conflict between trade and environment.[141]

3. Customary international law

(a) Opinio juris *and general practice*

51. In addition to the multilateral and bilateral conventions described above, there is abundant State practice and literature on the subject. The frequently cited *Trail Smelter* arbitration continues to be the leading case on transboundary air pollution. The principle of *sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of another) applied in the award is now generally recognized as part of customary international law, although with certain qualifications and conditions. The principle is recognized as customary international law as far as transboundary air pollution between adjacent countries is concerned, to the extent that cause and effect can be proved with clear and convincing evidence. Questions remain as to whether the same principle can be extended to the case of long-distance (transcontinental) air pollution, where the causal link is difficult to prove; and as to whether it can be extended to global atmospheric problems such as ozone depletion and climate change. Careful analysis is required in each case to determine whether and to what extent a principle or rule is considered "established" as customary international law in the light of *opinio juris sive necessitatis* and general State practice.[142] The assessment of evidence regarding the customary nature of a rule must be done on a case-by-case basis. It is generally understood that neither *opinio* unsupported by custom (usage) nor mere custom unsupported by *opinio* qualify as customary law.[143] There are also cases where customary law is in the making, rather than established, which is known as "emergent rules of customary law".[144]

52. It is expected that a great part of the Commission's work on the present project, like all other projects, will be devoted to the determination of the customary status of given principles and rules relating to the protection of the atmosphere. From an analytical perspective, the distinction between established and emergent rules becomes important if a parallel is drawn between the work of codification, which is conducted on the basis of established customary law, and that of progressive development, which is conducted on the basis of emergent rules of customary law.[145] However, the Commission does not seem very concerned about distinguishing the two types of work, suggesting that the difference between the two sources of rules may not be that significant in the actual context of codification and progressive development (unlike the context of judicial process in which the distinction could have a decisive impact on the determination of whether a particular provision of a convention is representative of a pre-existing customary law). Of greater importance is the distinction between emergent rules of customary law and rules that have not yet reached the necessary stage of maturity to be called emergent. Elaborating such rules would simply be an exercise in law-making, which, being outside the mandate of the Commission, should be avoided. The crucial task entrusted to the Commission is thus to clarify which elements are considered as constituting emergent rules of customary law suitable for progressive development. Again, this must be determined on a case-by-case basis. It is therefore necessary to look to the various materials that may be deemed relevant in determining what constitutes an emergent rule of customary international law. Accordingly, the material sources *praeter legem* (outside, but close to, the formal sources of law) should be examined.

(b) *Non-binding instruments*

53. Non-binding instruments are an important source for determining *opinio juris*. They include:

— Resolution of the Council of Europe Committee of Ministers on air pollution in frontier areas;[146]

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[140] See Faber and Brinke, *The Inclusion of Aviation in the EU Emissions Trading System: An Economic and Environmental Assessment*; Leggett, Elias and Shedd, *Aviation and the European Union's Emission Trading Scheme*; and Bartels, "The WTO legality of the application of the EU emissions trading system to aviation".

[141] With regard to potential disputes on the European Union emissions trading system before the ICAO Council, see Bae, "Review of the dispute settlement mechanism under the International Civil Aviation Organization: contradiction of political body adjudication". Regarding ICAO activities to combat climate change in the field of aviation, see the resolutions adopted at the thirty-eighth session of the ICAO Assembly, in 2013, entitled "Consolidated statement of continuing ICAO policies and practices related to environmental protection—general provisions, noise and local air quality" (resolution A38-17) and "Consolidated statement of continuing ICAO policies and practices related to environmental protection—climate change" (resolution A38-18) (*Assembly Resolutions in Force (as of 4 October 2013)*, Montreal, ICAO, 2014).

[142] *Colombian–Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at pp. 276–277; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77.

[143] It is not always easy to categorize material as evidence of *opinio juris* or State practice. Sometimes, the same source (such as domestic legislation) is double counted as evidence of both *opinio juris* and State practice.

[144] See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 41, paras. 69–71. Denmark and the Netherlands asserted that, even if the provision in article 6 of the Convention on the Continental Shelf had not been considered as reflecting pre-existing customary law, that it, as a norm-creating provision, "constituted the foundation of, or has generated a rule which … has since passed into the general *corpus* of international law". The Court stated that "this process is a perfectly possible one and does occur from time to time: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" (*ibid*., para. 71). Although the Court did not accept the contention by Denmark and the Netherlands on this particular provision of article 6, the Special Rapporteur considers there to be a strong basis for the progressive development of "emergent rule(s) of customary law", if supported by other material sources of law such as non-binding instruments, domestic law and domestic court decisions and other relevant incidents of State practice.

[145] For an enlightening analysis on the interrelationship of codification and progressive development, see McRae, "The interrelationship of codification and progressive development in the work of the International Law Commission".

[146] Resolution (71) 5, 26 March 1971.

— Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration);

— OECD recommendation of the Council on principles concerning transfrontier pollution;[147]

— OECD recommendation of the Council for the implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution;[148]

— Rio Declaration on Environment and Development;

— Malé Declaration on Control and Prevention of Air Pollution and its Likely Transboundary Effects for South Asia;[149]

— Acid Deposition Monitoring Network in East Asia;

— International Law Commission, draft articles on prevention of transboundary harm from hazardous activities;[150]

— International Law Commission, draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities;[151]

— Eastern Africa Regional Framework Agreement on Air Pollution (Nairobi, 2008);[152]

—Southern African Development Community Regional Policy Framework on Air Pollution (Lusaka, 2008);[153]

— West and Central Africa Regional Framework Agreement on Air Pollution (Abidjan, 2009);[154]

— North African Framework Agreement on Air Pollution (2011).

54. Although not binding in form, some soft-law instruments are very important as they reflect material sources of international law; a brief account of some of those documents is therefore appropriate.

55. **Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).** The Stockholm Declaration laid the ground for international environmental law in the twentieth century. It contains a set of "common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment",[155] although it does not specifically refer to the protection of the atmosphere.[156] The most important provision of the Declaration is principle 21, which asserts that States have 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". While the word "responsibility" (to ensure) is somewhat ambiguous (the word "devoir" is used in the French text), the principle is now widely considered to have acquired the status of customary international law as far as transboundary air pollution is concerned, having been incorporated into several conventions.[157]

56. **Rio Declaration on Environment and Development.** The Rio Declaration was a product of the 1992 United Nations Conference on Environment and Development. While it is non-binding, it establishes general principles on sustainable development, thereby providing the foundation for future environmental protection regimes. In addition to general principles, the Declaration contains specific provisions on procedural elements, such as access to information and opportunities for public participation (principle 10); environmental impact assessments (principle 17); and notification, information exchange and consultation (principle 19). In that way, it can be seen as a framework for environmental law-making at the national and international levels and a benchmark against which future developments can be measured.[158] Significantly, the Declaration represents a paradigm shift from environmental law to the law of sustainable development. The shift is evident in the wording of principle 2, a slightly modified version of principle 21 of the Stockholm Declaration. It states that

> 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 and developmental 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.

The Declaration recognizes that in order to effect substantial change, environmental concerns must be integrated into the greater framework of economic development; its stated purpose is to elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of strengthened national and international efforts to promote sustainable and environmentally sound development in all countries. The Declaration can be viewed as a compromise between developed countries primarily concerned with environmental protection and developing countries primarily concerned with economic development. That balance is evident in its key provisions, namely principles 3 and 4, respectively. Principle 3 states that: "The right to development must be fulfilled as to equitably meet developmental and environmental needs of present and future generations." Principle 4, in

[147] OECD/LEGAL/0133, available from https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0133.

[148] OECD/LEGAL/0152, available from https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0152.

[149] Report of the Seventh Governing Council Meeting of the South Asia Cooperative Environment Programme, annex XVI, Malé, 22 April 1998.

[150] *Yearbook … 2001*, vol. II (Part Two), pp. 146 *et seq.*, para. 97.

[151] *Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq.*, para. 66.

[152] Available from www.york.ac.uk/media/sei/documents/publications/gapforum/Eastern_Africa_Air_Pollution_Agreement.pdf. See also Nordberg, *Air Pollution: Promoting Regional Cooperation*.

[153] Available from https://web.archive.org/web/20111226174616/www.unep.org/urban_environment/PDFs/SADC-LusakaAgreement.pdf.

[154] Available from https://www.york.ac.uk/media/sei/documents/publications/gapforum/West_and_Central_Africa_Air_Pollution_Agreement_English_final.pdf.

[155] Second preambular paragraph.

[156] Principle 6 provides that: "The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems."

[157] Murase, *International Law: An Integrative Perspective on Transboundary Issues*, p. 24.

[158] Sands, *Principles of International Environmental Law*, p. 54.

turn, states that: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Read together, the two principles form the core of sustainable development. The Declaration goes on to codify several important principles contained within the concept of sustainable development: the precautionary principle,[159] equity (both intragenerational and intergenerational),[160] and common but differentiated responsibilities.[161] The principles laid down in the Rio Declaration have significantly guided subsequent environmental treaties.

57. **Acid Deposition Monitoring Network in East Asia.** The Acid Deposition Monitoring Network in East Asia was developed as part of the initiative to establish a regional framework for the control of transboundary air pollution. Owing to rapid economic growth and industrialization, many countries in the East Asia subregion are facing a serious threat from air pollution, including acid deposition. Regional cooperation for countermeasures to prevent regional air pollution is urgently needed. Led by Japanese efforts, the Network aims to reduce the adverse impact of acid deposition on human health and the environment. As the institutional framework for the Network, the intergovernmental meeting is the decision-making body. In addition, a Scientific Advisory Committee, composed of scientific and technical experts, has been established under the intergovernmental meeting. The secretariat and the Network Centre are designed to support the Network. By 2010, 54 deposition monitoring sites had been set up in 10 participating States, and ecological surveys had been conducted at 44 sites (forests, lakes and rivers) in the subregion.[162]

58. **The Commission's draft articles on prevention of transboundary harm from hazardous activities.** The Commission, while addressing State responsibility for wrongful acts, also turned its attention to liability for lawful acts. Based on the recommendation of the Working Group (established to consider the topic), the Commission decided that the two aspects of the topic, namely, prevention and remedial measures, should be dealt with separately.[163] In 2001, the Commission adopted and submitted the final text of the draft articles on prevention of transboundary harm from hazardous activities to the General Assembly. The draft articles represent the Commission's attempt not only to codify but to progressively develop the law through its elaboration of the procedural and substantive content of the duty of prevention. Underpinning the draft articles is the principle of *sic utere tuo ut alienum non laedas* (as articulated in the *Trail Smelter* case and in principle 21 of the Stockholm Declaration). Draft article 3 states that the State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof. The obligation to prevent transboundary harm is based on a standard of due diligence. Due diligence further involves the duty to assess the risk of activities likely to cause significant transboundary harm (draft article 7) and the duty to notify and provide relevant information to State(s) likely to be affected (draft article 8). Read with the duty of prior State authorization for risk-posing activities, the draft articles illustrate the interrelatedness of prevention and precaution, and endorse the precautionary principle with regard to environmental protection. In addition to elaborating the duty of due diligence, the draft articles codify several important overarching principles, some already well established in international law and some referred to with increasing frequency in international environmental treaties. The Commission refers to the duty to cooperate in good faith (draft article 4) in preventing significant transboundary harm and to seek solutions "based on an equitable balance of interests" (draft article 9).

59. **The Commission's draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.** The Commission resumed its work on the issue of liability with respect to transboundary harm in 2002, "bearing in mind the interrelationship between prevention and liability".[164] The scope of activities included in the draft principles remains the same as in the draft articles. The purpose of the draft principles is twofold: first, to "ensure prompt and adequate compensation to victims of transboundary damage"; and second, to "preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement" (draft principle 3). It is significant that the principles recognize the intrinsic value of the environment and prioritize its protection/preservation. In conjunction with the draft articles, they reinforce the principles of equity and sustainable development. Compensation is based on the polluter pays principle. In requiring "prompt and adequate compensation" (principle 4) for transboundary environmental damage, the cost-benefit analysis of preventive measures is altered; environmental costs (for example, control and remedial measures) are internalized, giving operators a greater incentive to take preventive measures. The draft principles do not provide for State liability. Instead, they provide for operator liability on a strict liability basis. The role of the State is to put in place a system of victim compensation through the adoption of national laws or international agreements. The draft principles attempt to create a framework to guide States with its substantive and procedural provisions. At the substantive end is principle 4, the provision of prompt and adequate compensation for

[159] Principle 15 represents a comparatively weak version of the precautionary principle.

[160] Principle 3 refers to the needs of both present and future generations: "The right to development must be fulfilled as to equitably meet developmental and environmental needs of present and future generations."

[161] Principle 7 states that: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

[162] The Acid Deposition Monitoring Network in East Asia was adopted in Jakarta in March 2000; see Takahashi, "Formation of an East Asian regime for acid rain control: the perspective of comparative regionalism"; 13 countries, namely, Cambodia, China, Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Mongolia, Myanmar, Philippines, Republic of Korea, Russian Federation, Thailand and Viet Nam have participated in the Network.

[163] *Yearbook … 1992*, vol. II (Part Two), paras. 344–349.

[164] In accordance with General Assembly resolution 56/82 of 12 December 2001, para. 3. See also *Yearbook … 2006*, vol. II (Part Two), p. 57, paras. 62–63; see also General Assembly resolution 61/36 of 4 December 2006, annex.

victims of transboundary damage[165] (comprising assignation of liability without proof of fault, specification of minimum conditions, and establishing insurance, bonds or other financial guarantees to cover liability). It should be noted that a threshold of "significant" transboundary harm must be met in order to trigger the application of the regime.[166] At the procedural end is principle 6: the provision of domestic and international procedures for claim settlements (comprising non-discriminatory access, availability of effective legal remedies and access to information). The provisions are neither couched in the language of rights or obligations, nor do they address the issue of non-operator State liability.

(c) *Domestic legislation*

60. Domestic legislation is important insofar as it addresses issues of transboundary harm to and global protection of the atmosphere. Inspiration may also be derived from laws of purely domestic concern that can be applied by analogy to the relevant international legal issues. Domestic law can be cited as evidence of State practice and, as such, constitute existing or emergent customary international law. It is also noteworthy that certain domestic legislation can have the norm-creating effect of opposability.[167] For instance, it can be said that in the *United States—Standards for Reformulated and Conventional Gasoline* case of the WTO Dispute Settlement Body (see paragraph 49 above), the central issue was whether the Clean Air Act of the United States was opposable *vis-à-vis* Brazil and Venezuela (Bolivarian Republic of).[168] In any event, the Special Rapporteur hopes to be supplied with relevant information on domestic legislation as well as the judicial decisions of the domestic courts referred to in paragraph 61 below.

(d) *Jurisprudence of domestic courts*

61. The decisions of domestic courts are also instructive to the extent that they are relevant to the protection of the atmosphere. As with domestic legislation, inspiration may be derived from domestic court decisions that can be applied to an international law context. Typically, the most relevant cases are those involving transboundary air pollution such as the 1957 *Walter Poro v. Houillères du Bassin de Lorraine* case along the French-German border.[169] However, there have also been pertinent cases involving global issues, notably, *Massachusetts v. Environmental Protection Agency*, which dealt with the question of whether the United States Environmental Protection Agency could decline to regulate carbon dioxide and other greenhouse gases.[170] Japanese courts have dealt with a number of cases related to air pollution[171] from which important analogies can be drawn to the protection of the atmosphere at the international level.

(e) *Other relevant incidents*

62. Incidents falling outside the categories listed above should also be taken into account and analysed to the extent to which they are considered relevant to State practice. For instance, atmospheric nuclear testing in the 1950s manifested itself as one of the first environmental issues to be confronted by the international community.[172] Accidents at nuclear facilities can have a direct impact on the atmosphere, as demonstrated by the accidents at Chernobyl in 1986 and Fukushima in 2011 (caused by the devastating earthquake and tsunami of 11 March 2011), and are currently a major concern, not only for Japan, but the international community in general.

4. Literature

63. A selected bibliography of the relevant international legal issues can be found in the syllabus on the topic, "Protection of the atmosphere".[173]

[165] Under principle 2(*a*), "'Damage' means significant damage caused to persons, property, or the environment". It includes, among other things, the costs of reasonable response measures and of reinstatement of the property, or environment including natural resources.

[166] Paragraph (2) of the commentary to principle 2 notes that: "The term 'significant' is understood to refer to something more than 'detectable' but need not be at the level of 'serious' or 'substantial'". See also *Yearbook … 2001*, vol. II (Part Two), p. 152, paras. (4) and (5), of the commentary to draft article 2 of the draft articles on prevention of transboundary harm from hazardous activities.

[167] It is well known that certain domestic measures based on domestic law have generated the creation of new international law, such as the regimes of conservation zones (see Moore, "Fur seal arbitration"); and preferential fishery zone (see *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3). See, on the concept of opposability and its law-making function, Murase, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 216–266.

[168] Murase, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 273–274.

[169] *Walter Poro v. Houillères du Bassin de Lorraine*, Court of Appeals (*Oberlandesgericht*, 2nd Civil Chamber) of Saarbrücken, Germany, 22 October 1957 (Z U 45/57), upon appeal against a judgment of 12 February 1957 by the Saarbrücken District Court (*Landgericht*) as court of first instance; English summary in Sand, *Transnational Environmental Law: Lessons in Global Change*, pp. 89–90 and 121; see also Rest, "International environmental law in German courts"s, p. 412.

[170] See, for example, *Massachusetts v. Environmental Protection Agency*, U.S. Supreme Court decision of 2 April 2007 (549 U.S. 497), which was concerned in part with certain obligations of the Environmental Protection Agency to regulate emissions of greenhouse gases.

[171] See Osaka, "Re-evaluation of the role of the tort liability system in Japan", pp. 413–423.

[172] See, for example, the *Daigo Fukuryu Maru* (Lucky Dragon No. 5) incident (Japan–United States) in 1954 (Whiteman, *Digest of International Law*, vol. 4, pp. 565–566); Oda, "The hydrogen bomb tests and international law"; and Goldie, "A general view of international environmental law: a survey of capabilities, trends and limits", pp. 72–73.

[173] *Yearbook … 2011*, vol. II (Part Two), p. 189, annex II, .

Chapter II

Definition

A. Physical characteristics of the atmosphere

64. In order to determine the definition, scope and objective of the exercise of codification and progressive development of international law on the protection of the atmosphere and characterize its legal status, it is first necessary to understand the physical structure and characteristics of the atmosphere.

65. The "atmosphere" is "the envelope of gases surrounding the earth".[174] The average composition of the atmosphere up to an altitude of 25 km is as follows: nitrogen (78.08 per cent), oxygen (20.95 per cent), argon (0.93 per cent), carbon dioxide (0.03 per cent), trace gases (0.01 per cent) and water vapour[175] in highly variable amounts. The atmosphere exists in what is called the atmospheric shell.[176] Physically, it extends upwards from the earth's surface, the bottom boundary of the atmosphere. It is divided vertically into four atmospheric spheres on the basis of temperature characteristics, namely, from the lower to upper layers: troposphere, stratosphere, mesosphere and thermosphere (see figure I). The temperature of the atmosphere changes with altitude. In the troposphere (up to the tropopause, at a height of about 12 km), the temperature decreases as altitude increases because of the absorption and radiation of solar energy by the surface of the planet.[177] In contrast, in the stratosphere (up to the stratopause, at a height of nearly 50 km), temperatures gradually increase with height[178] because of the absorption of ultraviolet radiation by ozone. In the third layer, the mesosphere (up to the mesopause, at a height of 80 km), temperatures again decrease with altitude. In the fourth layer, the thermosphere, temperatures once more rise rapidly because of X-ray and ultraviolet radiation from the sun. The atmosphere extends above the mesopause and "has no well-defined upper limit".[179] Accordingly, there is no sharp scientific boundary between the atmosphere and outer space. Above 100 km, only 0.00003 per cent of the atmosphere remains. Beyond that altitude, traces of the atmosphere gradually merge with the emptiness of space.[180]

[174] *Concise Oxford English Dictionary*, 12th ed. (Oxford, Oxford University Press, 2011). A similar definition is found in the *Oxford English Dictionary* (Oxford, Oxford University Press, 2014); *The New Shorter Oxford English Dictionary* (Oxford, Clarendon Press, 1993); *Webster's Third New International Dictionary of the English Language Unabridged* (Springfield, Massachusetts, G. and C. Merriam, 1961); and *Le Grand Robert de la langue française*, vol. 1 (Paris, Dictionnaires Le Robert, 1985) ("*Enveloppe gazeuse qui entoure le globe terrestre*"). The American Meteorology Society physically defines the atmosphere as "a gaseous envelope gravitationally bound to a celestial body". See http://glossary.ametsoc.org/wiki/Atmosphere.

[175] Physically, water vapour, which accounts for roughly 0.25 per cent of the mass of the atmosphere, is a highly variable constituent. In atmospheric science, "[b]ecause of the large variability of water vapor concentrations in air, it is customary to list the percentages of the various constituents in relation to dry air". Ozone concentrations are also highly variable. Exposure to ozone concentrations [greater than] 0.1 [parts per million by volume] is considered hazardous to human health. See Wallace and Hobbs, *Atmospheric Science: An Introductory Survey*, p. 8.

[176] The American Meteorological Society defines the "atmospheric shell" (also called the "atmospheric layer" or "atmospheric region") as "[a]ny one of a number of strata or 'layers' of the earth's atmosphere" (http://glossary.ametsoc.org/wiki/Atmospheric_shell).

[177] The thickness of the troposphere is not the same everywhere; it varies with latitude and the season. The top of the troposphere lies at an altitude of about 17 km at the equator, although it is lower at the poles. On average, the height of the outer boundary of the troposphere is about 12 km. See Tarbuck, Lutgens and Tasa, *Earth Science*, p. 466; Thompson and Turk, *Earth Science and the Environment*, p. 438.

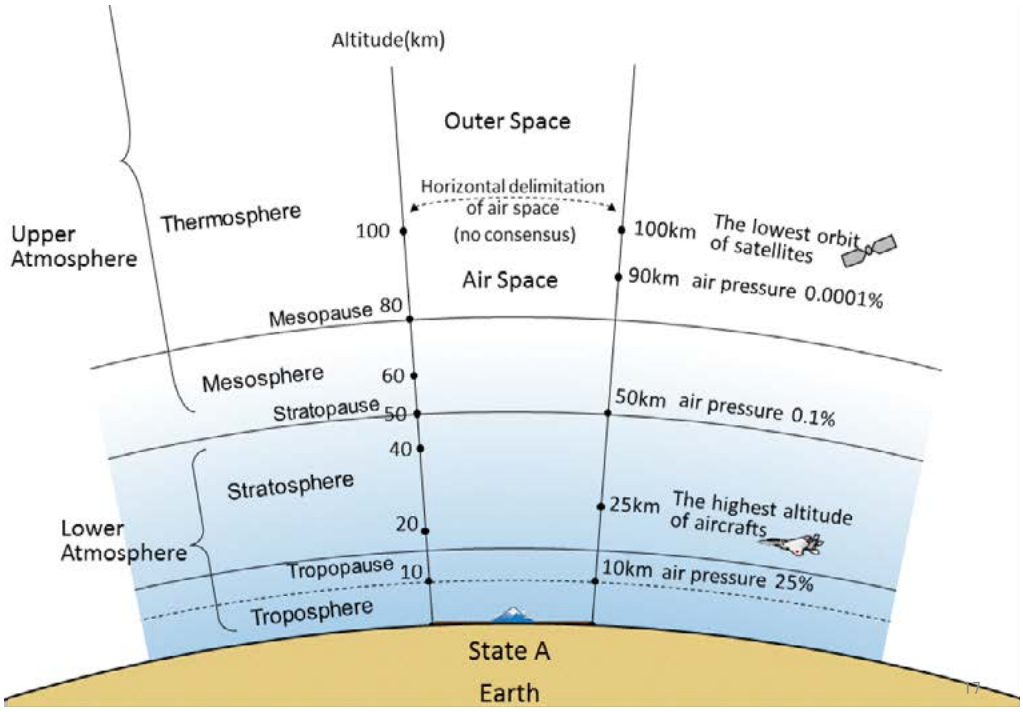
[178] Strictly, the temperature of the stratosphere remains constant to a height of about 20 to 35 km and then begins a gradual increase.

[179] Tarbuck, Lutgens and Tasa, *Earth Science*, p. 467.

[180] *Ibid.*, pp. 465–466.

FIGURE I

Spheres above the earth



Note: The diagram was drawn by the author with the assistance of Jun Okamoto, based on Ahrens, *Essentials of Meteorology: An Invitation to the Atmosphere*.

66. Because of gravity, the atmosphere exerts a downward force on the surface of the earth. Accordingly, as altitude increases, the gases in the atmosphere gradually become more dilute. Approximately 80 per cent of air mass exists in the troposphere and 20 per cent in the stratosphere. The thin, white hazy belt (with a thickness of less than 1 per cent of the radius of the globe) that one sees when looking at the earth from a distance is the atmosphere. In the troposphere and the stratosphere, the relative proportions of most gases are fairly stable. Scientifically, those spheres are grouped together as the lower atmosphere,[181] which extends to an average altitude of 50 km, and can be distinguished from the upper atmosphere.[182] The atmosphere moves and circulates around the earth in a complicated manner called atmospheric circulation.[183] The gravitational influence of the sun and moon also affect its movements by creating atmospheric tides.[184] Figure II shows where atmospheric problems, such as transboundary air pollution, depletion of the ozone layer and the accumulation of greenhouse gases, occur.

[181] The American Meteorological Society defines the "lower atmosphere" as "[g]enerally and quite loosely, that part of the atmosphere in which most weather phenomena occur (i.e., the troposphere and lower stratosphere); hence used in contrast to the common meaning for the upper atmosphere" (http://glossary.ametsoc.org/wiki/Lower_atmosphere).

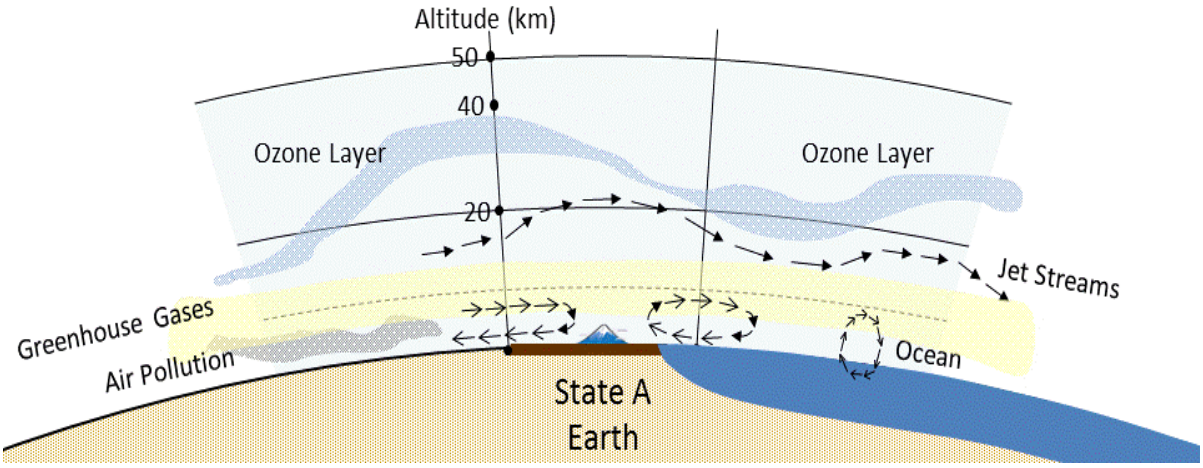
[182] In the same vein, the American Meteorological Society defines the "upper atmosphere" as residual, that is, "[t]he general term applied to the atmosphere above the troposphere" (http://glossary.ametsoc.org/wiki/Upper_atmosphere).

[183] Jones and others, *Collins Dictionary of Environmental Science*, p. 41.

[184] Allaby, *Dictionary of the Environment*, p. 34.

FIGURE II

Atmospheric circulation



Note: The diagram was drawn by the author, with the assistance of Jun Okamoto, based on C. Donald Ahrens, *Essentials of Meteorology: An Invitation to the Atmosphere*, 6th ed. (Belmont, California, Brooks/Cole, 2011), p. 210.

67. Both human and natural environments can be adversely affected by certain changes in the condition of the atmosphere. There are three particularly important causes for the degradation of the atmosphere.[185] First, the introduction of harmful substances (namely, air pollution) into the troposphere and lower stratosphere and associated chemical reactions[186] cause changes in atmospheric conditions. The major contributing sources of air pollution are acids (namely, nitrogen oxides and sulphur oxides), carbon monoxide, particulate matter and volatile organic compounds. Ozone and other photochemical oxidants are produced by a photochemical reaction of nitrogen oxides and volatile organic

[185] See Dolzer, "Atmosphere, protection", p. 290; and Kreuter-Kirchhof, "Atmosphere, international protection".

[186] Scientifically, pollutants are divided into two types: primary pollutants, substances that are emitted directly from identifiable sources; and secondary pollutants, substances that are not emitted directly into the air, but form in the atmosphere when reactions take place among primary pollutants. After the primary pollutant is emitted into the atmosphere, it combines with other substance(s) to produce other constituent pollutants through solar radiation or by photochemical reactions. See Tarbuck, Lutgens and Tasa, *Earth Science*, p. 464.

compounds under the sunlight in the troposphere; they produce harmful effects on humans and ecosystems.[187] Strong horizontal winds, for example, jet streams,[188] can quickly transport and spread such trace gases horizontally all over the globe far from their original sources (although vertical transport is mostly slow). It is important to recognize this functional aspect of the atmosphere as a medium for transporting pollutants. Some pollutants that are relatively innocuous while in the atmosphere can have significant deleterious effects when they accumulate in polar regions—both on fauna and flora and, through food chains, on humans, as in the cases of persistent organic pollutants and mercury. Second, chlorofluorocarbons, halons and other halocarbons emitted into the upper troposphere and stratosphere cause ozone depletion. The ozone layer, as its name implies, contains significant amounts of ozone. Ozone has the same chemical structure, whether it occurs miles above the earth or at ground level. It can be "good" or "bad", depending on its location in the atmosphere. The main concentrations of ozone ("good" ozone) are at altitudes of between 15 and 40 km (maximum concentrations occur between 20 and 25 km). The ozone layer filters out harmful ultraviolet radiation (known to cause skin cancer and other injury to life) from the sun. Third, changes in the composition of the troposphere and lower stratosphere cause climate change. The main source of anthropogenic climate change is the emission of gases (which already exist in trace amounts in the atmosphere), such as carbon dioxide, nitrous oxide, methane and hydrofluorocarbons. Such greenhouse gases are listed in annex A of the Kyoto Protocol (see paragraph 33 above).[189] Conditions within the troposphere heavily affect the weather on the earth's surface, including cloud formations, haze and precipitation. While some gases and aerosols are expunged through a natural cleansing process in the troposphere,[190] and a certain amount of carbon dioxide is absorbed by forests and oceans, emissions can overwhelm these processes, causing climate change to occur.

68. The three core international issues concerning the atmosphere—air pollution, ozone depletion and climate change—relate to the troposphere and the stratosphere,[191] although the major contributing factors may differ in each case. One such factor is residence time. While traditional air pollution constituents have a residence time of days to weeks, greenhouse gases, such as carbon dioxide and nitrous oxide, and compounds destroying the stratospheric ozone layer, have residence times that often exceed a century. The upper atmosphere (namely, the mesosphere and thermosphere), which comprises approximately 0.0002 per cent of the atmosphere's total mass, and outer space are of little concern as regards the environmental problems under consideration.

B. Definition of the atmosphere

69. Having briefly described the unique physical characteristics of the atmosphere, it is now necessary to formulate an appropriate legal definition that reasonably corresponds to the scientific definition. Most international treaties and documents do not define "atmosphere", even though it is the object of protection for the purpose of the application of those treaties. Alternatively, such instruments tend to define the causes and effects of damage to the object of protection.[192] It may nonetheless be noted that, in the contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, *Climate Change 2007—The Physical Science Basis*, atmosphere is defined as follows:

> The gaseous envelope surrounding the Earth. The dry atmosphere consists almost entirely of nitrogen (78.1% volume mixing ratio) and oxygen (20.9% volume mixing ratio), together with a number of trace gases, such as argon (0.93% volume mixing ratio), helium and radiatively active greenhouse gases such as carbon dioxide (0.035% volume mixing ratio) and ozone. In addition, the atmosphere contains the greenhouse gas water vapour, whose amounts are highly variable but typically around 1% volume mixing ratio. The atmosphere also contains clouds and aerosols.[193]

70. Once it undertakes the task of elaborating guidelines on the law relating to the atmosphere, the Commission will need to define the atmosphere. In so doing, it may need to address both the substantive aspect of the atmosphere as a layer of gases and the functional aspect of the atmosphere as a medium within which the

[187] See Royal Society, *Ground-level Ozone in the 21st Century: Future Trends, Impacts and Policy Implications* (London, 2008). Available from https://royalsociety.org/topics-policy/publications/2008/ground-level-ozone.

[188] Jet streams are narrow air currents, especially westerly winds (namely, those flowing from west to east) found in the upper stratum of the troposphere. They move at high speeds of between 240 and 720 km per hour.

[189] In recent years, however, experts have found that some of the substances in the troposphere are also responsible for climate change. On a scientific basis, chlorofluorocarbons also have greenhouse effects. Such contributions are defined as "a greenhouse warming potential (GWP)" (see Wallace and Hobbs, *Atmospheric Science: An Introductory Survey*, pp. 453–454).

[190] "Tropospheric … is continually being cleansed or scavenged of aerosols by cloud droplets and ice particles, some of which subsequently fall to the ground as rain or snow" (*ibid.*, p. 11).

[191] Kiss and Shelton, *International Environmental Law*, pp. 556–562.

[192] For instance, in the Convention on Long-range Transboundary Air Pollution, "air" is not defined, only a definition of "air pollution" is given. Article 1 (*a*) defines "air pollution" as "the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment"; and article 1 (*b*) defines "long-range transboundary air pollution" as "air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources". The Convention also refers to "substances or energy" in its definition of air pollution (art. 1 (*a*)). Some of the protocols to the Convention, while referring to the "atmosphere" in their preambles, and in their object and purpose clauses, give no definition of the term. The definition of "emission" is given as "the release of a substance from a point or diffuse source into the atmosphere". The United Nations Framework Convention on Climate Change defines "climate change" as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere" (art. 1, para. 2). The same article defines "greenhouse gases" as "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation" (art. 1, para. 5). Such definitions refer to the effects and causes of the damage to the object the Convention aims to protect.

[193] Annex I (available from www.ipcc.ch/site/assets/uploads/2018/05/ar4_wg1_full_report-1.pdf), p. 941.

transport and dispersion of airborne pollutants occurs. The Special Rapporteur thus proposes the draft guideline set out below.

"*Draft guideline 1. Use of terms*

"For the purposes of the present draft guidelines,

"(*a*) 'Atmosphere' means the layer of gases surrounding the earth in the troposphere and the stratosphere, within which the transport and dispersion of airborne substances occurs."[194]

[194] Definitions of other terms will be proposed at later stages, as appropriate. Nonetheless, it may be helpful to give a tentative definition of "air pollution" (which will be discussed in some depth in the second report of the Special Rapporteur). Draft guideline 1 (*b*): "Air pollution" means the introduction by humans of chemicals, particulate matter, biological material or energy that degrade or alter, or form part of a process of degradation or alteration of, the atmosphere, and that have or are likely to have significant adverse effects on human life or health or the earth's natural environment.

Chapter III

Scope of the draft guidelines

A. Anthropogenic environmental degradation

71. In clarifying the scope of the project, it is necessary to address the main elements to be encompassed by the draft guidelines on the protection of the atmosphere, leaving no ambiguity as to its coverage. It may be useful to refer to the previous work of the Commission.[195] In general, the articles of multilateral environmental treaties relating to scope refer either to the effects of pollution (significant adverse effects) or to its causes (human activities). However, those two components are complementary to each other, with the "causes" of human activities resulting in certain effects,[196] and vice versa.[197]

72. The proposed draft guidelines only address damage caused by human activities. Accordingly, their scope would not extend to, for instance, damage caused by volcanic eruption or desert sands (unless exacerbated by human activities).[198] The term "human activities" includes not only activities conducted by States but also those conducted by natural and juridical persons.

73. The atmosphere has been used in several ways, most notably in the form of aerial navigation. Acoustic/noise pollution has raised transboundary problems for airports in border regions, which have been addressed by a number of bilateral treaties and a growing body of judicial cases.[199] Weather modification is another example for utilization of the atmosphere. Scientists have been suggesting various possible methods for active utilization of the atmosphere. Some of the proposed geoengineering technologies (such as solar radiation management and carbon dioxide removal) are relevant if they become realizable. Thus, modalities of the use (or utilization) of the atmosphere should certainly be considered in depth by the present study.

74. Obviously, most of the activities so far are those conducted without a clear or concrete intention to affect atmospheric conditions. There are, however, certain activities whose very purpose is to alter atmospheric conditions, namely, weather modification (weather control). While weather modification in warfare has been prohibited under the Convention on the prohibition of military or any other hostile use of environmental modification techniques,[200] weather control has been experimented with and practised widely since the 1940s to produce desirable changes in weather. The General Assembly addressed the issue in 1961.[201] The goals of weather con-

[195] See draft article 1 ("Scope") of the draft articles on the law of transboundary aquifers (*Yearbook … 2008*, vol. II (Part Two), p. 20, para. 53), as follows: "The present draft articles apply to: (*a*) utilization of transboundary aquifers or aquifer systems; (*b*) other activities that have or are likely to have an impact upon such aquifers or aquifer systems; and (*c*) measures for the protection, preservation and management of such aquifers or aquifer systems."

[196] For example, article 1 of the Convention on Long-range Transboundary Air Pollution provides that: "For the purpose of the present Convention: (*a*) 'Air pollution' means the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects". Draft principle 1 ("Scope of application") of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (*Yearbook … 2006*, vol. II (Part Two), p. 58, para. 66) states that: "The present draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law." Draft article 1 ("Scope") of the draft articles on prevention of transboundary harm from hazardous activities (*Yearbook … 2001*, vol. II (Part Two), p. 146, para. 97) states that: "The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences."

[197] For example, article 1, paragraph 2, of the United Nations Framework Convention on Climate Change provides that for the purpose of this Convention, "'climate change' means a change of climate which is attributed directly or indirectly to human activity".

[198] In the context of the Convention on Long-range Transboundary Air Pollution, Iceland even made a premonitory reservation upon signature of the Convention that it "does not take upon itself any responsibility for long-range transboundary air pollution caused by volcanic eruptions in Iceland" (see ECE/HLM.1/2/Add.1, vol. II, annex IV). Note, however, that some regional instruments also cover air pollution from natural causes; for example, article 1, paragraph 6, of the ASEAN Agreement on Transboundary Haze Pollution, and the African regional framework agreements.

[199] See, for example, the French–Swiss border, the judgment of the French Court of Appeal at Lyon in the *Cointrin airport* case (*Gazette du Palais*, vol. 74-II (1954), p. 205), followed by a bilateral boundary airport treaty in 1956; see Guinchard, "La collaboration franco–helvétique en matière d'aéroports (Bâle-Mulhouse et Genève)". Multilateral regimes relevant to aircraft noise damage include the Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces; see, for example, Kiss and Lambrechts, "Les dommages causés au sol par les vols supersoniques", p. 771. Global technical standards for aircraft noise emissions have been laid down since 1971 by ICAO; see Davies and Goh, "Air transport and the environment: regulating aircraft noise".

[200] The Convention entered into force in 1978.

[201] In section C, paragraph 1 (*a*), of its resolution 1721 (XVI) of 20 December 1961 on international cooperation in the peaceful uses of outer space, the General Assembly advised Member States and other relevant organizations "to advance the state of atmospheric science and technology so as to provide greater knowledge of basic physical forces affecting climate and the possibility of large-scale weather modification."

trol range from preventing the occurrence of damaging meteorological events, such as hurricanes or tornadoes, to causing beneficial weather, such as artificial rainfall in an area experiencing drought; or, conversely, to stopping the rain in a designated area where an important event is scheduled to take place. Cloud seeding is a common technique to enhance precipitation; it entails spraying small particles such as dry ice and silver iodide into the sky in order to trigger cloud formation for eventual rainfall. Evidence of its safety is strong, but doubts remain as to its efficacy. The Governing Council of UNEP approved a set of recommendations for consideration by States and other weather modification operators in 1980.[202] If large-scale weather control were to become feasible in the future, there could be harmful consequences. Potential negative implications might include unintended side effects, damage to existing ecosystems and health risks to humans. Such effects, if transboundary in nature, could generate international concern for their injurious consequences.[203] It is suggested that progressive development of international law in this particular area should be pursued.[204]

B. Protection of natural and human environments

75. The draft guidelines should make clear the objects to be protected: natural and human environments. For the purpose of the present draft guidelines, the former is addressed as "the composition and quality of the atmosphere" and the latter as "human health or materials useful to mankind". Since the present draft guidelines are aimed at protecting the atmosphere, the primary concern is obviously the natural environment. However, given the intrinsic relationship between the natural environment and the human environment (which includes not only human health in a narrow sense but also natural vegetation and crops, materials and historical heritage), the draft guidelines should include both. It should also be added that any adverse effects on the environment should be "significant", warranting international regulation.

C. Causes of atmospheric degradation

76. While the present draft guidelines address various aspects of atmospheric degradation, both transboundary and global in nature, the causes of such environmental degradation are diverse. The causes generally fall into two categories, the first of which is the introduction of (deleterious) substances or energy into the atmosphere.[205] The major pollutants are acids (namely, nitrogen oxides), sulphur oxides, carbon monoxide, particulate matters and photochemical oxidants. Ozone depletion occurs as a result of the introduction of (deleterious) substances, such as chlorofluorocarbons and halons, into the atmosphere. In contrast, the main cause of climate change is the emission of greenhouse gases, such as carbon dioxide, nitrous oxide and methane. These gases are not always inherently deleterious to human health; rather, they have an indirect effect. They tend to cause climate change by altering the composition of the atmosphere.[206] Thus, the subject matter of the present draft guidelines, from a causal viewpoint, will include not only the introduction of certain substances but also of energy into the atmosphere, which would cover the problems of radioactive/nuclear pollution,[207] and will also include the cases of the

[202] Decision 8/7 A of the UNEP Governing Council on provisions for cooperation between States in weather modification, adopted at its eighth session, on 29 April 1980 (*Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 25* (A/35/25), annex I). It may be noted that, as early as 1963, WMO made an important remark cautioning the need for a prudent approach to weather modification technologies, stating: "the complexity of the atmospheric processes is such that a change in the weather induced artificially in one part of the world will necessarily have repercussions elsewhere. This principle can be affirmed on the basis of present knowledge of the mechanism of the general circulation of the atmosphere. However, that knowledge is still far from sufficient to enable us to forecast with confidence the degree, nature or duration of the secondary effects to which change in weather or climate in one part of the earth may give elsewhere, nor even in fact to predict whether these effects will be beneficial or detrimental. Before undertaking an experiment on large-scale weather modification, the possible and desirable consequences must be carefully evaluated, and satisfactory international arrangements must be reached". Roslycky, "Weather modification operations with transboundary effects: the technology, the activities and the rules", p. 20.

[203] Sand, "Internationaler Umweltschutz und neue Rechtsfragen der Atmosphärennutzung"; see also Taubenfeld, "International environmental law: air and outer space", p. 195; and Brown Weiss, "International responses to weather modification", p. 813.

[204] It is suggested that the following points may be considered as regards weather modification: the duty to benefit the common good of humankind; the duty not to cause significant transboundary harm; the duty to perform environmental impact assessments; public participation; the duty to cooperate; exchange of information and notification; consultation; the duty to utilize international organizations; and State responsibility. See Roslycky, "Weather modification operations with transboundary effects: the technology, the activities and the rules", pp. 27–40. See also Davis, "Atmospheric water resources development and international law", pp. 17 *et seq.*

[205] For example, article 1 (*a*) of the Convention on Long-range Transboundary Air Pollution provides that: "'air pollution' means the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment"; while article 1, paragraph 1, of the Agreement between Canada and the United States of America on air quality provides that "'air pollution' means the introduction by man, directly or indirectly, of substances into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment". It should be noted that article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea defines "pollution of the marine environment" as "the introduction … of substances or energy into the marine environment".

[206] For example, article 1 of the United Nations Framework Convention on Climate Change provides that "'climate change' means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods". See also article 1, paragraph 1, of resolution III of the Institute of International Law of 20 September 1987 on transboundary air pollution, which provides that: "For the purposes of this Resolution, 'transboundary air pollution' means any *physical, chemical or biological alteration in the composition or quality of the atmosphere** which results directly or indirectly from human acts or omissions, and produces injurious or deleterious effects in the environment of other States or of areas beyond the limits of national jurisdiction" (*Yearbook*, Session of Cairo 1987, vol. 62, Part II, Paris, Pedone, 1988).

[207] Questions on radioactive air pollution were debated in the context of the Convention on Long-range Transboundary Air Pollution. While, according to the explanatory memorandum to the Convention contained in a communication from the Government of Germany to Parliament ("Entwurf eines Gesetzes zu dem Übereinkommen vom 13, November 1979 über weiträumige grenzüberschreitende Luftverunreinigung", *Deutscher Bundestags-Drucksache* 9/1119, 2 December 1981, p. 14), radioactive substances are not covered (see also Rest, "Tschernobyl und die Internationale Haftung", pp. 612–613), the Government of Austria had expressed the contrary view, in a statement during the preparatory work of the Convention in January 1979 suggesting that the scope of the Convention should also include the study of possible negative effects resulting from the peaceful uses of nuclear energy on the environment of a State or States other than the State within which such activities are

alteration of the composition of the atmosphere. It bears repeating that the present draft guidelines will not attempt to deal with the specific substances causing such atmospheric degradation.

D. Linkages with other areas of international law

77. Obviously, the law of the atmosphere is intrinsically linked with other fields of international law such as the law of the sea[208] and biodiversity (forestry, desertification and wetlands),[209] as well as international trade law[210] and international human rights law.[211] The present draft guidelines will refer to those interrelationships, as appropriate. However, the linkages will be referred to as far as they are relevant to the other parts of the present draft guidelines.

78. On the basis of the foregoing considerations, the Special Rapporteur's proposal for draft guideline 2 would read as follows:

"Draft guideline 2. Scope of the guidelines

"(*a*) The present draft guidelines address human activities that directly or indirectly introduce deleterious substances or energy into the atmosphere or alter the composition of the atmosphere, and that have or are likely to have significant adverse effects on human life and health and the earth's natural environment;

"(*b*) The present draft guidelines refer to the basic principles relating to the protection of the atmosphere as well as to their interrelationship."

carried out; in this sense, see also Rauschning, "Interim report of the Committee: legal problems of continuous and instantaneous long-distance air pollution", p. 219; and Sands, *Chernobyl: Law and Communication—Transboundary Nuclear Air Pollution—The Legal Materials*, p. 163 (the definition in the Convention on Long-range Transboundary Air Pollution is "clearly wide enough to bring radioactive fallout within the scope of the Convention"). At the global level, the United Nations Scientific Committee on the Effects of Atomic Radiation, established by the General Assembly in its resolution 913 (X) of 3 December 1955 and now operating under the auspices of UNEP in Vienna, regularly monitors the levels and effects of ionizing radiation irrespective of its origin, including atmospheric emissions from underground tests not prohibited by the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water of 1963. These measurements thus reflect the cumulative impact of transnational radioactive air pollution from an aggregate of sources worldwide; see *Sources and Effects of Ionizing Radiation: United Nations Scientific Committee on the Effects of Atomic Radiation: UNSCEAR 2008 Report to the General Assembly with Scientific Annexes* (United Nations publication, Sales No. E.10.IX.3, 2010). On data-sharing by the Committee with the International Monitoring System under the Comprehensive Nuclear Test Ban Treaty (see General Assembly resolution 50/245 of 10 September 1996 and document A/50/1027), see Weiss, "The global dimensions of atmospheric radioactivity detection: experience and conclusions after the Fukushima Daiichi nuclear power plant accident".

[208] See United Nations Convention on the Law of the Sea, articles 212 ("Pollution from or through the atmosphere") and 195 ("Duty not to transfer damage or hazards or transform one type of pollution into another").

[209] The preamble of the United Nations Framework Convention on Climate Change refers to the negative impact of climate change on natural ecosystems, and article 4, paragraph 1, calls upon State parties to conserve "sinks and reservoirs of all greenhouse gases … including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems". See also article 2, paragraph 1 (*a*) (ii), of the Kyoto Protocol and the Convention on Biological Diversity, United Nations Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, and the Convention on wetlands of international importance especially as waterfowl habitat.

[210] See, in general, Murase, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 130–166.

[211] See, in general, Schulze, Wang-Helmreich and Sterk, *Human Rights in a Changing Climate—Demands on German and International Climate Policy: The Human Rights to Food and to Water*; and Knox, "Climate change and human rights law".

Chapter IV

Legal status of the atmosphere

79. There are five concepts that may be considered applicable to the legal status of the atmosphere: airspace, shared or common natural resources, common property, common heritage and common concern (common interest).[212] Each of the concepts is briefly considered below as to whether and to what extent they are applicable to the protection of the atmosphere.

A. Differentiation between airspace and the atmosphere

80. The notion of "airspace" differs significantly from that of the "atmosphere". The two terms cannot be used interchangeably. Airspace is a concept used to signify the spatial dimension where States exercise their jurisdiction or control for aviation and defence.[213] Thus, article 1 of the Convention on International Civil Aviation provides that "every State has complete and exclusive sovereignty over the 'airspace' above its territory". Article 2 of the same Convention defines the territory of a State to be the land areas and adjacent territorial waters. The airspace beyond the boundaries of territorial waters is regarded as being outside the sovereignty of any State and is open for use by all States like the high seas (see also the reference to airspace in article 2 of the United Nations Convention on the Law of the Sea).[214]

[212] Boyle, "International law and the protection of the global atmosphere: concepts, categories and principles"; see also Brunnée, "Common areas, common heritage, and common concern".

[213] See Hobe, "Airspace", and Tomas, "Air law".

[214] Article 2 ("Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil") states:

"1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

"2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

"3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."

81. Airspace refers to a domain,[215] an area-based approach; the atmosphere, in contrast, is a natural resource that flows through national boundaries. In respect of the legal status of the atmosphere, a functional, non-territorial, approach is more appropriate because it is a dynamic and fluctuating substance. Obviously, (vertical) delimitation is possible in the case of airspace by drawing lines vertically along territorial borders, but such artificial lines are not useful in the case of the atmosphere (air), which moves beyond borders in line with "atmospheric circulations" and "jet streams". Thus, the atmosphere is a fluid, single and non-partitionable unit, whereas airspace is a static—and separable—spatial domain.

82. Thus, the area-based approach adopted, for instance, by the United Nations Convention on the Law of the Sea (part XII, "Protection and preservation of the marine environment") cannot be followed for the protection of the atmosphere. The environmental regulations of the Convention are predominantly based on spatial (territorial) criteria (including the territorial sea, contiguous zones, exclusive economic zones and the high seas) for allocation of proper jurisdiction to control marine pollution, for example, flag-State jurisdiction, coastal-State jurisdiction and port-State jurisdiction.[216]

83. States may nonetheless feel it necessary to refer to the notion of airspace in the project since article 1 of the Convention on International Civil Aviation reaffirms the rule that "every State has complete and exclusive sovereignty over the airspace above its territory". Although the legal principles, rules and regulations envisaged in the proposed draft guidelines are perhaps most applicable to certain activities conducted on the ground within a State's territorial jurisdiction, there may be situations where the activities in question may be conducted in its airspace.[217] Therefore, the inclusion of a saving clause is proposed to the effect that nothing in the draft guidelines shall affect the legal status of airspace provided in other conventions.

B. Natural resources, shared or common

84. The atmosphere (air mass) is the earth's largest single natural resource, so listed—along with mineral, energy and water resources—by the Committee on Natural Resources,[218] as well as in the Stockholm Declaration[219] and in the World Charter for Nature.[220] It provides renewable "flow resources" essential for human, plant and animal survival on the planet; and, in addition to contributing basic economic production supplies (for example, oxygen and precipitation) as well as waste absorption services (for example, as a sink resource or dilution medium for combustion exhausts), it serves as a medium for transportation and communication ("spatial-extension resource").[221] It must be borne in mind that the atmosphere is a limited resource with limited assimilation capacity. The WTO Panel and Appellate Body recognized in the *Gasoline* case of 1996 that clean air was a natural resource that could be depleted. The atmosphere was long considered to be unlimited, non-exclusive and neutral (simply not worth fighting over) since it was assumed that everyone could benefit from it without depriving others.[222] That assumption is no longer valid. Although the atmosphere is not exploitable in the ordinary sense of the word (such as in the context of oil and gas resources), its proper maintenance is necessary for organisms to breathe and enjoy stable climatic conditions; thus, any polluting industry or polluting States in fact exploit the atmosphere by reducing its quality and

[215] The strict (horizontal) delimitation of airspace and outer space currently seems difficult, if not impossible (whereas the differentiation between the atmosphere and outer space is quite clear, because of the simple fact that there is no air in outer space). There is no agreement as to where airspace ends and outer space begins. Traditionally, two schools of thought existed. One school espoused the theory of the highest altitude of aircrafts while the other espoused the theory of the lowest orbit of satellites (see Matte, "Space law", p. 555). Bin Cheng for example, asserted that airspace reaches as far as the atmosphere can be found, by interpreting the French text "espace aérien" in article 1 of the Convention on International Civil Aviation. In this theory, the delimitation of airspace and outer space coincides with the differentiation between the atmosphere and outer space (van Bogaert, *Aspects of Space Law*, p. 12).

[216] Nordquist, Rosenne and Yankov, *United Nations Convention on the Law of the Sea 1982: A Commentary*, pp. 3–22. It may be noted, however, that the relevant part contains a provision based on the functional notion of the sea as a common good: article 216 ("Enforcement with respect to pollution by dumping") provides for so-called "loading State jurisdiction" in paragraph 1: "reduction and control of pollution of the marine environment by dumping shall be enforced" and in subparagraph (*c*) "by any State with regard to acts of loading of wastes or other matter occurring within its territory or at its off-shore terminals". It appears that loading State jurisdiction has the same theoretical foundation as State jurisdiction for the protection of the atmosphere under the present draft guidelines.

[217] Annex 16 of the 1944 Convention on International Civil Aviation is entitled "Environmental protection". The ICAO Council has established rules on aircraft engine emissions standards and recommended practices since 1981, with a view to achieving maximum compatibility between the safe and orderly development of civil aviation and the quality of the human environment. These emissions standards establish rules, *inter alia*, for vented fuel (Part II) and emission certification (part III), including emissions limits for smoke and certain chemical particles.

[218] The inclusion of "atmospheric resources" among "other natural resources" by the former Committee on Natural Resources was first mentioned in the Committee's report on its first session (New York, 22 February–10 March 1971), chap. II, sect.A.4 ("Other natural resources"), paragraph 94 (*d*) (*Official Records of the Economic and Social Council, Fiftieth Session, Supplement No. 6* (E/4969-E/C.7/13)). The work of the Committee on Natural Resources (later Committee on Energy and Natural Resources for Development) was transferred to the Commission on Sustainable Development.

[219] Principle 2: "The natural resources of the earth, including the air … must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."

[220] "[A]tmospheric resources that are utilized by man … shall be managed to achieve and maintain optimum sustainable productivity" (General Assembly resolution 37/7 of 28 October 1982, annex, para. 4).

[221] See the terminology coined by von Ciriacy-Wantrup, *Resource Conservation: Economics and Policies*, pp. 40–42, and McDougal, Lasswell and Vlasic, *Law and Public Order in Space*, pp. 777–779.

[222] This appears quite similar to the classic 16th–17th century controversy between Hugo Grotius' *Mare Liberum* and John Selden's *Mare Clausum* over whether ocean resources were to be regarded as unlimited or limited. Grotius advocated the freedom of the ocean by asserting that, in light of its nature, the ocean could not be the object of occupation or possession. Therefore, according to the author, a State was not able to assert an exclusive right for fishing, which he thought had to presuppose *dominium* over the ocean. Moreover, in Grotius' view, there was no need to modify this historical construction, for he considered ocean resources unlimited. Accordingly, everyone could exploit fish stocks without infringing on the interests of others under the regime of the freedom of the seas. See Grotius, *The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade*, chap. 5. In contrast, Selden maintained that States possessed and could possess a part of the ocean as long as they actually exercised their power over that part of the ocean. In addition, Selden disputed Grotius' view by emphasizing that ocean resources were exhaustible and that there was a danger that the free use of the ocean would result in their depletion (see Selden, *Of the Dominion, Or, Ownership of the Sea*).

its capacity to assimilate the pollutants of other industries or States.[223] This rationale underlies, for example, "trade in emission rights". Accordingly, the concept of shared natural resources appears to be applicable in part to the problem of bilateral or regional transboundary air pollution, and common natural resources to global environmental issues relating to the atmosphere.

85. Assuming that the atmosphere is a natural resource, the term "protection" employed in this project may need to be clarified. In the context of the environment, the term is often used (consciously or unconsciously) in two ways: preservation and conservation. "Preservation" means the measures taken to maintain the original state of nature by requiring a total restriction on human activities in a designated off-limits area. "Conservation", on the other hand, means to maintain the state of the environment in a designated area through intentional human activities, for example, a conservation zone for fisheries resources on the high seas. As was indicated in paragraph 73 above, the utilization aspects of the atmosphere are becoming increasingly important and, accordingly, the draft guidelines to be elaborated on the protection of the atmosphere will refer not only to the preservation aspect (in the sense that the international community will strive as much as possible not to change the existing composition and balance of the atmosphere) but also to the conservation approach, which will aim at achieving sustainability in the utilization of the atmosphere.

C. Common concern of humankind

86. Common property, or *res communis*, refers to areas such as the high seas that are open for legitimate use by all States and that may not be appropriated to the sovereignty of any individual State. The airspace above the high seas is in this sense "common property". However, like sovereign airspace, common property is fundamentally a spatial dimension and is therefore insufficient when it comes to dealing with the atmosphere as a global unit,[224] as described in paragraphs 81 to 85 above.

87. The concept of common heritage was employed in the United Nations Convention on the Law of the Sea and in the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies. However, the attempt of Malta at the General Assembly in 1988 to have the global atmosphere declared part of the common heritage of humankind was unsuccessful. Since "common heritage" implies that a resource must be exploited and conserved for the benefit of mankind as a whole, such designation would usually require a far-reaching institutional apparatus to control the allocation of exploitation rights and benefits. If the atmosphere were treated as part of the common heritage of mankind, it would, in effect, place atmospheric problems under collective management—something widely considered premature.[225]

88. While the concepts of common property and common heritage may not be appropriate indicators of the legal status of the atmosphere, the notion of common concern is, and should be included in its legal status under international law. In 1988, the General Assembly declared, in its resolution 43/53 of 6 December 1988 on the protection of global climate for present and future generations of mankind, that climate change was a "common concern of mankind", somewhat mitigating the failure of the proposal by Malta. The same concept was incorporated into paragraph 1 of the preamble to the United Nations Framework Convention on Climate Change. In view of the growing recognition of the linkages between transboundary air pollution and global climate change, application of the concept of common concern to all atmospheric problems should be considered appropriate.[226]

89. The legal content of the concept of common concern is that States can no longer claim that atmospheric problems are within the reserved domain of domestic jurisdiction because the issues now legitimately fall under "matters of international concern". It will certainly lead to the creation of substantive legal obligations on the part of all States to protect the global atmosphere as enforceable *erga omnes*.[227] It may be too early at present to interpret the concept of common concern as giving "all States a legal interest, or standing, in the enforcement of rules concerning protection of the global atmosphere",[228] in view of the absence of appropriate procedural law to implement such an interpretation. It may also be premature to consider the concept of common concern as creating rights for individuals and future generations.

90. Yet, based on the foregoing analysis, it may be concluded that the atmosphere has the legal status of

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[223] Biermann, " 'Common concern of humankind': the emergence of a new concept of international environmental law", p. 428.

[224] Boyle, "International law and the protection of the global atmosphere: concepts, categories and principles", p. 9.

[225] *Ibid.*, pp. 9–10.

[226] The implications of the concept of common concern of humankind in relation to global environmental issues were examined at a meeting of the UNEP Group of Legal Experts held in Malta from 13 to 15 December 1990. It has been noted that the " 'common concern' concept has at least two important facets: spatial and temporal. Spatial aspect means that common concern implies cooperation of all States on matters being similarly important to all nations, to the whole international community. Temporal aspect arises from long-term implications of major environmental challenges which affect the rights and obligations not only of present but also of future generations" (see Attard, "The meeting of the Group of Legal Experts to examine the concept of the common concern of mankind in relation to global environmental issues", p. 37). This illustrates strong linkages with principles such as intergenerational equity contained in the Rio Declaration on Environment and Development and other international environmental instruments. One application of the concept of common concern has been explored from the viewpoint of an ecosystem, e.g., in the context of regional watershed management (see Brunnée and Toope, "Environmental security and freshwater resources: ecosystem regime building").

[227] As the International Court of Justice indicated in the *Barcelona Traction* case, such obligations are owed to the international community as a whole. Because of their importance, they are "the concern of all States" (*Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 30, para. 33). In this context, one may also recall the Commission's reference to "massive pollution of the atmosphere or of the seas" as an international crime in draft article 19, para. 3 (*d*), of the draft articles on State responsibility for internationally wrongful acts (*Yearbook … 1976*, vol. II (Part Two), p. 96) in its first reading, although the article disappeared in the final draft adopted on second reading (*Yearbook … 2001*, vol. II (Part Two), p. 26 *et seq.*, para. 76).

[228] Boyle, "International law and the protection of the global atmosphere: concepts, categories and principles", pp. 11–13.

an international resource, whether shared or common, indispensable for sustaining life on earth, human health and welfare, crops and the integrity of ecosystems; and that consequently its protection is a common concern of humankind. It may also be appropriate to add a caveat, so as to avoid any misunderstanding, to the effect that the present draft guidelines are not intended to prejudice in any way the status of airspace already established in international law. Thus, draft guideline 3 would read as follows:

"*Draft guideline 3. Legal status of the atmosphere*

"(*a*) The atmosphere is a natural resource essential for sustaining life on earth, human health and welfare, and aquatic and terrestrial ecosystems; hence, its protection is a common concern of humankind;

"(*b*) Nothing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law."

Chapter V

Conclusion

91. In preparing the present report, the Special Rapporteur aimed to provide as thorough and exhaustive a background as possible on the topic, such as its historical development and the sources of law relevant to it, as well as to explain the rationale of the topic and the basic approaches, objectives and scope of the project. It has aptly been said that, "at its best, the [Commission's] real strength is the ability to take a systematic view of international law as a whole, to integrate new developments and different bodies of law and to articulate in its commentaries reasoned and fully researched conclusions".[229] Nonetheless, a number of problems had to be addressed here in a preliminary and general manner, leaving in-depth analysis of specific legal problems for a later stage. The Special Rapporteur hopes that he has been able to show that, with an appropriate approach, the protection of the atmosphere is both an important and proper topic for the codification and progressive development of international law—a topic through which the Commission can contribute significantly to the international community as a whole.

92. As a tentative plan of work to succeed the present first report, the Special Rapporteur hopes to consider, in the remaining two years (2015 and 2016) of the current quinquennium, questions relating to basic principles for the protection of the atmosphere. They will include the general obligations of States to protect the atmosphere, the principle of *sic utere tuo ut alienum non laedas* as applied to transboundary air pollution, as well as principles of equity, sustainable development and good faith. It is hoped that, during the next quinquennium (2017–2021), the Commission will complete its consideration of other related matters, such as international cooperation, compliance with international norms, dispute settlement and interrelationships.

[229] Boyle and Chinkin, *The Making of International Law*, p. 172.

CHECKLIST OF DOCUMENTS OF THE SIXTY-SIXTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/665	Provisional agenda for the sixty-sixth session	Mimeographed. For agenda as adopted, see *Yearbook … 2014*, vol. II (Part Two).
A/CN.4/666	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session, prepared by the Secretariat	Mimeographed.
A/CN.4/667	First report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur	Reproduced in the present volume.
A/CN.4/668 [and Corr.1] and Add.1	Seventh report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	*Idem.*
A/CN.4/669 and Add.1	Expulsion of aliens: Comments and observations received from Governments	*Idem.*
	[Additional information received from the European Union (in English only), and not included in document A/CN.4/669]	Mimeographed.
A/CN.4/670	Ninth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	Reproduced in the present volume.
A/CN.4/671	Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur	*Idem.*
A/CN.4/672	Second report on identification of customary international law, by Sir Michael Wood, Special Rapporteur	*Idem.*
A/CN.4/673 [and Corr.1]	Third report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur	*Idem.*
A/CN.4/674 [and Corr.1]	Preliminary report on the protection of the environment in relation to armed conflicts, by Ms. Marie G. Jacobsson, Special Rapporteur	*Idem.*
A/CN.4/675	Second report on the provisional application of treaties, by Mr. Juan Manuel Gómez Robledo, Special Rapporteur	*Idem.*
A/CN.4/L.831	Protection of persons in the event of disasters: Texts and titles of the draft articles adopted by the Drafting Committee on first reading	Mimeographed.
A/CN.4/L.832	Expulsion of aliens: Texts and titles of the draft articles adopted by the Drafting Committee on second reading	*Idem.*
A/CN.4/L.833	Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Texts and titles of draft conclusions 6 to 10 provisionally adopted by the Drafting Committee at the sixty-sixth session of the Commission	*Idem.*
A/CN.4/L.834	Draft report of the International Law Commission on the work of its sixty-sixth session, chapter I (Organization of the session)	*Idem.* See the adopted text in *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10). The final text appears in *Yearbook … 2014*, vol. II (Part Two).
A/CN.4/L.835	*Idem*, chapter II (Summary of the work of the Commission at its sixty-sixth session)	*Idem.*
A/CN.4/L.836	*Idem*, chapter III (Specific issues on which comments would be of particular interest to the Commission)	*Idem.*
A/CN.4/L.837 and Add.1/ Rev.1	*Idem*, chapter IV (Expulsion of aliens)	*Idem.*
A/CN.4/L.838 and Add.1	*Idem*, chapter V (Protection of persons in the event of disasters)	*Idem.*
A/CN.4/L.839	*Idem*, chapter VI (Obligation to extradite or prosecute (*aut dedere aut judicare*))	*Idem.*

Document	*Title*	*Observations and references*
A/CN.4/L.840 and Add.1–3	*Idem*, chapter VII (Subsequent agreements and subsequent practice in relation to the interpretation of treaties)	*Idem*.
A/CN.4/L.841	*Idem*, chapter VIII (Protection of the atmosphere)	*Idem*.
A/CN.4/L.842 and Add.1	*Idem*, chapter IX (Immunity of State officials from foreign criminal jurisdiction)	*Idem*.
A/CN.4/L.843	*Idem*, chapter X (Identification of customary international law)	*Idem*.
A/CN.4/L.844	Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)—Final report	Mimeographed.
A/CN.4/L.845	Draft report of the International Law Commission on the work of its sixty-sixth session, chapter XI (Protection of the environment in relation to armed conflicts)	*Idem*. See the adopted text in *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10). The final text appears in *Yearbook … 2014*, vol. II (Part Two).
A/CN.4/L.846	*Idem*, chapter XII (Provisional application of treaties)	*Idem*.
A/CN.4/L.847	*Idem*, chapter XIII (The most-favoured-nation clause)	*Idem.*
A/CN.4/L.848	*Idem*, chapter XIV (Other decisions and conclusions of the Commission)	*Idem.*
A/CN.4/L.849	Report of the Planning Group	Mimeographed.
A/CN.4/L.850	Immunity of State officials from foreign criminal jurisdiction: Text of draft articles 2 (*e*) and 5 provisionally adopted by the Drafting Committee on 15 July 2014	*Idem.*
A/CN.4/SR.3198–A/CN.4/SR.3243	Provisional summary records of the 3198th to 3243rd meetings	*Idem.* The final text appears in *Yearbook … 2014*, vol. I.

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