A/CN.4/SER.A/2015/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2015

Volume II
Part One

Documents of the sixty-seventh session

UNITED NATIONS

A/CN.4/SER.A/2015/Add.l (Part 1)

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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 ... 2014*).

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

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

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

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

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

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

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ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
ICRC	International Committee of the Red Cross
INTERPOL	International Criminal Police Organization
ITLOS	International Tribunal for the Law of the Sea
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural 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*
EJIL	*European Journal of International Law*
GC	Grand Chamber
I.C.J. Pleadings	ICJ, *Pleadings, Oral Arguments, Documents*
I.C.J. Reports	ICJ, *Reports of Judgments, Advisory Opinions and Orders*
ILM	*International Legal Materials* (Washington, D.C.)
ILR	*International Legal Reports* (Cambridge)
ITLOS Reports	*Reports of the International Tribunal for the Law of the Sea*
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (Nos. 1–24: up to and including 1930)
P.C.I.J., Series A/B	PCIJ, *Collection of Judgments, Orders and Advisory Opinions* (Nos. 40–80: beginning in 1931)
P.C.I.J., Series B	PCIJ, *Collection of Advisory Opinions* (Nos. 1–18: up to and including 1930)
P.C.I.J., Series C	PCIJ, *Pleadings, Oral Arguments, Documents* (Nos. 52–88: beginning in 1931)
RGDIP	*Revue générale de droit international public* (Paris)
UNRIAA	United Nations, *Reports of International Arbitral Awards*

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

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NOTE CONCERNING QUOTATIONS

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

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

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The Internet address of the International Law Commission is **www.un.org/law/ilc/index.htm**.

FILLING OF CASUAL VACANCIES IN THE COMMISSION (ARTICLE 11 OF THE STATUTE)

[Agenda item 2]

DOCUMENT A/CN.4/684

Note by the Secretariat

[*Original: English*]
[*8 April 2015*]

1. Following the election of Mr. Kirill Gevorgian to the International Court of Justice on 6 November 2014 and his subsequent resignation from the International Law Commission, one seat on the Commission has become vacant.

2. In this case, article 11 of the statute of the Commission is applicable. It prescribes that:

In the case of a vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 [of the statute].

Article 2 reads:

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal systems of the world should be assured.

3. The term of the member to be elected by the Commission will expire at the end of 2016.

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

[Agenda item 3]

DOCUMENT A/CN.4/686

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

[*Original: Spanish*]
[*29 May 2015*]

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* The Special Rapporteur wishes to thank the members of the research team working on the research project *La protección de los valores de la comunidad internacional: inmunidad, justicia e impunidad en el derecho internacional contemporáneo* (Protecting the values of the international community: immunity, justice and impunity in contemporary international law) (DER2013-45790-P): Professors Fanny Castro-Rial Garrone, Carmen Quesada Alcalá, Claribel de Castro Sánchez, Fernando Val Garijo, Teresa Marcos Martín and Nuria Pastor Palomar (National Distance Education University (UNED), Spain); and Rosario Ojinaga Ruiz, Yaelle Cacho Sanchez and José Antonio Valles Cavia (University of Cantabria, Spain). She would also like to thank Marko Sjekavica, a student at the Geneva Academy of International Humanitarian Law and Human Rights, for his collaboration.

Multilateral instruments cited in the present report

	Source
Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London, 8 August 1945)	United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid.*, vol. 78, No. 1021, p. 277.
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 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 (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.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87. See also A/CONF.67/16, p. 207.
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. 112.
Inter-American Convention to Prevent and Punish Torture (Cartagena de Indias, 9 December 1985)	OAS, *Treaty Series*, No. 67.
Inter-American Convention on Forced Disappearance of Persons (Belém, Brazil, 9 June 1994)	OAS, *Official documents*, OEA/Ser.A/55 (SEPF). See also ILM, vol. 33, No. 6 (November 1994), p. 1529.
Inter-American Convention against Corruption (Caracas, 29 March 1996)	E/1996/99.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.
Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)	*Ibid.*, vol. 2216, No. 39391, p. 225.
African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003)	ILM, vol. 43, 2004, p. 5.
United Nations Convention against Corruption (New York, 31 October 2003)	United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.
United Nations Convention on Jurisdictional Immunities of States and their Property (New York, 2 December 2004)	*Official Records of the General Assembly, Fifty-ninth session, Supplement No. 49* (A/59/49), vol. I, resolution 59/38, annex.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

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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 former Special Rapporteur, Mr. Kolodkin submitted three reports, in which he established the boundaries within which the topic should be considered and analysed, and 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 submitted a preliminary report on the immunity of State officials from foreign criminal jurisdiction.[6] 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 that remained and on which the Commission might wish to continue to work in the future.[7] The report also identified the topics which the Commission would have to consider, established the methodological bases for their study and set out a workplan for the consideration of the topic.

5. The Commission examined the preliminary report at its sixty-fourth session, held in 2012, and approved the methodological bases and workplan proposed by the Special Rapporteur.[8] The same year, the Sixth Committee, as part of its consideration of the report of the Commission during the sixty-seventh session of the General Assembly, examined the preliminary report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction and welcomed the proposals contained therein.[9]

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

[4] For the reports of the former 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.*, para. 5.

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

[9] The Sixth Committee considered the topic of "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 to 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 of the General Assembly during its sixty-seventh session (A/CN.4/657; mimeographed), paras. 26–38.

6. At the sixty-fifth session of the Commission, in 2013, the Special Rapporteur submitted a second report on the immunity of State officials from foreign criminal jurisdiction,[10] 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 arts. 1–2), definitions (draft art. 3) and the normative elements of immunity *ratione personae* (draft arts. 4–6), respectively.

7. At its 3164th to 3168th and 3170th meetings,[11] the Commission considered the second report of the Special Rapporteur and decided to refer the six draft articles to the Drafting Committee. On the basis of the report of the Drafting Committee,[12] the Commission provisionally adopted three draft articles, dealing with the scope of the draft articles (draft art. 1) and the normative elements of immunity *ratione personae* (draft arts. 3–4), 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 that 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.[13]

8. During the sixty-eighth session of the General Assembly, in 2013, the Sixth Committee 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 annual 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.[14]

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.[15] In response to that request, 10 States submitted written comments: Belgium, the Czech Republic, Germany, Ireland, Mexico, Norway, the Russian Federation, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

10. At the sixty-sixth session of the Commission, in 2014, the Special Rapporteur submitted a third report on the immunity of State officials from foreign criminal jurisdiction,[16] in which she commenced with an analysis of the normative elements of immunity *ratione materiae*, focusing on those aspects related to the subjective element. The report examined in detail the general concept of a "State official" and listed the criteria to be taken into consideration in identifying persons for inclusion in this category. It also analysed the subjective scope of immunity *ratione materiae*, determining those persons who can benefit from such immunity. Lastly, the report examined which would be the most suitable term for referring to persons who benefit from immunity, in view of the terminological issues posed by the use of the term "State official" and its equivalents in other language versions, with the Special Rapporteur proposing the use of the more general term "organ of the State". The report included two draft articles on the general concept of a "State official" for the purposes of the draft articles and the subjective scope of immunity *ratione materiae*, respectively, based on an analysis of judicial practice (national and international), relevant treaties and the previous work of the Commission relating to the topic.

11. The Commission considered the third report of the Special Rapporteur at its 3217th to 3222nd meetings[17] and decided to refer the two draft articles to the Drafting Committee. On the basis of the report of the Drafting Committee,[18] the Commission provisionally adopted the draft articles on the general concept of a "State official" (draft art. 2 (*e*)) and on "Persons enjoying immunity *ratione materiae*" (draft art. 5). The Commission also adopted the commentaries to those two draft articles.[19]

12. During the sixty-ninth session of the General Assembly, in 2014, the Sixth Committee examined the topic of immunity of State officials from foreign criminal jurisdiction as part of its consideration of the annual report of the Commission. States welcomed the third report of the Special Rapporteur and the two new draft articles provisionally adopted by the Commission. The majority of delegations were in favour of including a general definition of "State official" in the draft articles and expressed support for the definition proposed by the Commission, emphasizing the need to establish the existence of a link between the State and its officials. With regard to that definition, some States requested the Commission to clarify the scope of the phrase "who represents the State or who exercises State functions". The majority of States were in favour of taking the concept of "State official" into

[10] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661.

[11] 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.

[12] *Ibid.*, 3174th meeting.

[13] 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 Commission's discussions on the commentaries to the draft articles, see *ibid.*, vol. I, 3193rd to 3196th meetings.

[14] See *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 17th to 19th meetings (A/C.6/68/SR.17–19. The full texts of statements by delegates who participated in the debate are on file with the Codification Division. See also topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666; mimeographed), paras. 10–30.

[15] *Yearbook ... 2013*, vol. II (Part Two), para. 25.

[16] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673.

[17] For a detailed analysis of the issues raised in the discussions and the positions held by members of the Commission, see *ibid.*, vol. I, 3217th to 3222nd meetings.

[18] *Ibid.*, 3231st meeting The statement of the Chairman of the Drafting Committee is available from the website of the Commission.

[19] For the treatment of the topic by the Commission at its sixty-sixth session in 2014, see *ibid.*, vol. II (Part Two), paras. 123–132. See, in particular, the draft articles with the commentaries thereto contained in paragraph 132 of the report of the Commission. For the Commission's discussions on the commentaries to the draft articles, see *ibid.*, vol. I, 3240th to 3242nd meetings.

consideration in relation to immunity *ratione materiae*, since immunity from foreign criminal jurisdiction applies in respect of an individual (the "State official"), while they also emphasized the importance of the link between the State and the official. Furthermore, they supported the manner in which the Commission had addressed the topic and the wording of draft article 5. While some States said that the expression "acting as such" should be clarified, most welcomed it on the grounds that it clearly reinforced the functional nature of immunity. However, a small number of States expressed doubts about the advisability of taking the concept of "State official" into consideration in relation to immunity *ratione materiae*, being of the view that the definition of that category of immunity should be based solely on the nature of the acts performed and not the individual who performed them. It was generally held that future reports should address the concept of "acts performed in an official capacity" and the temporal aspect of immunity. States highlighted the significant progress made on the topic.[20]

13. In its report on the work of its sixty-sixth session, the Commission requested States to provide information, by 31 January 2015, on their domestic law and their practice, in particular judicial practice, with reference to the following issues: (*a*) 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; and (*b*) any exceptions to immunity of State officials from foreign criminal jurisdiction.[21] At the time of the present report being finalized, written replies had been received from the following States: Austria, Cuba, the Czech Republic, Finland, France, Germany, Peru, Spain, Switzerland and the United Kingdom. In addition, several States referred in their statements in the Sixth Committee to the issues raised in the request by the Commission. The Special Rapporteur wishes to thank those States for their comments, which are invaluable to the work of the Commission. She would also welcome any other comments that States may wish to submit at a later date. The comments received, as well as those submitted by States in 2014[22] and the observations contained in the oral statements made by delegates in the Sixth Committee, have been duly taken into account in the preparation of the present report.

14. Following the workplan announced at the previous session, the fourth report continues with the analysis of the normative elements of immunity *ratione materiae*, addressing the substantive and temporal aspects. As a result of this analysis, two draft articles are proposed and can be found in the relevant part of the present report. Moreover, in order to facilitate the work of the Commission, an annex has been added to the report, containing the proposed draft articles. Lastly, the Special Rapporteur wishes to point out that the present report should be read in conjunction with those submitted previously, with which it forms a whole, as well as with the draft articles provisionally adopted to date by the Commission and the commentaries thereto.

[20] See *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee,* 21st to 26th meetings (A/C.6/69/SR.21–26). See also the topical summary of the debate held in the Sixth Committee of the General Assembly at its sixty-ninth session (A/CN.4/678; mimeographed), paras. 37–51.

[21] *Yearbook ... 2014*, vol. II (Part Two), para. 28.

[22] See paragraph 9 above.

Chapter I

Immunity *ratione materiae*: normative elements (*continued*)

A. General considerations

15. As noted in the previous reports 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.[23] Moreover, the distinction between these two types of immunity of State officials from foreign criminal jurisdiction was previously considered by the Commission, as reflected in both the memorandum by the Secretariat[24] and in the preliminary report of the former Special Rapporteur, Mr. Kolodkin,[25] although in both cases the analysis was from a purely descriptive and conceptual standpoint.

16. With regard to the work of the Commission during the present quinquennium, it should be recalled that the Commission has been addressing the distinction between immunity *ratione personae* and immunity *ratione materiae* from a normative perspective since 2013, with a view to establishing a separate legal regime for each category. This does not mean, however, that the two categories of immunity do not have elements in common, especially in respect of the functional dimension of immunity in a broad sense.[26] This normative approach was reflected in the draft articles provisionally adopted by the Commission, in the commentaries thereto, and in the very structure of the draft articles as provisionally adopted thus far.[27]

[23] See *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, para. 47, *in fine*; and *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, para. 10.

[24] See "Immunity of State officials from criminal jurisdiction", memorandum by the Secretariat (A/CN.4/596 and Corr.1) (see footnote 3 above), paras. 88 *et seq.*

[25] See *ibid.*, vol. II (Part One), document A/CN.4/601, paras. 78–83.

[26] See *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, paras. 48 and 53; and *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, para. 10, *in fine*.

[27] It should be noted that the draft articles are divided into separate parts covering immunity *ratione personae* (part two) and immunity *ratione materiae* (part three) (see *Yearbook ... 2014*, vol. II (Part Two), para. 131). Furthermore, draft article 4, paragraph 3, as provisionally adopted by the Commission in 2013, is framed on the basis of that distinction, providing that "the cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*" (see the Commission's commentary to draft article 4, particularly para. (7), *Yearbook ... 2013*, vol. II (Part Two), para. 49, at pp. 47–50). In connection with this matter, see the third report of the Special Rapporteur, *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, para. 11.

17. In accordance with previous reports, 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.[28]

18. The normative elements that make up this type of immunity must be deduced from these three characteristics, namely:

(*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?[29]

19. Although the three aforementioned normative elements should be analysed together as a whole, their diversity and complexity means that they are addressed separately in the reports of the Special Rapporteur. The first element (the subjective scope) has already been discussed in the third report,[30] and the present report will analyse, in turn, the material scope (concept of an "act performed in an official capacity") and the temporal scope of immunity *ratione materiae*.

20. Lastly, it should be recalled that, as indicated in previous reports,[31] characterizing 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 this type of immunity. In particular, the Special Rapporteur wishes to emphasize that such characterization should not be read as a pronouncement on exceptions to immunity or as recognition that it is absolute or limitless in nature.

B. The concept of an "act performed in an official capacity"

1. General considerations

21. As stated in the third report, an individual may enjoy immunity from jurisdiction *ratione materiae* if, in a given case, three conditions are met: (*a*) the individual may be considered a State official; (*b*) as such, the individual performed an act in an official capacity; and (*c*) the act was carried out during the individual's term of office.[32] On the other hand, a situation may arise where, although an individual is a State official in the sense of the present draft articles and performs an act during his or her term of office, the act performed cannot be deemed to be an "act performed in an official capacity", in which case, the possibility of immunity from foreign criminal jurisdiction cannot be entertained.

22. In view of the above, it is clear that great importance must be attached to the "act performed in an official capacity" in the context of immunity *ratione materiae*, as has been emphasized by all members of the Commission and by States. Some have raised it to the level of exclusivity, taking the view that the only relevant consideration in determining the applicability of immunity *ratione materiae* is whether the act concerned is an "act performed in an official capacity", irrespective of who carried out the act. The fact that the Commission has not taken that approach[33] does not diminish the important role of the official's conduct (the "act performed in an official capacity") in the general structure of immunity *ratione materiae*. That role stems from the eminently functional nature of this type of immunity, in which the presence of the State manifests itself through two distinct but complementary connections: the connection that links the official to the State and the connection that links the State to certain acts that represent expressions of sovereignty and the exercise of functions of governmental authority.

23. Consequently, the two elements (subjective and material) are inextricably linked but constitute separate conceptual categories that must be analysed and dealt with independently of one another. The independent nature of the two elements, which was the subject of discussion at the sixty-sixth session of the Commission and which has also been raised in the Sixth Committee, was mentioned in the third report submitted by the Special Rapporteur, which states the following:

> 145. … 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

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[28] See *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, para. 50; and *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, paras. 12–13. These three elements correspond to the different definitions of immunity *ratione materiae* found in legal literature and case law, as well as in the previous work of the Commission. See *ibid.*, in particular footnotes 25 and 26 to paragraph 13 of that report.

[29] The same methodology is used for both immunity *ratione materiae* and immunity *ratione personae*, since the three elements identified as normative elements are present in both categories. See *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, para. 54; and *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, para. 13.

[30] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, in particular, paras. 18–21 and 145–151.

[31] See *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, paras. 15 and 23; and *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, para. 15.

[32] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, para. 11.

[33] See *ibid*, vol. II (Part Two), para. (3) of the commentary to draft article 5, para. 132, at p. 146.

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 … 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.[34]

24. The relationship between the concepts of "State official" and "act performed in an official capacity" was the subject of an interesting debate in the Commission at its sixty-sixth session. Some members of the Commission understood the definition of "official" proposed in draft article 2 (*e*), in particular its subparagraph (ii), to cover both the subjective and material elements of immunity *ratione materiae* from foreign criminal jurisdiction. While that issue could, in the opinion of the Special Rapporteur, have been settled by the wording of the paragraphs from the third report cited above, the Commission chose to avoid any possible confusion between the concepts of "official" and "act" by removing the reference to "acts" from article 2 (*e*) and replacing it with a reference to an "individual who represents the State or who exercises State functions". These neutral terms define the link between the official and the State without making an implicit judgment as to the type of acts covered by immunity.[35] In any case, as explicitly stated in the third report, the delimitation of such acts was left to be determined in a future study.[36] The present report fulfils that task.

25. Defining the concept and characteristics of an "act performed in an official capacity" is a matter of considerable importance for the topic of immunity of State officials from foreign criminal jurisdiction understood as a whole. However, it only has actual effects with regard to immunity *ratione materiae*, given that in the case of immunity *ratione personae* all acts performed by Heads of State, Heads of Government and Ministers for Foreign Affairs are covered by immunity, regardless of whether those acts are carried out in a private or in an official capacity. The concept of an "act performed in an official capacity" is thus a characteristic and essential element of immunity *ratione materiae* and its analysis is of crucial importance for the topic.

26. Based on these premises, the following issues will be analysed: the use of the expression "act performed in an official capacity" versus "act performed in a private capacity"; criteria for identifying an "act performed in an official capacity"; and the relationship between an "act performed in an official capacity", responsibility and immunity. The purpose of this analysis is to identify the characteristics of an "act performed in an official capacity" that can be used to formulate a proposed definition of the term.

2. "Act performed in an official capacity" versus "act performed in a private capacity"

27. At its sixty-fifth session, when it provisionally adopted draft article 4, paragraph 2, the Commission decided to use the expression "acts performed in an official capacity" in opposition to "acts performed in a private capacity" by a Head of State, Head of Government or a Minister for Foreign Affairs,[37] thus following the usage of the International Court of Justice in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case.[38] Since then, the Commission has continued to use the expression "acts performed in an official capacity" to refer to acts covered, in principle, by immunity *ratione materiae*. The same terminology will be used in the present report.

28. However, an analysis of practice, as well as of the specialized legal literature, reveals that many terms are used to refer to acts performed by an official that could give rise to immunity *ratione materiae*, for example, "official act", "act in representation of the State", "act in the name of the State", "public act", "governmental act" or even "act of State". These terms tend to be used interchangeably and could thus be considered synonymous; although it should be noted they are not all consistently used with an identical meaning. However, a detailed analysis of the various aforementioned terms is not required for the purposes of the present report, as it would be of very little relevance to the topic at hand. Moreover, the expression "act performed in an official capacity" seems to be the most commonly used term, particularly in the legal literature.

29. That said, it should be noted that the use of some of these terms in certain contexts must be analysed with extreme caution, as they may be used to refer to a phenomenon other than the one under consideration here. That is especially true of the expression "act of State", which is used in some common-law countries, particularly the United States and the United Kingdom, in the context of the "act of State doctrine". As is frequently pointed out in relevant literature, that doctrine, which is not recognized in other legal systems, does not fully coincide with the institution of jurisdictional immunity and is not based on customary international law. However, the fact that its practical effects are at times similar to those of jurisdictional immunity has led to a certain amount of confusion between the two concepts.[39]

30. It is also important to bear in mind that the distinction between "act performed in an official capacity" and "act performed in a private capacity" is not equivalent to, and should not be confused with, the distinction between *acta jure imperii* and *acta jure gestionis*, which are characteristics of State immunity. The term "act performed in an official capacity" is broader in scope than "*acta jure imperii*", as the former may cover certain *acta jure*

[34] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673. See also *ibid.*, paras. 12–13.

[35] See *ibid.*, vol. II (Part Two), p. 145, paras. (9)–(11) of the commentary to draft article 2 (*e*).

[36] *Ibid.*, vol. II (Part One), document A/CN.4/673, para. 152.

[37] See *Yearbook ... 2013*, vol. II (Part Two), pp. 47–50, commentary to draft article 4, in particular paras. (3)–(4).

[38] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3.

[39] Fox and Webb, *The Law of State Immunity*, pp. 53–72. Carnerero Castilla, *La inmunidad de jurisdicción penal de los Jefes de Estado extranjeros*, pp. 36–44.

gestionis performed by State officials in the discharge of their mandate and in exercise of State functions.

31. Furthermore, it should be noted that the distinction between "act performed in an official capacity" and "act performed in a private capacity" has no relation whatsoever to the distinction between lawful and unlawful acts. On the contrary, when used in the context of immunity of State officials from foreign criminal jurisdiction, the first two categories of acts are both considered, by definition, to be criminally unlawful. If they were not, there would be no cause for the exercise of the criminal jurisdiction of the forum State from which immunity is claimed.

32. In any case, it should be stressed that the expression "act performed in an official capacity" derives its meaning from being in opposition to "act performed in a private capacity". However, beyond this negative or exclusionary meaning, the expression "act performed in an official capacity" is somewhat ambiguous. Contemporary international law does not provide a definition of this type of act and national law is irrelevant for the purposes of this discussion, given the significant differences that may exist between the legislation of different States. Moreover, domestic legislation should not be a determining factor in defining the scope and meaning of the expression "act performed in an official capacity" for the purposes of draft articles aimed at identifying the international legal framework applicable to the immunity of State officials from foreign criminal jurisdiction; it should serve simply as a complementary interpretive tool.

33. In short, while considering "acts performed in an official capacity" in opposition to "acts performed in a private capacity" may be helpful for gaining an understanding in abstract terms of whether a certain act is covered by immunity *ratione materiae*, use of the two expressions as mutually exclusive terms is not useful for determining the scope and content of the material element of this type of immunity. To achieve that objective, it will be necessary to determine the identifying features of acts performed in an official capacity.

3. Criteria for identifying an "act performed in an official capacity"

34. In the light of the above, it is clearly important to determine the criteria for identifying an "act performed in an official capacity". In order to do so, it will be necessary to undertake an analysis of practice, following the approach and structure adopted for the analysis of the concept of a "State official" in the third report.[40] That will involve the successive analysis of judicial practice (international and national), treaty practice and the previous work of the International Law Commission that is particularly relevant to the topic.

(a) *International judicial practice*

35. The International Court of Justice, the European Court of Human Rights and the International Tribunal for the Former Yugoslavia have issued judgments which refer, in one way or another, to the concept of "acts performed in an official capacity" in the context of immunity.

36. It should be recalled that the International Court of Justice has referred to the immunity of State officials in *Arrest Warrant of 11 April 2000*[41] and *Certain Questions of Mutual Assistance in Criminal Matters*,[42] pronouncing in both cases on the nature of various acts performed by senior State officials. Furthermore, the case *Jurisdictional Immunities of the State*,[43] while referring only to the immunity of the State, also takes into consideration the concept of acts performed in an official capacity. Lastly, the case concerning *Questions relating to the Obligation to Prosecute or Extradite*[44] originated in alleged acts performed in an official capacity, although the Court did not ultimately have to pronounce on those acts.

37. In the first of the aforementioned cases, the facts giving rise to the application relate to the commission by the Minister for Foreign Affairs of the Democratic Republic of the Congo, Abdulaye Yerodia Ndombasi, of a series of acts that constituted grave breaches of the Geneva Conventions and the Additional Protocols thereto, as well as crimes against humanity. In its judgment, the Court states that Ministers for Foreign Affairs enjoy immunity from criminal jurisdiction and affirms that "the immunities … are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States".[45] Those functions are analysed in detail by the Court, which describes them as follows:

> He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for example, Article 7, paragraph 2 (*a*), of the 1969 Vienna Convention on the Law of Treaties) … it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.[46]

38. As can be seen, such activities derive from the exercise of elements of the governmental authority at the highest level; consequently, they are examples that must be taken into consideration in determining the criteria for identifying what constitutes an act performed in an official capacity. It should, however, be recalled that, in their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal questioned whether "serious international crimes [can] be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform". They

[40] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, paras. 29–110.

[41] See footnote 38 above.

[42] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177.

[43] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99.

[44] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422.

[45] *Arrest Warrant of 11 April 2000* (see footnote 38 above), paras. 51 and 53.

[46] *Ibid.*, para. 53.

added that there is an "increasing realization that State-related motives are not the proper test for determining what constitutes public State acts".[47]

39. The second of the cases brought before the International Court of Justice originated in various judicial proceedings opened in France as a result of the death in unexplained circumstances of Bernard Borrel, a French judge who had been seconded to the Ministry of Justice of Djibouti. In the context of those proceedings, investigations were opened which, based on statements by two Djibouti officials, provided circumstantial evidence that Ismaïl Omar Guelleh, President of Djibouti at the time the investigations were opened, was implicated in Mr. Borrel's death. On that basis, a witness summons was issued requesting his testimony in the case. Two other senior officials of Djibouti, Djama Souleiman Ali (*procureur de la République* [State Prosecutor]) and Hassan Said Khaireh (Head of National Security) were called to testify as *témoins assistés* (legally assisted witnesses) and the French courts issued a European arrest warrant against them; they were both eventually accused and found guilty of intimidating witnesses. The two aforementioned cases are of particular interest for the purposes of the present report. The Court did not rule on whether those two senior officials benefited from immunity *ratione materiae*; however, in analysing such a possibility it made statements that are of relevance for defining the concept of an "act performed in an official capacity". In particular, it expressly referred to the requirement that, in order to be characterized as acts performed in an official capacity, it was necessary that the acts imputed to them "were indeed acts within the scope of [the] duties [of those officials] as organs of State".[48] Furthermore, by stating 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",[49] the Court implicitly referred to the attribution of the act to the State as a requirement for determining the possibility of immunity.

40. In *Jurisdictional Immunities of the State*, the case is based on acts of murder, confinement and denial of prisoner-of-war status committed by the armed forces and other organs of the German Third Reich during the Second World War, in both Italy and Greece, against persons who held Italian or Greek nationality. Although the Court does not rule on the immunity of German officials but rather on the immunity of Germany, it refers to the said acts in its judgment, concluding that they must be regarded as *acta jure imperii*, which entail the exercise of sovereign power, and that they are therefore covered by the immunity from jurisdiction of the State.[50] To reach that conclusion, it carried out an analysis of the distinction between *acta jure imperii* and *acta jure gestionis*, which, although not relevant for the purposes of the topic, nonetheless contains arguments that can be used to identify some characteristics of acts performed in an official capacity. For example, it states as follows:

> The Court considers that the terms "*jure imperii*" and "*jure gestionis*" do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*).[51]

41. The aforementioned acts were also characterized as "sovereign acts" by Judge Koroma[52] and Judge *ad hoc* Gaja.[53] On the other hand, Judge Cançado Trindade concluded in his dissenting opinion that sovereignty cannot be invoked in reference to conduct constituting international crimes, stating that "international crimes are not acts of State, nor are they "private acts" either; a crime is a crime, irrespective of who committed it".[54]

42. Lastly, the case *Questions relating to the Obligation to Prosecute or Extradite* originated in the acts of extermination, torture, persecution and enforced disappearances allegedly committed by Hissène Habré during his term as President of Chad. However, the Court did not rule on the nature of those acts and the possibility that they might be covered by immunity; it merely retained the arguments put forward by the parties in the domestic proceedings followed in Belgium and Senegal.[55]

43. With reference to the contribution of the European Court of Human Rights to the topic under consideration in the present report, it should first of all be noted that judgments of the European Court do not, as a general rule, refer to the immunity of State officials from foreign criminal jurisdiction but to the State's immunity from civil jurisdiction;[56] the Court pronounces in all cases on the compatibility of such immunity from civil jurisdiction with the right to fair trial recognized in article 6 of

[47] *Ibid.*, joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 85.

[48] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 42 above), para. 191.

[49] *Ibid.*, para. 196.

[50] *Jurisdictional Immunities of the State* (see footnote 43 above), paras. 60–61.

[51] *Ibid.*, para. 60.

[52] *Ibid.*, separate opinion of Judge Koroma, para. 4: "a decision to deploy a nation's armed forces in an armed conflict is quintessentially a sovereign act".

[53] *Ibid.*, dissenting opinion of Judge *ad hoc* Gaja, para. 5. Judge Gaja states that, in order for an activity to be described as *jure imperii*, it must "[occur] in the exercise of a sovereign power by the … State". It should also be borne in mind that Judge *ad hoc* Gaja introduces an interesting nuance by citing a commentary that indicates that the distinction between *acta jure imperii* and *acta jure gestionis* assumes no relevance in respect of claims relating to intentional bodily harm or similar (*ibid.*, para. 5); he concludes that "even if immunity covered in general claims regarding damages caused by military activities in the territory of the forum State, it would not extend to claims relating to massacres of civilians or torture in the same territory" (para. 10).

[54] *Ibid.*, dissenting opinion of Judge Cançado Trindade, para. 181. See, in general, *ibid.*, paras. 178 *et seq.*

[55] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 44 above), paras. 20 and 22.

[56] 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* [GC], 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 Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić). This distinction was again highlighted by the Court 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 in the same case. The Government of the United Kingdom, however, accepted the distinction (see para. 179 of the judgment).

the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). It is, however, also true that, in its judgments, the European Court has addressed specific acts performed by State officials, and for that reason the pronouncements of the said Court could be useful for determining the characteristics of "acts performed in an official capacity".

44. In *McElhinney*, the case brought before the European Court of Human Rights originated in events that took place as a result of the conduct of an Irish citizen when passing a checkpoint at the border between Northern Ireland and the Republic of Ireland, followed by the pursuit by a British soldier of the said citizen, by then on Irish territory, in the course of which, according to the applicant, he was subject to ill-treatment, attacks against his physical integrity and a failure by the British soldier to perform his duties correctly. Notwithstanding other interesting arguments contained in that judgment regarding immunity from foreign criminal jurisdiction, it is worth highlighting here that, in the opinion of the European Court, "the acts of a soldier on foreign territory" are closely related to "the core area of State sovereignty … which, of their very nature may involve … issues affecting diplomatic relations between States and national security". As a result, it characterized the acts complained of before the Court as *acta jure imperii*, which are acts of the State and are covered by immunity.[57]

45. In the case of *Al-Adsani*, 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 brother of the Emir of Kuwait, to which the applicant had been transported in government vehicles. Although the Court did not rule on the possible immunity of the persons who committed the acts of torture because the British courts 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,[58] it did implicitly evaluate the nature of the acts in question. In that regard, it concluded that such acts constituted torture, which is prohibited by *jus cogens*;[59] nonetheless, it stated that it was not possible to identify in the international law applicable at that date any exception that would deprive States of immunity from civil suit in relation to such acts.[60] While it is true that the Court did not expressly describe the acts of torture as acts of State or acts performed in an official capacity, it is also true that the aforementioned argument is equivalent to recognizing torture as an act attributable to the State, which, *prima facie*, may therefore be regarded as an act performed in an official capacity by the perpetrators.

46. In the case of *Jones and Others*, the European Court of Human Rights had to rule on immunity in relation to acts of torture committed by Saudi Arabian officials against the applicants during their detention in Saudi Arabia.[61] As already mentioned in the third report, the judgment in that case is of great interest from various perspectives and should be subject to continued analysis in the work of the Commission.[62] With regard to the concept of an "act performed in an official capacity", the following statements by the Court are noteworthy: "State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State";[63] and "individuals only benefit from State immunity *ratione materiae* where the impugned acts were carried out in the course of their official duties".[64] Furthermore, the Court refers to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stating that

> the Convention against Torture defines torture as an act inflicted by a "public official or other person acting in an official capacity". This definition appears to lend support to the argument that acts of torture can be committed in an "official capacity" for the purposes of State immunity.[65]

As a result, it seems that these acts, at least *prima facie*, can be characterized as acts performed in an official capacity.

47. In analysing the case law of the European Court of Human Rights, it is useful to refer lastly to a recent judgment issued by that Court which, although it relates to immunities governed by domestic law, contains elements that could be of interest for the purposes of defining the characteristics of an act performed in an official capacity. The judgment in question is the one handed down in the case of *Urechean and Pavlicenco*,[66] which refers to public statements made in 2004 and 2007 by the President of the Republic of Moldova, accusing the applicants, respectively, of having created a mafia-style system of corruption and of having been linked with the Committee of State Security (KGB). The defamation or libel actions brought by the individuals concerned before the Moldovan courts were struck out, as those courts considered that the public statements had been made by the President in the exercise of his official duties and were therefore covered by immunity. For their part, the applicants argued that the defamatory statements of the President had not been made in his capacity as President but outside it, in his capacity as leader of his party. Although the Court considered that, in abstract terms, statements by a Head of State could be covered by immunity and did not conclude whether the

[57] See case of *McElhinney v. Ireland* [GC], No. 31253/96, ECHR 2001-XI (extracts), in particular the summary of the judgment, p. 40, and para. 38.

[58] See *Al-Adsani* (see footnote 56 above), paras. 14–15.

[59] *Ibid.*, paras. 58 and 61.

[60] *Ibid.*, para. 66.

[61] *Jones and Others* (see footnote 56 above). It should be borne in mind that a particular feature of the case is that the judicial acts complained of before the European Court of Human Rights did not refer, at their origin, to the immunity of the State but to the immunity from jurisdiction of Saudi Arabian officials against whom proceedings had been brought individually. It should also be added that the British courts undertook lengthy proceedings, in the course of which their position concerning the question of the immunity from civil jurisdiction of the aforementioned officials for the alleged commission of acts of torture was subject to successive appeals and changes in substantive pronouncements.

[62] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, paras. 45 *et seq.*

[63] *Jones and Others* (see footnote 56 above), para. 204.

[64] *Ibid.*, para. 205.

[65] *Ibid.*, para. 206.

[66] *Urechean and Pavlicenco v. the Republic of Moldova*, Nos. 27756/05 and 41219/07, 2 December 2014.

statements in the case in question were official or private acts, it did highlight the requirement for the domestic courts to establish whether the impugned statements were made in the exercise of official duties or not, particularly bearing in mind that the immunity accorded to the President of the Republic of Moldova for acts performed in exercise of his official duties are perpetual and do not end when he leaves office. From that perspective, the Court has begun an important debate on the need to establish whether an act is official or private, including with regard to acts that, *ab initio*, have a clear appearance of being official. That debate should also be taken into account for the purposes of the present report.

48. To conclude the present section, attention should be drawn to the judgment of 29 October 1997 handed down by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the case *Blaškić*, which is frequently cited in connection with immunity *ratione materiae*.[67] That judgment originated in the request of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, by means of which a Croatian official was ordered to appear before the Tribunal and produce certain official documents for its use (subpoena). The Appeals Chamber concluded that the subpoenaed official had acted in exercise of an official function of the State and that his acts were not attributable to him personally but to the State (acts performed in an official capacity);[68] thus, they did not fall within the category of acts performed by "individuals acting in their private capacity" (acts performed in a private capacity).[69]

(b) *National judicial practice*

49. The practice of national courts is particularly significant for defining the concept of an "act performed in an official capacity", as national courts are the judicial bodies that must decide cases that may be affected by the immunity of State officials from foreign criminal jurisdiction. These courts thus rule on the acts which, from the perspective of immunity *ratione materiae*, may be covered by immunity. Such practice will be discussed in the following pages, employing the same methodology as in the third report, by examining the outcomes of both criminal proceedings and civil cases dealing with issues relevant to the identification of the essential characteristics of "acts performed in an official capacity". The goal of such analysis is twofold. First, the aim is to identify forms of conduct that, in practice, have been subject to claims of immunity and therefore could be regarded *prima facie* as "acts performed in an official capacity". Second, the analysis seeks to identify elements common to such forms of conduct that could be regarded as criteria for identifying acts performed in an official capacity.

50. With respect to criminal proceedings, it is, first, worth noting that immunity has been invoked for only a few types of criminal conduct. In many cases, such conduct consists of crimes under international law, including torture, mass killings, genocide, extrajudicial executions, enforced disappearances, forced pregnancy, deportation, denial of prisoner-of-war status, enslavement and forced labour, and acts of terrorism.[70] Those crimes are sometimes mentioned *eo nomine*, while in other cases the proceedings refer generically to crimes against humanity, war crimes and serious and systematic human rights violations.[71] Second, the courts have been seized of other acts committed by members of the armed forces or security services that do not fall into the aforementioned categories; such acts include ill-treatment, abuse, illegal detention, abduction, offences against the administration of justice and other acts relating to policing and law enforcement.[72] Last, claims of immunity have been made in relation to the diversion and illegal appropriation of public funds, money-laundering and other acts linked to corruption, as well as drug trafficking.[73] With regard to civil proceedings, it should be

[67] *Prosecutor v. Tihomir Blaškić*, case No. IT-95-14-AR 108, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, Judgment, Appeals Chamber, International Tribunal for the Former Yugoslavia, 29 October 1997, ILR, vol. 110, p. 688; www.icty.org.

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

[69] *Ibid*., para. 49.

[70] Netherlands, *In re Rauter*, Special Court of Cassation, judgment of 12 January 1949, ILR, vol. 16, p. 526, at p. 553 (crimes committed by German occupation forces in Denmark); Israel, *Attorney General of Israel v. Adolf Eichmann* case, District Court of Jerusalem (case No. 40/61), judgment of 12 December 1961, and Appeals Tribunal, judgment of 29 May 1962, ILR, vol. 36, pp. 18 and 277 (crimes committed during the Second World War, including war crimes, crimes against humanity and genocide); Italy, *Yasser Arafat (Carnevale re. Valente—Imp. Arafat e Salah)* case, Court of Cassation, judgment of 28 June 1985, *Rivista di diritto internazionale,* vol. 69 (1986) (sale of weapons and collaboration with the Red Brigades on acts of terrorism); New Zealand, *R. v. Mafart and Prieur (Rainbow Warrior* case), High Court, Auckland Registry, 22 November 1985, ILR, vol. 74, p. 241 (acts carried out by members of the French armed forces and security forces to mine the ship *Rainbow Warrior*, which led to the sinking of the ship and the death of several people; these were described as terrorist acts); Germany, *Former Syrian Ambassador to the German Democratic Republic* case, Federal Supreme Court of Germany, Federal Constitutional Court of Germany, judgment of 10 June 1997, ILR, vol. 115, p. 595 (the case examined legal action against a former ambassador who allegedly stored, in diplomatic premises, weapons that were later used to commit terrorist acts); Netherlands, *Bouterse* case, R 97/163/12 Sv and R 97/176/12 Sv, Court of Appeal of Amsterdam, 2000, *Yearbook of International Humanitarian Law*, vol. 3 (2000), p. 682 (torture, crimes against humanity); France, *Gaddafi* case, Court of Appeal of Paris, judgment of 20 October 2000 and Court of Cassation, judgment of 13 March 2001, ILR, vol. 125, pp. 490 and 508 (the ordering of the downing of a plane using explosives, which caused the death of 170 people, considered as terrorism); Senegal, *Prosecutor v. Hissène Habré* case, Court of Appeal of Dakar, judgment of 4 July 2000, and Court of Cassation, judgment of 20 March 2001, ILR, vol. 125, pp. 571 and 577 (acts of torture and crimes against humanity); Belgium, *Sharon and Yaron*, Court of Appeal of Brussels, judgment of 26 June 2002, ILR, vol. 127, p. 110 (war crimes, crimes against humanity and genocide); Switzerland, *A. v. Office of the Public Prosecutor of the Confederation* (*Nezzar* case), Federal Criminal Court of Switzerland (case No. BB.2011.140), judgment of 25 July 2012 (torture and other crimes against humanity).

[71] United States, *In re Doe*, 860 *Federal Reporter* 2d 40 (Second Circuit, 1988) (human rights violations committed against Falun Gong members).

[72] Federal Republic of Germany, *Border Guards*, Federal Criminal Court of Germany, decision of 3 November 1992 (case No. 5 StR 370/92), ILR, vol. 100, p. 364 (death of a young German, as a result of shots fired by border guards of the German Democratic Republic, when he attempted to traverse the so-called Berlin Wall); Ireland, *Norbert 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 (irregular circumstances during the detention of the plaintiff by State officials); United Kingdom, *Khurts Bat v. Federal Court of Germany*, [2011] EWHC 2029 (Admin.) (kidnapping and illegal detention).

[73] United States, *United States v. Noriega*, United States Court of Appeals, Eleventh Circuit, judgment of 7 July 1997 (international drug trafficking to the United States when Noriega was Commander of the Armed Forces of Panama); France, Court of Appeal of Paris, judgments of 13 June 2013 and 16 April 2015.

noted that, in most cases, immunity has been invoked in connection with claims for damages in respect of some of the aforementioned offences,[74] although in some cases the claim of immunity from civil jurisdiction has also been extended to conduct that is not criminal in nature, such as the non-payment of debts, the nonfulfilment of personal obligations and personal injuries resulting from accidents.[75] In all cases, the issue of immunity has been linked to the actual or alleged status of the respondent or defendant as a State official.[76]

51. The responses of national courts to the question of immunity have varied; it cannot be concluded from the judicial decisions analysed that a consistent pattern has been uniformly followed. On the contrary, such decisions are based on different legal approaches and reasoning, in which national courts have taken into account the defendant's status as a State official, the nature of the acts for which immunity is invoked and, in some cases, the position taken by the government authorities of the forum State or the official's State.

52. With regard to cases in which national courts have granted immunity *ratione materiae*, the majority of judicial decisions have been based on the status of the official and the attribution to the State of the act carried out by that official. In that regard, it is useful to reproduce what the Special Rapporteur stated in her third report:[77]

> 34. … 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".[78] 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".[79] 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".[80] 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

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[74] United States, *Republic of the Philippines v. Marcos and others*, United States Court of Appeals, Second Circuit, judgment of 26 November 1986, 806 *Federal Reporter* 2d 344 (use of power to appropriate large sums of money belonging to the Government and the people of the Philippines); United States, *Saltany v. Reagan and others*, District Court for the District of Columbia, judgment of 23 December 1988, 702 *Federal Supp.* 319 (bombing by the United States air force of targets in Libya which caused death, personal injuries and damage to property; the British authorities allowed the use of bases in its territory for the bombing, for which they were also prosecuted); United States, *Herbage v. Meese*, District Court, District of Columbia, Judgment of 20 September 1990, 747 *Federal Supp.* 60 (DDC 1990), ILR, vol. 98, p. 101 (extradition of a British citizen to the United States; the plaintiff claimed that illegal acts had been committed by the State officials that carried out the extradition); United States, *Hilao, et al. v. Marcos*, United States Court of Appeals, Ninth Circuit, judgment of 16 June 1994, 25 *Federal Reporter* 3d 1467 (torture, summary executions and disappearances committed by intelligence agents in fulfilment of martial law declared by President Marcos in 1971); United States, *Lafontant v. Aristide*, United States District Court, Eastern District of New York, judgment of 27 January 1994, 844 *Federal Supp.* 128 (charge of extrajudicial killing of a Haitian national by security forces acting under orders from President Aristide); Ireland, *McElhinney v. Williams*, Supreme Court, 15 December 1995, ILR, vol. 104, p. 691 (persecution, detention and ill-treatment, by a British soldier, of an Irish citizen while he was crossing the border between Northern Ireland and the Republic of Ireland); United States, *Kadic v. Karadzic*, United States Court of Appeals, Second Circuit, judgment of 13 October 1995, 70 *Federal Reporter* 3d 232 (kidnapping, forced prostitution, forced pregnancies, torture and summary executions committed during the civil war in Bosnia as part of a genocide campaign, in line with a pattern of systematic human rights violations); Greece, *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadia, judgment of 30 October 1997 (crimes committed by German occupation forces against civilians and their property in the town of Distomo, Voiotia, during the Second World War); Canada, *Jaffe v. Miller and others*, Court of Appeal for Ontario, judgment of 17 June 1993, ILR, vol. 95, p. 446 (kidnapping in Canada and transfer to Florida by United States government officials after a failed attempt to extradite the plaintiff); United States, *A, B, C, D, E, F v. Jiang Zemin*, District Court, Northern District of Illinois, 21 October 2002 (torture, genocide and violation of the right to life, liberty and the security of the person, and freedom of thought, conscience and religion, committed against Falun Gong members: the United States courts did not issue a decision, as the persons concerned accepted the immunity suggested by the State Department; Italy, *Ferrini v. Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 658 (deportation to Germany of an Italian citizen who was subjected to forced labour and denied prisoner-of-war status); Canada, *Bouzari et al. v. Islamic Republic of Iran; Attorney-General of Canada et al, intervenors*, Court of Appeal for Ontario, judgment of 30 June 2004, CanLII 871, 71 OR (3d) 675 (Ontario Reports, 3rd Series) (kidnapping, illegal detention, torture and death threats); 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 *Federal Reporter* 3d 1279) (deaths and injury of persons who were in the United Nations compound during the shelling of Qana in 1996).

[75] France, *Mellerio* v. *Isabelle de Bourbon, ex-Reine d'Espagne*, Court of Appeal of Paris, judgment of 3 June 1872, *Recueil général des lois et des arrêts: 1872*, part II, p. 293 (non-payment of jewels acquired by the respondent); France, *Seyyid Ali Ben Hamond, Prince Rashid v. Wiercinski*, Seine Civil Court, judgment of 25 July 1916, *Revue de droit international privé et de droit pénal international*, vol. 15, 1919, p. 505. (non-payment of debts incurred with a masseuse); France, *Ex-roi d'Egypte Farouk c. s.a.r.l. Christian Dior*, Court of Appeal of Paris, judgment of 11 April 1957, *Journal du droit international* 84, No. 1 (1957), pp. 716–718 (non-payment of suits acquired by the former King Farouk); France, *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, judgment of 28 April 1961, ILR, vol. 47, pp. 275–277 (rental of housing in an individual capacity); United States, *Chuidian v. Philippine National Bank and Another*, United States Court of Appeals, Ninth Circuit, judgment of 29 August 1990, 912 *Federal Reporter* 2d 1095 (the contested act is the non-payment of a debt incurred with the plaintiff, payment having been prevented as a result of an order issued by the Commission on Good Government created by the Government of the Philippines after the mandate of President Marcos ended); United States, *Jungquist v. Sheik Sultan Bin Khalifa al Nahyan*, United States District Court, District of Columbia, judgment of 20 September 1996, 940 *Federal Supp.* 312 (1996) (brain damage suffered by the daughter of the plaintiffs during a private outing, to which the defendant had invited her, and non-payment of medical expenses he had committed to paying).

[76] The various categories of State officials against whom proceedings have been brought in foreign courts, whether civil or criminal, were analysed in the third report of the Special Rapporteur. See *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673, paras. 31–33.

[77] See *ibid.*, paras. 34–35. The footnotes in the original text have been retained, although they have been renumbered and streamlined in the present report.

[78] United Kingdom, *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, House of Lords, judgment of 14 June 2006 (Jones No. 2), [2006] (Lord Bingham of Cornhill, paras. 11 and 13).

[79] Federal Republic of Germany, *Church of Scientology*, Federal Supreme Court, judgment of 26 September 1978, ILR, vol. 65, p. 193.

[80] Ireland, *Schmidt v. Home Secretary of the Government of the United Kingdom* (see footnote 72 above).

the control of the State of Malta".[81] 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".[82]

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"[83] and "as an agent or instrumentality of the state".[84] 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".[85]

53. In some cases, the courts did not only base their decision on the fact that the acts were carried out on behalf of the State but also ruled on the nature of the acts, emphasizing that they were carried out in the exercise of governmental authority or were sovereign acts, and noting that they constituted a performance of public functions.[86] In that regard, a United States court ruled that the civilian and military officials involved in the planning and execution of a bombing in Libya acted in their official capacities and upon the orders of the Commander in Chief (President Reagan) and therefore enjoyed immunity.[87] In a case before the Swiss courts, it was decided that immunity *ratione materiae* could be awarded only in respect of "acts performed in the exercise of official duties".[88]

54. In a few cases, national courts have ruled on the meaning of "sovereign activity of the State" and have even connected it to the concept of *acta jure imperii*. In one case in Germany, the Federal Supreme Court concluded that "under German public law the exercise of police power unquestionably formed part of the sovereign activity of the State and was to be termed an act *iure imperii*. The exercise of such power could not therefore be excluded from immunity".[89] In another case, the German Constitutional Court identified as acts that fall under the "sphere of State authority" transactions relating to foreign affairs and military authority, the legislature, the exercise of police authority and the administration of justice.[90] In a similar vein, a United States court included among "strictly political or public acts" internal administrative acts, such as expulsion of an alien; legislative acts, such as nationalization; acts concerning the armed forces; acts concerning diplomatic activity; and public loans.[91] For their part, the French courts have defined as unequivocal acts of sovereignty acts in the service of the administration of justice,[92] as well as certain administrative acts associated with the flagging of a vessel.[93] Other courts have defined as acts that imply the exercise of sovereignty those relating to Israeli policies on settlements in the occupied territories,[94] the expulsion of aliens,[95] the confiscation of property by police forces,[96] the issuance of reports on the activity of staff serving at a military base

[81] France, *Agent judiciaire du trésor v. Malta Maritime Authority et Carmel X*, Court of Cassation, Criminal Chamber, judgment of 23 November 2004, *Bulletin des arrêts de la chambre criminelle*, No. 292 (2004), p. 1096.

[82] France, *Association des familles des victimes du Joola*, Court of Cassation, Criminal Chamber, judgment of 19 January 2010, *Bulletin des arrêts de la chambre criminelle*, No. I (2010), p. 41, case No. 9.

[83] 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 *Federal Supp.* 2d 284).

[84] United States, *Ali Saadallah Belhas et al. v. Moshe Ya'alon* (see footnote 74 above).

[85] United States: *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court, New York County, judgment of 31 October 1988, 141 *New York Miscellaneous Reports* 2d 787; *Chuidian v. Philippine National Bank and Another*, United States Court of Appeals, Ninth Circuit, judgment of 29 August 1990 (see footnote 75 above); *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 *Federal Reporter* 3d 1467; *Teresa Xuncax, Juan Diego-Francisco, Juan Doe, Elizabet Pedro-Pascual, Margarita Francisco-Marcos, Francisco Manuel-Méndez, Juan Ruiz Gómez, Miguel Ruiz Gómez and José Alfredo Callejas v. Héctor Gramajo and Diana Ortiz v. Héctor Gramajo*, United States District Court, District of Massachusetts, judgment of 12 April 1995, 886 *Federal Supp.* 162; and *Bawol Cabiri v. Baffour Assasie-Gyimah*, United States District Court, Southern District of New York, judgment of 18 April 1996, 921 *Federal Supp.* 1189.

[86] In this respect, in the *Gaddafi* case (see footnote 70 above), the Court of Appeal of Paris referred in its judgment of 20 October 2000 to "acts of governmental authority or public administration" and concluded that the charges constituted international crimes and therefore did not fall under the category of "functions of a head of State". On the basis of that argument, it concluded that such acts constituted an exception to immunity. Subsequently, in its judgment of 13 March 2001, the Court of Cassation granted immunity on the basis of its decision that the exception that had been invoked did not exist. However, it remained silent with regard to the Court of Appeal's previous characterization of the acts. In the case concerning the ship *Erika* and the Malta Maritime Authority (*Agent judiciaire de trésor*, footnote 81 above), the term "act of governmental authority" and "acts based on State sovereignty" are used and contrasted with simple "acts of management" (included as examples of the exercise of State functions are the attribution of a flag to a ship and the issuance and maintenance of a navigation licence—which are all administrative acts of the State—as well as the obligation to monitor vessels flying the national flag of the State).

[87] United States, *Saltany v. Reagan et al.* (see footnote 74 above).

[88] The Swiss Federal Criminal Court uses the term "acts performed in the exercise of official duties" in the *Nezzar* case (see footnote 70 above).

[89] Federal Republic of Germany, *Church of Scientology* (see footnote 79 above). In the case *Propend Finance Pty Ltd. v. Sing* et al. (United Kingdom, England, Court of Appeal, 1997, ILR, vol. 111, p. 611), the court made a similar ruling, affirming that the conduct of police functions was essentially a form of exercise of governmental activity. A United States court also concluded that police activities are official acts, however monstrous they may be, see *Saudi Arabia v. Nelson*, United States Supreme Court, 23 March 1993, ILR, vol. 100, p. 544.

[90] Federal Republic of Germany, *Empire of Iran*, German Federal Constitutional Court, 30 April 1963, ILR, vol. 45, p. 57. The activities of a member of the armed forces were also defined as an official act in *Lozano v. Italy* (Italy, case No. 31171/2008, *Oxford Reports on International Law in Domestic Courts*, vol. 1085 (IT 2008)), judgment of 24 July 2008.

[91] United States, *Victory v. Comisaria*, 336 *Federal Reporter* 2d 354 (Second Circuit, 1964); see also ILR, vol. 35, p. 110.

[92] France, *Ms Lydienne X.*, case No. 12-81.676, Court of Cassation, Criminal Chamber, judgment of 19 March 2013, *Bulletin des arrêts de la chambre criminelle*, No. 3 (2013) and *Mr. Michel X*, case No. 13-80.158, Court of Cassation, Criminal Chamber, judgment of 17 June 2014, available from www.legifrance.gouv.fr. The Swiss courts made a similar ruling in *A v. B* (Switzerland, Federal Court, 2003, case ATF 130 III 136), which concerns an international detention order issued by a Spanish judge.

[93] France, *Malta Maritime Authority* (see footnote 81 above).

[94] United States, *Doe I v. Israel*, 400 *Federal Supp.* 2d 86, 106 (DDC 2005).

[95] United States, *Rukmini S. Kline v. Yasuyuki Kaneko*, United States District Court, Southern District of New York, 3 May 1988, 685 *Federal Supp.* 386 (SDNY 1988); see also ILR, vol. 101, p. 497.

[96] United States, *First Merchants v. Argentina*, United States District Court, Southern District of Florida, 31 January 2002, 190 *Federal Supp.* 2d 1336 (SD Fla. 2002).

abroad[97] and even the hiring of thugs to intimidate members of a certain religious group.[98]

55. In a number of cases, *a contrario sensu*, national courts have concluded that the act in question exceeded the limits of official functions, or functions of the State, and was therefore not covered by immunity. For example, courts have concluded that the assassination of a political opponent[99] or acts linked to drug trafficking[100] do not constitute official acts. More generally, a court of the United States concluded that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do". According to that court, the "FSIA [Foreign Sovereign Immunity Act] does not immunize the illegal conduct of government officials" and thus, "an official acting under colour of authority, but not within an official mandate, can violate international law and not be entitled to immunity under FSIA".[101] Another United States court concluded even more explicitly that *ultra vires* acts are not subject to sovereign immunity, as the perpetrators acted beyond their authority by violating the human rights of the plaintiffs. If officials commit acts that are not officially sanctioned by the State, that is, if they are not "officials acting in an official capacity for acts within the scope of their authority", they cannot benefit from immunity.[102] In any case, such *ultra vires* acts should be differentiated from unlawful acts; several courts have concluded that unlawful acts are not exempt from immunity simply because they are unlawful,[103] even in cases when the act is contrary to international law.[104]

56. However, it should be noted that the arguments referred to in the preceding paragraphs have not always been applied uniformly in relation to a single category of criminal acts. On the contrary, immunity *ratione materiae* has on some occasions been recognized for a given offence while, on other occasions, the courts have decided that the same offence does not meet the requirements to be covered by immunity. Moreover, in some cases this has occurred in decisions rendered by courts of the same State. The prime example of this divergence in jurisprudence is the response of the British courts in respect of torture. The House of Lords, in *Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3) (Pinochet No. 3)*, stated that the former President of Chile could not benefit from immunity *ratione materiae* because it considered that the Convention against Torture imposed on States parties the obligation to prosecute acts of torture, and that, consequently, it was not possible to apply any type of immunity to such acts.[105] However, that did not constitute a definitive court ruling on the nature of torture as an "act performed in an official capacity", since out of the seven Law Lords, only two concluded that it did not constitute an official act, while the others believed that the acts with which General Pinochet had been charged bore some form of official status, although four of those concluded that they were nevertheless criminal acts.[106] The same House of Lords, in *Jones v. Saudi Arabia*, recognized the immunity *ratione materiae* of several Saudi citizens on the grounds that the conduct of all of the defendants was in discharge or purported discharge of their duties as servants or agents of Saudi Arabia and that, therefore, all acts performed by them, including torture, were attributable to that State and were covered by immunity.[107] Lastly, the recent decision taken in *FF v. Director of Public Prosecutions* (*Prince Nasser* case), a British court, applying the same doctrine as in *Pinochet No. 3*, concluded that Prince Nasser bin Hamad Al Khalifa, son of the King of Bahrain and Commander of the Royal Guard, did not benefit from immunity *ratione materiae* in respect of the crime of torture.[108] The British courts appear to have decided the cases under question differently in view of the criminal nature of the proceedings in the *Pinochet* and *Prince Nasser* cases and the civil nature of the proceedings in the *Jones v. Saudi Arabia* case.

57. These cases highlight the particular problem surrounding torture, which has also been raised before other courts. In a case brought before the Belgian courts, torture was defined as an act that cannot be regarded as falling within the normal exercise of the functions of a Head of State, one of whose tasks is specifically to ensure the protection of his fellow citizens.[109] A Dutch court expressed a similar opinion.[110] The aforementioned divergence

[97] United Kingdom, *Holland v. Lampen-Wolfe*, House of Lords, 20 July 2000), [2000], ILR, vol. 119, p. 367.

[98] United States, *Youming Jin et al. v. Ministry of State Security*, United States District Court, District of Columbia, 3 June 2008, 557 *Federal Supp.* 2d 131.

[99] United States, *Letelier v. Chile*, United States Court of Appeals, Second Circuit, 20 November 1984, 748 *Federal Reporter* 2d 790; see also ILR, vol. 79, p. 561.

[100] United States: *Jimenez v. Aristeguieta*, Court of Appeals, Fifth Circuit, 1962, 311 *Federal Reporter* 2d 547, see also ILR, vol. 32, p. 353; *United States v. Noriega* (see footnote 73 above).

[101] United States, *Hilao, et al. v. Marcos* (see footnote 74 above). In the Court's view, acts of torture, execution and disappearances were actions performed by Marcos and were not taken within any official mandate; they could not be regarded as the acts of an agency or instrumentality of a foreign State.

[102] United States, *Jane Doe I,* et al. *v. Liu Qi*, et al.*, Plaintiff A*., et al. v. *Xia Deren* et. al., United States District Court, Northern District of California, Judgment of 8 December 2004 (C-02-0672 CW, C-02-0695 CW), 349 *Federal Supp.* 2d 1258.

[103] Canada, *Jaffe v. Miller and others* (see footnote 74 above); United States. *Republic of Argentina v. Amerada Hess,* United States Supreme Court, 23 January 1989, 488 U.S. 248 (1989), see also ILR, vol. 81, p. 658; Ireland, *McElhinney v. Williams* (see footnote 74 above).

[104] United Kingdom, *I Congreso del Partido* case, England, 1981, [1983] 1 AC 244; see also ILR, vol. 64, p. 307. In *Jones v. Saudi Arabia* (see footnote 78 above), Lord Hoffman rejected the argument that an act contrary to *jus cogens* could not be an official act.

[105] United Kingdom, *Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)*, UKHL 17, [2000] 1 A.C. 147. The decision was taken by six votes to one; only Lord Goff believed that they were official acts that benefited from immunity.

[106] Only Lord Browne-Wilkinson and Lord Hutton stated that torture cannot be "a public function" or "a governmental function". Lord Goff, dissenting, concluded that it was a "governmental function", while similar statements were expressed by Lord Hope ("criminal yet governmental"), Lord Saville (who referred to "official torture"), Lord Millett ("public and official acts") and Lord Phillips ("criminal and official").

[107] United Kingdom, *Jones v. Saudi Arabia* (see footnote 78 above).

[108] United Kingdom, *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014, [2014] EWHC 3419 (Admin.). The significance of this ruling is the fact that it was issued as a "consent order", that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter accepted that the charges of torture against Prince Nasser were not covered by immunity *ratione materiae*.

[109] Belgium, *Pinochet*, Examining Magistrate of Brussels, Order of 6 November 1998, *Journal des Tribunaux*, No. 118 (1999), p. 308.

[110] Netherlands, *Bouterse* (see footnote 70 above).

regarding the categorization of certain forms of conduct as acts performed in an official capacity has generally arisen with respect to international crimes. In a number of cases, courts have considered that crimes under international law are not part of the functions of the State and, consequently, they have not recognized immunity. In other cases, however, courts have considered that these are acts clearly exercised in an official capacity, even if they are illegal and abusive, and have therefore granted immunity. A Greek court found that crimes committed by armed forces are acts attributable to the State for the purposes of international responsibility, but cannot be considered as sovereign acts for the purposes of State immunity.[111] It should also be noted that, in some cases, courts have referred to crimes under international law as exceptions to immunity, based on various arguments.[112]

58. Nonetheless, it is worth highlighting that, in general, national courts have denied immunity in cases linked to corruption, whether in the form of diversion or misappropriation of public funds or money-laundering, or any other type of corruption. In that regard, attention is drawn to the case *Teodoro Nguema Obiang Mangue*, in which the French courts have twice ruled on immunity, affirming that the misappropriation of public funds and money-laundering "are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity"[113] and that the acts with which Mr. Nguema Obiang Mangue is charged, by their nature, do not relate to the exercise of sovereignty or governmental authority, nor are they in the public interest.[114] Following the same logic, courts have not accepted that acts performed by State officials that are closely linked to a private activity and for the official's personal enrichment, not the benefit of the sovereign, are covered by immunity.[115]

59. In some cases, the issue has been brought before domestic courts under the umbrella of the so-called "act of State doctrine", which—as mentioned above—is sometimes confused in practice with immunity *stricto sensu*. Thus, in a case before the Federal Supreme Court of Germany, the accused parties invoked "the act of State doctrine", arguing that the doctrine did not allow for them to be prosecuted because they had been following orders and acting in the interest of a foreign State.[116] Another court accepted that, in accordance with the act of State doctrine, "courts generally refrain from judging the acts of a foreign State within its territory"; however, that did not prevent it from concluding that under no circumstances could the doctrine lead to "the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, [being] properly characterized as an act of State".[117] Moreover, in some cases, courts have found that the "act of State" doctrine, understood as grounds for relieving an official from responsibility, cannot, under any circumstances, be applied to international crimes.[118]

60. Lastly, it should be noted that in a number of cases brought before courts in the United States, immunity has been granted or refused without assessing the acts performed by a State official, but simply on the basis of the "suggestion" of immunity submitted by the United States authorities in accordance with common law principles.[119] On other occasions, the courts have not ruled on immunity for different reasons, such as when the State that officials served has ceased to exist or when the country in question is not considered to be a State.[120] Such cases are not, therefore, relevant for the purposes of defining the criteria for identifying "acts performed in an official capacity".

[111] Greece, *Prefecture of Voiotia* (see footnote 74 above).

[112] The Court of Appeal for Ontario (*Bouzari* (see footnote 74 above)) examined torture from the perspective of an exception to immunity, but found that it is not possible to establish such an exception. The Court of Appeal of Florence, in the *Ferrini* case (see footnote 74 above), determined that "functional immunity" cannot be invoked with regard to acts constituting international crimes. In the *Nezzar* case (see footnote 70 above)), the Federal Criminal Court of Switzerland drew attention to the fact that "it would be difficult to admit that conduct contrary to fundamental values of the international legal order can be protected by rules of that very same legal order".

[113] France, Court of Appeal of Paris, *Pôle* 7, second investigating chamber, judgment of 13 June 2013.

[114] France, Court of Appeal of Paris, *Pôle* 7, second investigating chamber, application for annulment, judgment of 16 April 2015. The statement cited was made by the Court after re-examining the arguments and statements of the judgment of 13 June 2013.

[115] United States, *United States v. Noriega* (see footnote 73 above). *Jungquist* (see footnote 75 above). France, *Mellerio* (footnote 73 above); *Seyyid Ali Ben Hamond, Prince Rashid v. Wiercinski* (footnote 73 above); *Ex-roi d'Egypte Farouk c. s.a.r.l. Christian Dior* (footnote 73 above); *Ali Ali Reza* (footnote 73 above). United States, *Trajano v. Marcos*, 978 *Federal Reporter* 2d 493 (Ninth Circuit, 1992), see also ILR, vol. 103, p. 521; *Doe v. Zedillo Ponce de León*, United States Court of Appeals, Second Circuit, No. 13-3122, 16 August 2013; *Jimenez v. Aristeguieta* (footnote 100 above); *Jean-Juste v. Duvalier* (1988), No. 86-0459 Civ, United States District Court, SD Fla, AJIL, vol. 82, p. 594; Switzerland, *Adamov v. Federal Office of Justice*, judgment of 22 December 2005, Federal Tribunal, *Schweizerisches Bundesgericht*, 132 II 81; United States, *Republic of the Philippines v. Marcos* et al. (see footnote 74 above); *Republic of the Philippines v. Marcos* et al. (No. 2) (1987, 1988), ILR, vol. 81, p. 608; United Kingdom, *Republic of Haiti v. Duvalier* [1990] 1 QB 202, ILR, vol. 107, p. 490; United States, *Islamic Republic of Iran v. Pahlavi* (1984), ILR, vol. 81, p. 557 (in this case it was the Government of the United States that informed the Court that the claim should not be barred either by application of the sovereign immunity principle or by the act of State doctrine).

[116] Federal Republic of Germany, *Border Guards* (see footnote 72 above). The foreign State to which the accused parties referred was the German Democratic Republic (GDR), which had already ceased to exist when the criminal proceedings began. The Federal Supreme Court considered that the doctrine was not applicable and the appeal was not admitted for a simple reason: "the GDR no longer exists" (pp. 272–273).

[117] United States, *Kadic v. Karadzic* (see footnote 74 above). The respondent had invoked both the "act of State doctrine" and the "political question" as exceptions in order to have the case dismissed.

[118] Israel, *Eichmann* (see footnote 70 above). This finding is also closely associated with the Nuremberg trials, the judgments of the Tribunal and the Nürnberg Principles.

[119] United States, *Lafontant v. Aristide* (see footnote 74 above). United States, *A, B, C, D, E, F v. Jiang Zemin*, United States District Court, Northern District of Illinois, 21 October 2002 (footnote 74 above): this case is significant because, once Jiang Zemin's term in office as President ended in 2003, a group of Democrat members of the United States Congress attempted to reopen the case, though without success, as the State Department maintained its suggestion of immunity. In a similar vein, in *Republic of the Philippines v. Marcos et al.* (footnote 74 above), the court did not classify the facts, but merely affirmed that immunity is lost when the defendant is no longer Head of State and it is the Government of the said State that is the plaintiff. In the *Ya'alon* case (footnote 74 above), the court took into consideration a letter from the Israeli Ambassador in Washington confirming that the acts performed by the official had been undertaken in the course of his official duties.

[120] The disappearance of the State was taken into consideration in *Border Guards* (Federal Republic of Germany (see footnote 72 above)). Furthermore, the Court of Cassation of Italy, because it considered that the Palestine Liberation Organization (PLO) could not be regarded as a State, did not rule on immunity in the case *Yasser Arafat* (see footnote 70 above).

(c) *Treaty practice*

61. The articles of a number of multilateral treaties include references, phrased in different ways and from different perspectives, to "acts performed in an official capacity". One group of instruments includes various United Nations conventions that directly or indirectly refer to immunities. A second group comprises treaties, both universal and regional, within the category of rules of international criminal law, that describe conduct prohibited by international law and, in some instances, include a reference to the official nature of the act in the definition thereof.

62. The Vienna Convention on Diplomatic Relations falls within the first group of instruments and is based on the understanding that the immunity from jurisdiction of diplomatic agents is immunity *ratione personae*, which applies throughout their term in office, to all acts performed by them in both an official and a personal capacity; it therefore does not contain any definition of an act performed in an official capacity.[121] However, the Convention also establishes rules relating to the immunities of members of the administrative, technical and service staff of the mission which combine characteristics of immunity *ratione personae* and immunity *ratione materiae*.[122] It also contains certain provisions concerning immunity *ratione materiae stricto sensu*. In that connection, attention is drawn to several provisions of the Convention that help define the concept of "acts performed in an official capacity" for the purposes of the present report:

(*a*) while the immunity from jurisdiction of diplomatic agents is understood as immunity *ratione personae* and thus as full immunity, the Convention establishes certain exceptions, according to which immunity from civil and administrative jurisdiction shall not apply in the following circumstances:

> [real actions] relating to private immovable property situated in the territory of the receiving State, unless [the diplomatic agent] holds it on behalf of the sending State for the purposes of the mission;
>
> … an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> … an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.[123]

Such acts are, therefore, exceptions to immunity *ratione personae*, exceptions that are justified because they concern acts performed by a diplomatic agent in a private capacity and for his or her own benefit. By the same logic, such acts cannot be considered "acts performed in an official capacity" for the purposes of the immunity *ratione materiae* of diplomatic agents, to which the Convention also refers. This provision should also be read in conjunction with the prohibition contained in article 42, in accordance with which "a diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity";

(*b*) the scope of the immunity of administrative and technical staff is limited; the Convention provides that their immunity from civil and administrative jurisdiction "shall not extend to acts performed outside the course of their duties";[124]

(*c*) service staff shall only "enjoy immunity in respect of acts performed in the course of their duties";[125]

(*d*) a diplomatic agent who is a national of or permanently resident in the receiving State shall enjoy only immunity in respect of "official acts performed in the exercise of his functions",[126] so as to ensure that, as pointed out by the Commission at the time, the said diplomatic agents should "enjoy at least a minimum of immunity to enable [them] to perform [their] duties satisfactorily".[127] Clearly such immunity corresponds to the category of immunity *ratione materiae* and acts covered by that immunity will be "acts performed in an official capacity";

(*e*) upon expiry of the term of office of diplomatic agents and members of administrative, technical and service staff, immunity ceases, although the Convention provides that "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist".[128] Such immunity is immunity *ratione materiae*, only applying to acts specific to the exercise of the functions of mission staff, which should therefore be regarded as "acts performed in an official capacity" for the purposes of the present report.

63. Consequently, it can be concluded that, in accordance with the Vienna Convention on Diplomatic Relations, an "act performed in an official capacity" is an act that occurs in "the exercise of the functions" of members of the mission. However, the Convention does not identify specific acts that are to be regarded as "acts performed in an official capacity", with the sole exception, *a contrario sensu*, of the acts referred to in article 31, paragraph 1, and article 42, which are to be regarded as private acts. In the other instances, the "act performed in an official capacity" is defined by reference to the functions of the mission itself and of the official within the mission, meaning that the question of whether a given act falls into that category must be resolved on a case-by-case basis. The Convention does not establish precise rules for doing so, except for the references in article 3, paragraph 1, to the functions of the diplomatic mission and activities of the members of the mission. With regard to the specific functions of the members of the mission, it should be borne in mind that the Convention is unclear and does not include elements for identifying those functions in general; it only mentions in vague terms the "administrative and technical service of the mission" and "the domestic service of the mission".[129]

[121] Art. 31.

[122] See, in general, art. 37.

[123] Art. 31, para. 1.

[124] Art. 37, para. 2. It should be noted that immunity applies only to administrative and technical staff that are not nationals of or permanently resident in the receiving State.

[125] Art. 37, para. 3. It should be noted that immunity applies only to service staff that are not nationals of or permanently resident in the receiving State.

[126] Art. 38, para. 1.

[127] Para. (3) of the commentary to article 37, *Yearbook ... 1958*, vol. II, at p. 102.

[128] Art. 39, para. 2.

[129] Art. 1, subparas. (*f*)–(*g*).

Nevertheless, the wording of the Convention is more explicit in referring to the functions of the diplomatic mission, which are listed as follows:

(*a*) representing the sending State in the receiving State;

(*b*) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(*c*) negotiating with the Government of the receiving State;

(*d*) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(*e*) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

It may also perform consular functions.[130] While this list allows for the inclusion of a number of specific acts, very distinct in nature, within the category of "acts performed in an official capacity", there is no doubt that such acts must be necessary in order to perform the aforementioned functions, that they must be unequivocally public and official in nature, and, in the case of diplomatic agents, that they must be closely linked to the concept of sovereignty and the exercise of elements of the governmental authority.

64. The Convention on Special Missions[131] and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[132] follow a model similar to that outlined above. The Vienna Convention on Consular Relations, meanwhile, reflects even more clearly the link between immunity and the exercise of specific functions on behalf of the State, since, under that Convention, immunity covers only "acts performed in the exercise of consular functions".[133] Furthermore, immunity from jurisdiction does not apply in respect of a civil action "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".[134] While this Convention, like the two aforementioned, does not list the acts that are to be regarded as "performed in an official capacity", meaning that again they must be determined on a case-by-case basis in the light of the consular functions listed in article 5,[135] the fact remains that the more specific list of consular functions contained in that article makes

[130] Art. 3, paras. 1–2.

[131] The Convention on Special Missions links the "official status of the act" to the fact that it is performed in exercise of functions that are specific to the mission and to the members of the mission, including the aforementioned limitations in relation to the prohibition on representatives of the State and members of its diplomatic staff practising "for personal profit any professional or commercial activity in the receiving State" (art. 48), as well as the provision limiting the immunity of representatives of the sending State in the special mission and members of its diplomatic staff who are nationals of or permanently resident in the receiving State to "official acts performed in the exercise of their functions" (art. 40, para. 1). However, as is the case with the Vienna Convention on Diplomatic Relations, the Convention on Special Missions does not contain a list of "official acts". Moreover, the definition of the functions of a special mission is more generic and imprecise than the definition of those of a diplomatic mission; it simply states that a special mission "[represents] the State, [being] 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" (art. 1, para. (*a*)). It must therefore be concluded that, under this Convention as well, "acts performed in an official capacity" must be identified on a case-by-case basis, using the criteria of "official status" and "functional status". By the very nature of special missions, those two criteria are less precisely defined, although such acts must still be linked to the performance of official functions and State sovereignty.

[132] The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character takes into consideration the same elements mentioned above, from which it can be concluded that the performance of official acts within the context of the functions of the mission or delegation is the precondition for recognition of immunity *ratione materiae* (arts. 30, 36, para. 2, 36, para. 3, 60, 66, para. 2, and 66, para. 3). The official and functional dimension of the acts that may be covered by such immunity 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 State" (art. 39, para. 1). It also provides that persons who are nationals of or permanently resident in the host State shall enjoy only immunity from jurisdiction in respect of "official acts performed in the exercise of their functions" (art. 37; see also art. 36). However, this Convention, like the Convention on Special Missions, does not contain a list of what are "acts performed in an official capacity", meaning that they must be identified on a case-by-case basis, using the aforementioned criteria of "official status" and "functional status".

[133] Art. 43, para. 1.

[134] Art. 43, para. 2 (*a*).

[135] Article 5 of the Vienna Convention on Consular Relations lists the following consular functions: "(*a*) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; (*b*) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention; (*c*) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested; (*d*) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State; (*e*) helping and assisting nationals, both individuals and bodies corporate, of the sending State; (*f*) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State; (*g*) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State; (*h*) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons; (*i*) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests; (*j*) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State; (*k*) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews; (*l*) extending assistance to vessels and aircraft mentioned in subparagraph (*k*) of this article, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State; (*m*) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State".

it possible to define with greater certainty some acts that should be categorized as "acts performed in an official capacity". In any case, there is no doubt that the said functions are manifestations of governmental authority and are linked to State sovereignty. Lastly, it should be noted that the Convention does not recognize the immunity of consular officers from criminal jurisdiction,[136] although that does not preclude the parameters outlined above being used as guiding elements for defining the concept of an "act performed in an official capacity".

65. To conclude this analysis of the first group of multilateral conventions, it is worth noting that the United Nations Convention on Jurisdictional Immunities of States and Their Property may also be taken into consideration for the purpose of defining an "act performed in an official capacity", particularly since, as was made clear by the Commission, the reference in article 2, paragraph 1, of the Convention to "the State and its various organs of government" and to "representatives of the State acting in that capacity" is to be understood from the perspective of immunity *ratione materiae*.[137] However, for the purposes of the present report, the provisions of the Convention should be subject to a nuanced analysis, taking into account, in particular, two aspects, namely: (*a*) that the Convention does not apply to criminal jurisdiction;[138] and (*b*) that the underlying distinction between *acta jure imperii* and *acta jure gestionis* is not comparable to the distinction between "acts performed in an official capacity" and "acts performed in a private capacity" that is examined in the present report. That said, the Convention is of interest for our analysis, since, for the purposes of determining State immunity, it focuses on the attribution to the State of acts performed by its officials and requires there to be a demonstrable link between the act and the exercise of sovereignty by the State in order for the act to be covered by immunity.

66. With regard to international criminal law, attention should first be drawn to the Convention against Torture, which includes a reference to the official nature of the act as one of the elements in the definition of torture itself by stipulating that the "pain or suffering" of victims must have been "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, *in fine*). Article 2, paragraph 3, of the Convention 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).[139] In its interpretation of those provisions in its general comments,[140] the Committee against Torture indicated that the prohibited acts are those carried out by "all persons who act, *de jure* or *de facto*, in the name of … the State",[141] by "its officials and those acting on its behalf"[142] or by "State authorities or others acting in official capacity",[143] stating that such persons are "are acting in an official capacity on account of their responsibility for carrying out the State function".[144] Furthermore, the Committee uses the term "agents"[145] of the State in its general comment No. 3, when it indicates that granting immunity to certain persons is in conflict with the Convention. The official status of the act is thus, *prima facie*, an undeniable component of torture.

67. The Inter-American Convention to Prevent and Punish Torture also includes the element of "official status", drawing attention to the connection with the State and the official nature of the acts in question, although it does not refer to the participation of a public official as an element in the definition of the crime.[146] However, the list of persons to be held guilty of the crime of torture shows that the involvement of a public official is a necessary element in order for an act to be defined as torture:

> a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
>
> b. A person who at the instigation of a public servant or employee mentioned in subparagraph (*a*) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.[147]

68. The necessary connection between a public official and the act of torture seems to break down in the Rome Statute of the International Criminal Court. In classifying torture as a crime against humanity[148] and a war crime,[149]

[136] Nevertheless, the Convention provides that all criminal proceedings must be conducted "with the respect due to [the consular officer] by reason of his official position and … in a manner which will hamper the exercise of consular functions as little as possible" (art. 41, para. 3). The Convention makes this same stipulation with respect to "honorary consular officers" subject to criminal jurisdiction (see art. 63).

[137] In that connection, the Commission's commentaries on article 2 (paras. (6), (8) and (17) thereof) and article 3 (para. (1) thereof) of the draft articles on jurisdictional immunities of States and their property, adopted on second reading in 1991, are pertinent. See *Yearbook … 1991*, vol. II (Part Two), pp. 13 *et seq.* The General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and their Property in its resolution 59/38 of 2 December 2004.

[138] In that regard, see the commentary to draft article 3, provisionally adopted in 2013, in particular paragraph (4) and footnote 267, *Yearbook ... 2013*, vol. II (Part Two), pp. 44–45.

[139] 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".

[140] In paragraphs 3 and 8 (*b*) of its general comment No. 1 (1997) on the implementation of article 3 in the context of article 22, the Committee refers to "a public official or other person acting in an official capacity" (see Report of the Committee against Torture, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), annex IX). In general comment No. 2 (2008) on the implementation of article 2, the Committee refers to "officials and others … acting in official capacity" (para. 15) and "officials" (para. 18) (*ibid., Sixty-third Session, Supplement No. 44* (A/63/44), 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) (see *ibid., Sixty-eighth Session, Supplement No. 44* (A/68/44), annex X).

[141] General comment No. 2 (see previous footnote), para. 7.

[142] *Ibid.*

[143] *Ibid.*, para. 18; see also general comment No. 3 (footnote 140 above), para. 7.

[144] General comment No. 2 (footnote 140 above), para. 17.

[145] General comment No. 3 (footnote 140 above), para. 42.

[146] See art. 2.

[147] See art. 3.

[148] See art. 7, para. 1 (*f*).

[149] See art. 8, para. 2, subparas. (*a*) (ii) and (*c*) (i).

the Statute does not specify what persons may be deemed to have committed the crime of torture, which could lead to the conclusion that the connection with the State and the official nature of the act are no longer required in order for an act to be regarded as torture.[150] However, that conclusion must be qualified if it is to be maintained. Thus, in the case of torture as a crime against humanity, it should be recalled that it must necessarily be "committed as part of a widespread or systematic attack directed against any civilian population".[151] Similarly, in the case of torture as a war crime, it must have been carried out "as part of a plan or policy or as part of a large-scale commission of such crimes".[152] The implications of both of these cases are discussed below.[153]

69. The International Convention for the Protection of All Persons from Enforced Disappearance is also of relevance. Following the same approach as the Rome Statute, it defines enforced disappearance as

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[154]

70. The "official status" of this type of criminal conduct is also reflected in the Inter-American Convention on Forced Disappearance of Persons, which defines forced disappearance as

> the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[155]

71. The Convention on the Prevention and Punishment of the Crime of Genocide does not include the "official status" of the perpetrator as an element of the definition of the crime. However, article IV of that Convention explicitly states that the offence may be committed by "constitutionally responsible rulers, public officials or private individuals". It can therefore be concluded that, under certain circumstances, the crime can be regarded as an "act performed in an official capacity". Furthermore, it is undeniable that, as has been indicated in the Commission's own work, genocide involves a series of acts that would be difficult to perform without the participation, support or consent of the State.[156]

72. An analysis of the Rome Statute of the International Criminal Court is also useful for categorizing certain crimes as "acts performed in an official capacity". As indicated above, the Statute provides that, in order for acts to be considered crimes against humanity they must be "committed as part of a widespread or systematic attack directed against any civilian population", where "attack" means "a course of conduct involving the multiple commission of [crimes against humanity] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[157] Such a policy "requires that the State or organization actively promote or encourage such an attack against a civilian population".[158] Consequently, the commission of a crime listed in article 7, paragraph 1, of the Rome Statute could be regarded as an "act performed in an official capacity" in the sense in which the phrase is used in the present report.

73. However, the official nature of the act is most clearly reflected in the definition of the crime of aggression in article 8 *bis* of the Rome Statute. In accordance with that article, the crime of aggression is a "crime of leaders" that can be committed only by "a person in a position effectively to exercise control over or to direct the political or military action of a State" and involves the commission by the commander or leader of a series of actions relating to an "act of aggression",[159] which, according to the Statute, is "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations".[160] In sum, it seems that the only possible conclusion is that the crime of aggression, as defined in the Rome Statute, must be regarded as an "act performed in an official capacity".

74. Lastly, it is useful to refer to the various universal and regional conventions against corruption. The United Nations Convention against Corruption lays down regulations concerning various acts of corruption that might be carried out by State officials. All such acts are directly related to the official functions of those persons but are performed with the aim of obtaining "an undue advantage, for the official himself or herself or another person or entity".[161] It should also be noted that the Convention addresses the issue of immunity of State officials (although from an internal perspective). In that regard, it imposes on each State party the obligation to

> take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions

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[150] Likewise, the section of Elements of Crimes referring to those crimes does not contain any reference to the official status of the perpetrators. See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B, and *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010* (International Criminal Court publication, RC/9/11), resolution RC/Res.5.

[151] See the *chapeau* of art. 7, para. 1; art. 7, para. 2 (*a*); and para. 3 of the introduction to art. 7 in Elements of Crimes (see previous footnote).

[152] See art. 8, para. 1.

[153] See para. 72 below.

[154] Art. 2.

[155] Art. II.

[156] See paras. 91 and 93 below.

[157] *Chapeau* of art. 7, para. 1, and art. 7, para. 2 (*a*).

[158] Para. 3 of the introduction to art. 7 in Elements of Crimes (see footnote 150 above).

[159] Art. 8 *bis*, para. 1. Similarly, see Elements of Crimes, "Crime of aggression", para. 2 (see footnote 150 above).

[160] Art. 8 *bis*, para. 2. This definition is reiterated in Elements of Crimes (see footnote 150 above), which stipulates that the "act of aggression" must have been committed (para. 3).

[161] Art. 15, subpara. (*a*). The following crimes are mentioned: (*a*) bribery of national public officials (art. 15); (*b*) bribery of foreign public officials and officials of public international organizations (art. 16); (*c*) embezzlement, misappropriation or other diversion of property by a public official (art. 17); (*d*) trading in influence (art. 18); (*e*) abuse of functions (art. 19); (*f*) illicit enrichment (art. 20); and (*g*) bribery in the private sector (art. 21).

and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with [the] Convention.[162]

75. The Inter-American Convention against Corruption also addresses acts of corruption carried out by "a government official or a person who performs public functions" in relation to the performance of functions that have been entrusted to that person by the State. Again, the act must have been committed for the specific purpose of obtaining "any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity", or simply "illicitly obtaining benefits for himself or for a third party".[163] It should also be noted that the Inter-American Convention explicitly states that none of those acts shall qualify as "a political offence or as a common offence related to a political offence" simply because the property obtained was intended for political purposes or because the act itself was committed for political motives or purposes.[164]

76. The Criminal Law Convention on Corruption of the Council of Europe also defines certain actions as acts of corruption that must be criminalized by States. These are acts committed by domestic or foreign "public officials", members of domestic, foreign or international assemblies, or judges or officials of international courts. As in the two aforementioned conventions, such acts involve both the performance of a public function and a purposive element, namely that the act of corruption is performed with the purpose of obtaining "any undue advantage … for himself or herself or for anyone else".[165] The Convention also refers to immunity, in this case from an international perspective, establishing that "the provisions of [the] Convention shall be without prejudice to the provisions of any Treaty, Protocol or Statute, as well as their implementing texts, as regards the withdrawal of immunity".[166] This obscure provision has been interpreted by the Council of Europe itself as recognition that States parties are obliged to give effect to the provisions governing privileges and immunities to which they may be subject (whether deriving from treaties or from customary law) when seeking to exercise jurisdiction in respect of the crimes mentioned in the Convention, particularly with regard to "public international or supranational organizations … members of international parliamentary assemblies … as well as judges and officials of international courts".[167]

77. Lastly, the African Union Convention on Preventing and Combating Corruption also envisages the possibility that a public official may commit acts of corruption in connection with the discharge of his or her duties for the purpose of obtaining "benefits for himself or herself or for a third party".[168]

(d) *Other work of the Commission*

78. As already mentioned in the Special Rapporteur's third report, the Commission has previously undertaken work on a number of topics involving the consideration of issues related to immunity that are relevant for the purposes of defining the concept of an "act performed in an official capacity". While its work on the articles on responsibility of States for internationally wrongful acts is certainly of greatest relevance, its deliberations resulting in the adoption of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles),[169] the 1954 draft Code of Offences against the Peace and Security of Mankind[170] and the 1996 draft Code of Crimes against the Peace and Security of Mankind[171] are also of interest. Moreover, it may be useful to analyse the work of the Commission on the articles on the responsibility of international organizations.[172]

79. The articles on responsibility of States for internationally wrongful acts[173] are particularly relevant for the purposes of the present report. On the assumption that, in order for an act to qualify as an "act performed in an official capacity", there must be an identifiable link between the act and the exercise of State functions or activities, it is clear that the provisions concerning the attribution of an act to the State contained in articles 4 to 11 of the articles must be duly taken into account. They include elements that relate both to the concept of a "State official" and to the concept of an "act performed in an official capacity". As the elements relating to the concept of a "State official" were covered in the third report,[174] the present report will focus exclusively on the elements that may be used to define the specific characteristics of the act, which are, essentially, that the act is performed on behalf of the State and in exercise of "elements of the governmental authority"[175] or "legislative, executive, judicial or any other functions".[176]

80. The Commission's commentary to the aforementioned articles is also of interest for determining how an act is attributed to the State and how it may be concluded that a person is acting on behalf of the State. For instance, the introductory commentary to part one, 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".[177] Furthermore, what is relevant is not the internal

[162] Art. 30, para. 2.

[163] Art. VI, subparas. (*b*)–(*c*), which define the acts of corruption. This same purposive condition is envisaged for a number of crimes grouped under the heading "Progressive development", in art. XI. See arts. VIII (Transnational bribery) and IX (Illicit enrichment).

[164] Art. XVII.

[165] Arts. 2–6 and 9–11.

[166] Art. 16.

[167] *Explanatory Report to the Criminal Law Convention on Corruption*, para. 77. Available from www.coe.int/en/web/conventions, *Full list*.

[168] Art. 4, para. 1 (*c*).

[169] *Yearbook ... 1950*, vol. II, document A/1316, p. 374, paras. 95–127.

[170] *Yearbook ... 1954*, vol. II, para. 54.

[171] *Yearbook ... 1996*, vol. II (Part Two), para. 50.

[172] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ...2011*, vol. II (Part Two), paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

[173] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[174] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, p. 100–101, paras. 106–110.

[175] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76, art. 5.

[176] *Ibid.*, art. 4, para. 1.

[177] *Ibid.*, p. 38, para. (2) of the introductory commentary to part one, chapter II.

function the agent performs within the State, but rather the fact that he performs "public functions" and exercises "public powers".[178] As the Commission indicates in its commentary to article 7, the central issue is whether "the conduct was performed by the body in an official capacity or not".[179] In the view of the Commission, such conduct includes cases in which the act is performed "in an apparently official capacity, or under colour of authority".[180]

81. The Commission also took the view that the essential element for attributing conduct to a State is that the official must be acting as an organ or agent of the State, regardless of the particular motivation he or she may have. It should be added that, in accordance with article 7, "the conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions". Thus, even *ultra vires* acts by persons or organs empowered to exercise elements of the governmental authority are attributable to the State for the purposes of responsibility. However, as indicated by the Commission, "[c]ases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State".[181]

82. It should further be recalled that the articles also cover certain types of conduct by persons who are not organs or agents of the State, where, *a priori*, it is impossible to confirm, or difficult to conclude, that they have exercised elements of the governmental authority. The scenarios envisaged are essentially: (*a*) the conduct is directed or controlled by the State (art. 8); (*b*) the conduct is carried out in the absence or default of the official authorities (art. 9); and (*c*) the conduct is acknowledged and adopted by the State as its own (art. 11). In addition, acts performed by insurrectional movements should also be taken into consideration, as they are retroactively attributable to the State under certain circumstances. Ultimately, the articles seek to define as broadly as possible those acts that, directly or indirectly, may be attributed to the State for the purposes of responsibility, in order to prevent States from fraudulently evading responsibility for acts that were unequivocally carried out for their benefit, and, on occasion, even under their control or with their implicit consent.

83. In any event, it should be noted that while the Commission has indicated that, in international law, the main point is that the act performed be regarded as an official "governmental" act, it has not defined that concept. In fact, when considering the scope of such governmental authority, the Commission pointed out in its commentary to article 5 that the term "governmental" is necessarily imprecise. However, in the commentaries to the relevant articles, it gave some isolated examples of what constitutes governmental authority, including the functions of the police,[182] powers of detention and discipline pursuant to a judicial sentence or to prison regulations,[183] or immigration control and quarantine.[184] 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 for which they are to be exercised and the extent to which the entity is accountable to government for their exercise".[185] In any case, there is no doubt that the concept of "elements of the governmental authority" must be understood in a broad sense to include the exercise of legislative, judicial and executive prerogatives.

84. In that connection, it should also be recalled that the Commission has stated:

> It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta jure gestionis* … the breach by a State of a contract does not as such entail a breach of international law … But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act.[186]

85. To conclude the analysis of these articles, it should be noted that the Commission stated, in article 58, that the articles on State responsibility "are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State". The Commission thus accepts the existence of two distinct types of responsibility that may derive from the same act: State responsibility and individual responsibility. That topic is discussed below.[187]

86. While the articles on responsibility of international organizations do not refer directly to "acts performed in an official capacity" by a "State official", the work of the Commission on that topic has raised issues that are relevant to the present report. The concepts of "effective control", "on duty" and "discharge of official functions" are of particular interest. The question of "effective control" has arisen, in particular, in the context of peacekeeping operations. In that regard, the Commission has stated that:

> Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.
>
> ….

[178] *Ibid*., p. 39, para. (6) of the introductory commentary to part one, chapter II.

[179] *Ibid*., p. 46, para. (7) of the commentary to draft article 7.

[180] *Ibid.*, p. 42, para. (13) of the commentary to draft article 4.

[181] *Ibid.*, pp. 45–46, draft art. 7 and para. (7) of the commentary thereto. As the Commission continues to affirm, in the words of the Iran–United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority" (*Petrolane, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991)).

[182] See para. (6) of the introductory commentary to part one, chapter II, para. (5) of the commentary to draft article 5, and para. (6) of the commentary to draft article 9, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at pp. 39, 43, and p. 49, respectively.

[183] Para. (2) of the commentary to draft article 5, *ibid*., at p. 43.

[184] *Ibid*.

[185] Para. (6) of the commentary to draft article 5, *ibid*., at p. 43. The Commission stated at that time that "what is regarded as 'governmental' depends on the particular society, its history and traditions" (*ibid*.).

[186] Para. (6) of the commentary to draft article 4, *ibid*., at p. 41.

[187] See paras. 98–101 below.

… [W]hen an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question.[188]

87. In its discussion of the second concept, the Commission refers to the organ or agent that acts "in the performance of functions" given to that organ or agent, as it is meaningless to refer to the "exercise of elements of the governmental authority" in this context.[189] The Commission therefore refers in its commentary to "conduct … linked with … official functions" or "'on-duty' conduct". In particular, in its commentary to article 8, relating to the attribution of *ultra vires* acts to an organization, it states:

Practice of international organizations confirms that *ultra vires* conduct of an organ or agent is attributable to the organization when that conduct is linked with the organ's or agent's official functions … While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization, the "on-duty" conduct may be so attributed. One would then have to examine whether the *ultra vires* conduct in question is related to the functions entrusted to the person concerned.[190]

88. Lastly, it should be recalled that, like the articles on State responsibility, the articles on responsibility of international organizations contain a "without prejudice" clause concerning individual responsibility (art. 66), thereby recognizing the possibility that the same act may give rise to two distinct types of responsibility.[191]

89. In the Nürnberg Principles,[192] the Commission does not address the official nature of the crimes set out therein or their attribution to the State. Instead, its focus is on defining crimes under international law and establishing the international responsibility of individuals who commit such crimes. This does not mean, however, that in so doing the Commission has taken no account of the underlying State component of the crimes thus defined. On the contrary, it may be concluded from an analysis of the work of the Commission that the Principles should be interpreted in the light of the acts from which they derive and, in particular, of the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis establishing the International Military Tribunal (the Nürnberg Tribunal) and the judgment handed down by the Tribunal. From that standpoint, the following elements of the set of principles drafted by the Commission and subsequently adopted by the General Assembly should be noted:

(*a*) the crimes set out in principle VI (crimes against peace, war crimes and crimes against humanity) are defined in a manner that makes clear the connection between the acts constituting such crimes and the activity of the State;[193]

(*b*) the Commission includes among the potential perpetrators of such crimes persons who "acted as Head of State or responsible Government official", and thus as State officials within the meaning of the present topic;[194]

(*c*) the Commission also considers the possibility that "a person acted pursuant to order of his Government or of a superior", in which case the crime may also be attributed to the State under the rules of attribution established in the articles on responsibility of States for internationally wrongful acts.[195]

It may thus be concluded that the crimes set out in the Nürnberg Principles may be regarded as "acts performed in an official capacity", at least in some cases, even though the Principles establish the individual responsibility of persons who commit such acts.[196]

90. To conclude the analysis of the work of the Commission, it is necessary to consider the manner in which it dealt with the question of "acts performed in an official capacity" in the 1954 draft Code of Offences against the Peace and Security of Mankind and the 1996 draft Code of Crimes against the Peace and Security of Mankind. In relation to the two drafts, it should first be noted that, as in the case of the Nürnberg Principles, there was no need for the Commission to specify whether a particular crime should be regarded as an "act performed in an official capacity". Meaningful conclusions on this issue can nonetheless be drawn both from the draft Codes themselves and from the Commission's commentary to some of the articles.

91. In the 1954 draft Code, article 2 contains the list of offences against peace and security.[197] Paragraphs (1) to (9) of article 2 refer to acts that can only be performed by "the authorities of a State", while paragraphs (10) and (11) thereof envisage the possibility that acts may be

[188] See paras. (7)–(8) of the commentary to article 7 of the articles on responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), para. 88, at pp. 57–58.

[189] Para. (4) of the commentary to article 7, *ibid*., at p. 57.

[190] Para. (9) of the commentary to article 8, *ibid*., at p. 61.

[191] The wording of article 66 is almost identical to that of article 58 of the articles on State responsibility, the only difference being the addition of the phrase "an international organization or".

[192] See footnote 169 above.

[193] Principle VI (*Yearbook ... 1950*, vol. II, document A/1316, p. 376) is worded as follows:

"The crimes hereinafter set out are punishable as crimes under international law:

(*a*) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(*b*) War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(*c*) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime."

[194] Principle III. In its commentary to this principle, the Commission emphasizes that reference is being made to a person acting in an official capacity, based on the Nürnberg Tribunal's references to "representatives of a State" and to persons "acting in pursuance of the authority of the State". *Yearbook ... 1950*, vol. II, document A/1316, p. 375, paras. 103–104.

[195] Principle IV (*ibid*., p. 375).

[196] It should be borne in mind that the Nürnberg Tribunal rejected the argument of the defence that the acts of the defendants were solely "acts of the State" that automatically ruled out individual responsibility. Commentary to principle IV, *ibid*., paras. 105–106.

[197] The full text of the draft Code adopted by the Commission at its sixth session, in 1954, is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8.

performed "by the authorities of a State or by private individuals". Nonetheless, as Mr. Doudou Thiam, Special Rapporteur, would later state in relation to such offences (those referred to in paragraphs (10) and (11)),

> the participation of individuals, which is unimaginable in theory, seems to be impossible in practice. Genocide is the outcome of a systematic large-scale effort to destroy an ethnic, national or religious group. In the modern world, private individuals would find it difficult to carry out such an undertaking single-handed. The same is true, moreover, of all crimes against humanity, which require the mobilization of means of destruction which the perpetrators can obtain only through the exercise of power. Some of these crimes—*apartheid*, for example—can only be the acts of a State. In short, it seems questionable whether individuals can be the principal perpetrators of offences against the peace and security of mankind.[198]

92. The 1996 draft Code, meanwhile, establishes the individual responsibility of persons who commit any of the crimes against the peace and security of mankind included in the following list: aggression (art. 16); genocide (art. 17); crimes against humanity (art. 18); crimes against United Nations and associated personnel (art. 19); and war crimes (art. 20). While this draft does not introduce any elements regarding the "official" nature of such acts in defining these crimes, it contains several provisions that are germane to the present report:

(*a*) first, articles 5, 6 and 7 reflect the official nature of such acts by referring, respectively, to the order of a Government or a superior, the responsibility of the superior, and the fact that the official position of an individual who commits a crime is irrelevant to the determination of responsibility;

(*b*) second, article 2, paragraph 2, in conjunction with article 16, establishes that the crime of 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.[199] The other forms of criminal conduct, however, may in principle be committed either by private individuals or by agents of the State, in a broad sense;

(*c*) third, the definition of crimes against humanity in article 18 requires that the acts in question be committed in a systematic manner or on a large scale "and instigated or directed by a Government or by any organization or group".

93. Both the Special Rapporteur and the Commission point out that even though these crimes may be committed by individuals considered in their personal capacity, in practice they require the participation of persons invested with official status. It may be recalled, for example, that the Commission, in its commentary to article 5, states that "[c]rimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command".[200] Also significant is the position taken by Mr. Doudou Thiam, Special Rapporteur, who, in his third report, affirms that offences jeopardizing the independence, safety or territorial integrity of a State

> involve means whose magnitude is such that they can be applied only by State entities. Moreover, it is difficult to see how aggression, the annexation of a territory, or colonial domination could be the acts of private individuals. These offences can be committed only by individuals invested with a power of *command*, in other words the *authorities of a State*, persons of high rank in a political, administrative or military hierarchy who give or receive orders, who execute government decisions or have them executed. These are *individual-organs*, and the offences they commit are often analysed in terms of abuse of sovereignty or misuse of power. Consequently, individuals cannot be the perpetrators of these offences.[201]

94. Also of relevance, lastly, is article 4, entitled "Responsibility of States", which provides that "[t]he fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law". This article thus reiterates the principle that a single act may entail dual responsibility, as mentioned previously in the present report. As the Commission notes in its commentary to this article, "it is possible, indeed likely, … that an individual may commit a crime against the peace and security of mankind as an 'agent of the State', 'on behalf of the State', 'in the name of the State' or even in a *de facto* relationship with the State, without being vested with any legal power".[202] This statement should moreover be read in conjunction with the Commission's commentary to article 2, in which, while recognizing that the scope of application of the Code *ratione personae* is limited to natural persons, it categorically affirms that "[i]t is true that the act for which an individual is responsible might also be attributable to a State if the individual acted as an 'agent of the State', 'on behalf of the State', 'in the name of the State' or as a *de facto* agent, without any legal power".[203]

4. Characteristics of an "act performed in an official capacity"

95. On the basis of the foregoing analysis, it may be concluded that the following are characteristics of an "act performed in an official capacity":

(*a*) the act is of a criminal nature;

(*b*) the act is performed on behalf of the State;

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[198] *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/387, para. 13.

[199] Para. (5) of the commentary to article 2, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at pp. 19–20. See also commentary to article 16, *ibid.*, at p. 43.

[200] Para. (1) of the commentary to article 5, *ibid.*, at p. 24.

[201] *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/387, para. 12.

[202] Para. (1) of the commentary to article 4, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 23.

[203] Para. (4) of the commentary to article 2, *ibid.*, at p. 19. The relationship between the individual responsibility of the person who directly commits an act and the potential responsibility of the State had already been highlighted years earlier. For example, the March 1983 analytical paper prepared pursuant to the request contained in paragraph 256 of the report of the Commission on the work of its thirty-fourth session (A/CN.4/365, in particular paras. 117–125) reflects the view of a number of State representatives, who, while emphasizing the principle of individual responsibility, felt that the question of State responsibility should not be overlooked. Some representatives even suggested that the future text should include an express provision that the assertion of individual criminal responsibility shall not affect the international responsibility of States.

(*c*) the act involves the exercise of sovereignty and elements of the governmental authority.

Each of these characteristics is analysed below.

(a) *Criminal nature of the act*

96. In defining the scope of application of this topic, the Commission has already specified that it refers to immunity from criminal jurisdiction. Draft articles 3 and 5, provisionally adopted by the Commission, expressly provide that State officials "enjoy immunity … from the exercise of foreign criminal jurisdiction".[204] The acts performed in an official capacity to which the present report refers must, therefore, be of a criminal nature. This means that they have certain characteristics that must be analysed in order to determine whether they have any significance for the purposes of the present report.

97. The chief characteristic of a criminal act is its highly personal nature and the existence of a direct link between the act and the person by whom it was committed. The responsibility entailed by the act is thus, by definition, of an individual nature and attributable to the person who committed the act, with no possibility of substituting the responsibility of a third party for that of the person in question. This is true even if a separate (independent or subsidiary) legal obligation can be imposed on a third party in respect of the same act. Such an obligation would derive from, but cannot be confused with, the primary criminal responsibility. It is for this reason that the attribution to the State of criminal acts committed by its officials is significantly limited and can only be understood as a legal fiction grounded in the traditional model of attributing acts to the State for the purposes of ascribing responsibility for internationally wrongful acts. Nevertheless, any criminal act covered by immunity *ratione materiae* is not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed.

98. The initial consequence of the criminal nature of the act is thus the possibility that the act may entail two different types of responsibility. The first, of a criminal nature, attaches to the individual who committed the act. The second, of a civil nature, attaches either to the individual who committed the act or to a third party. In the context of the present study, this means that an act performed by a State official may give rise both to criminal responsibility, which is attributable solely to the official himself or herself, and to a subsidiary civil responsibility attributable to both the official and the State.[205] This model of the relationship between an act and the responsibility arising from it appeared in international law relatively recently, and became consolidated on the basis of the definition of the principle of individual criminal responsibility that emerged after the Second World War, and especially the institutionalization of international criminal law over the last decade of the twentieth century. This phenomenon is not, however, alien to internal law. On the contrary, the legal practice analysed in the present report shows how the same acts have given rise to various claims, sometimes directed against the State and sometimes against the individual, that have been made under both criminal and civil jurisdiction.

99. This model, which may be termed "single act, dual responsibility", has been expressly recognized by the Commission in several of its texts, in particular article 4 of the draft Code of Crimes against the Peace and Security of Mankind,[206] article 58 of the articles on responsibility of States for internationally wrongful acts,[207] and article 66 of the articles on the responsibility of international organizations.[208] The way in which this model operates is described by the Commission in the commentaries reproduced below:

> The 'without prejudice' clause contained in article 4 [of the draft Code of Crimes against the Peace and Security of Mankind] indicates that the Code is without prejudice to any question of the responsibility of a State under international law for a crime committed by one of its agents. As the Commission already emphasized in the commentary to article 19 of the draft on State responsibility, the punishment of individuals who are organs of the State 'certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs.' The State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime.[209]
>
> Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out. Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law".[210]

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[204] For draft article 3, see *Yearbook ... 2013*, vol. II (Part Two), para. 48; for draft article 5, see *Yearbook ... 2014*, vol. II (Part Two), para. 131.

[205] In this regard, see Foakes, *The Position of Heads of State and Senior Officials in International Law*, pp. 150–151; Van Alebeek, *The Immunity of States and their Officials in the Light of International Criminal Law and International Human Rights Law*, pp. 103 *et seq.*; Yang, *State Immunity in International Law*, p. 427.

[206] Article 4 reads as follows: "*Responsibility of States*. The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law". *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 23.

[207] Article 58 reads as follows: "*Individual responsibility*. These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State". *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, at p. 30.

[208] Article 66 is identical to article 58 of the articles on responsibility of States for internationally wrongful acts, with the sole exception of an express reference to international organizations: "*Individual responsibility*. These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State". *Yearbook ...2011*, vol. II (Part Two), para. 87, at p. 46.

[209] Para. (2) of the commentary to article 4, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 23.

[210] Para. (3) of the commentary to article 58, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 142–143. See also para. (2), *ibid.*

> [T]he fact that the conduct of an individual is attributed to an international organization or a State does not exempt that individual from the international criminal responsibility that he or she may incur for his or her conduct. On the other hand, when an internationally wrongful act of an international organization or a State is committed, the international responsibility of individuals that have been instrumental to the wrongful act cannot be taken as implied. However, in certain cases the international criminal responsibility of some individuals may arise, for instance when they have been instrumental to the serious breach of an obligation under a peremptory norm in the circumstances envisaged in article 41.[211]

100. The International Court of Justice also recognized the dual responsibility that may arise from an act of genocide in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. In that case, the Court held that the same conduct could give rise to two different types of responsibility, established through legal procedures that are likewise different.[212] This duality of effects is expressed in the Court's observation that "if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed".[213] In any event, it should be noted that the Court takes this argument to its ultimate conclusion by finding, in its judgment, that Serbia and Montenegro is not responsible for committing or conspiring to commit genocide, but is responsible for failing to meet its obligation to prevent and punish the crime of genocide in the case of the Srebrenica massacre. This recognition of dual responsibility is moreover linked in the judgment to the test for determining the attributability of an act to the State, an issue that will be explored further in the present report.

101. The considerations described above illustrate how the principle that any act committed by an official is automatically an act of the State and engages only the responsibility of the State cannot be applied presumptively when the act is of a criminal nature. On the contrary, the "single act, dual responsibility" model gives rise to several alternatives, which may be described as follows:

(*a*) exclusive responsibility of the State in cases where the act is not attributable to the person by whom it was committed;

(*b*) responsibility of the State and the individual when the act is attributable to both;

(*c*) exclusive responsibility of the individual when the act is solely attributable to such individual, even though he or she acted as a State official.

102. The criminal nature of the act and the duality of responsibility that it may entail also have consequences with respect to immunity, especially in relation to the existing model defining the relationship between the immunity *ratione materiae* enjoyed by State officials and the immunity of the State *stricto sensu*. It should be borne in mind that the immunity of State officials from jurisdiction has traditionally been viewed as a form of State immunity and has been conflated with that concept. It is not unusual to find references, in legal practice, to the idea that State officials enjoy the same immunity enjoyed by the State.[214] This view has led to the conclusion that the immunity of State officials from jurisdiction is not an individual immunity, as it derives from State immunity, the legal regime of which is fully applicable. This conclusion is the outcome of various arguments, including the following: (*a*) the immunity from jurisdiction enjoyed by State officials is a consequence of the principle of the sovereign equality of States, as expressed by the phrase *par in parem non habet imperium*; (*b*) immunity is recognized in order to protect State sovereignty and ensure that international relations can be carried on peacefully and sustainably; (*c*) the immunity of State officials is not in fact immunity of the officials but immunity of the State, as demonstrated by the State's freedom of choice with regard to such immunity, including the freedom to lift or waive it; and (*d*) bringing suit against a State official in a foreign court is an indirect way of bringing suit against the State when the latter cannot be prosecuted in the courts of a third State, meaning that the official's immunity from jurisdiction serves as a safeguard against frivolous challenges to State immunity, and is therefore equivalent to State immunity.[215]

103. These arguments certainly contain valid points that cannot be denied, especially the fact that officials are given immunity from jurisdiction in the interest of the State and in order to safeguard values and principles that pertain solely and exclusively to the State. Even so, the arguments fail to consider other factors that must be taken into account in order to determine how the immunity of State officials from foreign criminal jurisdiction is related to the immunity of the State, or, in other words, to answer the question, as vividly put by one author, "[w]hich came first—the chicken or the egg? State immunity as a consequence of functional immunity rather than functional immunity as a corollary of State immunity".[216]

104. In order to find an adequate response, it is necessary to consider, once again, the criminal nature of the act, which has two major consequences: (*a*) the object to which the jurisdictional claims in such cases directly relate is the individual, and (*b*) any consequences of the outcome of the criminal proceedings are individual and strictly personal. This creates a direct link between the individual and immunity from foreign criminal jurisdiction, which the Commission took into account in deciding to include an express definition of the concept of a

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[211] Para. (2) of the commentary to article 66, *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, at p. 104.

[212] *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 pp. 119–120, paras. 180–182.

[213] *Ibid*., para. 180. This same observation was made by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at p. 61, para. 128.

[214] See, for example, United Kingdom, *Propend Finance Pty Ltd.* v. *Sing* et al.(see footnote 89 above); United Kingdom, *Jones* v. *Saudi Arabia*, (see footnote 78 above); and United States, *Chuidian* v. *Philippine National Bank*, United States Court of Appeals, Ninth Circuit, judgment of 29 August 1990 (see footnote 75 above).

[215] For an analysis of these arguments, see, *inter alia*, Foakes, *The Position of Heads of State...*, pp. 137–139.

[216] Van Alebeek, *The Immunity of States and their Officials*, p. 105.

"State official" in the draft articles, and even to use the term "individual" in the definition of a "State official" to indicate that such immunity applies to a natural person.[217] It should also be noted that a State can never be prosecuted in national criminal courts, as any responsibility it may have for criminal acts committed by its officials will always be of a civil nature and can only be determined in civil court by means of a claim for compensation for the harm caused by such acts.[218] This implies a distinction between immunity from civil jurisdiction and immunity from criminal jurisdiction, which must be duly taken into account.

105. In the Special Rapporteur's view, it may be concluded, from the two elements mentioned above, that the immunity of State officials from foreign criminal jurisdiction *ratione materiae* is individual in nature and distinct from the immunity of the State *stricto sensu*. This is true even though this distinction is not always made with sufficient clarity in the literature and in practice, largely as a result of the traditional emphasis on the State (and its rights and interests) as the beneficiary of the protection afforded by immunity. While the State undeniably occupies a central position in this institution, the protection of its rights and interests is nevertheless an insufficient reason to conclude that the immunity of the State and the immunity of its officials are one and the same, just as identity of purpose, as in the case of State immunity and diplomatic immunity, does not mean that the two types of immunity are identical.[219] Rather, in order to gain a proper understanding of the institution of immunity of State officials from foreign criminal jurisdiction *ratione materiae*, it is necessary to distinguish between the direct beneficiary of the immunity (the State official) and the indirect or ultimate beneficiary (the State). Immunity *ratione materiae* is recognized in the interest of the State, which has sovereignty, but it directly benefits the official when he or she acts in expression of such sovereignty.

106. The distinction between the immunity of the State and the immunity of its officials from foreign criminal jurisdiction is not a mere theoretical construct; it has been reflected in a number of judicial decisions adopted by both national and international courts. Regarding decisions at the national level, it suffices to recall the different ways in which the House of Lords dealt with immunity in the *Pinochet (No. 3)*, *Prince Nasser* and *Jones v. Saudi Arabia* cases, based on the different nature (criminal and civil, respectively) of the proceedings in which immunity was invoked and on the consequences of that difference in terms of immunity. Of particular relevance is *Samantar v. Yousuf*, in which the Supreme Court of the United States held that a State official cannot be deemed to be included in the concept of a "State" within the meaning of the Foreign Sovereign Immunities Act and that the immunity of such an official is subject to rules that differ from those applicable to the immunity of a State from prosecution in that country's courts.[220]

107. Of greatest relevance are the decisions of international courts that have expressed or implied a distinction between State immunity and the immunity of State officials. The International Court of Justice, in *Jurisdictional Immunities of the State*, acknowledged this distinction by affirming that

> [t]he Court must emphasize that [in the judgment] it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.[221]

The Court also expressed acceptance of the distinction between the immunity of the State and the immunity of its officials in referring to the way in which national and international courts have dealt with the distinction between civil and criminal jurisdiction and its consequences for immunity,[222] and in referring to its own jurisprudence.[223]

108. The judgment handed down by the European Court of Human Rights in *Jones and Others* is highly relevant, since, as the Court notes, the application refers to a case of immunity which, unlike the one in *Al-Adsani*, was brought before the British courts against individuals and not against a foreign State. The Court nonetheless applied the traditional doctrine that State immunity applies also to individuals.[224] This conclusion, however, requires a nuanced view, as the Court makes clear, in explaining the legal grounds for its judgment, that its decision refers exclusively to immunity in the context of civil cases, and alludes to the possibility that a different approach may be taken when immunity is invoked in criminal cases.[225]

109. This differentiation between the immunity of State officials from foreign criminal jurisdiction and the immunity of the State *stricto sensu* is still more evident in the case of immunity *ratione personae*, as an official who enjoys such immunity (a Head of State, Head of Government or Minister for Foreign Affairs) may do so even in respect of acts which are performed in a private capacity and which thus are not attributable to the State and do not engage its responsibility. In such cases, the immunity of these three officials from foreign criminal jurisdiction for a criminal act committed in a private capacity has no

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[217] See paras. (1) and (4) of the commentary to draft article 2 (*e*), *Yearbook ... 2014*, vol. II (Part Two), para. 132.

[218] See, in this regard, Bröhmer, *State Immunity and the Violation of Human Rights*, pp. 29 and 45; Foakes, *The Position of Heads of States ...*, pp. 140–141; Fox and Webb, *The Law of State Immunity*, p. 555; Van Alebeek, *The Immunity of States and their Officials*, pp. 103 *et seq.*; and Yang, *State Immunity in International Law*, p. 427.

[219] See, for example, Kohen, "The distinction between State immunity and diplomatic immunity".

[220] United States, *Samantar* v. *Yousuf*, 560 U.S. 305; 130 S. Ct. 2278 (2010). *Samantar* v. *Yousuf* is of particular importance because United States courts had previously upheld the applicability of the Foreign Sovereign Immunities Act to officials of foreign States, thereby conflating the two types of immunity. In relation to the position held previously by such courts, see United States, *Chuidian* v. *Philippine National Bank* (see footnote 75 above).

[221] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (see footnote 43 above), para. 91. It should be borne in mind that the Court makes this statement after concluding that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict". See also the separate opinion of Judge Bennouna (para. 35) and the dissenting opinion of Judge Yusuf (para. 40).

[222] *Ibid.*, paras. 87 *et seq.*

[223] *Ibid.*, para. 100.

[224] *Jones and Others* (see footnote 56 above), paras. 200 and 202–204.

[225] *Ibid.*, paras. 207 and 212–214. The Court expressed the same view in *Al-Adsani* (see footnote 56 above), para. 65.

equivalent whatsoever in the realm of State immunity. And yet, even in these cases, such acts are covered by a form of immunity from foreign criminal jurisdiction that is recognized for the benefit of the State, not of its official.

110. The following conclusions may be drawn on the basis of the foregoing considerations:

(*a*) State immunity is typically assumed to apply in respect of acts which are attributable to the State alone and for which the State alone can be held responsible;

(*b*) when an act is attributable both to the State and to an individual, and both can be held responsible, two types of immunity can be distinguished: immunity of the State, on the one hand, and immunity of the official, on the other;

(*c*) the differentiation between immunity of the State and immunity of State officials is clearest in respect of the immunity of State officials from foreign criminal jurisdiction, given the different types of responsibility attaching to the State (civil) and its official (criminal) and the different nature of the jurisdictions from which immunity is invoked.

(b) *Attribution of the act to the State*

111. The exercise of immunity *ratione materiae* is justified only when a link exists between the State and the act carried out by a State official; it is this link that qualifies the act as one performed on behalf of the State. Accordingly, in order to conclude that such a link exists, the act must first be attributable to the State. Given that the attribution must follow the rules of international law, the rules of attribution contained in articles 4 to 11 of the articles on responsibility of States for internationally wrongful acts, which have been discussed above, take on special significance. However, it should be recalled that the aforementioned criteria for attribution were defined by the Commission in the context of international responsibility, with a clear purpose: to prevent the State from using indirect forms of action, or individuals who are not its organs and who have not been expressly empowered to exercise elements of the governmental authority, in order to fraudulently free itself from international responsibility arising from acts committed on its behalf, under its instruction, control or direction, or under circumstances that render them acts of the State because they were carried out for the benefit or in the interest of the State.[226] Therefore, all of the criteria contained in chapter II of the articles on State responsibility should be analysed to determine whether they support the conclusion that an act attributable to a State is an "act performed in an official capacity" for the purposes of immunity of State officials from foreign criminal jurisdiction.

112. In this respect, the criminal nature of the acts to which the criteria for attribution are to be applied, as well as the nature of immunity, which itself constitutes an exception to the general rule on the exercise of jurisdiction by the forum State, should be taken into account. Both of these elements require an interpretation of the criteria for attribution that ensures that the institution of immunity does not become a mechanism to evade responsibility, thus altering its very nature.[227] In that light, it is questionable whether all the criteria for attribution contained in the articles on responsibility of States for internationally wrongful acts are useful for the purposes of immunity. Particularly unsuitable are the criteria set out in articles 7 to 11, which are analysed below.

113. The criterion contained in article 7 addresses the general issue of *ultra vires* acts and acts performed by the official with specific motives, which the Commission declared to be irrelevant for the purpose of determining State responsibility. However, the official's motives and the *ultra vires* nature of his or her acts may be significant in the context of immunity. Suffice it to note at this point that the judicial practice discussed above reveals that, in a number of cases, national courts have taken into account the perpetrators' motives when characterizing their acts as private acts not covered by immunity. Similarly, on several occasions, the courts have referred to non-fulfilment of the official's mandate or conduct in excess of authority to conclude that he or she has acted in a manner that precluded the enjoyment of immunity. In all of these cases, it is clear that the officials acted for their own benefit or in a manner that was inconsistent with or exceeded the mandate that the State had conferred on them, and the attribution of their acts to the State for the purposes of immunity cannot be justified. However, it should be noted that, while the motive of self-interest has in all cases been

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[226] See the introductory commentary to part one, chapter II, of the draft articles, in particular paras. (4) and (9). *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at pp. 38–39.

[227] It should also be noted that when the International Court of Justice itself has applied those criteria for attribution, it has always done so using a restrictive approach. In that regard, the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 212 above) and the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 213 above) are particularly significant, since in both cases, the responsibility of the State is determined in relation to conduct that has an unequivocally criminal component: genocide. In both cases, the International Court of Justice interpreted the criteria for attribution in a narrow and restrictive manner, distinguishing between acts committed by individuals acting on the basis of the existence of a formal link between themselves and the State and acts committed by persons who did not have such a link to the State, but which nevertheless could be attributed to the State. While the Court concluded that, in the first scenario, the attribution of the act to the State was automatic and did not require any particular proof, it asserted that, in the second scenario, it was not possible to attribute the act to the State unless it exercised direct control over the individuals in question. The Court also interpreted this last form of attribution in narrow terms, affirming that it constitutes an extraordinary scenario. In addition, it is interesting to note that in situations where persons commit acts at the instigation of, or under orders or instructions of, the State, the Court has concluded that the responsibility which the State may incur as a result of such acts is not equivalent to any characterization of the same as acts of the State *stricto sensu*. On the contrary, in such situations, the responsibility of the State derives from its own acts, namely, the instructions or orders in violation of international law that have been issued by its own organs or by persons legally empowered to exercise elements of the governmental authority. State responsibility may also derive from the failure to adopt the prevention and punishment measures called for in the Convention on the Prevention and Punishment of the Crime of Genocide. Lastly, it should be noted that the Court carried out a rigorous and restrictive analysis of the existence of a link between the State and the individuals and organizations who committed acts of genocide. See, in particular, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 212 above), paras. 385–389, 392–397, 406, 412, 438 and 449.

interpreted as a reason not to characterize an official's act as an act performed on behalf of the State, jurisprudence is less coherent with regard to *ultra vires* acts.

114. The criteria for attribution contained in articles 8 and 9 raise, in a general way, the phenomenon of "*de facto* officials". In the case of article 8, the Commission has stated that "most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State,"[228] especially bearing in mind the distinction made by the International Court of Justice between individuals acting under the direct control of the State and those simply acting at the instigation and under instructions of the State. The conclusion reached by the Court in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* with regard to responsibility[229] appears to be equally applicable in respect of immunity; this would mean that only acts carried out by an individual acting under the direct control of the State could be regarded as acts attributable to the State for the purposes of immunity. The concept of a State official is thus defined more accurately, excluding those individuals who are usually regarded as *de facto* officials. Only this conclusion is consistent with the nature of immunity, as it seems unreasonable that the State could claim immunity for individuals to whom it had not voluntarily conferred the status of organ or person authorized to exercise elements of the governmental authority, or with whom it had not established a special link of dependence and effective control at the time of commission of the acts that constitute the material element with regard to immunity.

115. With regard to the criterion contained in article 9, a more nuanced analysis is needed to assess its applicability for the purposes of immunity. In this case, the articles provide for a *de facto* situation in which the official authorities have disappeared or are being gradually restored. As stated by the Commission, that would be a form of "agency of necessity".[230] The cumulative conditions that the Commission requires for attribution in this case (the conduct must effectively relate to the exercise of elements of the governmental authority, the conduct must have been carried out in the absence or default of the official authorities, and the circumstances must have been such as to call for the exercise of those elements of authority) would generate a situation that closely resembles the performance of public functions. As stated by the Commission, the verb "call for" refers to the logic of need: the circumstances necessitated "some exercise of governmental functions". There is also a normative element in the form of agency entailed by article 9 which distinguishes these situations from the general rule that conduct of private parties, including insurrectionary forces, is not attributable to the State.[231] Thus, on an exceptional basis such acts could possibly be characterized as having been performed in an official capacity for the purposes of the immunity *ratione materiae* discussed in the present report. However, the very special circumstances under which such acts would be carried out make it highly unlikely that the said acts would result in a claim of immunity. Indeed, in the practice discussed above, there are no cases to which this scenario applies.

116. Third, in the case of retroactive attribution to the State of acts performed by insurrectional movements that assume power (art. 10), it should be noted that the individuals who performed such acts did not hold the status of State officials at the time they carried out the said activities. It is therefore difficult to conclude that an act which, when it originated, could not under any circumstance be considered an "act performed in an official capacity" could retroactively acquire such status, and that immunity from jurisdiction *ratione materiae* could be generated *a posteriori*, when it was not applicable to the act at the time it occurred. This is all the more true when the acts in question were conducted in the context of confrontations, including armed confrontations, with the authorities that, at the time, were undoubtedly acting on behalf of the State. As in the previous case, practice offers no examples of cases in which immunity from foreign criminal jurisdiction *ratione materiae* has been invoked in respect of acts carried out by insurrectional movements. Therefore, it may be concluded that such acts as may occur in the context of the activities envisaged under article 10 of the articles on responsibility of States for internationally wrongful acts cannot be regarded as "acts performed in an official capacity" in relation to the present topic.

117. Lastly, article 11 provides for the attribution of an act to a State if the State freely acknowledges the act as its own, without it being necessary for any type of prior link to exist between the act and the State. This criterion for attribution is fully justified for the purposes of determining State responsibility, but it is incompatible with the nature of immunity *ratione materiae*, which requires the acts covered by such immunity to have been performed in an official capacity at the time of commission. To deem this criterion for attribution applicable for the purposes of immunity would be equivalent to endowing the State with the right to declare, unilaterally and without any limit, that any act carried out by any person, irrespective of when the act was committed, could benefit from the immunity of State officials from foreign criminal jurisdiction. That is without a doubt incompatible with the very nature of immunity and with the foundation and objectives of the institution. It may therefore be concluded that this criterion for attribution is not relevant for the purpose of characterizing an act as having been performed in an official capacity for the purposes of the present topic.

(c) *Sovereignty and exercise of elements of the governmental authority*

118. As noted above, the attribution of an act to a State is the prerequisite for that act to be considered an "act performed in an official capacity" for the purposes of immunity from foreign criminal jurisdiction *ratione materiae*. However, the fulfilment of that requirement, even on the basis of the restrictive interpretation advocated above, is not enough to give rise to such characterization.

[228] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 47, para. (2) of the commentary to article 8.

[229] See footnote 212 above.

[230] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 49, para. (2) of the commentary to article 9.

[231] *Ibid*., para. (2) of the commentary to article 9.

On the contrary, characterizing an act which has been attributed to the State as an "act performed in an official capacity" requires the application of an additional, teleological criterion. Since immunity *ratione materiae* is intended to ensure respect for the principle of the sovereign equality of States, embodied in the maxim *par in parem non habet imperium*, the acts covered by such immunity must also have a link to the sovereignty that, ultimately, is intended to be safeguarded. That link, which cannot be merely formal, is reflected in the requirement that the act performed in an official capacity cannot be only an act attributable to the State and performed on behalf of the State, but must also be a manifestation of sovereignty, constituting a form of exercise of elements of the governmental authority. Furthermore, this requirement reflects the distinction between State responsibility and immunity, which precludes the automatic application of all of the criteria and legal categories defined for the purposes of the former to the latter.[232]

119. However, the concept of sovereignty remains difficult to define. Furthermore, it is not easy to describe what is meant by the "exercise of elements of the governmental authority", as evidenced by the fact that the Commission has not provided a definition of that term, nor is it defined in case law or in the legal literature. That being said, a series of elements leading to an approximation of the concept can be inferred from the analysis of practice set out above. Drawing on both the previous work of the Commission[233] and the judicial decisions taken by a number of national courts,[234] it may be concluded that the definition of "exercise of elements of the governmental authority" should be based on two elements, namely: (*a*) certain activities which, by their nature, are considered to be expressions of or inherent to sovereignty (police, administration of justice, activities of the armed forces, foreign affairs); and (*b*) certain activities occurring during the implementation of State policies and decisions that involve the exercise of sovereignty and are therefore linked to sovereignty in functional terms. These positive criteria are complemented by a negative criterion, which is just as important: national courts have expressly excluded from the scope of immunity those acts in which private interest and motives override the interest and motives of the State, even when the acts in question conducted by the official had a semblance of official status.[235] Such criteria should be applied, logically and on a case-by-case basis, so as to take into account all the elements that come together when a given act is performed and need to be assessed in order to determine whether, on the basis of its nature or its function, it constitutes an act in the exercise of elements of governmental authority and an expression of sovereignty. This case-by-case and context-based approach has also been employed by the courts whose decisions have been analysed in the present report.

[232] For a view against this argument, see O'Keefe, *International Criminal Law*, in particular para. 10.60. The Special Rapporteur is grateful to the author for sending a draft version of chapter 10 of his work, which she has used for the preparation of the present report. O'Keefe follows the reasoning set out by the former Special Rapporteur, Mr. Kolodkin (see *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631, para. 24).

[233] See para. 83 above.

[234] See para. 54 above.

[235] See para. 58 above.

120. The aforementioned criteria, which are based on practice, offer some guidance to the courts responsible for ruling on immunity. It should also be noted that national courts have in a number of cases referred to the distinction between *acta jure imperii* and *acta jure gestionis* to support their reasoning.[236] In this respect, it must be recalled that those two categories were established in the context of State immunity to serve as elements for analysis in relation to the restrictive theory of State immunity. The emphasis placed on the public and private or commercial dimension that characterizes each of these categories therefore makes it very difficult to automatically apply that distinction in order to identify "acts performed in an official capacity" for the purposes of immunity of State officials from foreign criminal jurisdiction. Nevertheless, the legal constructs that have gradually developed in respect of the basic characteristics of *acta jure imperii* offer some useful elements that may be taken into account by legal actors in the context of characterizing an act for the purposes of the present report.

121. The application of these criteria poses a special challenge in the case of international crimes. As demonstrated in the analysis of judicial practice, courts have not adopted a consistent position with regard to the definition of "acts performed in an official capacity" for the purposes of immunity.[237] In some decisions, it has been argued that international crimes cannot under any circumstances be regarded as "acts performed in an official capacity" or benefit from immunity. The opposing view holds that international crimes are acts performed in an official capacity and are therefore covered by immunity. An intermediate position is that, while international crimes have been viewed as acts performed in an official capacity, they cannot, by their nature, be regarded as benefiting from immunity. Lastly, in some cases it has been argued that international crimes cannot benefit from immunity without some pronouncement being made as to whether or not they are acts performed in an official capacity. The literature reflects the same divergences in interpretation.[238] The work of the Commission will therefore need to address the issue of the relationship between immunity and international crimes. At this stage, that relationship will be discussed solely from the perspective of the definition of acts performed in an official capacity.

122. According to the first position mentioned above, international crimes cannot be regarded as a manifestation of sovereignty or a form of exercise of elements of the governmental authority and must therefore be excluded from the concept of "acts performed in an official capacity" for the purposes of immunity. Various lines of reasoning are put forward in favour of this interpretation, but they can be summed up in two basic arguments, which are sometimes formulated jointly: (*a*) the commission of international crimes is not a function of the State; and (*b*) international crimes constitute forms of conduct prohibited under international law and undermine the core values and principles of that system. In both cases, international crimes are viewed from the perspective of the

[236] See para. 54 above.

[237] See paras. 56–57 above.

[238] On international crimes, see Pedretti, *Immunity of Heads of State and State Officials for International Crimes*.

limits to immunity: such crimes are forms of conduct that cannot be regarded as having been performed in an official capacity and immunity therefore does not apply to such crimes because they do not present the characteristics that define the material element of immunity *ratione materiae*. That position is often presented together with a reflection on the need to consolidate and strengthen the fight against impunity, as one of the distinctive features of international law at the beginning of the twenty-first century.

123. These arguments are certainly thought-provoking and have the attractive quality of defending the values and principles that underpin society and international law in our time. However, there are two major problems associated with this understanding of international crimes as a limit on immunity *ratione materiae*. The first relates to the very concept of acts performed in an official capacity for the purposes of immunity. The second challenge is broader in scope and concerns the consequences the approach could have with regard to State responsibility for international crimes.

124. The conclusion that an international crime cannot be regarded as an act performed in an official capacity is based on the assumption that such crimes cannot be committed in exercise of elements of the governmental authority or as an expression of sovereignty and State policies. However, the argument that torture, enforced disappearances, extrajudicial killings, ethnic cleansing, genocide, crimes against humanity and war crimes are devoid of any official or functional dimension in relation to the State is at odds with the facts. Indeed, as has been highlighted on many occasions, including in the work of the Commission, such crimes are committed using the State apparatus, with the support of the State, and to achieve political goals that, regardless of their morality, are those of the State. Such crimes are on many occasions committed by "State officials", within the meaning given to this term for the purposes of the topic under consideration. Furthermore, the participation of State officials is an essential element of the definition of some forms of conduct characterized as international crimes under contemporary international law. In addition, the argument that international crime is contrary to international law does not provide any additional element of relevance for the characterization of an act performed in an official capacity, given that, as noted above, the criminal nature of the act, and consequently, its illegality, is one of the characteristics of any act performed in an official capacity in respect of which immunity from foreign criminal jurisdiction may be invoked, regardless of whether it is determined to be illegal by virtue of national or international law.

125. The second of the two problems mentioned above is no less significant. For a full understanding of this issue, consideration must be given to the fact that, in order for an act to be characterized as having been performed in an official capacity for the purposes of immunity, the act must necessarily be attributable to the State. Therefore, the assertion that an international crime cannot be considered as having been performed in an official capacity could perversely, and doubtless unintentionally, give rise to an understanding of international crimes as acts that are not attributable to the State and can only be attributed to the perpetrator. The potential major consequences of this assertion with regard to responsibility require little explanation: if the act is not attributable to the State, the State would be exempted from any international responsibility in relation to that act and, instead of international responsibility being attributed to the State, criminal responsibility would be attributed to the individual. That conclusion is incompatible with the very nature of immunity and with the latest developments in international law in the area of responsibility, one of the distinctive features of which has been the adoption of the model of dual responsibility (State and individual).[239] Thus, it cannot be concluded from this perspective either that international crimes are not acts performed in an official capacity for the purposes of immunity.

126. Yet the characterization of international crimes as "acts performed in an official capacity" does not mean that a State official can automatically benefit from immunity *ratione materiae* for the commission of such crimes. On the contrary, given the nature of those crimes and the particular gravity accorded to them under contemporary international law, there is an obligation for them to be taken into account for the purposes of defining the scope of immunity from foreign criminal jurisdiction. However, an analysis of the effects of international crimes in respect of immunity could be explored more fully in the context of exceptions to immunity. That is the approach the Special Rapporteur proposes to take in her fifth report.

5. Conclusion: the definition of an "act performed in an official capacity"

127. On the basis of the analysis set out in the preceding pages, the following draft article is proposed:

"*Draft article 2. Definitions*

"For the purposes of the present draft articles:

"(*f*) an 'act performed in an official capacity' means an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction."

C. The temporal element

128. The temporal element of immunity *ratione materiae* is not disputed in either practice or doctrine; there is a broad consensus on the indefinite nature of this type of immunity. The term "indefinite nature" refers to the fact that immunity *ratione materiae* can be applied at any time after the commission of the act, whether the official concerned remains in office or has left office.

129. In order to understand the real meaning of the temporal element of immunity *ratione materiae*, a distinction must be made between two points in time: the moment when the act that could give rise to immunity is committed and the moment when immunity is invoked. While the first must have taken place during the term of office of the State official, the second will occur when criminal proceedings are initiated against the perpetrator of the act, irrespective

[239] See paras. 96–110 above.

of whether immunity is invoked during the official's term of office or after it has ended. Therefore, the temporal element of immunity *ratione materiae* is more conditional in nature than it is limited: if the condition is met at a given time, there is no time limit whatsoever for the applicability of immunity. This is substantiated by the very nature of this type of immunity and the primacy in the same of the concept of an "act performed in an official capacity", the nature of which does not change or disappear when the official leaves office.

130. This understanding of the temporal element of immunity *ratione materiae* thus differs from that of the temporal element of immunity *ratione personae*, which is by nature limited. As established in draft article 4, paragraph 1, which was provisionally adopted by the Commission, immunity *ratione personae* ends when the Head of State, Head of Government or Minister for Foreign Affairs completes his or her term of office. Such immunity cannot be invoked subsequently, as the individual concerned must be in office in order to benefit from it.

131. However, this conceptual distinction between the temporal element of immunity *ratione personae* and that of immunity *ratione materiae* does not mean that the two types of immunity are mutually exclusive. On the contrary, immunity *ratione materiae* can be applied to any State official and, therefore, former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, after they have left office, will be able to benefit from immunity *ratione materiae*, even though they are no longer covered by immunity *ratione personae*. In that case, former Heads of State, former Heads of Government and former Ministers for Foreign Affairs will be subject to the general regime applicable to immunity *ratione materiae* and the temporal element will also function as a condition in their regard, since it will be necessary to demonstrate that any act performed by them in respect of which immunity is being invoked can be characterized as an act performed in an official capacity and that it was committed during the period in which they held the relevant position in the State structure. However, the fact that the position they held at one time was that of Head of State, Head of Government or Minister for Foreign Affairs does not in any way change the substantive regime of immunity *ratione materiae*, as appears to be confirmed by both treaty and judicial practice. The latter does not offer any examples of cases in which a former Head of State, Head of Government or Minister for Foreign Affairs has benefited from a more advantageous regime than the one corresponding to any other official by application of immunity *ratione materiae*. This same conclusion may be drawn from the resolutions on immunity of the International Law Institute, in particular those adopted in 2001 and 2009.[240]

D. Scope of immunity *ratione materiae*

132. The two normative elements of immunity *ratione materiae* analysed in the preceding pages are conceptually and legally distinct, which justifies their separate consideration in the present report. However, the two elements are interrelated and help to define the scope (material and substantive) of immunity *ratione materiae*. In addition, the Commission, when provisionally adopting draft article 4 (Scope of immunity *ratione personae*), chose to cover the two elements in a single draft article. Accordingly, based on the analysis conducted in this report on the material and temporal elements of immunity *ratione materiae*, the following draft article is proposed:

"*Draft article 6. Scope of immunity* ratione materiae

"1. State officials, when acting in that capacity, enjoy immunity *ratione materiae*, both while they are in office and after their term of office has ended.

"2. Such immunity *ratione materiae* covers exclusively acts performed in an official capacity by State officials during their term of office.

"3. Immunity *ratione materiae* applies to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, under the conditions set out in paragraphs 1 and 2 of this draft article."

133. Draft article 6 follows the same pattern as the draft article on the scope of immunity *ratione personae* (draft article 4), adopted by the Commission in 2014. The proposed draft article should be read together with the other draft articles provisionally adopted by the Commission, and the commentary thereto; in particular, it should be read in conjunction with draft article 5. Lastly, it should be noted that draft article 6 has no implications and should not be read as a pronouncement on the issue of limits and exceptions to immunity.

[240] Resolutions by the Institute of International Law on "Immunities from jurisdiction and execution of Heads of State and of Government in international law" adopted on 26 August 2001, Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), p. 743; and "Immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", Institute of International Law, Session of Naples (2009) (available from www.idi-iil.org, *Resolutions*).

Chapter II

Future workplan

134. In her fifth report, to be submitted to the Commission in 2016, the Special Rapporteur proposes to analyse the issue of limits and exceptions to the immunity of State officials from foreign criminal jurisdiction.

135. The issue of limits and exceptions to immunity has been present in the work of the Commission ever since it began to study the topic of immunity of State officials from foreign criminal jurisdiction; it was addressed in the memorandum by the Secretariat[241] and in the second re-

[241] See "Immunity of State officials from criminal jurisdiction", memorandum by the Secretariat (A/CN.4/596) (footnote 3 above).

port of the former Special Rapporteur, Mr. Kolodkin.[242] It is certainly one of the major issues to which the Commission should respond, and it can unequivocally be said that it is the most politically sensitive issue among those addressed by these draft articles. It therefore comes as no surprise that the issue of limits and exceptions has been the subject of an ongoing debate in the Commission and that, in fact, some of its members consider the issue to be the very purpose, even the only purpose, of this topic. The importance attributed to this issue is also reflected in the statements delivered in the Sixth Committee of the General Assembly, in which States have repeatedly insisted that the topic of immunity of State officials from foreign criminal jurisdiction must be addressed in a way that is not detrimental to or incompatible with the ongoing efforts of the international community to combat impunity. That said, in the opinion of another group of States, the issue of limits and exceptions to immunity should be approached cautiously and prudently.

136. As was noted in the preliminary report of the Special Rapporteur,[243] the issue of limits and exceptions to immunity should be addressed once the analysis of the normative elements of immunity *ratione personae* and immunity *ratione materiae* has been completed. This is for the obvious reason that only after examining the basic elements that define the general regime applicable in abstract terms to immunity from foreign criminal jurisdiction is it possible to address the complex question of whether that general regime may be subject to limits and exceptions. In addition, the issue of limits and exceptions to immunity must be analysed both comprehensively and with reference to the two types of immunity previously analysed.

137. The issue of limits and exceptions to immunity has been considered essentially from the perspective of the acts that can be covered by immunity. Emphasis has therefore been placed on the relationship between immunity from foreign criminal jurisdiction, international crimes, grave and systematic human rights violations, the fight against impunity and *jus cogens*. The wealth of legal literature produced in recent years on the immunity of the State and its officials underscores how the aforementioned relationship constitutes one of the major concerns of the legal community. However, this concern is not exclusively theoretical or doctrinal. On the contrary, the discussion concerning the judgments of the European Court of Human Rights in the *Al-Adsani* and *Jones v. the United Kingdom*[244] cases demonstrates how the issue of limits and exceptions to sovereign immunity has a very important practical dimension. Lastly, the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* has placed the close relationship between immunity and several key categories of contemporary international law at the forefront of the debate, while the recent judgment of the Italian Constitutional Court concerning the application in Italy of that International Court of Justice judgment[245] has added complexity to the issue. Consequently, any work of the Commission on the immunity of State officials from foreign criminal jurisdiction would be incomplete without an appropriate consideration of the limits and exceptions to such immunity.

138. Such analysis should not be limited to the relationship between international crimes and immunity from foreign criminal jurisdiction, even though that issue certainly constitutes the central and most controversial aspect of the issue. Instead, the distinction between a limit and an exception, and the different functions that each of these categories may play in the legal regime of immunity of State officials from foreign criminal jurisdiction, must first be examined. Such analysis must also be carried out systematically, taking due account of the fact that international law is a complete legal system whose rules are related and interact with each other.

139. With the submission and discussion of the report on limits and exceptions to immunity, the Commission could, during the present quinquennium, complete its study of the substantive issues which define the legal status of the institution. Issues of a procedural nature should be addressed in a sixth report, which would be submitted to the Commission during the first session of the next quinquennium. The submission of the proposed report and future work will, however, be subject to any decisions taken by the new Commission that is to be elected by the General Assembly in 2016.

[242] See *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

[243] See *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/654.

[244] See footnote 56 above.

[245] Italy, Judgment No. 238 (2014), Constitutional Court, 22 October 2014, *Gazetta Ufficiale della Repubblica Italiana*, 1st Special Series—Consitutional Court, No. 45 (2014), p. 1. English version available from www.cortecostituzionale.it.

Annex

Proposed draft articles

Draft article 2. Definitions

For the purposes of the present draft articles:

(*f*) an "act performed in an official capacity" means an act performed by a State official exercising elements of the governmental authority that, by its nature, constitutes a crime in respect of which the forum State could exercise its criminal jurisdiction.

Draft article 6. Scope of immunity ratione materiae

1. State officials, when acting in that capacity, enjoy immunity *ratione materiae*, both while they are in office and after their term of office has ended.

2. Such immunity *ratione materiae* covers exclusively acts performed in an official capacity by State officials during their term of office.

3. Immunity *ratione materiae* applies to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, under the conditions set out in paragraphs 1 and 2 of this draft article.

SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

[Agenda item 4]

DOCUMENT A/CN.4/683

Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur*

[*Original: English*]
[*7 April 2015*]

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	Source
Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.
Constitution of the World Health Organization (New York, 22 July 1946)	*Ibid.*, vol. 14, No. 221, p. 185.
International Convention for the Regulation of Whaling (Washington, D.C., 2 December 1946)	*Ibid.*, vol. 161, No. 2124, p. 72.
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 for the Establishment of a European Organization for Nuclear Research (Paris, 1 July 1953)	*Ibid.*, vol. 200, No. 2701, p. 149.
Convention and Statutes relating to the Development of the Chad Basin (Fort Lamy, 22 May 1964)	*Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (United Nations publication, Sales No. E.84.II.A.7), p. 8.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.*, vol. 1833, No. 31363, p. 3.
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.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	United Nations, *Treaty Series*, vols. 1867–1869, No. 31874, p. 3.
Agreement on Technical Barriers to Trade (Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization)	*Ibid.*, p. 276.
Multilateral Agreement on the Liberalization of International Air Transportation (Washington, D.C., 1 May 2001)	*Ibid.*, vol. 2215, No. 39375, p. 33.
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Introduction

1. In 2012, the International Law Commission placed the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" on its current programme of work.[1] This topic originated from previous work by the Commission's Study Group on treaties over time.[2]

2. During its sixty-fifth session, in 2013, the Commission considered the first report on subsequent agreements and subsequent practice in relation to treaty interpretation[3] and provisionally adopted five draft conclusions with commentaries.[4] These concerned:

(*a*) general rule and means of treaty interpretation (draft conclusion 1);

(*b*) subsequent agreement and subsequent practice as authentic means of interpretation (draft conclusion 2);

(*c*) interpretation of treaty terms as capable of evolving over time (draft conclusion 3);

(*d*) definition of subsequent agreements and subsequent practice (draft conclusion 4);

(*e*) attribution of subsequent practice (draft conclusion 5).

3. During the debate in the Sixth Committee on the report of the Commission on its sixty-fifth session, States generally reacted favourably to the work of the Commission on the topic.[5]

4. During its sixty-sixth session, in 2014, the Commission considered the second report on the topic[6] and provisionally adopted five more draft conclusions with commentaries.[7] These concerned:

(*a*) identification of subsequent agreements and subsequent practice (draft conclusion 6);

(*b*) possible effects of subsequent agreements and subsequent practice in interpretation (draft conclusion 7);

(*c*) weight of subsequent agreements and subsequent practice as a means of interpretation (draft conclusion 8);

(*d*) agreement of the parties regarding the interpretation of a treaty (draft conclusion 9);

(*e*) decisions adopted within the framework of a Conference of States Parties (draft conclusion 10).

[1] *Yearbook ... 2012*, vol II (Part Two), chap. X; see also General Assembly resolution 67/92 of 14 December 2012, paras. 2–3.

[2] *Yearbook ... 2008*, vol II (Part Two), annex I; *Yearbook ... 2009*, vol II (Part Two), chap. XII; *Yearbook ... 2010*, vol II (Part Two), chap. X; *Yearbook ... 2011*, vol. II (Part Two), chap. XI.

[3] *Yearbook ... 2013*, vol II (Part One), document A/CN.4/660.

[4] *Ibid.*, vol II (Part Two), pp. 17 *et seq.*, paras. 38–39.

[5] *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee,* 18th meeting (A/C.6/68/SR.18) and, *ibid.*, 19th meeting (A/C.6/68/SR.19).

[6] *Yearbook ... 2014*, vol II (Part One), document A/CN.4/671.

[7] *Ibid.*, vol II (Part Two), paras. 75–76.

5. During the debate in the Sixth Committee in 2014, delegations generally welcomed the adoption of these five draft conclusions, which were considered balanced and in line with the overall objective of the work on the topic.[8]

6. At its 2014 session, the Commission requested, "by 31 January 2015", States and international organizations:

(*a*) to provide it with any examples where the practice of an international organization has contributed to the interpretation of a treaty; and

(*b*) to provide it with any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.[9]

7. As of the date of submitting the present report, four contributions had been received.[10] Further contributions are welcome at any time.

8. The first two reports have considered general aspects of the topic. The present third report addresses the role of subsequent agreements and subsequent practice in relation to the interpretation of a particular type of treaty: constituent instruments of international organizations. While article 5 of the Vienna Convention on the Law of Treaties (hereinafter, "1969 Vienna Convention") provides that the Convention is applicable to such treaties, it also recognizes that this may raise specific questions regarding their interpretation. An international organization, by definition, possesses a separate international legal personality and it exercises its powers (competences) and functions through its organs.[11] These characteristics raise certain questions, in particular regarding the relationship between subsequent agreements and subsequent practice of the parties to the constituent instruments themselves, and the subsequent conduct of the organs of international organizations, for the interpretation of constituent instruments of international organizations.

9. In addressing these questions, the important differences between States and international organizations should be borne in mind. The Commission has referred to those differences in its general commentary to the 2011 articles on the responsibility of international organizations:

> International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ("principle of speciality"). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound.[12]

10. That statement describes not only the main differences between States and international organizations, but also characteristics of treaties that are constituent instruments of such organizations and may be relevant for their interpretation.

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[8] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session (A/CN.4/678; available from the Commission's website), para. 20.

[9] *Yearbook ... 2014*, vol II (Part Two), para. 26.

[10] Austria, Finland, Germany and the European Union.

[11] See article 2, subparagraphs (*a*) and (*c*), of the draft articles on the responsibility of international organizations: "(*a*) 'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. …; (*c*) 'organ of an international organization' means any person or entity which has that status in accordance with the rules of the organization" (General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol II (Part Two), paras. 87–88).

[12] Para. (7) of the general commentary, *Yearbook ... 2011*, vol II (Part Two), para. 88, at p. 47.

Chapter I

Scope of the present report

11. The present report does not address every aspect of the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties involving international organizations.

12. The report is limited to the role of subsequent agreements and subsequent practice in relation to treaties that are the constituent instruments of international organizations (art. 5 of the 1969 Vienna Convention). It therefore does not concern the interpretation of treaties adopted within an international organization or those concluded by international organizations. The latter category is addressed by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter, "1986 Vienna Convention"). Whereas the interpretation of such treaties does, in principle, fall within the scope of the topic,[13] the Special Rapporteur is inclined to agree with Gardiner, who has expressed the following view:

> It seems reasonable to predict that the rules on interpretation as replicated in the 1986 [Vienna] Convention will be subject to gravitational pull and will come to be regarded as stating customary international law in the same way as those of the 1969 [Vienna] Convention; but there is insufficient practice to assert this definitely.[14]

13. The report also does not address questions of the interpretation of decisions by organs of international organizations as such. As the International Court of Justice

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[13] This was clarified at the outset, see *Yearbook ... 2008*, vol II (Part Two), annex I, pp. 153–154, para. 12, and is reflected in the title of the topic, which is general.

[14] Gardiner, *Treaty Interpretation*, p. 112.

has held with respect to the interpretation of Security Council resolutions:

> While the rules on treaty interpretation embodied in articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member 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. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[15]

14. These considerations are not only true for decisions of the Security Council, but also for many other decisions of organs of international organizations. Special considerations also apply to decisions of international courts, as has been confirmed by the International Court of Justice for its own judgments:

> A judgment of the Court cannot be equated to a treaty, an instrument which derives its binding force and content from the consent of the contracting States and the interpretation of which may be affected by the subsequent conduct of those States, as provided by the principle stated in article 31, paragraph 3 (*b*), of the 1969 Vienna Convention on the Law of Treaties. A judgment of the Court derives its binding force from the Statute of the Court and the interpretation of a judgment is a matter of ascertaining what the Court decided, not what the parties subsequently believed it had decided. The meaning and scope of a judgment of the Court cannot, therefore, be affected by conduct of the parties occurring after that judgment has been given.[16]

15. The present report does, however, consider the possible effect of decisions and conduct of organs of international organizations for the interpretation of a constituent instrument of an international organization.

16. The report does not address the question of whether the conduct of different organs of international organizations may have different weight regarding the interpretation of constituent instruments of international organizations, including the question of the possible effect, for the purpose of interpretation, of pronouncements or other action by a treaty monitoring body consisting of independent experts;[17] these questions will be dealt with in the next report.

17. The report does not consider decisions by a court or a tribunal that is authorized by the constituent instrument of an international organization to adjudicate questions regarding the interpretation of such a treaty as a possible form of "subsequent practice" for the purpose of treaty interpretation.[18] Whereas they technically emanate from an organ of the international organization concerned and may under certain circumstances amount to a "clear and constant jurisprudence"[19] ("*jurisprudence constante*"), thereby possessing considerable weight for the purpose of interpretation, such decisions by courts or tribunals constitute a special means for the interpretation of the treaty in subsequent cases, as indicated, in particular, by Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

18. Finally, the present report is not concerned with decisions of Conferences of States Parties. In its draft conclusion 10, provisionally adopted in 2014, the Commission has addressed the possible effects of decisions adopted within the framework of Conferences of States Parties for the interpretation of treaties. In this context, the Commission has observed that Conferences of States Parties "can be roughly divided into two basic categories", namely those conferences and assemblies of the parties to a treaty which "are actually an organ of an international organization within which States parties act in their capacity as members of that organ … [and those other Conferences of Parties] convened pursuant to treaties that do not establish an international organization".[20]

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[15] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 442, para. 94; see also Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (part eight)", p. 29; Wood, "The interpretation of Security Council resolutions", p. 85; Gardiner, *Treaty Interpretation*, p. 113.

[16] *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.

[17] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at pp. 663–664, para. 66; Alvarez, *International Organizations as Law-Makers*, pp. 88–89; Klabbers, "Checks and balances in the law of international organizations", pp. 151–152; Ulfstein, "Reflections in institutional design—especially treaty bodies", p. 439.

[18] But see Gardiner, *Treaty Interpretation*, p. 111; Dörr, "Article 31: General rule of interpretation", p. 531, para. 19.

[19] This is an expression from the context of the European Court of Human Rights, see United Kingdom, *Regina v. Secretary of State for the Environment,* Transports *and the Regions ex parte Alconbury (Developments Limited and others)*, House of Lords, [2001] UKHL 23; *Regina v. Special Adjudicator ex parte Ullah; Do (FC) v. Immigration Appeal Tribunal*, House of Lords, [2004] UKHL 26 [20] (Lord Bingham); *Regina (On The Application of Animal Defenders International) v. Secretary of State For Culture, Media and Sport*, House of Lords, [2008] UKHL 15.

[20] Draft conclusion 10, para. 2, and para. (2) of the commentary thereto, *Yearbook … 2014*, vol II (Part Two), para. 75, at pp. 128.

Chapter II

Subsequent agreements and subsequent practice in the interpretation of constituent instruments of international organizations

19. The interpretation of treaties that are constituent instruments of international organizations, in accordance with article 5 of the 1969 Vienna Convention (see sect. A below), while being governed, in principle, by the rules expressed in articles 31 to 33 of the 1969 Vienna Convention (sect. B below), knows specific modes of subsequent practice (sect. C below), as well as of subsequent agreements (sect. D below), which raise questions of how to

conceive them in terms of the Vienna rules of interpretation (sect. E below) and how to determine the character and the weight of such conduct (sect. F below). Finally, the question of the customary character of article 5 will be addressed (sect. G below).

A. Article 5 of the 1969 Vienna Convention

20. Article 5 of the 1969 Vienna Convention provides that: "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."[21]

21. This provision follows the general approach of the Convention, according to which its rules apply "unless the treaty otherwise provides".[22] When the Commission elaborated the draft articles on the law of treaties, some members doubted whether a provision such as article 5 was necessary, since a constituent instrument of an international organization is unquestionably a treaty, and since the Vienna Convention is based on the understanding that the parties to a treaty may, with the exception of rules of *jus cogens*, agree on specific rules that can deviate from the rules of the Convention. For some time, the Commission considered formulating, instead of a general provision (as article 5), different specific provisions that would have constituted "reservations" regarding relevant rules of constituent instruments of international organizations in areas in which such treaties were likely to be treated differently by their parties (e.g., provisions regarding termination). Ultimately, however,

> the Commission concluded that the article in question should be transferred to its present place in the introduction and should be reformulated as a general reservation covering the draft articles as a whole. It considered that this would enable it to simplify the drafting of the articles containing specific reservations. It also considered that such a general reservation was desirable in case the possible impact of rules of international organizations in any particular context of the law of treaties should have been inadvertently overlooked.[23]

22. Therefore, article 5 is not intended to add constituent instruments of international organizations to those treaties to which the Convention would normally apply, but rather to emphasize that the general rule according to which all treaties between States are subject to the rules of the Convention "unless the treaty otherwise provides" also applies to constituent instruments of international organizations.[24] Even if such constituent instruments exhibit certain special characteristics, these can be taken into account by virtue of article 5, a provision that, by itself, does not constitute a special rule.

23. A treaty that is a constituent instrument of an international organization may contain certain provisions that are unrelated to the powers (competences) and functions of the organization. For example, the United Nations Convention on the Law of the Sea is the constituent treaty of the International Seabed Authority, an "[international] organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area" (art. 157, para. 1, of the Convention). This suggests that the rules of the Convention that are unrelated to the responsibilities of the Authority are, from a functional point of view, not part of the constituent rules of this particular international organization, although they are formally part of one instrument. On the other hand, there are also instruments which may be separated from each other to a certain degree, but which are functionally closely interrelated. One example is the Marrakesh Agreement Establishing the World Trade Organization, which serves as an umbrella for a number of other treaties that are formally annexed to it and whose implementation is supervised and enabled by that organization. It is not necessary, for the purpose of the present report, to determine whether the term "constituent instrument of an international organization" in article 5 of the 1969 Vienna Convention should be defined in purely formal or also in functional terms. Even if it were defined by taking functional considerations into account, the term "constituent instrument of an international organization" would encompass all provisions of a treaty, or of different formally connected treaties, for whose implementation, or supervision thereof, the organization is given certain responsibilities.

B. The application of the rules of the 1969 Vienna Convention on treaty interpretation to constituent instruments of international organizations

24. Article 5 confirms the applicability, as a general rule, of the rules of the 1969 Vienna Convention, including articles 31 to 33 regarding treaty interpretation, to treaties that are constituent instruments of international organizations.[25] The International Court of Justice has confirmed this in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* by stating that, "[f]rom a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply".[26]

25. In the same vein, the Court has pronounced, with respect to the Charter of the United Nations, the following:

> On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics.[27]

26. At the same time, article 5 suggests, and the case law confirms, that constituent instruments of international organizations are also treaties of a particular type that may need to be interpreted in a specific way. Accordingly, the International Court of Justice has stated:

> But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust

[21] See also the parallel provision of article 5 of the 1986 Vienna Convention.

[22] See, e.g., articles 16; 19 (*a*) and (*b*); 20, paras. 1 and 3–5; 22; 24, para. 3; 25, para. 2; 44, para. 1; 55; 58, para. 2; 70, para. 1; 72, para. 1; and 77, para. 1.

[23] Para. (1) of the commentary to article 4 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol II, para. 38, at p. 191.

[24] Schmalenbach, "Article 5: Treaties constituting international organizations and treaties adopted within an international organization", p. 89, para. 1.

[25] Gardiner, *Treaty Interpretation*, p. 247.

[26] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 74, para. 19.

[27] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 157.

the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.[28]

27. By virtue of article 5, more specific "relevant rules" of interpretation that are contained in a constituent instrument of an international organization take precedence over the general rules of interpretation under the 1969 Vienna Convention.[29] However, few such constituent instruments contain explicit rules regarding their interpretation.[30] Still, specific "relevant rules" of interpretation do not necessarily have to be formulated explicitly in the constituent instrument of an international organization, but may also be implied, or be part of the "established practice of the organization".[31]

28. For example, the Court of Justice of the European Union has developed its own practice of interpreting the founding treaties of the European Union by emphasizing their object and purpose and their effective implementation.[32] This approach has been explained by the Court to be a consequence of its interpretation of the founding treaties of the European Union as creating a "new legal order" rather than simply an ordinary international organization.[33] The Andean Tribunal of Justice has adopted a similar approach.[34] As a consequence of its general approach, the Court of Justice of the European Union does not take subsequent practice by the parties or the organs of the Union into account as far as it is competent to interpret the founding treaties of the European Union.[35] By pointing out that "[a] mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty [and that] [s]uch a practice cannot therefore create a precedent binding on Community institutions with regard to the correct legal basis",[36] the Court of Justice of the European Union not only refers to derogation in the sense of modification, but also to the taking into account of subsequent practice as a decisive element in the interpretation of rules of primary Union law.

29. At the same time, the Court of Justice of the European Union does not deny the applicability of the customary rules of interpretation, as they are expressed in the 1969 Vienna Convention, to be binding upon the European Union institutions and that they form part of the European Union legal order.[37] The Court therefore does take into account the subsequent practice when it comes to the interpretation of treaties concluded by the European Union with non-member States, or other international organizations.[38] According to the Court, such

[28] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (see footnote 26 above), p. 75, para. 19.

[29] See, for example, Klabbers, *An Introduction to International Institutional Law*, p. 88; Schmalenbach, "Article 5…", p. 89, para. 1, and p. 96, para. 15; Brölmann, "Specialized rules of treaty interpretation: international organizations", p. 522; Dörr, "Article 31…", p. 538, para. 32.

[30] Most so-called interpretation clauses determine which organ is competent authoritatively to interpret the treaty, or certain of its provisions, but do not formulate rules "on" interpretation itself; see Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms*, pp. 26–27; Dörr, "Article 31…" , p. 537, para. 32.

[31] See 1986 Vienna Convention, art. 2, para. 1 (*j*); and the draft articles on the responsibility of international organizations (see footnote 11 above), art. 2 (*b*); Peters, "Subsequent practice and established practice of international organizations …".

[32] This approach can be traced back to the landmark decisions *Van Gend en Loos* and *Costa v. E.N.E.L.* on the special character of the European Union legal order, see *Van Gend en Loos v. Netherlands Inland Revenue Administration*, Case 26/62, Judgment of 5 February 1963, Court of Justice of the European Communities, *European Courts Reports 1963*, p. 1 , and *Costa v. E.N.E.L.*, Case 6/64, Judgment of 15 July 1964, Court of Justice of the European Communities, *European Court Reports 1964*, p. 585. See also Kuijper, "The European Courts and the law of treaties: the continuing story", pp. 258 *et seq.* It should be noted, however, that the Court has, at times, made reference to the Vienna rules on treaty interpretation, particularly to the object and purpose of the treaty and its provisions, when interpreting the founding treaties of the European Union, see *Malgorzata Jany and others v. Staatssecretaris van Justitie*, Case C-268/99, Judgment of 20 November 2001, Court of Justice of the European Union, *European Court Reports 2001*, p. I-08615 , at para. 35 (with further references to previous decisions).

[33] Opinion 2/13 (Full Court), 18 December 2014, on the compatibility with European Union law of the draft agreement for European Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (stating that "the founding treaties of the [European Union], unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which [m]ember States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only States but also their nationals" (para. 157)); this has been confirmed by the European Union in its contribution to the request of the Commission to provide it with examples where the practice of an international organization has contributed to the interpretation of a treaty (see para. 7 above) ("That the Union law represents an autonomous legal order and that the founding Treaties of the Union are not like ordinary international treaties is a long standing and well-settled case-law, the origins of which could be traced back to judgements delivered already in the early years of the existence of the then European Communities"); Gardiner, *Treaty Interpretation*, pp. 113–114.

[34] Alter and Helfer, "Legal integration in the Andes: law–making by the Andean Tribunal of Justice", p. 715 ("The [Andean Tribunal of Justice] invoked [European Court of Justice] jurisprudence to establish Andean Community law as distinct from traditional international law").

[35] *Defrenne v. Société anonyme belge de navigation aérienne Sabena*, Case 43/75, Court of Justice of the European Communities, *European Courts Reports 1976*, p. 455, at paras. 14, 33 and 57; Nolte, "Second report of the ILC Study Group on treaties over time: jurisprudence under special regimes relating to subsequent agreements and subsequent practice", pp. 297–300; see also European Union contribution (see para. 7 above) ("subsequent practice of institutions of the [European] Union in implementation of the founding Treaties is not capable of creating a precedent binding upon the Union's institutions with regard to the proper interpretation and implementation of the relevant provisions of the Treaties").

[36] *United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities*, Case 68/86, Judgment of 23 Feburary 1988, Court of Justice of the European Communities, *European Court Reports 1988*, p. 855, at para. 24; see also *French Republic v. Commission of the European Communities*, Case C-327/91, Judgment of 9 August 1994, Court of Justice of the European Communities, *European Court Reports 1994*, p. I-3641, paras. 31 and 36.

[37] *Espada Sánchez et al. v. Iberia Líneas Aéreas de España SA*, Case C-410/11, Judgment of 22 November 2012, Court of Justice of the European Union, para. 21; *Helm Düngemittel GmbH v. Hauptzollamt Krefeld*, Case C-613/12, Judgment of 6 February 2014, Court of Justice of the European Union, para. 37; *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Case C-386/08, Judgment of 25 February 2010, Court of Justice of the European Union, *European Court Reports 2010*, p. I-1289, para. 42.

[38] *Cayrol v. Giovanni Rivoira & Figli*, Case 52/77, Judgment of 30 November 1977, Court of Justice of the European Communities, *European Court Reports 1977*, p. 2261, at p. 2277. *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others*, Case C-432/92, Judgment of 5 July 1994, Court of Justice of the European Union, *European Court Reports 1994*, p. I-3087, at paras. 43 and 50–51; Nolte, "Jurisprudence under special regimes …", pp. 300–302; Finland, in its contribution (see para. 7 above), has pointed to the possibility that "EU–regulation (especially directives) could be seen as practice affecting the interpretation of international agreements".

international instruments are "governed by international law and, more specifically, as regards its interpretation, by the international law of treaties".[39]

C. Subsequent practice as a means for the interpretation of constituent instruments of international organizations

30. Since the rules of the 1969 Vienna Convention regarding treaty interpretation (arts. 31 to 33) apply, in principle, to treaties which are constituent instruments of international organization, "without prejudice to any relevant rules of the organization", and given the fact that their "own practice" "may deserve special attention when the time comes to interpret" such treaties,[40] the question arises which forms of conduct may constitute relevant subsequent practice for the purpose of the interpretation of a constituent instrument of an international organization.

31. Three forms of conduct may be relevant:

(*a*) the subsequent practice of the parties to constituent instruments of international organizations under article 31, paragraph 3 (*b*), and article 32 of the 1969 Vienna Convention;

(*b*) the practice of organs of an international organization;

(*c*) a combination of practice of organs of the international organization of subsequent practice of the parties.

32. The International Court of Justice, like other judicial or quasi-judicial bodies and States, has recognized that all three forms of conduct may be relevant for the interpretation of constituent instruments of international organizations.

1. Subsequent practice of the parties to constituent instruments of international organizations under articles 31, paragraph 3 (*b*), and 32 of the 1969 Vienna Convention

33. The Court has, in the first place, recognized that article 31, paragraph 3 (*b*), is applicable to constituent instruments of international organizations. In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, after describing constituent instruments of international organizations as being treaties of a particular type, the Court introduced its interpretation of the Constitution of the World Health Organization by stating:

> According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted "in their context and in the light of its object and purpose" and there shall be
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> "taken into account, together with the context:
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> …
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> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[41]

34. Referring to different precedents from its own case law, in which it had, *inter alia*, employed subsequent practice under article 31, paragraph 3 (*b*), as a means of interpretation, the Court announced that

> it will also apply it in this case for the purpose of determining whether, according to the [World Health Organization] Constitution, the question to which it has been asked to reply arises 'within the scope of [the] activities' of that Organization.[42]

35. Regarding the subsequent practice element of its interpretation of this term, the Court remarked the following:

> Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the [World Health Organization], could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons.[43]

36. Thus, when considering whether a particular resolution of an organ expressed or amounted to "a practice establishing agreement between the members of the Organization" the Court emphasized, quoting article 31, paragraph 3 (*b*), the relevance of the agreement of the parties to the respective treaty themselves, and not the practice of the organ as such.[44]

37. The ruling in *Land and Maritime Boundary between Cameroon and Nigeria* is another decision in which the Court put decisive emphasis, in a case involving the interpretation of a constituent instrument of an international organization,[45] on the subsequent practice of the parties themselves. Proceeding from the observation that "Member States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts",[46] the Court concluded that:

> From the treaty texts and the practice [of the parties] 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.[47]

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[39] *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen* (see footnote 37 above), para. 39. On this differentiated approach to the interpretation of founding treaties and those treaties entered by the European Union and other States, or international organizations, see Kuijper, "The European Courts and the law of treaties: the continuing story", pp. 258–260; and Aust, Rodiles and Staubach, "Unity or uniformity: domestic courts and treaty interpretation", pp. 101–104.

[40] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (see footnote 26 above), p. 75, para. 19.

[41] *Ibid.*

[42] *Ibid.*

[43] *Ibid.*, p. 81, para. 27.

[44] The Permanent Court of International Justice had adopted this approach in its case concerning the *Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer, Advisory Opinion, 1926, P.C.I.J. Reports*, *Series B*, No. 13, pp. 19–20; see Engel, "'Living' international constitutions and the World Court (the subsequent practice of international organs under their constituent instruments)", p. 871.

[45] See article 17 of the Convention and Statute relating to the Development of the Chad Basin; generally: Sand, "Development of international water law in the Lake Chad Basin".

[46] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 305, para. 65.

[47] *Ibid.*, at pp. 306–307, para. 67.

38. Besides subsequent practice that establishes the agreement of the parties under article 31, paragraph 3 (*b*), other subsequent practice by parties in the application of the constituent instrument of an international organization may also be relevant for the interpretation of that treaty. Constituent instruments of international organizations, like other multilateral treaties, are, for example, sometimes implemented by subsequent bilateral or regional agreements or practice.[48] Such bilateral treaties are not, as such, subsequent agreements under article 31, paragraph 3 (*a*), if only for the fact that they are only concluded between a limited number of the parties to the multilateral constituent instrument. They may, however, imply assertions concerning the proper interpretation of the constituent instrument itself and, taken together, they may be relevant for the interpretation of such a treaty.

39. The Convention on International Civil Aviation, which establishes the International Civil Aviation Organization (ICAO), provides an example for such a form of subsequent practice through bilateral agreements in a multilateral constituent treaty framework. The Convention leaves several aspects for the parties to settle on a bilateral, plurilateral or regional basis. In order to achieve as much uniformity as possible among the parties to the Convention, a "Form of Standard Agreement" was agreed and annexed to the Final Act of the Civil Aviation Conference.[49] This model agreement gives general guidance for the adoption of subsequent bilateral agreements regarding the performance of international commercial air services (air service agreements or air transport agreements).[50] The two air transport agreements between the United States of America and the United Kingdom of Great Britain and Northern Ireland of 1946 and 1977 (the so-called "Bermuda" and "Bermuda II" agreements)[51] have served as standards for other States, many of which have developed their own model agreements based on them. A third generation of bilateral agreements, which have been concluded after 1990,[52] follows a series of treaties between the United States and several other States that grant greater liberalization and freedom rights than the previous agreements that they supersede ("Open Skies Agreements"). A few plurilateral and regional treaties perform the same function.[53]

40. Between 3,000 and 4,000 mostly bilateral air service agreements or air transport agreements have been entered into since the entry into force of the Convention on International Civil Aviation, most of which are registered with ICAO. This bilateral system, which is derived from the Convention, has been described as a "complex web of … interlocking bilateral air services agreements",[54] which "evolved through subsequent State practice".[55]

41. A well-known case of subsequent practice by the parties to a constituent instrument by way of an accumulation of bilateral agreements concerns article 5 of the Convention on International Civil Aviation. According to this provision, non-scheduled flights (mostly by charter airlines) "shall have the right … to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing", provided they do not take or discharge passengers, cargo or mail. In practice, however, States parties have over the years required "charter airlines to seek permission to land in all cases, and the article is now so interpreted".[56] The practice of requiring authorization is partly unilateral, but it is also expressed in several bilateral air service agreements.[57] The combination of such unilateral requirements by some States parties to the Convention, a series of corresponding bilateral agreements among yet another set of parties, and the absence of opposition by other States parties may have established an agreement among the parties of the Convention regarding the interpretation of article 5 of the Convention. But even if such agreement cannot be established, the subsequent practice that has emerged from the series of bilateral agreements and unilateral conduct may be taken into account in the interpretation of article 5 of the Convention[58] under article 32 of the 1969 Vienna Convention.

42. Another example for the relevance, for the purpose of the interpretation of a constituent instrument of an international organization, of an agreement subsequently arrived at between fewer than all parties to that instrument is the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.[59]

2. Practice of organs of an international organization

43. In other cases, the International Court of Justice has referred to the practice of organs of an international organization in its interpretative reasoning apparently

[48] Benvenisti and Downs, "The empire's new clothes: political economy and the fragmentation of international law", pp. 610–611.

[49] Form of Standard Agreement for Provisional Air Routes, annexed to Final Act of the International Civil Aviation Conference, 7 December 1944, available from *Supplement to the American Journal of International Law*, vol 39 (1945), pp. 111–142.

[50] See Bowen, "The Chicago International Civil Aviation Conference", pp. 309 *et seq.*

[51] United Nations, *Treaty Series,* vol. 3, No. 36, p. 253 and *ibid.*, vol. 1079, No. 16509, p. 21, respectively. Replaced by the 2007 Air Transport Agreement between the United States and the European Community and its Member States (Brussels and Washington, D.C., 25 and 30 April 2007; *Official Journal of the European Union*, L 134/1, vol 50 (2007), p. 4), as amended by the 2010 Protocol (Luxembourg, 24 June 2010; *ibid.*, L 223, vol 53 (2010), p. 3). On the Bermuda Agreements and their influence on other bilateral agreements, see Haanappel, "Bilateral air transport agreements—1913–1980".

[52] See Jomini *et al.*, "The changing landscape of air service agreements".

[53] Such as the Multilateral Agreement on the Liberalization of International Air Transportation between Brunei Darussalam, Chile, New Zealand, Singapore and the United States of 2001, and the Protocol thereto of the same date between Brunei Darussalam, New Zealand and Singapore. For more information on these multilateral agreements, see www.maliat.govt.nz and Tomas, "Air transport agreements, regulation of liability".

[54] Department of Infrastructure and Transport of Australia, "The bilateral system—how international air services work". Available from www.infrastructure.gov.au/aviation/international/bilateral_system.aspx.

[55] Havel, *Beyond Open Skies: A New Regime for International Aviation*, p. 10.

[56] Aust, *Modern Treaty Law and Practice*, p. 215; see also Feldman, "Evolving treaty obligations: a proposal for analyzing subsequent practice derived from WTO dispute settlement", p. 664.

[57] Haanappel, *The Law and Policy of* Air Space *and* Outer Space*: A Comparative Approach*, pp. 110–111, referring to the practice of the United States as reflected in open skies agreements.

[58] *Ibid.*

[59] See Anderson, "1969 Vienna Convention: Article 5—Treaties constituting international organizations and treaties adopted within an international organization", p. 96, para. 26.

without reference to the practice or to the acceptance of the members of the Organization. In particular, the Court has stated that the international organization's "own practice" "may deserve special attention" in the process of interpretation.[60] For example, in its advisory opinion on the *Competence of Assembly regarding admission to the United Nations*, the Court stated that:

The organs to which article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of the recommendation of the Security Council.[61]

44. Similarly, in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court referred to acts of organs of the organization when it referred to the practice of "the United Nations":

In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials … In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.[62]

45. Also, in its advisory opinion in *Constitution of the Maritime Safety Committee*, the International Court of Justice has referred to "the practice followed by the Organization itself in carrying out the Convention" as a means of interpretation.[63]

46. In its advisory opinion on *Certain expenses of the United Nations*, it was an important consideration for the Court that:

It is a consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security. Annually, since 1947, the General Assembly has made anticipatory provision for "unforeseen and extraordinary expenses" arising in relation to the "maintenance of peace and security".[64]

The Court concludes that, from year to year, the expenses of [the United Nations Emergency Force] have been treated by the General Assembly as expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter.[65]

47. In that advisory opinion, the Court also explained why the practice of organs, as such, may be relevant for the interpretation of the constituent instrument of an international organization:

Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization".[66]

48. Since many international organizations share the same characteristic of not having an "ultimate authority to interpret" their constituent instrument, this reasoning of the Court has been generally accepted as reflecting a general principle of the law of international organizations.[67]

49. The identification of a presumption, in the *Certain expenses of the United Nations* opinion, which arises from the practice of an organ of an international organization, is a way of recognizing such practice of organs as a means of interpretation. The practice of organs in the application of a constituent instrument can thus, at a minimum, be conceived as being "other subsequent practice" under article 32 of the 1969 Vienna Convention.[68] The effect that the Court has ascribed to the practice of organs seems, however, to go further than the conditions and effects contemplated in article 32. Since the presumption recognized in the *Certain expenses of the United Nations* opinion already arises from one or more acts by the organ of an international organization, such practice is not necessarily identical with "established practice" according to article 2, paragraph 1 (*j*), of the 1986 Vienna Convention, which may even constitute a "[rule] of the organization".[69] This demonstrates that the practice of organs of international organizations may, in itself, constitute a means of interpretation for the constituent instrument of the organization, and that the presumptive effect according to the *Certain expenses of United Nations* opinion is merely an example of such a role in the process of interpretation.[70] By also referring to acts of international organizations that were adopted despite the opposition of certain member States,[71] the Court has recognized that such acts may constitute subsequent practice for the purposes of interpretation, but not a (more weighty) practice that establishes agreement between the parties regarding the interpretation.

[60] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (see footnote 28 above), pp. 74–75, para. 19.

[61] *Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

[62] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, at p. 194, para. 48.

[63] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169.

[64] *Certain expenses of the United Nations* (see footnote 27 above), at p. 160.

[65] *Ibid.*, at p. 175.

[66] *Ibid.*, at p. 168.

[67] Klabbers, *An Introduction to International Law*, p. 90; Amerasinghe, *Principles of the Institutional Law of International Organizations*, p. 25; Alvarez, *International Organizations as Law-Makers*, p. 80; Rosenne, *Developments in the Law of Treaties 1945–1986*, pp. 224–225.

[68] See draft conclusions 1, paragraph 4, and 4, paragraph 3, on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook ... 2013*, vol II (Part Two), para. 38.

[69] It should be noted that the Commission held, in its commentary to the relevant draft articles, that the reference in article 2, paragraph 1 (*j*), to "established practice" "is in no way intended to suggest that practice has the same standing in all organizations", para. (25) of the commentary to article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol II (Part Two), para. 63, at p. 21.

[70] Lauterpacht, "The development of the law of international organizations by the decisions of international tribunals", p. 460; Blokker, "Beyond 'Dili': on the powers and practice of international organizations", pp. 312–318.

[71] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 (referring to General Assembly resolutions 1600 (XV) of 15 April 1961 (adopted with 60 votes in favour, 23 abstentions, and 16 votes against, including the Union of Soviet Socialist Republics (USSR) and other States of the "Eastern bloc") and 1913 (XVIII) of 13 December 1963 (adopted by 91 affirmative votes over 2 negative votes (Spain and Portugal), and 11 abstentions)).

50. It should also be noted that the practice of the organ of one international organization may contribute to the interpretation of the constituent instrument of another international organization. For example, the secretariat of the International Maritime Organization has recently reaffirmed its long-standing position according to which

> non-compliance with these [International Maritime Organization] provisions would result in sub-standard ships and violate the basic obligations set forth in [the United Nations Convention on the Law of the Sea] concerning safety of navigation and prevention of pollution from ships.[72]

51. These examples demonstrate that the practice of organs, as such and independently of the acceptance by all the parties to the constituent instrument of the international organization concerned, has been recognized as a means of interpretation, although not as a measure that is necessarily determinative for the outcome of the process of interpretation. Commentators agree that the interpretation of the constituent instruments of international organizations by the practice of their organs often constitutes a relevant means of interpretation.[73] The interpretative effect of the practice of organs may therefore amount to the effect provided for in article 32 and, depending on the rules of the constituent instrument concerned, possibly beyond.

3. Combination of practice of organs of the organization and subsequent practice of the parties

52. A third possibility for taking practice in the application of a constituent instrument of an international organization into account is to consider a combination of the practice of organs of the organization and of the subsequent practice by the States parties of that organization, in particular their acceptance of the practice of organs.[74] Accordingly, in its *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* advisory opinion, the International Court of Justice arrived at its interpretation of the term "concurring votes" in Article 27, paragraph 3, of the Charter of the United Nations as including abstentions primarily by relying on the practice of the organ concerned in combination with the fact that it was then "generally accepted" by Member States:

> [T]he 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 not constituting a bar to the adoption of resolutions … This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.[75]

53. In this case, the Court equally emphasized the practice of one or more organs of the international organization and the "general acceptance" by the Member States, and characterized the combination of those two elements as being a "general practice of that organization".[76] The Court followed this approach in its advisory opinion *Legal Consequences of the Construction of a Wall* by stating that: "The Court considers that the *accepted** practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter".[77]

54. Similarly, in the *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* case, the International Court of Justice referred to (non-binding) recommendations of the International Whaling Commission (which is the name of an international organization established under the International Convention for the Regulation of Whaling[78] and an organ thereof), clarifying that, when such recommendations are "adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule".[79] In this context, the Court expressed the view that

> Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many [International Whaling Commission] resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (*a*) and (*b*), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties.[80]

55. Another example concerns the admission of the United Arab Republic (Egypt and Syria) to ICAO. In this case, the ICAO Council decided to admit the United Arab

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[72] International Maritime Organization, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, document LEG/MISC.8, 30 January 2014, p. 12: this information was provided by Germany in response to the request by the Commission for information; however, the International Court of Justice has held with respect to a treaty that was not the constituent instrument of an international organization: "It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom", *Reservations to the Conventions on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25.

[73] Brölmann, "Specialized rules of treaty interpretation: international organizations", pp. 520–521; Kadelbach, "The interpretation of the Charter", p. 80; Gardiner, *Treaty Interpretation*, pp. 113 and 246 (who also points to the fact that, although international organizations have accumulated much experience in interpreting their own constituent instruments, much of the relevant material is either not very accessible or does not "readily yield up insights into application of rules of treaty interpretation").

[74] Higgins, "The development of international law by the political organs of the United Nations", p. 119.

[75] *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.

[76] Thirlway, "The law and procedure of the International Court of Justice 1960–1989 (part two)", pp. 76–77 (mentioning that "[t]he Court's reference to the practice as being 'of' the Organization is presumably intended to refer, not to a practice followed by the Organization as an entity in its relations with other subjects of international law, but rather a practice followed, approved or respected throughout the Organization. Seen in this light, the practice is not so much a set of acts of abstention by the permanent members, with the intention of neither blocking the proposed resolution, nor going on record as endorsing it, as rather a recognition by the other members of the Security Council at the relevant moment, and indeed by all member States by tacit acceptance, of the validity of such resolutions").

[77] *Legal Consequences of the Construction of a Wall* (see footnote 71 above), p. 150; see also pp. 149 *et seq.*

[78] Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change*, pp. 37–38; Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law*, p. 311, note 121.

[79] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226, at p. 248, para. 46.

[80] *Ibid.*, at p. 257, para. 83.

Republic, but added that its decision was without prejudice to the "right of the [ICAO] Assembly to determine for itself questions concerning the United Arab Republic in relation to the Organization". The following decision of the Council "remained unchallenged and was accepted by the [m]ember States by tacit consent".[81] A similar practice was followed in the cases of succession in the International Monetary Fund membership of the members of the former Czech and Slovak Federal Republic and the Socialist Federal Republic of Yugoslavia.[82]

56. Some authors consider it necessary to "draw a distinction between the conduct of the organization collectively and the conduct of the parties",[83] but this does not exclude the possibility of assessing both forms of subsequent practice in combination.[84]

D. Subsequent agreements under article 31, paragraph 3 (*a*), as a means of interpretation of constituent instruments of international organizations

57. The interpretation of treaties that are constituent instruments of international organizations may also be affected by subsequent agreements under article 31, paragraph 3 (*a*). It should be noted, however, that the possible significance of agreements between the parties must be evaluated, in the first place, under the provisions of the constituent instrument itself and of other rules of the organization. If, for example, the constituent instrument contains a clause according to which the interpretation of the instrument is subject to a special procedure, it is to be presumed that the parties, by reaching an agreement subsequently to the conclusion of the treaty, do not wish to circumvent such procedure. In addition, the rules of the organization and its established practice may exclude taking into account agreements between the parties regarding the interpretation of its constituent instruments, as is the case for the European Union in areas in which the Court of Justice of the European Union exercises jurisdiction.[85]

58. Two basic forms of subsequent agreements regarding the interpretation of constituent instruments of international organizations exist: self-standing agreements between the parties and agreements between the parties in the form of a decision of a plenary organ of an international organization.

1. Self-standing subsequent agreements between the parties

59. Self-standing agreements between the parties regarding the interpretation of constituent instruments of international organizations are rare. When questions of interpretation arise with respect to such an instrument, the parties mostly act as members within the framework of the plenary organ. If there is a need to modify, amend or supplement the treaty, the parties either use the amendment procedure that is provided for in the treaty, or they conclude a further treaty, usually a protocol (arts. 39 to 41 of the 1969 Vienna Convention). It is, however, also possible that the parties act as such within a plenary organ of the respective organization. In the European Union, for example, the European Council (an organ which comprises the Heads of State or Government of the member States, together with the Council's own president and the President of the Commission) decided in 1995 that

> the name given to the European currency shall be Euro. … The specific name euro will be used instead of the generic term "ecu" used by the Treaty to refer to the European currency unit.
>
> The Governments of the 15 [m]ember States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions.[86]

60. It is sometimes difficult to determine whether "member States meeting within" a plenary organ of an international organization intend to act in their capacity of members of that organ, as they usually do, or whether they intend to act in their capacity as States parties to the constituent instrument of the organization.[87] The Court of Justice of the European Union, when confronted with this question, in the first place, proceeded from the wording of the act in question:

> It is clear from the wording of that provision that acts adopted by representatives of the [m]ember States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the [m]ember States, are not subject to judicial review by the Court. As the Advocate General stated in section 18 of his Opinion, it makes no difference in this respect whether such an act is called an "act of the [m]ember States meeting in the Council" or an "act of the representatives of the Governments of the [m]ember States meeting in the Council".[88]

61. Ultimately, however, the Court accorded decisive importance to the "content and all the circumstances in which [the decision] was adopted" in order to determine whether the decision was that of the organ or of the States parties themselves:

> Consequently, it is not enough that an act should be described as a "decision of the [m]ember States" for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.[89]

62. It appears that these considerations are also pertinent when determining whether a particular act regards the interpretation of the constituent instrument of the organization concerned.

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[81] Bühler, *State Succession and Membership in International Organizations*, p. 295 (referring to Buergenthal, *Law-Making in the International Civil Aviation Organization*, p. 32).

[82] *Ibid.*, pp. 297–298.

[83] Lauterpacht, "The development of the law of international organizations by the decisions of international tribunals", p. 457.

[84] See, e.g., *Prosecutor v. Duško Tadić a/k/a "DULE", Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, International Tribunal for the Former Yugoslavia, Appeals Chamber, 2 October 1995, *Judicial Reports 1994–1995*, para. 30.

[85] See footnote 35 above.

[86] See conclusions of the Presidency from the Madrid European Council (1995), *Bulletin of the European Union*, No. 12 (1995), p. 10; for a description of this decision as a subsequent agreement, see Aust, *Modern Treaty Law and Practice*, p. 213, and Hafner, "Subsequent agreements and practice: between interpretation, informal modification and formal amendment", pp. 109–110.

[87] Kapteyn and VerLoren van Themaat, *Introduction to the Law of the European Communities*, pp. 340–343.

[88] *Parliament v. Council and Commission*, Case C-181/91 and C-248/91, Judgment of 30 June 1993, Court of Justice of the European Communities, *European Courts Reports 1993*, para. 12.

[89] *Ibid.*, para. 14.

2. Decisions of plenary organs as subsequent agreements between the parties

63. Decisions and recommendations of plenary organs of international organizations regarding the interpretation or the application of a treaty provision may also, under certain circumstances, reflect a subsequent agreement between the parties under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention provided that such acts represent an agreement of the parties themselves to the constituent instrument. Accordingly, the World Trade Organization (WTO) Appellate Body has stated in general terms:

> Based on the text of Article 31 (3) (*a*) of the Vienna Convention, we consider that a decision adopted by Members may qualify as a "subsequent agreement between the parties" regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.[90]

64. Regarding the specific conditions under which a decision of a plenary organ may be considered to be a subsequent agreement within the meaning of article 31, paragraph 3 (*a*), the WTO Appellate Body held:

> 263. With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO.
>
> … With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an *agreement* between Members on the *interpretation* or *application* of the term "reasonable interval" in Article 2.12 of the *TBT Agreement [Agreement on Technical Barriers to Trade]*.
>
> 264. We recall that paragraph 5.2 of the Doha Ministerial Decision provides:
>
>> Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.
>
> 265. In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC—Bananas III (Article 21.5—Ecuador II) / EC—Bananas III (Article 21.5—US)*. The Appellate Body observed that the International Law Commission (the "ILC") describes a subsequent agreement within the meaning of Article 31 (3) (*a*) of the *Vienna Convention* as "a further *authentic element of interpretation* to be taken into account together with the context". According to the Appellate Body, "by referring to 'authentic interpretation', the ILC reads Article 31 (3) (*a*) as referring to *agreements bearing specifically upon the interpretation of the treaty*." Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*.
>
> 266. Paragraph 5.2 of the Doha Ministerial Decision refers explicitly to the term "reasonable interval" in Article 2.12 of the *TBT Agreement* and defines this interval as "normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued" by a technical regulation. In the light of the terms and content of paragraph 5.2, we are unable to discern a function of paragraph 5.2 *other than* to interpret the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. We consider, therefore, that paragraph 5.2 *bears specifically* upon the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement. We turn now to consider whether paragraph 5.2 of the Doha Ministerial Decision reflects an "agreement" among Members—within the meaning of Article 31 (3) (*a*) of the Vienna Convention—on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.
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> 267. We note that the text of Article 31 (3) (*a*) of the *Vienna Convention* does not establish a requirement as to the form which a "subsequent agreement between the parties" should take. We consider, therefore, that the term "agreement" in Article 31 (3) (*a*) of the *Vienna Convention* refers, fundamentally, to substance rather than to form. Thus, in our view, paragraph 5.2 of the Doha Ministerial Decision can be characterized as a "subsequent agreement" within the meaning of Article 31 (3) (*a*) of the *Vienna Convention* provided that it clearly expresses a common understanding, and an acceptance of that understanding among Members with regard to the meaning of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. In determining whether this is so, we find the terms and content of paragraph 5.2 to be dispositive. In this connection, we note that the understanding among Members with regard to the meaning of the term "reasonable interval" in Article 2.12 of the *TBT Agreement* is expressed by terms—"*shall be understood to mean*"—that cannot be considered as merely hortatory.
>
> 268. For the foregoing reasons, we uphold the Panel's finding … that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31 (3) (*a*) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.[91]

65. Although the Doha Ministerial Decision does not concern a provision of the Marrakesh Agreement establishing the World Trade Organization itself, it concerns an annex to that Agreement (the Agreement on Technical Barriers to Trade) and thus a provision of a constituent instrument of an international organization. In any case, the Appellate Body speaks of "WTO law" generally which includes, first and foremost, the WTO agreement itself.

66. The reasoning of the Appellate Body is significant as it requires, for the decision of a plenary organ to constitute a subsequent agreement under article 31, paragraph 3 (*a*), that the decision "bear[] specifically upon the interpretation" of the treaty, and that it do so clearly ("we are unable to discern a function of paragraph 5.2 *other than* to interpret the term 'reasonable interval'") in order to exclude the possibility that the parties merely intended the decision to provide one or more non-exclusive practical options for implementing the treaty, or a policy recommendation ("merely hortatory"). These rather strict conditions suggest that the Appellate Body generally considers that the decision of the WTO Ministerial Conference as a plenary organ, in addition to its regular effect under the constituent instrument, would only under exceptional circumstances possess the character of a subsequent agreement under article 31, paragraph 3 (*a*).

67. This view is in line with the view that acts of plenary organs of other international organizations may also, under certain circumstances, constitute subsequent agreements within the meaning of article 31, paragraph 3 (*a*). While authors have made this point explicitly, both for the General Assembly[92] and for other plenary organs of

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[90] WTO Appellate Body report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 262.

[91] *Ibid*., paras. 263–268.

[92] See Aust, *Modern Treaty Law and Practice*, p. 213 (mentioning that General Assembly resolution 51/210 on measures to eliminate international terrorism can be seen as a subsequent agreement on the interpretation of the Charter of the United Nations); Jiménez de Aréchega, "International law in the past third of a century", p. 32 (stating in relation to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in

international organizations,[93] the International Court of Justice has taken resolutions of the General Assembly into account when interpreting provisions of the Charter of the United Nations. Although the Court did not mention article 31, paragraph 3 (*a*), it made it clear that the mere adoption of a resolution would not be sufficient. This has in particular been the case when the Court relied on the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[94] for the interpretation of Article 2, paragraph 4, of the Charter, emphasizing the "attitude of the Parties and the attitude of States towards certain General Assembly resolutions" and their consent thereto.[95] Indeed, as the WTO Appellate Body has indicated, the characterization of a collective decision as an "authentic element of interpretation" under article 31, paragraph 3 (*a*), is only justified if it is clear that the parties of the constituent instrument of an international organization acted as such, and not, as they usually do, institutionally as members of the respective plenary organ.[96]

E. How to conceive various uses of subsequent practice and subsequent agreements in terms of the Vienna rules of interpretation

68. Different views have been expressed as to whether the various uses by international courts and tribunals of practice in the application of constituent instruments of international organizations as a means of interpretation merely represent different manifestations of articles 31 and 32 as the basic rules regarding the interpretation of treaties, or whether such uses also reflect a special or additional rule of interpretation that is applicable to such constituent instruments.

69. According to Gardiner, since the International Court of Justice followed the reference to the international organization's "own practice" in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* advisory opinion "by singling out the 1969 Vienna Convention's provision on subsequent practice for complete quotation in its brief reference to some elements of the general rule, it appears to have equated the organization's own practice with subsequent practice in the Vienna rules".[97] On the other hand, Schermers and Blokker, while recognizing that the Court in this advisory opinion has "more than before attempted to formulate a legal basis for referring to the practice of the organization", considered that it is "a disadvantage of the approach taken by the Court that 'subsequent practice' as a canon of interpretation laid down in the 1969 Vienna Convention refers to the practice of the *[S]tates* that are party to a particular treaty, and not to the practice of the *organization* itself". In this sense, according to Schermers and Blokker, "article 31 (3) (*b*) of

accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex) that "[t]his Resolution does not purport to amend the Charter, but to clarify the basic legal principles contained in Article 2. Adopted in these terms and without a dissenting vote, it constitutes an authoritative expression of the views held by the totality of the parties to the Charter as to these basic principles and certain corollaries resulting from them. In the light of these circumstances it seems difficult to deny the legal weight and authority of the Declaration both as a resolution recognizing what the Members themselves believe constitute existing rules of customary law and as an interpretation of the Charter by the subsequent agreement and the subsequent practice of all its members"); Schachter, "International law in theory and practice: general course in public international law", p. 113 ("[T]he law-declaring resolutions that construed and 'concretized' the principles of the Charter—whether as general rules or in regard to particular cases—may be regarded as authentic interpretation by the parties of their existing treaty obligations. To that extent they were interpretation, and agreed by all Member States, they fitted comfortably into an established source of law. A prominent example cited by governments and lawyers is the Declaration of Principles of International Law concerning Friendly Relations adopted by consensus (i.e. without objection) in 1970"); White, *The United Nations System: Toward International Justice*, p. 38 (noting that General Assembly resolutions adopted by consensus may be regarded as subsequent agreements); see also Boyle and Chinkin, *The Making of International Law*, pp. 216–217 (observing in relation with article 31, paragraph (3) (*a*), of the 1969 Vienna Convention that "[t]here are well-known instances of General Assembly resolutions interpreting and applying the UN Charter, including the Universal Declaration of Human Rights, the Declaration of Principles of International Law Concerning Friendly Relations, and others dealing with decolonisation, terrorism or the use of force"); Kunig, "United Nations Charter, interpretation of", p. 275 (stating that, "[i]f passed by consensus, [General Assembly resolutions] are able to play a major role in the formation and change of legal values and thereby in the interpretation of the UN Charter", and finding support for this in the *Nicaragua* judgment of the International Court of Justice (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14).

[93] Schermers and Blokker, *International Institutional Law*, p. 854 (referring to interpretations by the Assembly of the Oil Pollution Compensation Fund regarding the constituent instruments of the Fund); Cogen, "Membership, associate membership and pre-accession arrangements of CERN, ESO, ESA, and EUMETSAT", pp. 157–158 (referring to a unanimously adopted decision of the Council of the European Organization for Nuclear Research (CERN) of 17 June 2010, interpreting the admission criteria established in the Convention for the Establishment of a European Organization for Nuclear Research as a possible case of a subsequent agreement under article 31, paragraph 3 (*a*)).

[94] See footnote 92 above.

[95] *Military and Paramilitary Activities* (see footnote 92 above), pp. 99–100, para. 188: "The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves." This statement, whose primary purpose is to explain the possible role of General Assembly resolutions for the formation of customary law, also recognizes the (lesser) treaty-related point that such resolutions may serve to express the agreement, or the positions, of the parties regarding a certain interpretation of the Charter of the United Nations as a treaty ("elucidation"); similarly: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (see footnote 15 above), p. 437, para. 80 (where the Court concluded from, *inter alia*, the Declaration on Friendly Relations between States: "Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States"); in this sense, see, e.g., Sohn, "The UN system as authoritative interpreter of its law", pp. 176–177 (noting with regard to the *Nicaragua* case that "[t]he Court accepted the Friendly Relations Declaration as an authentic interpretation of the Charter"); Divac Öberg, "The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ", p. 897 (observing that, according to the *Nicaragua* judgment, the role of General Assembly resolutions, such as the Declaration on Principles of International Law concerning Friendly Relations, is not "confined to restatement or interpretation ('reiteration or elucidation')").

[96] See WTO Appellate Body report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes* (see footnote 90 above), and Bonzon, *Public Participation and Legitimacy in the WTO*, pp. 114–115 (arguing that "among decisions reached by WTO bodies, a distinction should be made between so-called 'institutional decisions' and 'non-institutional' decisions. The former—referred as 'subsidiary law-making'—are based on powers specifically attributed to a given organ and reached according to procedures established by the rules of the organization. By contrast, 'non-institutional' decisions are reached within the framework of the WTO, but by States individually as parties to a multilateral treaty on the basis of general international law—namely the 1969 Vienna Convention on the Law of Treaties").

[97] Gardiner, *Treaty Interpretation*, p. 247.

the Vienna Convention seems to be incorrect as a foundation on which the 'practice of the organization' may rest".[98]

70. The views of Gardiner, and Schermers and Blokker do not seem to differ in substance, but rather in whether they regard an international organization's "own practice" as being relevant under article 31, paragraph 3 (*b*), (and 32) or rather on an independent basis. Others have attempted to bridge this constructive difference. For example, in the case of *Lawfulness of the recall of the privately held shares*, the Arbitral Tribunal of the Permanent Court of Arbitration has held that:

> [Article 31 (3) (*b*)] takes on special meaning when applied, in accordance with Article 5 of the Vienna Convention, to the constituent instruments of international organizations. In *Reparations for Injuries Suffered in the Service of the United Nations*, the International Court of Justice held that "the rights and duties of an entity such as the Organization [of the United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and *developed in practice*." The fact that the Bank [for International Settlements] has, on a number of occasions, amended its Statutes by the introduction of a new article appears to be probative of the authoritative interpretation of the Statutes in this regard.[99]

71. Klabbers, on the other hand, referring to the advisory opinion of the International Court of Justice in the *Constitution of the Maritime Safety Cornmittee* case,[100] questions the existence of "a special rule regarding the interpretation of constitutional treaties, which is not to deny that often, a more teleologically inspired interpretation takes place when it concerns constituent instruments".[101]

72. Whereas a certain difference persists between the approach of the arbitral tribunal and that of Klabbers, both seem to agree that an international organization's "own practice" will often play a specific role in the interpretation of their constituent instruments under the pertinent rules of the Vienna Convention, in particular by contributing to specifying the object and purpose of the treaty, or the functions of the organization.[102] As the Special Rapporteur has indicated in his first report, subsequent agreements and subsequent practice, on the one hand, and the object and purpose of a treaty, on the other, can be closely interrelated in the sense that that subsequent agreements and subsequent practice are sometimes used for specifying the object and purpose of the treaty in the first place.[103] The Commission subsequently confirmed, in its commentary to draft conclusion 1, that "given instances of subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty".[104]

73. The different explanations of the possible relevance of an international organization's "own practice" ultimately remain within the framework of the rules of interpretation reflected in the 1969 Vienna Convention. Those rules permit to take into account not only the practice of an organization which the parties themselves confirm by their own practice (under a narrow interpretation of article 31, paragraph 3 (*b*)), but also to consider such practice of organs as being relevant for the proper determination of the object and purpose of the treaty (including the function of the international organization concerned), or as a form of "other practice" in the application of the treaty under article 32. Depending on the specific constituent instrument concerned, the organization's "own practice" may thus be considered to be relevant as such, or in combination with the practice of the parties, or as an indication of the object and purpose of the treaty, or not at all (as, for example, in the case of the European Union). In this sense, the modern case law reflects the approach described by Judge Lauterpacht in 1955 as follows:

> A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization.[105]

74. Article 5 allows for the application of the rules of interpretation in articles 31 and 32 in a way which takes account of the role which different forms of subsequent practice and subsequent agreements may play for the interpretation of a constituent instrument of an international organization, as well as for taking into account, as an aspect of the object and purpose of the treaty, the specific institutional character of the international organization or of the act concerned.[106] In their specific combination in each case, those elements contribute to identifying whether, and if so how, the interpretation of a constituent instrument of an international organization is capable of evolving over time.[107] Sometimes the taking into account of these elements has resulted in comparatively dynamic interpretations of such instruments.[108]

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[98] Schermers and Blokker, *International Institutional Law*, p. 844; see also Crawford, *Brownlie's Principles of Public International Law*, p. 187.

[99] *Partial Award on the lawfulness of the recall of the privately held shares on 8 January 2001 and the applicable standards for valuation of those shares*, 22 November 2002, UNRIAA, vol XXIII (Sales No. E.04.V.15), p. 183, at p. 224, para. 145.

[100] *Constitution of the Maritime Safety Committee* (see footnote 63 above), p. 150.

[101] Klabbers, *An Introduction to International Law*, pp. 89–90.

[102] The International Court of Justice used the expression "purposes and functions as specified or implied in its constituent documents and developed in practice", *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 180.

[103] *Yearbook ... 2013*, vol II (Part One), document A/CN.4/660, para. 51, with further references.

[104] Para. (15) of the commentary to draft conclusion 1, footnote 58, of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *ibid*., vol II (Part Two), para. 39, at p. 21; see, in particular, *Land and Maritime Boundary* (see footnote 46 above), pp. 306–307, para. 67.

[105] *South-West Africa—Voting Procedure, Advisory Opinion, I.C.J. Reports 1955*, p. 67, separate opinion of Judge Lauterpacht, at p. 106.

[106] Commentators are debating whether the specific institutional character of certain international organizations, in combination with the principles and values that are enshrined in their constituent instruments, could also yield a "constitutional" interpretation of such instruments that receives inspiration from national constitutional law: see, e.g., Alvarez, "Constitutional interpretation in international organizations"; while such an approach has been recognized, in particular, for the founding treaties of the European Union, it has not been generally accepted for most other international organizations.

[107] See draft conclusion 3 and the commentary thereto, *Yearbook ... 2013*, vol II (Part Two), paras. 38–39.

[108] Dörr, "Article 31", p. 537, para. 31; Schmalenbach, "Article 5", p. 92, para. 7.

F. Character and weight of the practice of organs and of organizations

75. The previous work of the Commission is in line with this comprehensive approach under the rules on interpretation of the 1969 Vienna Convention. The Commission has addressed one aspect of the role of practice other than by parties of the treaty, for the purpose of interpretation, when it provisionally adopted draft conclusion 5 on the attribution of subsequent practice as follows:

Draft conclusion 5. Attribution of subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.

2. 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.

76. Draft conclusion 5 does not imply that the practice of organs of international organizations, as such, cannot be subsequent practice under articles 31 and 32. In its commentary to draft conclusion 5, the Commission has explained that:

Decisions, resolutions and other practice by international organizations can be relevant for the interpretation of treaties in their own right. This is recognized, for example, in article 2, paragraph 1 (*j*), of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations …, which mentions the "established practice of the organization" as one form of the "rules of the organization". Draft conclusion 5 only concerns the question whether the practice of international organizations may be indicative of relevant practice by States parties to a treaty.[109]

77. It must be noted, however, that the practice of parties to a treaty and that of organs of an international organization may have a different weight for the purpose of the interpretation of a treaty that is the constituent instrument of an international organization. On the one hand, as the Commission has noted in its commentary to article 2, paragraph 1 (*j*), of the 1986 Vienna Convention, the weight of a particular practice of organs may depend on the particular rules and characteristics of the respective organization, as expressed in its constituent instrument:

It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules. However, the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect.[110]

78. On the other hand, international courts and tribunals have on numerous occasions—appropriately—conceived the practice of the organs of the organization and that of the member States as being interrelated and as constituting a whole ("general practice of [the] Organization")[111] for the purpose of interpretation. From that perspective, it is reasonable to consider "that relevant practice will usually be that of those on whom the obligation of performance falls",[112] which means that "where States by treaty entrust performance of activities to an organization, how those activities are conducted can constitute practice under the treaty; but whether such agreement establishes agreement of the parties regarding the treaty's interpretation may require account to be taken of further factors".[113]

79. Accordingly, by referring to acts of international organizations that were adopted despite the opposition of certain member States[114] the International Court of Justice has recognized that such acts may constitute subsequent practice for the purpose of interpretation generally, but not as a practice establishing an agreement between the parties and thus as an authentic means of interpretation.[115] In contrast, for the Court, a "general practice of the organization" seems to carry more weight as a means of interpretation than an "established practice" of an organ thereof. This is because an established practice of an organ that is accepted by the whole membership amounts to a subsequent practice of the parties under article 31, paragraph 3 (*b*). This reflects the necessary interplay between the organs of the organization and the conduct of their member States for a general practice of the organization to arise.

80. "General acceptance" requires "at a minimum" acquiescence.[116] In the *Legal Consequences of the Construction of a Wall* opinion, the Court relied on the practice of the organization ("practice of the United Nations"), in order to determine that the interpretation of Article 12 of the Charter has evolved over time through the subsequent conduct of the General Assembly and the Security Council.[117] When speaking in this context of the "accepted practice of the General Assembly",[118] the Court implicitly affirmed that acquiescence on behalf of the Member States regarding the practice followed by the Organization in the application of the treaty is a sufficient requirement for establishing the agreement regarding the interpretation of the relevant treaty provision.

81. Similarly, the "established practice of the organization" is a means for the interpretation of constituent instruments of international organizations. Article 2, paragraph 1 (*j*), of the 1986 Vienna Convention and article 2 (*b*) of the draft articles on the responsibility of international organizations even list the "established practice of the organization" as a "rule of the organization". This designation does not, however, exclude that such practice also serves as a means of interpretation for the constituent instrument. The Commission noted in its commentary to

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[109] Para. (14) of the commentary to draft conclusion 5, *Yearbook … 2013*, vol II (Part Two), para. 39, at p. 36.

[110] Para. (25) of the commentary to article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook … 1982*, vol II (Part Two), para. 63, at p. 21.

[111] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 75 above), p. 22.

[112] Gardiner, *Treaty Interpretation*, p. 246.

[113] *Ibid.*

[114] The Court cited General Assembly resolutions 1600 (XV) of 15 April 1961 and 1913 (XVIII) of 3 December 1963 in *Legal Consequences of the Construction of a Wall* (see footnote 71 above), p. 149.

[115] Gardiner, *Treaty Interpretation*, p. 247.

[116] See Arato, "Treaty interpretation and constitutional transformation", p. 322.

[117] *Legal Consequences of the Construction of a Wall* (see footnote 71 above), p. 149.

[118] *Ibid.*, p. 150.

draft article 2, paragraph 1 (*j*), of what became the 1986 Vienna Convention that

> the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect. Similarly, by referring to "established" practice, the Commission only seeks to rule out uncertain or disputed practice; it is not its wish to freeze practice at a particular moment in an organization's history.[119]

82. The Commission thereby recognized the "established practice of the organization" at least as a supplementary element of the law of an international organization. It is a source of some controversy which specific legal effects such practice may produce in different organizations and whether such effects should be explained more in terms of traditional sources of international law (treaty or custom) or of institutional law.[120] But even though it is difficult to make general statements, it is clear that "established practice of the organization" encompasses a qualified form of practice by organs,[121] one which has generally been accepted by the members of the organization, albeit sometimes tacitly.[122] Such practice can hardly be distinguished from the "general practice of the organization", a form of action which the International Court of Justice has applied as a means of interpretation.[123] Such practice is therefore a means of interpretation of the constituent instrument of an international organization,[124] which shall be taken into account as it is based on the agreement of the membership or follows from the institutional character of the organization. It is possible that the "established practice of the organization" produces further legal effects but such effects are uncertain and are not part of the present topic.

G. Article 5 as reflection of customary law

83. Commentators have maintained that article 5 of the 1969 Vienna Convention reflects customary law.[125] This assessment is based on certain statements by delegates regarding draft article 4 (now article 5) at the United Nations Conference on the Law of Treaties in Vienna (1968–1969). In particular, reference is made to the statement of the delegate of Argentina, Mr. Ruda, who expressed the view that

> the debate had shown that the rule laid down in article 4 was one of *lex lata*, codifying existing rules of customary law. The law established on a customary basis between States, added to long practice, resulted in rules differing from those of general international law existing in treaties. In his delegation's opinion, article 4 only reflected the current situation, and introduced no innovation.[126]

84. However, clear support for this proposition has remained scarce.[127] Moreover, the debates on draft article 4 at the Vienna Conference reflected the contentious nature of this rule at that time, with some delegations suggesting that the text "introduced a danger of confusion and obscurity into a particularly difficult subject",[128] and others asking for its deletion, although for different reasons.[129] So far, the International Court of Justice has not addressed the question whether article 5 of the Convention reflects customary international law.

85. For the purposes of the present topic, it is, however, not necessary to make a precise determination regarding the customary status of article 5. It suffices to say that it has been generally recognized that the rules of the 1969 Vienna Convention regarding treaty interpretation are applicable to constituent instruments of international organizations, but always "without prejudice to any relevant rules of the organization". The rule that is formulated in article 5 is sufficiently flexible to accommodate all conceivable cases, including cases in which the organs of an international organization declare, as the Court of Justice of the European Union has done, that the organization concerned does not consider "practice" by either the States parties or the organs to be relevant for the interpretation of the founding treaties. If it is understood in this broad and flexible sense it is clear that article 5 does reflect customary international law.

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[119] Para. (25) of the commentary to draft article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol II (Part Two), para. 63, at p. 21; this does not exclude that practice exists within an organization that is not "established", but which is nevertheless important for the functioning of the organization.

[120] Higgins, "The development of international law by the political organs of the United Nations", p. 121 ("aspects of treaty interpretation and customary practice in this field merge very closely"); Peters, "Subsequent practice and established practice of international organizations …", pp. 630–631 (such practice "should be considered a kind of customary international law of the organization"); it is not persuasive to limit the "established practice of the organization" to so-called internal rules since, according to the Commission, "[t]here would have been problems in referring to the 'internal' law of an organization, for while it has an internal aspect, this law also has in other respects an international aspect", para. (25) of the commentary to draft article 2 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol II (Part Two), para. 63, at p. 21; Schermers and Blokker, *International Institutional Law*, p. 766; but see Ahlborn, "The rules of international organizations and the law of international responsibility", pp. 424–428.

[121] Blokker, " 'Beyond Dili' ", p. 312.

[122] Lauterpacht, "The development of the law of international organizations by the decisions of international tribunals", p. 464 ("consent of the general body of membership"); Higgins, "The development of international law by the political organs of the United Nations", p. 121 ("[t]he degree of length and acquiescence need here perhaps to be less marked than elsewhere, because the U.N. organs undoubtedly have initial authority to make such decisions [regarding their own jurisdiction and competence]"); Peters, "Subsequent practice and established practice of international organizations …", pp. 633–641.

[123] Arato, "Treaty interpretation and constitutional transformation", p. 322.

[124] *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 16th meeting (A/C.6/64/SR.16), declaration of the United Kingdom (on file with the Codification Division); Schermers and Blokker, *International Institutional Law*, pp. 842–845, para. 1347; Rosenne, *Developments in the Law of Treaties 1945-1986*, p. 241; Engel, " 'Living' international constitutions and the World Court", p. 894; Bühler, *State Succession and Membership in International Organizations*, p. 292; Alvarez, *International Organizations as Law-Makers*, p. 90; Ahlborn, "The rules of international organizations and the law of international responsibility", p. 425.

[125] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 120.

[126] *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), 9th meeting, 2 April 1968, p. 52, para. 73.

[127] See the statements of the representatives of Brazil (*ibid.*, 10th meeting, 3 April 1968, p. 56, para. 30), and of the representative of Council of Europe (observer) (*ibid.*, 9th meeting, 2 April 1968, p. 47, para. 13).

[128] *Ibid.*, 8th meeting, 2 April 1968, p. 44, para. 25 (Spain).

[129] See *ibid.*, 8th meeting, 2 April 1968, p. 43, paras. 15, 18 and 21 (United States) and p. 45, paras. 33 and 36 (Sweden).

Chapter III

Draft conclusion 11

86. The preceding considerations permit to propose the following draft conclusion:

"*Draft conclusion 11. Constituent instruments of international organizations*

"1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

"2. The conduct of an organ of an international organization in the application of the constituent instrument of the organization may give rise to or articulate a subsequent agreement or subsequent practice of the parties under article 31, paragraph 3 (*a*) and (*b*), or to other subsequent practice under article 32.

"3. The conduct of an organ of an international organization in the application of the constituent instrument of the organization may itself constitute a relevant practice for the purpose of the interpretation of such a treaty.

"4. The established practice of an international organization shall be taken into account in the interpretation of the constituent instrument of the international organization."

PROVISIONAL APPLICATION OF TREATIES

[Agenda item 6]

DOCUMENT A/CN.4/687

Third report on the provisional application of treaties, by Mr. Juan Manuel Gómez Robledo, Special Rapporteur*

[*Original: English/Spanish*]
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Constitution of the International Labour Organization (Versailles, 28 June 1919)	*Ibid.*, p. 191. See also International Labour Office, *Official Bulletin*, vol. 1, April 1919–August 1920, Geneva, 1923.
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Constitution of the International Refugee Organization and Agreement on interim measures to be taken in respect of refugees and displaced persons (New York, 15 December 1946)	*Ibid.*, vol. 18, No. 283, p. 3.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	*Ibid.*, vol. 55, No. 814, p. 187.
Arrangement regarding international trade in textiles (schedule LXXV of the General Agreement on Tariffs and Trade) (Geneva, 20 December 1973)	*Ibid.*, vol. 930, No. 814, p. 166.
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Statute of the International Atomic Energy Agency (New York, 26 October 1956)	*Ibid.*, vol. 276, No. 3988, p. 3.
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International Coffee Agreement, 1968 (New York, 18 March 1968 and New York, 31 March 1968)	*Ibid.*, vol. 647, No. 9262, p. 3.
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Convention on the International Maritime Satellite Organization (INMARSAT) (London, 3 September 1976)	*Ibid.*, vol. 1143, No. 17948, p. 105.
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International Cocoa Agreement, 1980 (Geneva, 19 November 1980)	*Ibid.*, vol. 1245, No. 20313, p. 253.
Sixth International Tin Agreement (Geneva, 26 June 1981)	*Ibid.*, vol. 1282, No. 21139, p. 205.
International Coffee Agreement, 1983 (London, 16 September 1982)	*Ibid.*, vol. 1333, No. 22376, p. 120.
International Agreement on Jute and Jute Products, 1982 (Geneva, 1 October 1982)	*Ibid.*, vol. 1346, No. 22672, p. 59.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.*, vol. 1833, No. 31363, p. 3.
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.
International Tropical Timber Agreement, 1983 (Geneva, 18 November 1983)	*Ibid.*, vol. 1393, No. 23317, p. 67.
International Sugar Agreement, 1984 (Geneva, 5 July 1984)	*Ibid.*, vol. 1388, No. 23225, p. 3.

	Source
International Wheat Agreement, 1986:	*Ibid*., vol. 1429, No. 24237, p. 71.
(*a*) Wheat Trade Convention (London, 14 March 1986)	
(*b*) Food Aid Convention (London, 13 March 1986)	
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
International Agreement on Olive Oil and Table Olives (Geneva, 1 July 1986)	United Nations, *Treaty Series*, vol. 1445, No. 24591, p. 13.
Protocol of 1993 extending the above-mentioned Agreement (Geneva, 10 March 1993)	*Ibid*., vol. 1763, No. 24591, p. 319.
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International Sugar Agreement, 1992 (Geneva, 20 March 1992)	*Ibid*., vol. 1703, No. 29467, p. 203.
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International Cocoa Agreement, 1993 (Geneva, 16 July 1993)	*Ibid*., vol. 1766, No. 30692, p. 3.
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.
International Tropical Timber Agreement, 1994 (Geneva, 26 January 1994)	*Ibid*., vol. 1955. No. 33484, p. 81.
International Coffee Agreement, 1994 (London, 30 March 1994)	*Ibid*., vol. 1827, No. 31252, p. 3; extended until 30 September 2001 (*ibid.*, vol. 2086, No. 31252, p. 147), as amended by Resolution No. 384 adopted by the International Coffee Council in London on 21 July 1999.
Energy Charter Treaty (Lisbon, 17 December 1994)	*Ibid*., vol. 2080, No. 36116, p. 95.
International Natural Rubber Agreement, 1994 (Geneva, 17 February 1995)	*Ibid*., vol. 1964. No. 33546, p. 3.
International Grains Agreement, 1995:	*Ibid*., vol. 1882, No. 32022, p. 195.
(*a*) Grains Trade Convention, 1995 (London, 7 December 1994)	
(*b*) Food Aid Convention, 1995 (London, 5 December 1994)	
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Protocol to the Comprehensive Nuclear-Test-Ban Treaty	*Ibid.*
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997)	United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.
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Introduction

1. In his second report on the provisional application of treaties,[1] the Special Rapporteur considered the legal effects of provisional application as well as the legal consequences of the breach of a treaty applied provisionally. The report also provided a summary of the views expressed by various Member States regarding the first report and the comments of some States regarding their practice in respect of provisional application.

2. The discussion held by the Sixth Committee of the General Assembly has proven to be very useful in guiding the continuation of this research. Twenty–seven Member States and the European Union spoke on the topic.

3. It was generally agreed that the provisional application of a treaty constitutes a means to contribute to its more timely entry into force and that, given its flexibility, provisional application accelerates the acceptance of international law. With respect to the legal effects of provisional application, there was support for the Commission's view that the rights and obligations of a State that has decided to provisionally apply a treaty are the same as if the treaty were in force. In that regard, it was noted that a breach of the obligations assumed under the provisional application of a treaty is an internationally wrongful act that gives rise to the international responsibility of the State.[2]

4. Several delegations referred to the provisional application of a treaty by means of a unilateral commitment and emphasized that it cannot be characterized as a unilateral act since article 25 of the Vienna Convention on the Law of Treaties (hereinafter, "1969 Vienna Convention") assumes the existence of an agreement between the potential States parties to a treaty and the objective of provisional application is to establish treaty relations. If the treaty does not provide for the possibility of provisional application, it is necessary to establish that it has been agreed in some other manner, as stated in article 25, paragraph 1 (*b*), of the 1969 Vienna Convention.[3]

[1] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675.

[2] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session (A/CN.4/678), paras. 66–76.

[3] *Ibid*., para. 70.

5. However, this conclusion does not rule out the possibility that a State could commit itself to respecting the provisions of a treaty by means of a unilateral declaration without obtaining the agreement of the potential States parties. In such cases, the provisional application could only lead to obligations incumbent upon the State declaring the unilateral commitment.[4] That was the situation the Special Rapporteur sought to address in his second report, particularly with regard to cases where the treaty is silent and the will of the States involved in the negotiation of the treaty cannot be determined. Evidently, the issue has been clarified and will not be further addressed for the time being.

6. Another key question addressed by the Sixth Committee in its discussion, and, naturally, by the Commission, has been the future direction of the Special Rapporteur's mandate and the pending work. This issue will be the focus of the conclusion of the present report. However, the Special Rapporteur believes that there is now sufficient evidence for him to submit some draft guidelines for consideration by the Commission. The draft guidelines presented below are not based exclusively on issues covered in the present report but derive jointly from the three reports submitted by the Special Rapporteur, which should each be read in the light of the others.

7. The present third report, which follows the approach proposed by the Special Rapporteur[5] and fully takes into account the very valuable suggestions of Commission members and Member States,[6] addresses four issues in particular.

8. First, it offers an analysis of the comments on State practice that were provided after the second report was submitted, in response to a request from the Commission. Although the number of comments available remains low, an attempt has been made to better systematize State practice, while recognizing that it remains insufficient.

9. In that regard, it should be noted that the question of whether to proceed with a comparative study of constitutional law, and perhaps also of administrative law, with a view to further identifying State practice, was not entirely resolved during the discussions of the Sixth Committee. Some States consider that it is not relevant to this topic, while others believe that such a study is necessary to gain a better understanding thereof.

[4] *Ibid.*

[5] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675, paras. 97–98.

[6] Topical summary (see footnote 2 above), paras. 73–75.

10. On that point, the Special Rapporteur continues to believe that, for reasons that have been set forth in both the Commission and the General Assembly,[7] the final outcome of the Commission's work on the topic should not be affected by the domestic law of States regarding the provisional application of treaties, since a significant number of treaties discussed in the present report contain a clause that provides for provisional application to the extent that it is permitted by the provisions of the domestic legislation of each State. Moreover, the risk of misinterpreting States' domestic laws naturally discourages the Special Rapporteur from undertaking this endeavour. That being said, the Special Rapporteur remains open to any guidance that the Commission may wish to offer him.

11. Second, the report summarizes the relationship of provisional application to other provisions of the 1969 Vienna Convention. That was a pending task and might require further study based on the issues raised during the consideration of the present report by the Commission.

12. Third, the report examines the provisional application of treaties by international organizations, as envisaged in article 5 of the 1969 Vienna Convention, and in the light of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter, "1986 Vienna Convention").

13. Lastly, as noted above, the report presents draft guidelines that have been developed as a result of the study of the topic to date. If the Commission so wishes, these draft guidelines can be referred to the Drafting Committee during the present session. The Special Rapporteur also expects to receive the comments of the Commission and of Member States in the Sixth Committee, with a view to making any adjustments deemed advisable at the next session of the Commission.

14. The Special Rapporteur will address his proposal for continued consideration of the topic in the conclusion of the present report.

[7] *Ibid.*, para. 74.

Chapter I

Continuation of the analysis of views expressed by Member States

15. By the time the second report was completed, the Commission had received comments on national practice from 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.[8] A preliminary assessment of those national reports was made in the second report.

[8] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675, para. 20.

16. The Commission has since received comments from Austria, Cuba, Finland (on behalf of the Nordic countries), the Republic of Korea and Spain, as well as additional comments from the Czech Republic. Those comments on State practice, as well as those mentioned in paragraph 15, will be analysed below in a more systematic manner.

17. First, it should be noted that none of the comments submitted by the 15 States as at the time of writing of this report (May 2015) indicate that the provisional

application of treaties is prohibited by their domestic law. With the exception of Botswana, all of the States reported that they have resorted to provisional application. It can therefore be said that provisional application is permitted by the domestic law of those States that have submitted comments to the Commission.

18. Regarding the conditions under which States may resort to provisional application, Austria, Botswana, the Czech Republic, Germany, the Federated States of Micronesia, Norway, the Republic of Korea, the Russian Federation, Spain, Switzerland and the United States expressly indicate that the practice must be subject to the requirements of their domestic legislation, especially constitutional requirements.

19. Austria, Botswana, the Czech Republic, Germany, Norway, the Republic of Korea and Switzerland state explicitly that the provisional application of a treaty is subject to the same procedure as is followed for State accession to the treaty. In many of the United States precedents, acceptance of provisional application was by "executive agreement", that is, by "international agreement other than treaty".[9]

20. While Cuba and Mexico report that treaties may be provisionally applied, they do not indicate a specific process that must be followed. In addition to the examples provided by Mexico, which were referenced in the second report,[10] Cuba provides as examples of its national practice the agreement between Cuba and Cabo Verde on the abolition of visas, signed on 3 June 1982, and the technical and economic cooperation agreement between Cuba and China, signed on 22 July 2014.

21. The Russian Federation indicates that provisional application is regulated by the Federal Act on Treaties of the Russian Federation,[11] article 23, paragraph 1, of which essentially reproduces article 25 of the 1969 Vienna Convention.

22. Spain notes that provisional application is regulated by Act No. 25/2014, of 27 November, on treaties and other international agreements, which entered into force on 18 December 2014.[12] This Act replaces the legislative instrument that had regulated the issue since 1972. Under the current Act, it is the Council of Ministers, on the basis of a proposal by the Minister for Foreign Affairs and Cooperation, that takes the decision to provisionally apply a treaty (art. 15, para. 1). However, those treaties by which powers deriving from the Spanish Constitution are vested in an international organization or international institution may not be provisionally applied (art. 15, para. 2). The termination of provisional application may also be decided by the Council of Ministers; however, as indicated in the comments submitted by Spain, that scenario has not occurred in practice. With regard to the practice of Spain in respect of provisional application, its comments on its national practice indicate that years in which at least two dozen provisional applications are authorized are not exceptional and provide a list of provisional applications authorized by Spain, by year, since 1992. It is worth noting that, in 2014 alone, provisional application was authorized in the case of 11 treaties, 7 of them bilateral and 4 of them multilateral.

23. Lastly, it is particularly notable that Finland (on behalf of the Nordic countries), Norway, the Republic of Korea, Spain, Switzerland and the United States explicitly indicate that the provisional application of a treaty has the same legal effects as if the treaty were in force.

24. The Special Rapporteur reiterates his appreciation for the comments submitted as well as the interest shown by Member States in the topic of the provisional application of treaties.

25. Pending the further collection of information, the following attempt to categorize State practice may be of interest:

(*a*) States whose domestic laws or constitutions contain specific provisions regulating provisional application include Belarus, the Netherlands and the Russian Federation;

(*b*) States in which provisional application is a matter of uncodified practice include Albania, Hungary, Romania and the former Yugoslav Republic of Macedonia;

(*c*) States in which provisional application is prohibited by their constitutions or not accepted by their legal system include Austria, Brazil, Colombia, Costa Rica, Cyprus, Egypt, Italy, Luxembourg, Mexico and Portugal;

(*d*) States that permit provisional application in exceptional circumstances include Belgium, Colombia, France, Greece and Turkey;

(*e*) States that generally allow provisional application include Bosnia and Herzegovina, Finland, Slovakia and Spain;

(*f*) States that allow provisional application subject to certain conditions include Canada, Denmark, Israel, Lithuania, the Netherlands, Norway, Slovenia, Sweden and the United Kingdom.[13]

26. This categorization generally coincides with the comments that have been submitted to the Commission thus far. However, some of the cases described by Quast Mertsch do not correspond to the information provided by States in their comments. The two most obvious examples are Austria and Mexico, which noted that their domestic law allows them to resort to provisional application. The list proposed by Quast Mertsch no doubt represents a doctrinal exercise aimed at systematizing the information available at the time.

[9] United States, Library of Congress, Report on the Law of the Sea Treaty: Alternative Approaches to Provisional Application, 93rd Congress, 2nd Session, House Committee on Foreign Affairs (4 March 1974), ILM, vol. 13, p. 456. This document analyses the practice of the United States of America in respect of 10 international treaties.

[10] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675, para. 47.

[11] ILM, vol. 34 (1995), p. 1370.

[12] *Boletín Oficial del Estado*, No. 288 (28 November 2014), sect. I, p. 96841.

[13] Iinformation from Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature*, pp. 62–64.

Chapter II

Relationship of provisional application to other provisions of the 1969 Vienna Convention

27. Before beginning this analysis, the Special Rapporteur wishes to note that he has not identified in the literature any comments addressing this issue that go beyond the relationship between provisional application and the regimes derived from articles 18 and 26 of the 1969 Vienna Convention, respectively.

28. However, the Special Rapporteur believes that an analysis of the relationship between provisional application and other provisions of the 1969 Vienna Convention is relevant in the light of the practice identified thus far. Furthermore, such analysis responds to the requests made in the context of discussions held by the Commission and the Sixth Committee.[14]

29. It follows from the freedom of States to conclude treaties that they may at any time decide that a treaty, or certain of its provisions, applies provisionally.[15] As the Special Rapporteur stated in his first report, the legal regime derived from provisional application will depend not only on the terms in which provisional application is agreed in the treaty or, where applicable, the separate agreement, but also on subsequent interpretation and practice. In other words, the content and scope of the provisional application of a treaty will depend largely on the terms in which such application is envisioned in the treaty to be applied provisionally.[16] Thus, the relationship of provisional application to other provisions of the 1969 Vienna Convention may be determined by the terms of the treaty or the separate instrument that provides for that practice.

30. As mentioned in the introduction to the present report, this is an initial analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention, which could be expanded in the light of comments from the Commission and States.

31. In that context, the Special Rapporteur will focus on the provisions whose relationship to provisional application is most evident, namely: article 11 (means of expressing consent to be bound by a treaty); article 18 (obligation not to defeat the object and purpose of a treaty prior to its entry into force); article 24 (entry into force); article 26 ("*pacta sunt servanda*"); and article 27 (internal law and observance of treaties).

A. Article 11. Means of expressing consent to be bound by a treaty

32. A State's consent to be bound to a treaty may, as a general rule, be expressed by traditional means, such as by signature, exchange of instruments, ratification, acceptance, approval or accession. Furthermore, the last part of article 11 provides that States may express their consent to be bound by a treaty "by any other means if so agreed".

33. One of the reasons for the initial reluctance to introduce the provision on the provisional application of treaties into the 1969 Vienna Convention was the possibility that a contradiction would arise from that practice. It was thought that the practice of provisional application opposed treaty provisions regarding the mode of expression of consent to be bound, which meet internal law requirements, with the agreement on provisional application, which does not necessarily meet those requirements. In that regard, some States indicated, at the United Nations Conference on the Law of Treaties, held in Vienna in 1968 and 1969 (hereinafter, "Vienna Conference"), that the practice of provisional application bypasses the internal law regimes of States or alters the constitutional order.[17]

34. A question that arises with regard to provisional application is whether it can be considered to be an exceptional modality used to express consent to be bound by a treaty. That point is illustrated by the 1880 Convention for the Establishment of the Right of Protection in Morocco, which concerns the protection of foreign nationals in Morocco. The Convention stipulates that "[b]y exceptional consent of the high contracting parties the stipulations of this convention shall take effect on the day on which it is signed at Madrid".[18]

35. The Special Rapporteur believes that neither the discussions of the Commission thus far nor the comments of States lead to such a conclusion. It is important to distinguish between the two concepts. The modalities used to express consent to be bound by a treaty are linked to its entry into force, while provisional application is intended for the period preceding the entry into force of a treaty, that is, prior to a State's expression of its consent to be bound by the treaty in question.

36. Consent to be bound is the pivotal act by which a State expresses its willingness to be bound by the terms of the treaty.[19] Prior to the expression of consent, the instrument is only a text that serves as evidence of what the States negotiated; only after consent has been expressed does the instrument become a treaty within the meaning of the Convention.[20] Once a State has expressed its consent to be bound by a treaty, it qualifies as a "contracting State" within the meaning of article 2, paragraph 1 (*f*), of the 1969 Vienna Convention.[21]

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[14] See *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 25th meeting (A/C.6/69/SR.25), declaration of the European Union, paras. 72–75.

[15] Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 354.

[16] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/664, paras. 20–21.

[17] Mathy, "1969 Vienna Convention: Article 25—Provisional application", p. 643. See also *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), 26th meeting, para. 46.

[18] Quoted in *ibid*., p. 646, footnote 53.

[19] Villiger, *Commentary on the 1969 Vienna Convention …*, p. 176.

[20] *Ibid.*

[21] *Ibid*., p. 177.

37. What is of relevance to our topic is that the 1969 Vienna Convention provides for specific legal effects once a State has expressed consent to be bound by the treaty, while it is silent on the effects of provisional application. For example, in accordance with article 24, paragraph 2, of the Convention, failing an explicit provision, the negotiating States' expression of consent to be bound gives rise to the treaty's entry into force.

38. However, the obligation of a State to apply treaty provisions provisionally is derived from an explicit clause, contained in the treaty[22] or a separate instrument, or agreed by any other means.

39. The above points to the flexibility surrounding all aspects of provisional application, which is very different from any supposed exceptional modality for entry into force.

40. An excellent example of the flexibility that the 1969 Vienna Convention affords States with regard to the modalities for provisional application is the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. Article 7 (Provisional application) of that Agreement establishes that if on 16 November 1994 the Agreement had not entered into force, in accordance with Article 6,

it shall be applied provisionally pending its entry into force by:

(*a*) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which … notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing;

(*b*) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement;

(*c*) States and entities which consent to its provisional application by so notifying the depositary in writing;

(*d*) States which accede to this Agreement.

41. Article 5 (Simplified procedure) of the Agreement provides that States which have ratified or acceded to the United Nations Convention on the Law of the Sea and which have signed the Agreement shall be considered to have expressed their consent to be bound by the Agreement 12 months after the date of its adoption, unless they notify the depositary that they are not availing themselves of the simplified procedure, in which case those States shall be subject to the provisions of article 4 on consent to be bound by the Agreement and, hence, its entry into force. This procedure has been described as a low–profile tool that States can use to express their consent to be bound by the Agreement.[23] The internal political problems concerning ratification of the Agreement in some of the contracting States to the Convention explain why it was agreed that if a State merely signed the Agreement it would be considered to have expressed its consent to be bound by its terms, with the exception described above.[24]

[22] Aust, *Modern Treaty Law and Practice*, p. 172.

[23] *Ibid*., p. 114.

[24] *Ibid*.

42. However, that does not mean that the simplified procedure is in any way related to the provisional application of the Agreement, which is provided for in article 7. The simplified procedure is directly related to the entry into force of the Agreement, as provided for in article 4, as an expression of the freedom that negotiating States enjoy pursuant to article 24, paragraph 1, of the 1969 Vienna Convention.

43. As will be seen below, the flexibility that characterizes provisional application has given rise to a wide variety of means by which States may express their wish to avail themselves of it, while always maintaining the distinction between provisional application and entry into force of a treaty.

44. In that regard, the means of expressing consent to be bound by a treaty, as provided in article 11 of the 1969 Vienna Convention, may also be used to agree to its provisional application.

B. Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force

45. In his second report, the Special Rapporteur indicated 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 … 1969 Vienna Convention".[25] However, the relationship of provisional application with article 18 of the Convention is analysed in greater detail in the following paragraphs.

46. Article 18 of the 1969 Vienna Convention obliges States to refrain from acts which would defeat the object and purpose of a treaty. The terms "object and purpose" refer to the reasons for which States parties or signatories concluded a treaty, and the continuing functions and *raison d'être* of the treaty.[26]

47. The International Court of Justice used the phrase "object and purpose" in its advisory opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* and explained that it concerns at least what is essential to a treaty.[27] The Commission included the concept in its Guide to Practice on Reservations to Treaties, establishing in guideline 3.1.5 thereof that

a reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty.[28]

48. Signatory States and any State that has "expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed" (art. 18), are not obliged to

[25] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675, para. 14.

[26] Villiger, *Commentary on the 1969 Vienna Convention …*, p. 248.

[27] *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. 15 and 27.

[28] *Yearbook ... 2011*, vol. II (Part Three), para. 1.

apply a treaty that is not in force. However, it would be wrong to claim that these States have no obligation whatsoever in respect of the signed treaty.[29] As the International Court of Justice established in the aforementioned advisory opinion:

> [S]ignature constitutes a first step to participation in the Convention … Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.[30]

49. The Court emphasized the provisional nature of the status of signatory States to the treaty. They may take advantage of that status during the time between signature and ratification, although, as indicated in the advisory opinion, they must always respect the obligation to refrain from defeating the object and purpose of the treaty, as a "first step to participation" in the treaty.

50. The case of provisional application is very different. It would not be sufficient for States that decide to provisionally apply a treaty to refrain from defeating its object and purpose, as provisional application is subject to the rule *pacta sunt servanda*.[31]

51. In short, the obligations deriving from provisional application must be fulfilled in the good faith that is to be expected of a State that signs an international treaty and, *a fortiori*, of a State that has expressed its consent to be bound by a treaty. The principle that the actions of signatory States must be governed by good faith was considered by the Permanent Court of International Justice long before the existence of the 1969 Vienna Convention, when it examined what acts of a signatory State could constitute a misuse of rights prior to the entry into force of a treaty.[32]

52. As proposed by Quast Mertsch, the premise that provisional application can be equated to the general obligation to refrain from defeating the object and purpose of a treaty prompts an *argumentum ad absurdum*: why is there a need for provisional application at all, if it produces the same legal consequences as the obligation not to defeat a treaty's object and purpose pending its entry into force, as already provided in article 18?[33]

C. Article 24. Entry into force

53. The provisional application of a treaty presumes that the treaty is not in force. Certain conditions must be met before it can enter into force, such as obtaining the necessary parliamentary approval or reaching a certain number of ratifications. The Special Rapporteur has previously mentioned the problems associated with using the expression "provisional entry into force" to refer to provisional application.[34] As has been stated previously,[35] provisional application should be distinguished from entry into force within the meaning of article 24 of the 1969 Vienna Convention.[36] They are two distinct legal concepts.

54. Furthermore, article 24, paragraph 2, is without prejudice to those provisions of the treaty that regulate matters arising necessarily before its entry into force (authentication, modalities for the establishment of consent and entry into force, reservations, functions of the depositary, etc.), which apply from the time of the adoption of the text of a treaty although it has not yet entered into force.[37] This situation is also distinct from that deriving from provisional application, as article 24, paragraph 2, concerns only the so-called final clauses of a treaty, while provisional application concerns some or all of the substantive provisions of the treaty, that is, the legal regime which the treaty establishes.[38]

55. Lastly, the entry into force of a treaty has to be distinguished from its operation or application.[39] The date of entry into force of a treaty, that is, the date when the negotiated terms become binding, may not be the same as the date of entry into operation of all or some of its stipulations. The latter date may well be posterior to the former.[40] While the entry into force of a treaty and its entry into operation or application generally coincide, it is perfectly possible for them to occur separately.[41] It should also be noted that this is distinct from the intention of the regime of provisional application.

D. Article 26. "*Pacta sunt servanda*"

56. The relationship between articles 25 and 26 of the 1969 Vienna Convention will not be analysed in depth here, as the legal effects of treaties that are applied provisionally were discussed in the Special Rapporteur's second report,[42] which states that "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".[43] This was also expressed as far back as during the debates of the Vienna Conference, in 1968 and 1969.[44]

57. The principle that "obligations must be observed" (*pacta sunt servanda*) extends also to provisionally applied treaties. In that respect, the legal consequences of the provisional application of a treaty are the same as the legal consequences of its entry into force. The regime

[29] Crnic-Grotic, "Object and purpose of treaties in the Vienna Convention on the Law of Treaties", p. 153.

[30] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 27 above), p. 28.

[31] Mathy, "1969 Vienna Convention: Article 25 …", p. 652. See also Villiger, *Commentary on the 1969 Vienna Convention* …, p. 357.

[32] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A*, p. 37.

[33] Quast Mertsch, *Provisionally Applied Treaties* …, p. 174.

[34] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664, paras. 7 and 15–16.

[35] *Ibid.*, paras. 7–24.

[36] Villiger, *Commentary on the 1969 Vienna Convention* …, p. 354.

[37] *Ibid.* Aust, "1969 Vienna Convention: Article 24—Entry into force", p. 637.

[38] Quast Mertsch, *Provisionally Applied Treaties* …, p. 12.

[39] *Ibid.*, p. 11.

[40] *Yearbook … 1950*, vol. II, document A/CN.4/23, Report on the law of treaties, by J. L. Brierly, Special Rapporteur, p. 242, para. 103.

[41] Quast Mertsch, *Provisionally Applied Treaties* …, p. 12.

[42] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675, paras. 23–68 and 86–95.

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

[44] Quast Mertsch, *Provisionally Applied Treaties* …, p. 49.

of provisional application presupposes that the obligations arising from the provisionally applied treaty will be complied with in full until the treaty enters into force, or until its provisional application is terminated by mutual agreement of the States among which the treaty is being applied provisionally, or until the State notifies the other States provisionally applying the treaty of its intention not to become a party to the treaty.[45]

58. Provided that it is valid, provisional application produces the same legal effects as any other international agreement and is therefore subject to the rule *pacta sunt servanda*.[46] Its legal effects are definite and enforceable and cannot subsequently be called into question in view of the "provisional" nature of the treaty's application.[47]

59. Thus, the principle of *pacta sunt servanda* is applicable to a provisionally applied treaty until its provisional application comes to an end, whether that be as a result of the terms of the treaty, agreement of the parties, notification of the intention not to become a party to the treaty, or entry into force of the treaty.

E. Article 27. Internal law and observance of treaties

60. Article 27 of the 1969 Vienna Convention directly relates to the binding nature of a treaty, which is determined exclusively by international law, meaning that its execution by the parties cannot depend on, or be conditional to, their respective internal laws.[48] In other words, whatever the provisions of the internal law of a State party to a treaty, they should not affect the international obligations of the State or the responsibility that may be incurred for any failure to carry them out.[49]

61. While it is true that each State may decide, as a matter of internal law, whether to allow provisional application and if so upon what conditions,[50] a violation of internal law cannot justify a party's failure to perform a treaty. Consequently, the invocation of provisions of the internal law of a State in an attempt to justify the failure to perform an agreement on provisional application will engage the international responsibility of that State.[51]

62. The arbitral tribunal that heard the *Yukos* case[52] had the opportunity to analyse the relationship between the provisional application of the Energy Charter Treaty and article 27 of the 1969 Vienna Convention. In that case, the Russian Federation argued that since the limitation clause contained in article 45, paragraph 1, of the Treaty[53] recognized the priority of the constitution, it should be interpreted in such a way as to avoid any impingement on the prerogatives of the national legislative authority (the State Duma, in the case of the Russian Federation) and that, therefore, no provision of the Treaty could be provisionally applied unless: (*a*) it was in line with existing legislation; (*b*) it involved an act that fell under the exclusive competence of the executive branch; or (*c*) it involved an act approved by the State Duma.[54] In other words, the Russian Federation sought to make the provisional application of the Treaty subject to its internal law.

63. The arbitral tribunal held that, in accordance with the principle of *pacta sunt servanda* and article 27 of the 1969 Vienna Convention, a State may not invoke its internal legislation as a justification for its failure to perform a treaty:

> In the Tribunal's opinion, this … principle … strongly militates against an interpretation of Article 45 (1) that would open the door to a signatory, whose domestic regime recognizes the concept of provisional application, to avoid the provisional application of a treaty (to which it has agreed) on the basis that one or more provisions of the treaty is contrary to its internal law. Such an interpretation would undermine the fundamental reason why States agree to apply a treaty provisionally. They do so in order to be able to assume obligations immediately pending the completion of various internal procedures necessary to have the treaty enter into force.[55]

64. The tribunal went even further, establishing that

> [a]llowing a State to modulate (or … eliminate) the obligation of provisional application, depending on the content of its internal law in relation to the specific provisions found in the Treaty, would undermine the principle that provisional application of a treaty creates binding obligations.[56]

It emphasized that articles 26 and 27 of the Vienna Convention on the Law of Treaties did not admit an interpretation that would allow a signatory State whose domestic regime recognizes provisional application to avoid provisionally applying a treaty on the basis of its internal law.[57]

65. Thus, in the *Yukos* case, it was recognized that provisional application is a question of public international law, which should not be combined with domestic law to form a hybrid in which the content of domestic law directly controls the content of an international legal obligation.[58]

66. The Special Rapporteur wishes to stress that, in the interim award on jurisdiction and admissibility in the *Yukos* case, the tribunal recognized that a treaty must not allow domestic law to determine the content of an international legal obligation "unless the language of the treaty is clear and admits no other interpretation",[59] which reaffirms that States have absolute freedom to negotiate the terms of a treaty and, hence, its provisional application.

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[45] Osminin, *Prinjatie i realizacija gosudarstvami meždunarodnych dogovornych objazatel'stv* [The Adoption and Implementation by States of International Treaty Obligations]; see also Lefeber, "The provisional application of treaties", p. 89.

[46] Mathy, "1969 Vienna Convention: Article 25 …", p. 652.

[47] Villiger, *Commentary on the 1969 Vienna Convention …*, p. 354.

[48] Schaus, "1969 Vienna Convention: Article 27 …", p. 689.

[49] *Yearbook ... 1959*, vol. II, document A/CN.4/120, Fourth report on the law of treaties, by Sir Gerald Fitzmaurice, Special Rapporteur, "Article 7, Obligatory character of treaties: the principle of the supremacy of international law over domestic law", p. 58.

[50] Quast Mertsch, *Provisionally Applied Treaties …*, p. 64.

[51] Mathy, "1969 Vienna Convention: Article 25 …", p. 646.

[52] Permanent Court of Arbitration, *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[53] "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."

[54] *Yukos* (see footnote 52 above), para. 293.

[55] *Ibid.*, para. 313.

[56] *Ibid.*, para. 314.

[57] *Ibid.*, para. 313.

[58] *Ibid.*, para. 315.

[59] *Ibid.*

67. Another relevant aspect of this analysis is the question whether a treaty must be in force in the internal order as a condition for applicability of article 27 of the Vienna Convention on the Law of Treaties. It is generally considered that the obligation to perform the treaty exists from the moment that the treaty has entered into force in the international order.[60]

68. There is no doubt that, as stated in previous reports and during discussions in the Commission and the Sixth Committee, States resort to provisional application provided that it is permitted or not prohibited by their internal law.[61] It is nonetheless interesting to note that, in the *Yukos* case, the tribunal highlighted that Russian domestic law recognizes the concept of provisional application,[62] but did not state that such recognition is a condition for the validity of provisional application at the international level.

69. Even when it is not prohibited, States sometimes do not make use of the option of provisional application, simply because many States require parliamentary consent in order to provisionally apply a treaty.[63]

70. However, the Special Rapporteur considers that once a treaty is being provisionally applied, internal law may not be invoked as justification for failure to comply with the obligations deriving from provisional application. That would be contrary to the law on State responsibility, according to which the characterization of an act of a State as internationally wrongful is governed by international law and such characterization is not affected by the characterization of the same act as lawful by internal law.[64]

[60] Schaus, "1969 Vienna Convention: Article 27 …", p. 697.

[61] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/664, para. 44; *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675, para. 17.

[62] *Yukos* (see footnote 52 above), para. 313.

[63] Aust, *Modern Treaty Law and Practice*, p. 173.

[64] Art. 3 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76. See also General Assembly resolution 56/83 of 12 December 2001, annex.

Chapter III

Provisional application with regard to international organizations

A. Background

71. As was noted in the second report,[65] the Special Rapporteur undertook to address in the present report the question of the provisional application of treaties by international organizations, as had been requested by both Member States and the Commission.

72. In 1949, the International Court of Justice determined that an organization is an international person, which means that it is a subject of international law, possessing rights and duties.[66] That legal personality is the key element that allows an international organization to be bound by treaties, although its legal capacity to acquire rights and duties through treaties is not inherent to its status as a subject of international law, as is the case with a State,[67] but is governed by the organization's rules.[68]

73. It is States that confer legal personality and capacity on international organizations when they are constituted. The treaty mechanisms by which States confer powers on an international organization are either by use of the constituent treaty or, on a more *ad hoc* basis, by conclusion of a treaty that is separate from the constituent treaty.[69]

74. It is useful to make the following distinction. On the one hand, the present report will examine treaties by which two or more States decided to constitute an international organization (constituent treaties), and treaties adopted within an international organization, in accordance with article 5 of the 1969 Vienna Convention. On the other hand, the report will examine treaties concluded between States and international organizations or between international organizations that are governed by the 1986 Vienna Convention and may be the constituent instrument of a new international organization or entity or, as is very common, are intended to regulate matters relating to the headquarters of an international organization previously established under a different treaty.

75. In that context, both the 1969 Vienna Convention and the 1986 Vienna Convention are pertinent to the present report. It should be emphasized that "the general rule according to which all treaties between States are subject to the rules of the Convention [of 1969] 'unless the treaty otherwise provides' also applies to constituent instruments of international organizations".[70]

B. Memorandum prepared by the Secretariat on the legislative development of article 25 of the 1986 Vienna Convention

76. While the Special Rapporteur did not consider it necessary to address the legislative development of article 25 of the 1986 Vienna Convention in his first report, such analysis provides valuable input for consideration of the topic in the present third report, as expressed both by members of the Commission and by Member States during discussions in the Sixth Committee.

[65] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675, para. 98.

[66] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 179.

[67] Art. 6 of the 1969 Vienna Convention.

[68] Art. 6 of the 1986 Vienna Convention.

[69] Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, p. 18.

[70] Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Georg Nolte, Special Rapporteur, document A/CN.4/683 (reproduced in the present volume), para. 22.

77. Thus, at the 3243rd meeting, held on 8 August 2014, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the *travaux préparatoires* of the relevant provisions of the 1986 Vienna Convention.[71]

78. It is important to note that the 1986 Vienna Convention is not yet in force, since that would require ratification by 35 States, in accordance with article 85 of the Convention. To date, only 31 States have ratified it, together with 12 international organizations. Nevertheless, its legislative history is relevant to the study of the topic under consideration.

79. On 25 November 2014, the Secretariat circulated a memorandum[72] supplementing the memorandum submitted in 2013, which outlines the previous work undertaken by the Commission in the context of its work on the law of treaties and on the *travaux préparatoires* of article 25 of the 1969 Vienna Convention on the Law of Treaties.[73]

80. The Special Rapporteur wishes to thank the Secretariat for preparing this very valuable input. It is not necessary to summarize the memorandum in the present report; it is, however, worth highlighting a few elements contained therein.

81. Article 25 of the 1986 Vienna Convention reads as follows:

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 and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

82. It is clear from reading article 25 of the 1969 and 1986 Vienna Conventions, respectively, that their wording is practically identical. As eluded to in the memorandum, when draft articles 24 and 25 were submitted, the Special Rapporteur, Mr. Paul Reuter, said that "the two articles were based on the corresponding provisions of the Vienna Convention, from which they differed only to the extent of the drafting changes needed in order to take account of international organizations".[74] He added that the flexibility of articles 24 and 25 of the 1969 Vienna Convention meant that they could be adapted to any situation that might result from agreements concluded by international organizations.[75]

83. The second element mentioned in the memorandum of the Secretariat is that, during the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, held in Vienna in 1986 (hereinafter, "1986 Vienna Conference"), draft article 25 of the Convention was referred directly to the Drafting Committee without substantive consideration in the plenary of the Conference.[76] Article 25 was in the end adopted by the Conference without a vote.[77]

84. It could be that the 1986 Vienna Conference endorsed, without repeating, the deliberations of the first session of the Vienna Conference in 1969 and the decisions adopted with regard to the law of treaties between States. After all, article 25 of the 1969 Convention "underwent considerable change at the Vienna Conference",[78] and so the participants at the 1986 Vienna Conference avoided additional discussions that would have led to the same result as in 1969.

85. These elements, together with the considerations set forth in the first and second reports,[79] provide greater clarity with regard to certain features of the provisional application of treaties that have arisen as a result of practice, namely:

(*a*) that the wording of article 25 of the 1969 and 1986 Vienna Conventions, "demonstrates the flexibility which States enjoy in view of a forthcoming treaty";[80]

(*b*) that even though it may be argued that it is not an essential provision for the law of treaties regime, and is therefore not obligatory, it does have an indicative nature and its general nature "will mean that it is enriched by practice";[81]

(*c*) that article 25, "enunciating one of a number of aspects of the freedom of States to conclude treaties, indubitably reflects an established customary rule of international law";[82] and

(*d*) that the legal regime of provisional application of treaties between States and international organizations or between international organizations is, *mutatis mutandis*, the same as that relating to treaties between States, with the legal effects derived from the *pacta sunt servanda* principle.

C. Provisional application of treaties establishing international organizations and international regimes

86. International practice shows that States have repeatedly agreed to the provisional application of treaties establishing international organizations or some type of international regime.

[71] *Yearbook ... 2014*, vol. II (Part Two), para. 227.

[72] A/CN.4/676 (reproduced in the present volume).

[73] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/658.

[74] *Yearbook ... 1977*, vol. I, 1435th meeting, p. 104, para. 4.

[75] *Ibid*.

[76] Document A/CN.4/676 (reproduced in the present volume), para. 37.

[77] *Ibid*., para. 40.

[78] Villiger, *Commentary on the 1969 Vienna Convention …*, p. 357.

[79] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/664 and *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675.

[80] Villiger, *Commentary on the 1969 Vienna Convention …*, pp. 357–358.

[81] Vignes, "Une notion ambigüe: l'application à titre provisoire des traités", p. 192.

[82] Villiger, *Commentary on the 1969 Vienna Convention …*, p. 357.

87. Provisional application can play a key role in the complex process of establishing and setting up a new international organization or facilitating the establishment of an international organization.[83]

88. The legal literature contains examples dating back to the nineteenth and early twentieth centuries of the provisional application of organizations' constituent instruments, for example the administrative union in the nineteenth century, the establishment in 1875 of the International Bureau of Weights and Measures by virtue of the Metre Convention, or the establishment of the International Labour Organization, founded on 28 June 1919, by virtue of the Treaty of Versailles.[84]

89. The Secretary-General of the United Nations, in 1973, prepared a report that provides examples of precedents of States and international organizations provisionally applying treaties establishing international organizations or international regimes.[85]

90. In that report, the Secretary-General identifies, as precedents, eight cases "in which provisional measures were taken with respect to multilateral treaties that subsequently came into force".[86]

91. The examples to which the report of the Secretary-General refers are the Provisional International Civil Aviation Organization;[87] the Preparatory Committee of the Intergovernmental Maritime Consultative Organization;[88] the Preparatory Commission of the International Refugee Organization;[89] the Interim Commission of the World Health Organization;[90] the Preparatory Commission of the International Atomic Energy Agency;[91] the International Sugar Agreement; the Fisheries Convention; and the European Central Inland Transport Organization.[92]

92. As noted in the introduction to the report, the above are examples of "cases in which provisional measures were taken with respect to multilateral treaties that subsequently came into force …; instances in which the arrangements made remained provisional have not therefore been included".[93] As will be seen below, there are also precedents of treaties that continue to be applied provisionally, at least in part.

[83] Michie, "The role of provisionally applied treaties in international organisations", p. 48.

[84] *Ibid*., p. 49.

[85] Report of the Secretary-General on examples of precedents of provisional application, pending their entry into force, of multilateral treaties, especially treaties which have established international organizations and/or regimes (A/AC.138/88).

[86] *Ibid*., para. 3.

[87] Convention on International Civil Aviation.

[88] Convention on the Intergovernmental Maritime Consultative Organization.

[89] Agreement on interim measures to be taken in respect of refugees and displaced persons.

[90] Arrangement concluded by the Governments represented at the International Health Conference.

[91] Annex to the Statute of the International Atomic Energy Agency.

[92] Agreement Concerning a Provisional Organisation for European Inland Transport.

[93] A/AC.138/88, para. 3.

93. The first four cases identified above concern the arrangements made to cover the period between the date of preparation of the constitutional instrument of four specialized agencies and the entry into force of that instrument. Much the same pattern was followed in the case of the International Atomic Energy Agency. However, in the last three cases different approaches were taken.[94]

94. As was noted in the Special Rapporteur's second report, the provisional application of treaties has legal effects.[95]

95. Referring to articles 24 and 25 of the 1969 Vienna Convention in his report, the Secretary-General notes that

> [a]ccording to these provisions, the provisional application of a treaty only occurs, strictly speaking, when the treaty itself so provides or the negotiating States have in some other manner so agreed. The International Sugar Agreement, 1968, is an example of a multilateral treaty which itself expressly provides for provisional entry into force, under specified conditions.[96]

96. In all the other cases cited, "recourse was had to the adoption of a separate instrument …, usually by simplified means, in order to make provisional organizational arrangements pending the entry into force of the major treaty and the establishment of the permanent body",[97] with the exception of the Preparatory Committee of the Intergovernmental Maritime Consultative Organization, which was established by a resolution of a conference; in that case, provisional application usually takes immediate effect.[98]

97. In short, provisional application allowed the establishment of international bodies or international regimes whose objective was to carry out the preparations necessary for the functioning of a permanent international organization or to commence the operation and execution of the responsibilities of the international organization concerned.[99]

98. The fact that, in his analysis, the Secretary-General divided his examples into cases where the practice reflects the provisions of article 25 of the 1969 Vienna Convention, on the one hand, and "particular examples of the application of article 24 [of the Convention] so far as the manner of entry into force",[100] on the other, is further proof of the flexibility with which States and international organizations interpret and apply article 25 of the Convention.

99. The most famous precedent is, undoubtedly, the 1947 General Agreement on Tariffs and Trade, which was provisionally applied for decades by virtue of a "hugely atypical" protocol of provisional application.[101]

[94] *Ibid*., paras. 4–5.

[95] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675, para. 24.

[96] A/AC.138/88, para. 9.

[97] *Ibid*., para. 10.

[98] United States, Library of Congress, Report on the Law of the Sea Treaty … (see footnote 9 above).

[99] A/AC.138/88, para. 12.

[100] *Ibid*., para. 10.

[101] Aust, *Modern Treaty Law and Practice*, pp. 172–173.

100. Another notable example is the Energy Charter Treaty, which established the Energy Charter Conference. Article 45, paragraph 4, of that Treaty states:

> Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.

101. Moreover, the Secretariat has prepared and made available to the Special Rapporteur a document that collates a total of 50 multilateral treaties concluded between 1968 and 2013, and indicates: (*a*) the article or provision that addresses the question of provisional application; (*b*) the text of the provisional application clauses; (*c*) whether the treaty is open to international organizations; and (*d*) if it is, which international organizations are parties to the treaty. While this list is not exhaustive, the Special Rapporteur considers it to be a very useful reference tool and has therefore included the document in question as an annex to the present report.

102. All of these examples highlight not only the use, but also what has come to be called the “useful abuse”, of provisional application.[102]

D. Provisional application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations

103. Despite the existence of the aforementioned precedents, at the time the 1969 Vienna Convention was adopted, provisional application clauses were still relatively rare. The growing need for them has been caused by a combination of the requirement to bring treaties that are subject to ratification into force early, and the problem of doing just that. The problem is especially difficult for treaties adopted within the United Nations or the specialized agencies, since they require a substantial number of ratifications for entry into force.[103] A relatively short period of provisional application is therefore envisaged, even if this cannot be complied with.[104]

104. It is noted that, in order to accommodate differing interests and circumstances, clauses on provisional application have tended to become increasingly complex and to embrace a range of possibilities, rather than a single straightforward formula.[105]

105. One example is the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. This Agreement was adopted by the General Assembly on 28 July 1994 in order to modify, by way of interpretation, some of the controversial provisions of the 1982 Convention. The aim was for the Agreement to be applied in full when the 1982 Convention entered into force on 16 November 1994. In accordance with article 7 of the Agreement, which sets out various modalities for States to avail themselves of the provisional application regime, the Agreement was provisionally applied from 16 November 1994 until its entry into force on 28 July 1996. The decision to provisionally apply the Agreement could be put into practice simply by notifying the depositary, in accordance with article 7, paragraph 1 (*c*).

106. This modality of simply notifying the depositary, which could be called the simplified option, has become standard practice for this type of treaty. Other examples include article 15 of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency and article 13 of the Convention on Early Notification of a Nuclear Accident, also dated 1986, which were negotiated under the auspices of the International Atomic Energy Agency.

107. The voluntary nature of this type of clause provides an option that can be used even by a State that was not one of those negotiating the treaty in question, owing to the fact that universal accession tends to be envisaged for multilateral treaties and to the urgency of the subject matter in question or the seriousness of that which a particular treaty is intended to prohibit. In cases where the provisional application option is exercised by means of notification, the only requirement is that such an option is provided for in the treaty or in some other manner so agreed.

108. Moreover, the case may arise where a State decides not to make use of the provisional application option established for all potential States parties to the treaty, in which case that State must notify the depositary of its decision not to apply the treaty provisionally. That possibility was envisaged in article 7, paragraph 1 (*a*) and (*b*), of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

109. In the Special Rapporteur’s view, the case of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization is another current example underscoring that provisional application can be of great use for the establishment and operation of an international organization.

110. On 10 September 1996, the General Assembly adopted the Comprehensive Nuclear-Test-Ban Treaty. Almost 20 years after its adoption, the Treaty has still not entered into force.

111. However, article II of the Treaty provides for the establishment of the Comprehensive Nuclear-Test-Ban Treaty Organization. To that end, the Secretary-General of the United Nations, in his capacity as depositary of the Treaty, convened a meeting of States signatories at which a resolution establishing a Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty

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[102] Lefeber, “The provisional application of treaties”, p. 81.

[103] Aust, *Modern Treaty Law and Practice*, p. 173.

[104] Treaty on Open Skies, which stipulated that the provisional application should be effective for a period of 12 months from the date when the Treaty was opened for signature. However, the Treaty provided that, should it not enter into force before the period of provisional application expired, that period might be extended if all the signatory States so decided (art. 18, para. 2). The entire Treaty was applied provisionally from the date when it was opened for signature in 1992 until it entered into force in 2002.

[105] See Michie, “The role of provisionally applied treaties in international organisations”.

Organization was adopted.[106] The annex to that resolution details, in its 22 paragraphs, the mandated functions of the Preparatory Commission, including that of undertaking all necessary preparations to ensure the operationalization of the Treaty's verification regime at entry into force.[107] Furthermore, the appendix to the resolution comprises a six-page indicative list of verification tasks assigned to the Preparatory Commission.[108] A review of the indicative list clearly shows that these are substantive functions, with legal effects. Indeed, the Preparatory Commission has concluded agreements with States for the establishment of monitoring facilities in their territories, as provided for in the Protocol to the Comprehensive Nuclear-Test-Ban Treaty.[109] International Monitoring System monitoring stations and laboratories are currently operating effectively in 89 States.[110]

112. The Protocol to the Comprehensive Nuclear-Test-Ban Treaty[111] has also been provisionally applied. Paragraph 4 of that Protocol provides that:

> In accordance with appropriate agreements or arrangements and procedures, a State Party or other State hosting or otherwise taking responsibility for International Monitoring System facilities and the Technical Secretariat shall agree and cooperate in establishing, operating, upgrading, financing, and maintaining monitoring facilities, related certified laboratories and respective means of communication within areas under its jurisdiction or control or elsewhere in conformity with international law.

113. The establishment and provisional operation of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization has clearly demonstrated, for almost two decades, the usefulness of this concept for the implementation of an international nuclear test verification system with full legal effect. Moreover, the ratifications required pursuant to the Comprehensive Nuclear-Test-Ban Treaty, and annex 2 thereof, in order for the Treaty to enter into force, are not expected to be obtained in the near future.

114. In that regard, the provisional agreements cited above, and the provisional operation of the Preparatory Commission, have every appearance of continuing indefinitely, which highlights the value of the provisional application of the Treaty over and above its purely preparatory function.[112]

115. It is worth considering, lastly, a case in which a series of amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) and its Operating Agreement[113] were provisionally applied. Neither of the two instruments provided for provisional application. Nor was such a concept mentioned when amendments to the two instruments were agreed. The negotiating States therefore had to consider, *inter alia*, the following questions: (*a*) whether in the absence of any explicit provision in the Convention, the Assembly of Parties had authority to decide that the amendments could be applied provisionally; (*b*) whether a consensus decision would be sufficient and what would happen if one of the Parties objected; and (*c*) in the absence of consensus, how many votes would be needed and what rights would be recognized as pertaining to a dissenting Party or Parties.

116. In order to guide their thinking, the negotiating States referred to a number of precedents in which the supreme organs of organizations provisionally applied the amendments, without explicit power in their constitutions. Such examples include the general congress of the Universal Postal Union, the Committee of Ministers of the Council of Europe and, in particular, the practice of the International Telecommunication Union.[114]

117. Essentially, what they needed to do was to establish that the requirement of article 25, paragraph 1 (*b*), of the 1969 and 1986 Vienna Conventions had been fulfilled, by proving that provisional application had been agreed "in some other manner".

118. Yet another example of a factor that may tip the balance in favour of provisional application is that of the amendment adopted in 2011 by the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, in considering the gap in the operation of the clean development mechanism that might arise in relation to the entry into force of amendments to the Kyoto Protocol, recommended that those amendments could be applied provisionally.[115] That recommendation was endorsed by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, which, in its report on its eighth session, decided that "Parties may provisionally apply the amendment pending its entry into force in accordance with Articles 20 and 21 of the Kyoto Protocol, and … that Parties will provide notification of any such provisional application to the Depositary".[116]

119. In his second report, the Special Rapporteur addressed the issue of the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.[117]

120. It is, however, worth referring again to that case. When the Syrian Arab Republic unilaterally declared that

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[106] Resolution establishing the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, CTBT/MSS/RES/1, of 19 November 1996.

[107] *Ibid*., p. 5, para. 13.

[108] *Ibid*., appendix, pp. 8–13.

[109] For example, with Australia, United Nations, *Treaty Series*, vol. 2123, No. 36987, p. 41; Cook Islands, *ibid*., No. 1235, p. 111; Finland, *ibid*., No. 36986, p. 27; Jordan, *ibid*., No. 36988, p. 59; Kenya, *ibid*., No. 36989, p. 75; and South Africa, *ibid*., No. 36990, p. 93.

[110] See www.ctbto.org/verification-regime/background/overview-of-the-verification-regime/.

[111] Michie, "The provisional application of arms control treaties", p. 369.

[112] *Ibid*., p. 370.

[113] Sagar, "Provisional application in an international organization".

[114] *Ibid*., pp. 104–106.

[115] Legal considerations relating to a possible gap between the first and subsequent commitment periods (FCCC/KP/AWG/2010/10), para. 18.

[116] Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its eighth session, held in Doha from 26 November to 8 December 2012 (FCCC/KP/CMP/2012/13/Add.1), para. 5.

[117] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675, paras. 66–68.

it would provisionally apply the said Convention, the Director General of the Organization for the Prohibition of Chemical Weapons replied neutrally, informing the Syrian Arab Republic that its "request" to provisionally apply the agreement would be forwarded to the States parties. Although the Convention does not provide for provisional application and such a possibility was not discussed during the negotiations, neither the States parties nor the Organization opposed the provisional application of the Convention by the Syrian Arab Republic, as expressed in its unilateral declaration.[118] In this case, the dialogue between States and the Organization, through its Director General, is worth noting, since it shows that "although the Director General of the [Organization] is not the depositary of the [Convention], the Organization, as the implementing body of the [Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction], had a role to play"[119] in determining the legal effects of provisional application. Moreover, "the conduct of international organizations may serve to catalyse State practice".[120]

121. In conclusion, as was stated by the International Law Association in the final report of the 2004 Berlin Conference on Arms Control and Disarmament Law in relation to the Comprehensive Nuclear-Test-Ban Treaty, "[t]he provisional application, as a confidence-building mechanism, reinforces the legal standing of the [Comprehensive Nuclear-Test-Ban Treaty], encourages further ratifications, and deters any State from conducting nuclear tests in the future".[121]

E. Provisional application of treaties to which international organizations are party

122. Treaties to which international organizations are party, and which are provisionally applied, also merit analysis in the context of the present third report. As has already been mentioned, the 1986 Vienna Convention has not entered into force; however, its rules have full legal effect, because they reflect norms of customary international law.[122]

123. In that regard, "the practice of international organizations relating to the international conduct of the organization or international organizations generally may, as such, serve as relevant practice for purposes of formation and identification of customary international law".[123]

124. In view of the above, a number of cases that are relevant for identifying the practice of international organizations are set out below.

125. Examples of provisionally applied treaties that refer to the establishment of the headquarters of international organizations include:

(*a*) Headquarters agreement for the establishment of the International Atomic Energy Agency, signed between Austria and the Agency, which entered into force on 1 March 1958, but was applied provisionally from 1 January 1958;[124]

(*b*) Headquarters agreement signed between Spain and the World Tourism Organization, which was applied provisionally from 1 January 1976 and entered into force on 2 June 1977;[125]

(*c*) Headquarters agreement signed between Germany and the United Nations for the establishment of United Nations premises in Bonn, which "came into force" provisionally on the same day as it was adopted;[126] and

(*d*) Headquarters agreement signed between the United Nations and the Netherlands for the establishment of the International Tribunal for the Former Yugoslavia, article XXIX, paragraph 4, of which provides for provisional application of the agreement as from the date of signature.[127]

126. There are also examples of treaties signed between international organizations that have been applied provisionally. For example:

(*a*) Agreement concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons,[128] which, in article XVI, paragraph 2, provided for a regime of provisional application upon signature;

(*b*) Agreement between the World Intellectual Property Organization and the Organization of the Islamic Conference, applied provisionally as from the date of its signature on 3 November 1992;[129]

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[118] See Jacobsson, "Syria and the issue of chemical weapons …", pp. 137–141.

[119] *Ibid.*, p. 138.

[120] Document A/CN.4/682 (reproduced in the present volume), para. 75.

[121] International Law Association, "Final report of the Committee on Arms Control and Disarmament Law", *Report of the Seventy-First Conference, Berlin, 16–21 August 2004*, London, 2004, pp. 488–527, at para. 8.

[122] Michie, "The role of provisionally applied treaties in international organisations", pp. 42–43. For more in-depth analysis, see Michie, "The provisional application of treaties with special reference to arms control, disarmament and non-proliferation instruments", pp. 86–111.

[123] Document A/CN.4/682 (reproduced in the present volume), para. 76.

[124] Agreement between the International Atomic Energy Agency and Austria regarding the headquarters of the International Atomic Energy Agency (Vienna, 11 December 1957), United Nations, *Treaty Series*, vol. 339, No. 4849, p. 110, at footnote 1.

[125] Agreement between Spain and the World Tourism Organization concerning the legal status of the World Tourism Organization in Spain (Madrid, 10 November 1975), *ibid.*, vol. 1047, No. 15762, p. 69, at footnote 1.

[126] Agreement between the United Nations and Germany concerning the occupancy and use of the United Nations premises in Bonn (New York, 13 February 1996), *ibid.*, vol. 1911, No. 32554, p. 187, at footnote 1.

[127] Agreement between the United Nations and the Netherlands concerning the headquarters of 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 (New York, 29 July 1994), *ibid.*, vol. 1792, No. 31119, p. 351.

[128] Agreement concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons (New York, 17 October 2000), General Assembly resolution 55/283 of 7 September 2001, annex.

[129] Agreement between the World Intellectual Property Organization and the Organization of the Islamic Conference on the establishment of working relations and cooperation (Geneva and Jeddah, 3 November 1992) United Nations, *Treaty Series*, vol. 1727, No. 1079, p. 251, footnote 1.

(*c*) Agreement concerning the relationship between the United Nations and the International Seabed Authority, also applied provisionally as from the date of signature on 14 March 1997;[130] and

(*d*) Agreement between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the World Meteorological Organization, article XIII, paragraph 2, of which provides for provisional application of the Agreement.[131]

127. There are even examples of agreements concluded by exchanges of letters between States and international organizations that provide not only for provisional application but also for retroactive effect. That was the case with the agreement between Cyprus and the United Nations regarding the peacekeeping operation in that country.[132] Other examples are the agreements concluded between the International Labour Organization and Ethiopia[133] and the Russian Federation,[134] respectively.

128. The flexibility demonstrated by these cases arises from the need to implement certain provisions of the treaty in question in order to be able to operate in practice within a specific legal framework. They also show that both States and international organizations recognize the legal effects of treaties applied provisionally.

129. As a corollary to the foregoing, it may be noted that, in a questionnaire developed by Quast Mertsch on the legal effects of provisional application, which was circulated among States and the legal advisers of international organizations in the period 2007–2008, 12 out of 18 States and 5 out of 7 legal advisers of international organizations surveyed responded that provisionally applied treaties are legally binding.[135]

[130] Agreement concerning the relationship between the United Nations and the International Seabed Authority (New York, 14 March 1997), *ibid*., vol. 1967, No. 1165, p. 255, footnote 1.

[131] Agreement between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the World Meteorological Organization, document CTBT/LEG.AGR/39.

[132] Exchange of letters constituting an agreement concerning the status of the United Nations PeaceKeeping Force in Cyprus (New York, 31 March 1964), United Nations, *Treaty Series*, vol. 492, No. 7187, p. 57, entered into force provisionally on 31 March 1964 and with retroactive effect from 14 March 1964 (*ibid*., at footnote 1).

[133] Agreement between Ethiopia and the International Labour Organization concerning the office of the Organization in Addis Ababa (Addis Ababa, 8 September 1997), *ibid*., vol. 2157, No. 37726, p. 255. Provisionally on 8 September 1997 and definitively on 4 June 2001, in accordance with article 10 (*ibid*., art. 10, para. 1).

[134] Agreement between the Russian Federation and the International Labour Organization on the office of the Organization in Moscow (Moscow, 5 September 1997), *ibid*., vol. 2058, No. 35602, p. 29. Provisionally on 5 September 1997 by signature and definitively on 24 September 1998 by notification, in accordance with article 15.

[135] Quast Mertsch, *Provisionally Applied Treaties …*, p. 171.

Chapter IV

Preliminary proposals for guidelines on provisional application

130. It was in his first report that the Special Rapporteur first put forward the idea of developing "guidelines" that would be useful for States and international organizations when they decided to apply treaties provisionally.[136]

131. In that respect, and further to the analysis presented in his first and second reports, the Special Rapporteur presents the following initial series of draft guidelines on the provisional application of treaties. The discussion within the Commission and the opinions expressed by Member States in the Sixth Committee of the General Assembly will provide valuable insights for possible consideration of these draft guidelines by the Drafting Committee during the Commission's forthcoming sessions.

"*Draft guideline 1*

"States and international organizations may provisionally apply a treaty, or parts thereof, when the treaty itself so provides, or when they have in some other manner so agreed, provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application.

"*Draft guideline 2*

"The agreement for the provisional application of a treaty, or parts thereof, may be derived from the terms of the treaty, or may be established by means of a separate agreement, or by other means such as a resolution adopted by an international conference, or by any other arrangement between the States or international organizations.

"*Draft guideline 3*

"A treaty may be provisionally applied as from the time of signature, ratification, accession or acceptance, or as from any other time agreed by the States or international organizations, having regard to the terms of the treaty or the terms agreed by the negotiating States or negotiating international organizations.

"*Draft guideline 4*

"The provisional application of a treaty has legal effects.

"*Draft guideline 5*

"The obligations deriving from the provisional application of a treaty, or parts thereof, continue to apply until: (i) the treaty enters into force; or (ii) the provisional application is terminated pursuant to article 25, paragraph 2, of the Vienna Convention on the Law of Treaties or the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, as appropriate.

"*Draft guideline 6*

"The breach of an obligation deriving from the provisional application of a treaty, or parts thereof, engages the international responsibility of the State or international organization."

[136] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/664, para. 54.

Chapter V

Conclusion

132. The Special Rapporteur believes that, in submitting the present report, he has fulfilled the request for a study of provisional application in relation to the practice of international organizations; he therefore does not consider it necessary to return to that issue in future reports.

133. It has become clear that the interpretation of article 25 of the 1969 Vienna Convention and article 25 of the 1986 Vienna Convention must be virtually identical, particularly with regard to the legal effects of provisional application.

134. Furthermore, the report has provided relevant examples of practice demonstrating that both States and international organizations frequently resort to provisional application.

135. The Special Rapporteur has also presented an initial study of the relationship of article 25 with other provisions of the 1969 Vienna Convention, with a particular focus on articles 11, 18, 24, 26 and 27.

136. Lastly, the Special Rapporteur looks forward to receiving the reactions to and comments on this report that the Commission and Member States may formulate in order to identify the way forward. The Special Rapporteur would like to receive more reports on State practice and thanks States in advance for preparing such reports and submitting them to the Commission.

137. With regard to its future work, the Special Rapporteur proposes that the Commission should: (*a*) continue to analyse the relationship of provisional application with other provisions of the 1969 Vienna Convention, such as the reservations regime; (*b*) address the question of the relationship between provisional application and succession of States with respect to treaties; (*c*) examine the practice of multilateral treaty depositaries; and (*d*) study the legal effects of the termination of provisional application with respect to treaties granting individual rights.

138. The Special Rapporteur will also continue to formulate draft guidelines supplementing those presented in the present report.

Annex

[*Original: English*]

Provisional application of treaties by international organizations

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Cocoa Agreement, 1972	Art. 66	(1) A signatory Government which gives a notification under paragraph (1) of article 65 may also indicate in its notification, or at any time thereafter, that it will apply this Agreement provisionally either when it enters into force in accordance with article 67 or, if this Agreement is already in force, at a specified date. An indication by a signatory Government that it will apply this Agreement when it enters into force in accordance with article 67 shall, for the purposes of provisional entry into force of this Agreement, be equal in effect to an instrument of ratification, acceptance or approval. Each Government giving such an indication shall at that time state whether it is joining the Organization as an exporting member or an importing member. (2) When this Agreement is in force, either provisionally or definitively, any Government which gives a notification under paragraph (2) of article 65 may also indicate in its notification, or at any time thereafter, that it will apply this Agreement provisionally at a specified date. Each Government giving such an indication shall at that time state whether it is joining the Organization as an exporting member or an importing member. (3) A Government which has indicated under paragraph (1) or (2) that it will apply this Agreement provisionally, either when it enters into force or at a specified date, shall, from that time, be a provisional member of the Organization until either it has deposited its instrument of ratification, acceptance, approval or accession or until the time limit in its notification under article 65 has expired, whichever is the earlier. If, however, the Council is satisfied that the Government concerned has not deposited its instrument owing to difficulties in completing its constitutional procedures, the Council may extend that Government's provisional membership for a further specified period.	Yes (see art. 4)	European Economic Community
International Cocoa Agreement, 1975	Art. 68	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument may, at any time, notify the Secretary-General of the United Nations that it will apply this Agreement provisionally either when it enters into force in accordance with Article 69 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting member or an importing member. 2. A Government which has notified under paragraph 1 that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional member. It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see art. 4)	European Economic Community
International Cocoa Agreement, 1980	Art. 65	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 66 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting member or an importing member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional member. It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see art. 4)	European Economic Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Cocoa Agreement, 1986	Art. 69	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures, it will apply this Agreement provisionally either when it enters into force in accordance with article 70 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting member or an importing member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional member. It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see art. 4)	European Economic Community
International Cocoa Agreement, 1993	Art. 55	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 56 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting Member or an importing Member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional Member. It shall remain a provisional Member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see art. 4)	European Community
International Cocoa Agreement, 2001	Art. 57	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this agreement provisionally either when it enters into force in accordance with article 58 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting Member or an importing Member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional Member. It shall remain a provisional Member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see art. 4)	–
International Cocoa Agreement, 2010	Art. 56	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the Depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 57 or, if it is already in force, at a specified date. Each Government giving such notification shall inform the Secretary-General whether it is an exporting Member or an importing Member at the time of giving such notification or as soon as possible thereafter. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional Member. It shall remain a provisional Member until the date of deposit of its instrument of ratification, acceptance, approval or accession.	Yes (see art. 4, paras. 5–6)	European Union

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Agreement on olive oil and table olives, 1986	Art. 54	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally when it enters into force in accordance with article 55, or, if it is already in force, at a specified date. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement when it enters into force, or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.	Yes (see art. 5)	–
Protocol of 1993 extending the International Agreement on Olive Oil and Table Olives, with amendments, 1986	Art. 54	Change article "54" to "55". In paragraph 1, sixth line, change article "55" to "56".	Yes (see art. 5)	–
Grains Trade Convention, 1995	Art. 26	Any signatory Government and any other Government eligible to sign this Convention, or whose application for accession is approved by the Council, may deposit with the depositary a declaration of provisional application. Any Government depositing such a declaration shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto.	Yes (see art. 2, para. 2)	European Community
Wheat Trade Convention, 1986	Art. 26	Any signatory Government and any other Government eligible to sign this Convention, or whose application for accession is approved by the Council, may deposit with the depositary a declaration of provisional application. Any Government depositing such a declaration shall provisionally apply this Convention and be provisionally regarded as a party thereto.	Yes (see art. 2, para. 2)	European Economic Community
Food Aid Convention, 1986	Art. XIX	Any signatory Government may deposit with the depositary a declaration of provisional application of this Convention. Any such Government shall provisionally apply this Convention and be provisionally regarded as a party thereto.	Yes (see art. II, para. 2)	European Economic Community
Food Aid Convention, 1995	Art. XIX	Any signatory Government may deposit with the depositary a declaration of provisional application of this Convention. Any such Government shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto.	Yes (see art. II, para. 2)	European Community
	Declaration made upon the declaration of provisional application: European Community	The Republic of Austria, the Republic of Finland and the Kingdom of Sweden, having become member States of the European Community on 1 January 1995, will no longer be individual members of this Convention but will be covered by Community membership of the Convention. The European Community accordingly also undertakes to exercise the rights and perform the undertakings laid down in this Convention for those three countries as soon as this Convention is applied provisionally.		
Food Aid Convention, 1999	Art. XXII, para. (*c*)	Any signatory Government may deposit with the depositary a declaration of provisional application of this Convention. Any such Government shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto.	Yes (see art. II, para. *b*)	European Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
Sixth International Tin Agreement	Art. 53	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession under the provisions of article 54, but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will, within the limitations of its constitutional and/or legislative procedures, apply this Agreement provisionally either when it enters into force in accordance with article 55 or, if it is already in force, at a specified date. 2. Any Government referred to in paragraph 1 of this article which notifies the depositary that, as a consequence of applying this Agreement within the limitations of its constitutional and/or legislative procedures, it will not be able to make its contributions to the Buffer Stock Account, shall not exercise its voting rights on matters relating to the provisions of chapters X to XV inclusive of this Agreement. Such a Government shall, however, meet all its financial obligations pertaining to the Administrative Account. The provisional membership of a Government which notifies in the manner referred to in this paragraph shall not exceed 12 months from the provisional entry into force of this Agreement, unless the Council decides otherwise.	Yes (see art. 56)	European Economic Community
International Coffee Agreement, 1968, as extended, and the Protocol for the continuation in force thereof	Art. 62, para. 2	The Agreement may enter into force provisionally on 1 October 1968. For this purpose a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement, 1962, containing an undertaking to apply the Agreement provisionally and to seek approval, ratification or acceptance in accordance with its constitutional procedures, as rapidly as possible, that is received by the Secretary-General of the United Nations not later than 30 September 1968, shall be regarded as equal in effect to an instrument of approval, ratification or acceptance. A Government that undertakes to apply the Agreement provisionally will be permitted to deposit an instrument of approval, ratification or acceptance and shall be provisionally regarded as a party thereto until either it deposits its instrument of approval, ratification or acceptance or up to and including December 1968, whichever is the earlier.	No	–
International Coffee Agreement, 1976	Art. 61, para. 2	This Agreement may enter into force provisionally on 1 October 1976. For this purpose, a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement 1968 as Extended by Protocol containing an undertaking to apply this Agreement provisionally and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 30 September 1976, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval. A Government which undertakes to apply this Agreement provisionally pending the deposit of an instrument of ratification, acceptance or approval shall be regarded as a provisional Party thereto until it deposits its instrument of ratification, acceptance or approval, or until and including 31 December 1976 whichever is the earlier. The Council may grant an extension of the time within which any Government which is applying this Agreement provisionally may deposit its instrument of ratification, acceptance or approval.	Yes (see art. 4, para. 3)	European Economic Community
International Coffee Agreement, 1983, and first, second, third and fourth extensions with modifications thereto	Art. 61, para. 2	This Agreement may enter into force provisionally on 1 October 1983. For this purpose, a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement 1976 as extended containing an undertaking to apply this Agreement provisionally and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 30 September 1983, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval. A Government which undertakes to apply this Agreement provisionally pending the deposit of an instrument of ratification, acceptance or approval shall be regarded as a provisional party thereto until it deposits its instrument of ratification, acceptance or approval, or until and including 31 December 1983 whichever is the earlier. The Council may grant an extension of the time within which any Government which is applying this Agreement provisionally may deposit its instrument of ratification, acceptance or approval.	Yes (see art. 4, para. 3)	European Economic Community (first extension only)

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Coffee Agreement, 1994, as extended until 30 September 2001, with modifications, by resolution No. 384 adopted by the International Coffee Council in London on 21 July 1999	Art. 40, para. 2	This Agreement may enter into force provisionally on 1 October 1994. For this purpose, a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement 1983, as extended, containing an undertaking to apply this Agreement provisionally, in accordance with its laws and regulations, and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 26 September 1994, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval. A Government which undertakes to apply this Agreement provisionally, in accordance with its laws and regulations, pending the deposit of an instrument of ratification, acceptance or approval shall be regarded as a provisional Party thereto until it deposits its instrument of ratification, acceptance or approval, or until and including 31 December 1994, whichever is the earlier. The Council may grant an extension of the time within which any Government which is applying this Agreement provisionally may deposit its instrument of ratification, acceptance or approval.	Yes (see art. 4, para. 3)	–
International Coffee Agreement 2001	Art. 45, par. 2	A Government which undertakes to apply this Agreement provisionally, in accordance with its laws and regulations, pending the deposit of an instrument of ratification, acceptance or approval shall be regarded as a provisional Party thereto until it deposits its instrument of ratification, acceptance or approval, or until and including 30 June 2002 whichever is the earlier. The Council may grant an extension of the time within which any Government which is applying this Agreement provisionally may deposit its instrument of ratification, acceptance or approval.	Yes (see art. 4, para. 3)	–
International Sugar Agreement, 1968	Art. 62	(1) Any Government which gives a notification pursuant to Article 61 may also indicate in its notification, or at any time thereafter, that it will apply the Agreement provisionally. (2) During any period the Agreement is in force, either provisionally or definitively, and before the deposit of its instrument of ratification, acceptance, approval or accession or the withdrawal of its indication, a Government indicating that it will apply the Agreement provisionally shall be a provisional Member of the Agreement until the time limit contained in the notification given under Article 61 expires. If, however, the Council is satisfied that the Government concerned has not deposited its instrument owing to difficulties in completing its constitutional procedures, the Council may extend that Government's provisional Member status until some later specified date. (3) A provisional Member of the Agreement shall, pending ratification, acceptance or approval of, or accession to the Agreement, be regarded as being a Contracting Party thereto.	Yes (see art. 2, para. 26)	–
International Sugar Agreement, 1973, and first and second extensions thereof	Art. 35	1. Any Government which gives a notification pursuant to article 34 may also indicate in its notification, or at any time thereafter, that it will apply the Agreement provisionally. 2. During any period the Agreement is in force, either provisionally or definitively, a Government indicating that it will apply the Agreement provisionally shall be a provisional Member of the Organization until it deposits its instrument of ratification, acceptance, approval or accession, and thus becomes a Contracting Party to the Agreement, or the time limit for the deposit of its instrument in accordance with article 34 has elapsed, whichever is earlier.	Yes (see art. 2, para. 11)	–
International Sugar Agreement, 1977, as extended	Art. 74	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the Secretary-General of the United Nations that it will apply this Agreement provisionally either when it enters into force in accordance with article 75 or, if it is already in force, at a specified date. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.	Yes (see art. 2, para. 23)	–

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Sugar Agreement, 1984	Art. 37	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 38 or, if it is already in force, at a specified date. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.	Yes (see art. 5)	–
International Sugar Agreement, 1987	Art. 38	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 39 or, if it is already in force, at a specified date. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.	Yes (see art. 5)	–
International Sugar Agreement, 1992	Art. 39	1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 40 or, if it is already in force, at a specified date. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.	Yes (see art. 5)	–
International Natural Rubber Agreement, 1979	Art. 60	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will fully apply this Agreement provisionally, either when it enters into force in accordance with article 61, or if it is already in force, at a specified date. 2. Notwithstanding the provisions of paragraph 1 of this article, a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures. However, such Government shall meet all its financial obligations pertaining to the Administrative Account. The provisional membership of a Government which notifies in this manner shall not exceed 18 months from the provisional entry into force of this Agreement. In case of the need for a call-up of funds for the Buffer Stock Account within the 18-month period, the Council shall decide on the status of a Government holding provisional membership under this paragraph.	Yes (see art. 5)	European Economic Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Natural Rubber Agreement, 1987	Art. 59	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will fully apply this Agreement provisionally, either when it enters into force in accordance with article 60 or, if it is already in force, at a specified date. 2. Notwithstanding the provisions of paragraph 1 of this article, a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures. However, such Government shall meet all its financial obligations pertaining to the Administrative Account. The provisional membership of a Government which notifies in this manner shall not exceed 12 months from the provisional entry into force of this Agreement. In case of the need for a call-up of funds for the Buffer Stock Account within the 12-month period, the Council shall decide on the status of a Government holding provisional membership under this paragraph.	Yes (see art. 5)	European Economic Community
International Natural Rubber Agreement, 1994	Art. 60	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will fully apply this Agreement provisionally, either when it enters into force in accordance with article 61 or, if it is already in force, at a specified date. 2. Notwithstanding the provisions of paragraph 1 of this article, a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures and its domestic laws and regulations. However, such Government shall meet all its financial obligations to this Agreement. The provisional membership of a Government which notifies in this manner shall not exceed 12 months from the provisional entry into force of this Agreement, unless the Council decides otherwise pursuant to paragraph 2 of article 59.	Yes (see art. 5)	European Community
International Tropical Timber Agreement, 1983	Art. 36	A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 37, or, if it is already in force, at a specified date.	Yes (see art. 5)	European Economic Community
International Tropical Timber Agreement, 1994	Art. 40	A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 41, or, if it is already in force, at a specified date.	Yes (see art. 5)	European Community
International Tropical Timber Agreement, 2006	Art. 38	A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument may, at any time, notify the depositary that it will apply this Agreement provisionally in accordance with its laws and regulations, either when it enters into force in accordance with article 39 or, if it is already in force, at a specified date.	Yes (see art. 5)	European Community
International Agreement on Jute and Jute Products, 1982	Art. 39	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 40 or, if it is already in force, at a specified date. At the time of its notification of provisional application, each Government shall declare itself to be an exporting member or an importing member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when this Agreement enters into force or, if this Agreement is already in force, at a specified date shall, from that time, be a provisional member of the Organization, until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a member.	Yes (see art. 5)	European Economic Community

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
International Agreement on Jute and Jute Products, 1989	Art. 39	1. A signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 40 or, if it is already in force, at a specified date. At the time of its notification of provisional application, each Government shall declare itself to be an exporting member or an importing member. 2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when this Agreement enters into force or, if this Agreement is already in force, at a specified date shall, from that time, be a provisional member of the Organization, until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a member.	Yes (see art. 5)	European Economic Community
Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982	Art. 7, para. 1	If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by: (*a*) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing; (*b*) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement; (*c*) States and entities which consent to its provisional application by so notifying the depositary in writing; (*d*) States which accede to this Agreement.	No mention, but see art. 8, para. 2	European Economic Community
Convention on Cluster Munitions	Art. 18	Any State may, at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State.	No	–
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction	Art. 18	Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.	No	–
Terms of Reference of the International Copper Study Group	Para. 22 (*c*)	Any State or any intergovernmental organization referred to in paragraph 5 which desires to become a member of the Group shall notify the depositary that it accepts these terms of reference either provisionally, pending the conclusion of its internal procedures, or definitively. Any State or intergovernmental organization which has notified its provisional acceptance of these terms of reference shall endeavour to complete its procedures within 36 months of the date of entry into force of these terms of reference or the date of its notification of provisional acceptance, whichever is the later, and shall notify the depositary accordingly. Where a State or intergovernmental organization is not able to complete its procedures within the time limit referred to above, the Group may grant an extension of time to the State or intergovernmental organization concerned.	Yes (see para. 5)	–
Agreement establishing the Union of Banana Exporting Countries	Art. 38	Any Government of a member country may, if its internal law so allows, inform the depositary Ministry of Foreign Affairs of its provisional acceptance of this Agreement while it completes the required formalities for its final ratification. A country which has recourse to this procedure shall have all the rights and duties which final ratification would give it.	No	–
Arms Trade Treaty	Art. 23	Any State may at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.	No	–

Name of treaty	*Article*	*Corresponding text*	*Membership open to international organizations?*	*International organizations that have applied provisionally*
Arrangement regarding international trade in textiles (schedule LXXV of the General Agreement on Tariffs and Trade)	–	There is no express mention of provisional application in the Arrangement. However, it is stated in article 13, paragraph 1, that the Arrangement "shall be open for acceptance, by signature or otherwise, by governments contracting parties to the [General Agreement on Tariffs and Trade] or having provisionally acceded to the [General Agreement on Tariffs and Trade] and by the European Economic Community". The European Economic Community is also listed under States or organizations provisionally accepting the Arrangement.	Yes (see art. 13, para. 1)	–

PROVISIONAL APPLICATION OF TREATIES

[Agenda item 6]

DOCUMENT A/CN.4/676

Memorandum by the Secretariat

[*Original: English*]
[*25 November 2014*]

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Multilateral instruments cited in the present document

	Source
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
African Charter of Human and Peoples' Rights (Nairobi, 27 June 1981)	*Ibid*., vol. 1520, No. 26363, p. 217.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Summary

Article 25 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (hereinafter, "1986 Vienna Convention"), provides for the application of treaties on a provisional basis by negotiating States and negotiating international organizations. When undertaking the preparatory work for the Convention, the International Law Commission modelled that provision on article 25 of the Vienna Convention on the Law of Treaties of 1969 (hereinafter, "1969 Vienna Convention"). The present memorandum traces the negotiating history of the provision both in the Commission and at the United Nations Conference on the Law of Treaties between States and International Organizations or Between International Organizations of 1986 (hereinafter, "1986 Vienna Conference").

Introduction

1. At its sixty-fourth session, held in 2012, the Commission included the topic "Provisional application of treaties" in its programme of work.[1]

2. At its sixty-sixth session, held in 2014, the Commission "decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the *travaux préparatoires* of the relevant provisions of the [1986] Vienna Convention."[2]

3. The present memorandum provides, in chapter I below, a brief procedural history of the origins and subsequent preparation and negotiation of the 1986 Vienna Convention.[3]

4. Chapter II contains a description of the *travaux préparatoires* of article 25 of the Convention in terms of the work undertaken by the Commission in preparing the draft articles on the law of treaties between States and international organizations or between international organizations, adopted in 1982,[4] as well as in the context of the subsequent negotiation and adoption of the Convention at the diplomatic conference of plenipotentiaries, held in 1986.

5. Article 25 of the 1986 Vienna Convention reads as follows:

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

[1] *Yearbook ... 2012*, vol II (Part Two), para. 141.

[2] *Yearbook ... 2014*, vol II (Part Two), para. 227. The present memorandum supplements an earlier study (*Yearbook ... 2013*, vol II (Part One), document A/CN.4/658), also undertaken by the Secretariat at the request of the Commission, on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention.

[3] As at 21 November 2014, the Convention was not yet in force.

[4] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 1982*, vol II (Part Two), para. 63.

CHAPTER I

Procedural history of the 1986 Vienna Convention

A. Developments prior to 1970

6. During the consideration of the draft articles on the law of treaties from 1950 to 1966, the Commission discussed on several occasions the question of whether the draft articles should apply not only to treaties between States but also to treaties concluded by other entities,[5] and in particular by international organizations. However, the Commission subsequently decided to confine the study to treaties between States.[6]

7. At the United Nations Conference on the Law of Treaties, held in Vienna in 1968 and 1969, the United States of America proposed an amendment that would

[5] See the first report on the question of treaties concluded between States and international organizations or between two or more international organizations (*Yearbook ... 1972*, vol II, document A/CN.4/258) and the historical survey prepared by the Secretariat (document A/CN.4/L.161 and Add.l–2; mimeographed).

[6] Article 1 of the draft articles on the law of treaties, adopted by the Commission in 1966, reads: "The present articles relate to treaties concluded between States". *Yearbook ... 1966*, vol II, document A/6309/Rev.l, part II, chap. II.

have extended the scope of the future convention to treaties concluded by international organizations.[7] The United States subsequently withdrew its proposal[8] in the face of concerns that it would serve to delay the work of the Conference.

8. Instead, the Conference adopted a resolution in which, *inter alia*, it

[r]ecommend[ed] to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations.[9]

B. Consideration by the Commission, 1970–1982

9. The General Assembly, in its resolution 2501 (XXIV) of 12 November 1969, acting on the resolution of the conference,

[r]ecommend[ed] that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question.

10. The following year, the Commission decided to include the question in its programme of work and established a subcommittee to undertake a preliminary study.[10] Mr. Paul Reuter was appointed Special Rapporteur for the topic at the twenty-third session, in 1971.[11] On the basis of 11 reports submitted by the Special Rapporteur between 1972 and 1982, the Commission prepared a set of 80 draft articles, and an annex, on the law of treaties between States and international organizations or between international organizations, which it adopted in 1982, together with commentaries.[12]

11. At the time of adoption, the Commission commented on the relationship of the draft articles to the 1969 Vienna Convention, and provided some explanations of the methodological approach undertaken during the preparation of the draft articles. In particular, it indicated the following:

35. By comparison with others, the present codification possesses some distinctive characteristics owing to the extremely close relationship between the draft articles and the [1969] Vienna Convention.

36. Historically speaking, the provisions which constitute the draft articles now under consideration would have found a place in the Vienna Convention had the Conference not decided that it would confine its attention to the law of treaties between States. Consequently, the further stage in the codification of the law of treaties represented by the preparation of draft articles on the law of treaties between States and international organizations or between international organizations cannot be divorced from the basic text on the subject, namely the Vienna Convention.

37. That Convention has provided the general framework for the present draft articles. This means, firstly, that the draft articles deal with the same questions as formed the substance of the Vienna Convention. The Commission has had no better guide than to take the text of each of the articles of that Convention in turn and consider what changes of drafting or of substance are needed in formulating a similar article dealing with the same problem in the case of treaties between States and international organizations or between international organizations.

…

40. Treaties are based essentially on the equality of the contracting parties, and this premise leads naturally to the assimilation, wherever possible, of the treaty situation of international organizations to that of States. The Commission has largely followed this principle in deciding generally to follow as far as possible the articles of the Vienna Convention referring to treaties between States for treaties between States and international organizations, and for treaties between international organizations. The increasing number of treaties in which international organizations participate is evidence of the value of treaties to international organizations as well as to States.

41. However, even when limited to the field of the law of treaties, the comparison involved in the assimilation of international organizations to States is quickly seen to be far from exact. While all States are equal before international law, international organizations are the result of an act of will on the part of States, an act which stamps their juridical features by conferring on each of them strongly marked individual characteristics which limit its resemblance to any other international organization. As a composite structure, an international organization remains bound by close ties to the States which are its members; admittedly, analysis will reveal its separate personality and show that it is "detached" from them, but it still remains closely tied to its component States. Being endowed with a competence more limited than that of a State and often somewhat ill-defined (especially in the matter of external relations), for an international organization to become party to a treaty occasionally required an adaptation of some of the rules laid down for treaties between States.

42. The source of many of the substantive problems encountered in dealing with this subject lies in the contradictions which may arise as between *consensuality* based on the equality of the contracting parties and the differences between States and international organizations. Since one of the main purposes of the draft articles, like that of the Vienna Convention itself, is to provide residuary rules which will settle matters in the absence of agreement between the parties, the draft must set forth general rules to cover situations which may be more varied than those involving States alone. For international organizations differ not only from States but also from one another. They vary in legal form, functions, powers and structure, a fact which applies above all to their competence to conclude treaties.[13]

12. The Commission explained further that it had followed a methodology intended to establish the draft articles as being

independent of the Vienna Convention in the sense that the text as a whole represents a complete entity that can be given a form which would enable it to produce legal effects irrespective of the legal effects of the Vienna Convention. If, as recommended, the set of draft articles becomes a convention, the latter will bind parties other than those to the Vienna Convention and will have legal effects whatever befalls the Vienna Convention.[14]

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[7] A/CONF.39/C.1/L.15 ("or other subjects of international law"). 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), Committee of the Whole, 2nd meeting, paras. 3–5.

[8] *Ibid.*, 3rd meeting, para. 64.

[9] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), Final Act of the United Nations Conference on the Law of Treaties, document A/CONF.39/26, annex, resolution relating to article 1 of the Vienna Convention on the Law of Treaties, p. 285.

[10] *Yearbook ... 1970*, vol II, para. 89.

[11] *Yearbook ... 1971*, vol II (Part One), document A/8410/Rev.1, para. 118 (*a*).

[12] *Yearbook ... 1982*, vol II (Part Two), para. 63.

[13] *Ibid.*, paras. 35–37 and 40–42.

[14] *Ibid.*, para. 46.

C. 1986 Vienna Conference

13. Pursuant to the Commission's recommendation that a conference be convoked to conclude a convention,[15] the General Assembly subsequently decided[16] to convene the Conference in Vienna from 18 February to 21 March 1986.[17] In paragraph 5 of its resolution 39/86 of 13 December 1984, the General Assembly "*refer[red]* to the Conference, as the basic proposal for its consideration, the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission at its thirty-fourth session". Ninety-seven States participated in the Conference, which culminated in the adoption of the Convention.[18]

[15] *Ibid*., para. 57.

[16] General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985.

[17] The General Assembly had before it several reports by the Secretary-General containing the written comments and observations of Member States and intergovernmental organizations. See A/38/145 and Corr.1 and Add.1 and A/39/491; see also the statement on treaties between States and international organizations or between international organizations by the Administrative Committee on Coordination (A/C.6/38/4, annex).

[18] Following a request by the representative of Bulgaria, the Convention as a whole was adopted by a vote of 67 votes to 1, with 23 abstentions, on 20 March 1986 (*Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986,* vol I, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (A/CONF.129/16 (vol. I), United Nations publication, Sales No. E.94.V.5), 7th plenary meeting, para. 52.

Chapter II

Development of article 25

A. Consideration by the Commission

1. First reading of the draft articles

14. The Commission undertook the first reading of the draft articles from 1970 to 1980, on the basis of the first nine reports of the Special Rapporteur, Mr. Paul Reuter. The question of the provisional application of treaties was considered for the first time[19] in his fourth report,[20] submitted at the twenty-seventh session in 1975, which included the following proposal for draft article 25:

Article 25. Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States or international organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States or international organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or organization notifies the other States or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

15. In the commentary to that article, the Special Rapporteur indicated simply that the text "differ[ed] from article 25 of the 1969 Convention only with respect to the drafting changes needed in order to take account of international organizations".[21]

16. The Commission considered the proposal for draft article 25 at its twenty-ninth session in 1977. In introducing the draft article, together with the proposal for draft article 24 (on entry into force), the Special Rapporteur indicated, *inter alia*, that

[s]ince the text of article 24 of the Vienna Convention was extremely flexible, it could be adapted to any situation which might result from agreements concluded by international organizations. That was why he had not distinguished between treaties concluded between organizations and treaties concluded between States and international organizations. *He had not made that distinction in draft article 25 either**.[22]

17. During the ensuing debate, the primary concern of the members who spoke was that the proposed draft article envisaged States and international organizations being placed on an equal footing. Mr. Laurel B. Francis observed that

the provisions of article 25, paragraph 1 (*a*), would give international organizations a voice in determining whether a treaty in the negotiation of which they had participated with States could apply provisionally. Article 25, paragraph 1 (*b*), however, seemed to imply that, where both international organizations and States had negotiated a treaty, only the latter could determine whether or not it should apply provisionally. Difficulties would also arise from article 25, paragraph 2, since an international organization would not be able to give the notice to which that provision referred to "other" States because it was not itself a State. If the intention was that international organizations should have the same rights with respect to the entry into force and the provisional application of treaties as the States with which they had negotiated those treaties, paragraph 1 (*b*), and paragraph 2 of article 25 would have to be amended.[23]

18. The Special Rapporteur, confirmed that "[h]is intention had been to place States and international organizations on an equal footing, as that could not cause any difficulties".[24]

19. Mr. N. A. Ushakov, in turn, stated that

he was convinced that the same formula could not be applied to States and to international organizations and that there must be one provision

[19] An earlier reference to the provisional application of treaties is to be found in the comments of Mr. Sette Câmara, of 14 January 1971, made in response to a questionnaire addressed to Commission members, in which he, *inter alia*, suggested that articles 24 and 25 of the 1969 Vienna Convention "should also be explored for adaptation to the new articles in the pertinent provisions". *Yearbook... 1971*, vol. II (Part Two), document A/CN.4/250, annex II, p. 197.

[20] *Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 39.

[21] *Ibid*.

[22] *Yearbook ... 1977*, vol. I, 1435th meeting, p. 104, para. 4.

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

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

for treaties concluded between international organizations and another for treaties concluded between States and international organizations.[25]

He added that

[i]t was not a question of agreements between "parties", … but of agreements between "negotiating" States and international organizations. Article 3 (*c*) of the [1969] Vienna Convention reserved the application of that Convention to the relations of States as between themselves under international agreements to which other subjects of international law were also parties, and he did not see how the articles under consideration would make it possible to apply that provision to treaties to which a large number of States and a single international organization were parties. According to article 25, for example, it would be necessary for the negotiating international organization to agree to the provisional application of the treaty. If the future convention on the law of the sea provided for the participation of the United Nations and did not contain any provisions on entry into force or provisional application, the agreement of the United Nations would be necessary for the entry into force or provisional application of that instrument.[26]

20. In response, the Special Rapporteur pointed out that

Mr. Ushakov was calling in question the notion of a party to a treaty. He (the Special Rapporteur) believed that the agreement of the single State was essential if, for example, the treaty related to assistance to be provided to that State by a number of international organizations. Similarly, it was inconceivable that a treaty concluded between a large number of States and an international organization, which made that organization responsible for nuclear monitoring, could enter into force or be applied provisionally without the organization's consent. If the Commission decided to give international organizations a special status, it would be necessary to amend … [the] articles so that restrictive rules would apply to international organizations. If the Commission chose that course, he would defer to its wishes, although he held a different view. In the circumstances, he thought that articles 24 and 25 could be referred to the Drafting Committee for consideration. [27]

21. The Drafting Committee subsequently prepared both a draft article 25 and draft article 25 *bis*, as follows:

Article 25. Provisional application of treaties between international organizations

1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating international organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating international organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Article 25 bis. *Provisional application of treaties between one or more States and one or more international organizations*

1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating State or States and international organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and international organization or organizations have otherwise agreed:

(*a*) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty;

(*b*) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.[28]

22. In introducing the report of the Drafting Committee, its Chair indicated that "the Drafting Committee had kept to the basic distinction between two different types of treaties, namely, treaties between international organizations and treaties between States and international organizations"[29] and that

[i]n consequence of the basic distinction between the two types of treaties…the Drafting Committee had prepared separate but parallel articles when that had seemed necessary for the purposes of clarity and precision, namely, with respect to…the provisional application of treaties (articles 25 and 25 *bis*).[30]

Both draft articles were adopted at that session, on first reading, without comment or objection, in the form proposed by the Drafting Committee.[31]

23. The commentary to draft article 25, also adopted in 1977, simply indicated that

[f]or reasons of clarity, the provisions which correspond to article 25 of the Vienna Convention are set out in two separate symmetrical articles, 25 and 25 *bis*, the texts of which differ from the Vienna Convention only by the drafting changes needed to adapt them to cover the two categories of treaties with which the present draft articles are concerned.[32]

24. The report of the Commission included a further explanation that:

65. … In accordance with the method adopted from the outset, the Commission endeavoured to follow the provisions of the Vienna Convention as closely as possible, but in doing so it met with problems of both drafting and substance. …

[25] *Ibid*., para. 8.

[26] *Ibid*., para. 18.

[27] *Ibid*., para. 17. See also the views of Mr. Milan Šahović ("it might be advisable to adopt Mr. Ushakov's suggestion and subdivide the articles under consideration, so as to make them easier to understand"), *ibid*., para. 14, and Mr. Stephen Verosta ("[a]ccording to draft article 1, the draft articles did not apply to treaties in general but to two particular kinds of treaty, namely, treaties between one or more States and one or more international organizations and treaties between international organizations. Those were therefore the two categories of treaties which the Commission should take into account in formulating the draft articles"), *ibid*., para. 27. A different view was expressed by Mr. Juan José Calle y Calle ("[w]hile he agreed with Mr. Ushakov that it was essential to make a distinction between States and international organizations in certain articles, he did not think that was necessary in articles 24 and 25"), *ibid*., para. 13, and Mr. Stephen M. Schwebel ("[t]he point concerning the differences between international organizations and States was certainly a valid one, to which all the members of the Commission subscribed, but it should not be pressed too far … He was not convinced that an attempt to categorize treaties according to the preponderant type of party would be a productive endeavour"), *ibid*., paras. 29–30.

[28] *Ibid*., 1451st meeting, para. 45.

[29] *Ibid*., para. 14.

[30] *Ibid*., para. 15.

[31] *Ibid*., para. 45.

[32] *Ibid*., vol. II (Part Two), para. 76, at p. 117. The commentary to article 25 *bis* stated that the comments made on article 25 also applied to article 25 *bis* (*ibid*., at p. 118).

66. The source of these substantive problems … lies in the contradictions which may arise as between consensus based on the equality of the contracting parties and the differences between States and international organizations. Since one of the main purposes of the draft articles, like that of the Vienna Convention itself, is to provide residuary rules which will settle matters in the absence of agreement between the parties, the draft must set forth general rules to cover situations which may be more varied than those involving States alone. For international organizations differ not only from States but also from one another. They vary in legal form, functions, powers and structure, a fact which applies above all to their competence to conclude treaties… Moreover, although the number and variety of international agreements to which one or more international organizations are parties have continued to increase, international practice concerning certain basic questions … is almost nonexistent. …

…

75. The articles of the Vienna Convention relating to the … provisional application … of treaties were adapted to the treaties to which the present draft articles relate. This raised no problems of substance.[33]

2. Comments made in connection with the first reading

25. The only relevant comments by Governments were made in the Sixth Committee at the thirty-second session of the General Assembly, in 1977. Peru agreed with the articles formulated by the Special Rapporteur on, *inter alia*, the provisional application of treaties.[34] The German Democratic Republic suggested that

a rule should be established providing that the failure of any international organization to become a party to an international treaty should not be regarded as an obstacle to the entry into force or provisional application of the treaty unless the participation of that international organization was essential to the object and purpose of the treaty.[35]

Czechoslovakia was of the view that

the method adopted by the Commission in following the provisions of the Vienna Convention while keeping in mind the specific position of international organizations was the only possible way to proceed… It would also be appropriate to follow the Vienna Convention with regard to entry into force and provisional application. That method would make it possible to arrive at a certain unification and stabilization of the legal rules, which was one of the main conditions for successful codification.[36]

26. In its written comments on the draft articles as adopted on first reading, the Federal Republic of Germany, while welcoming the fact that the Commission had adhered closely to the wording of the 1969 Vienna Convention, nonetheless expressed the view that

the Commission's draft of a new parallel convention has certain shortcomings where the requisite adaptations are too cumbersome and perfectionistic in drafting. The intelligibility and transparency of numerous articles suffer as a result (see arts. 1, 3, 10 to 25 *bis*, …). The Commission should examine whether the extensive subdivision of rules and terms relating to the peculiarities of international organizations could not be avoided.[37]

Accordingly, it proposed combining draft articles 25 and 25 *bis*, since, in its view, it did not seem necessary to divide the subject matter into two articles.[38]

3. Second reading of the draft articles

27. The second reading of the draft articles was commenced in 1981 at the thirty-third session of the Commission and concluded the following year at the thirty-fourth session, on the basis of the tenth and eleventh reports of the Special Rapporteur. A key focus of the second reading was the simplification of the text. The Commission explained this process as follows:

51. As the Commission's work progressed, views were expressed to the effect that the wording of the draft articles as adopted in first reading was too cumbersome and too complex. Almost all such criticisms levelled against these draft articles stemmed from the dual position of principle that was responsible for the nature of some articles:

On the one hand, it was held that there are sufficient differences between States and international organizations to rule out in some cases the application of a single rule to both;

On the other hand, it was held that a distinction must be made between treaties between States and international organizations and treaties between international organizations and that different provisions should govern each.

There is no doubt that these two principles were responsible for the drafting complexities which were so apparent in the draft articles as adopted in first reading.

52. Throughout the second reading of the draft articles … the Commission considered whether in concrete instances it was possible to consolidate certain articles which dealt with the same subject-matter, as well as the text within individual articles … it proceeded in certain cases to combine two articles into a more simplified single one (arts. … 25 and 25 *bis*).[39]

28. The consolidation of draft articles 25 and 25 *bis* was recommended by the Special Rapporteur in his tenth report, in 1981, in a proposal for a new draft article 25,[40] formulated as follows:

Article 25. Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides, or

(*b*) the participants in the negotiation have in some other manner so agreed.

2. Unless the treaty otherwise provides or the participants in the negotiation have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization shall be terminated if that State or organization notifies the other States or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

In doing so, he explained that

[n]o substantive observations were made with regard to articles … 25 and 25 *bis*. The wording of these articles and of their titles may be simplified, and … articles 25 and 25 *bis* may … be combined in a single article.[41]

29. No substantive comments on the proposal were made during the plenary debate on the tenth report, held at thirty-third session, prior to the referral of the draft article to the Drafting Committee.[42]

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[33] *Ibid.*, paras. 65, 66 and 75.

[34] *Official Records of the General Assembly, Thirty-second Session, Sixth Committee*, 35th meeting (A/C.6/32/SR.35), para. 21.

[35] *Ibid.*, para. 32.

[36] *Ibid.*, 38th meeting(A/C.6/32/SR.38), para. 9.

[37] *Yearbook ... 1981*, vol. II (Part Two), p. 186.

[38] *Ibid.*, p. 187.

[39] *Yearbook ... 1982*, vol. II (Part Two), p. 15, paras. 51–52.

[40] *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, para. 85.

[41] *Ibid.*

[42] *Ibid.*, vol. I, 1652nd meeting, paras. 30–31.

30. Subsequently, the Chair of the Drafting Committee, in introducing a reformulated version of draft article 25, explained that the text of the article "had been prepared following the pattern … of aligning the regime of international organizations on that of States. Accordingly, … article 25 replaced articles 25 and 25 *bis*", and observed that the new formulation "corresponded more closely to [article 25] of the Vienna Convention, with the necessary drafting adjustments".[43]

31. The Commission proceeded to adopt, on second reading,[44] the following formulation for draft article 25, as proposed by the Drafting Committee, without any comments:

Article 25. Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or that organization notifies the other States and the organizations or, as the case may be, the other organizations and the States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

32. In the commentary to articles 24 and 25, also adopted at the thirty-third session, it was explained that

[n]o substantive changes were made to these two articles after their second reading. Their wording is, however, considerably lighter than that of the corresponding provisions as adopted in first reading, articles 24 and 24 *bis* and articles 25 and 25 *bis* respectively having been merged to form single articles. Articles 24 and 25 as now drafted differ from the corresponding articles of the Vienna Convention only in so far as is necessary to cater for the distinction between treaties between international organizations and treaties between States and international organizations (art. 24, paras. 1 and 3; art. 25, subpara. 1 (*b*) and para. 2).[45]

33. Draft article 25 was included among the draft articles on the law of treaties between States and international organizations or between international organizations transmitted to the General Assembly in 1982.[46]

4. Comments on the draft articles, as adopted on second reading

34. Among the written comments before the Commission during the second reading, the only observation relating to draft article 25 was received from the Council of Europe, which indicated that "[p]rovisional application has already been provided for in a number of instruments drawn up within the Council of Europe, all of which, however, are treaties concluded between States only".[47]

[43] *Ibid*., 1692nd meeting, para. 44.

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

[45] *Ibid*., vol. II (Part Two), para. 129.

[46] *Yearbook … 1982*, vol. II (Part Two), para. 63.

[47] *Ibid*., annex, p. 143, para. 38.

35. The only comment[48] on the draft article, in the debate in the Sixth Committee, held at the thirty-sixth session of the General Assembly in 1981, came from Zaire, which observed that

[t]he idea of provisional application of treaties, dealt with in article 25, had already been resisted at the Ministerial Conference held at Banjul in 1981 for the purpose of elaborating the African Charter on Human and Peoples' Rights. Several delegations had taken the view that the arbitration and mediation commission referred to in the draft Charter should not be established before the Charter entered into force.[49]

B. Consideration at the 1986 Vienna Conference

36. In preparing for the 1986 Vienna Conference, the General Assembly, at its thirty-ninth session in 1984, called on the prospective participants to hold informal consultations on, *inter alia*, the rules of procedure and "on major issues of substance", in order to facilitate a successful conclusion of its work through the promotion of general agreement.[50] The ensuing negotiations resulted in agreement on a set of rules of procedure, which were subsequently referred to the Conference,[51] and which had been "drafted for the specific use of that Conference in view of its particular nature and the subject-matter to be considered by it".[52] In particular, a distinction was made in the rules of procedure between those articles in the text formulated by the Commission, as listed in annex II to General Assembly resolution 40/76, which required substantive consideration, and all the other articles. Under rule 28 of its rules of procedure, the Conference, *inter alia*, referred to the Committee of the Whole only those draft articles that required substantive consideration. All other articles were referred directly to the Drafting Committee. In addition, in order to expedite its work, the Conference decided that the Drafting Committee would report directly to the plenary of the Conference.[53]

37. Article 25 was among the articles referred directly to the Drafting Committee, i.e., without substantive consideration in the plenary of the conference.

38. The Chair of the Drafting Committee subsequently introduced a revised formulation for the article—which became article 25 of the 1986 Vienna Convention[54]—at the fifth meeting of the plenary, held on 18 March 1986. In his report to the plenary, he explained that

[t]he text of paragraph 1 of article 25 remained unchanged. Paragraph 2, however, had been adjusted… The introduction in the basic proposal of the complexities required by the attempt to cover all "other" treaty partner permutations had led to a heavy text which had not, in fact, covered all possible situations. As the text referred to treaty partners being notified, the clear and obvious meaning was that it referred to notifying "other" treaty partners. Thus, the original phrase in paragraph 2,

[48] None of the comments by Governments and international organizations, submitted in writing after the conclusion of the second reading in 1982 (see footnote 17 above), addressed article 25.

[49] *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 47th meeting (A/C.6/36/SR.47), para. 41.

[50] General Assembly resolution 39/86 of 13 December 1984, para. 8.

[51] General Assembly resolution 40/76 of 11 December 1985, annex I.

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

[53] *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations …* (see footnote 18 above), 4th plenary meeting, para. 4.

[54] See para. 5 above.

"the other States and the organizations or, as the case may be, the other organizations and the States between which" had been changed to read simply "the States and organizations with regard to which".[55]

39. The only substantive comment on the provision, in plenary, was made by the Brazil, which stated that

> for the record and for the purpose of interpretation, … [article] 25 … of both the 1969 Vienna Convention on the Law of Treaties and the present draft articles adopted by the Drafting Committee … should in its view be considered, in respect of States, against the background of the general principle of parliamentary approval of treaties and of the practice ensuing therefrom; but that his delegation also recognized the residuary nature of those provisions of both the 1969 Convention and the present draft articles as adopted by the Drafting Committee.[56]

40. Article 25 was adopted without a vote at the same meeting.[57]

[55] *Official Records …* (see footnote 53 above)., 5th plenary meeting, p. 14, para. 65.

[56] *Ibid*., p. 14, para. 67.

[57] *Ibid.*

IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

[Agenda item 7]

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Third report on identification of customary international law, by Sir Michael Wood, Special Rapporteur*

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Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.
Geneva Conventions for the Protection of War Victims (Geneva, 12 August 1949)	*Ibid.*, vol. 75, Nos. 970–973, p. 31.
Treaty establishing the European Economic Community (Rome, 25 March 1957)	*Ibid.*, vol. 294, No. 4300, p. 3. See also the consolidated version of the Treaty on the European Union, *Official Journal of the European Union*, vol. 55, No. C 326, 26 October 2012, p. 13.

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	Source
Convention on the High Seas (Geneva, 29 April 1958)	*Ibid.*, vol. 450, No. 6465, p. 11.
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Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.*, 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.
United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004)	*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), vol. I, resolution 59/38, annex.

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Introduction

1. In 2012, the International Law Commission placed the topic "Formation and evidence of customary international law" in its current programme of work,[1] and held an initial debate on the basis of a preliminary note by the Special Rapporteur.[2]

2. In 2013, the Commission held a general debate[3] on the basis of the Special Rapporteur's first report[4] and a memorandum by the Secretariat.[5] The Commission changed the title of the topic to "Identification of customary international law".[6]

3. A second report by the Special Rapporteur,[7] prepared for the Commission's sixty-sixth session in 2014, covered the approach to the identification of rules of customary international law, and contained a detailed enquiry into the nature and role of the two constituent elements and how to determine whether they are present. It proposed 11 draft conclusions divided into four parts. As was explained, it seemed desirable to cover in the same report both practice and acceptance as law, given the close relationship between the two,[8] while noting that further draft conclusions relating to these and other matters would be proposed in the third report.

4. The Commission held a debate on the second report from 11 to 18 July 2014,[9] which confirmed the general support among members of the Commission for the "two element" approach. There continued to be widespread agreement that, among the main materials for seeking guidance on the topic, were decisions of international courts and tribunals, in particular the International Court of Justice, and that the outcome of the topic should be a practical guide for assisting practitioners in the task of identifying customary international law. One point discussed was the need to strike the right balance between the draft conclusions and the commentaries, as well as

[1] *Yearbook ... 2012*, vol. II (Part Two), para. 19.

[2] *Ibid*., vol. II (Part One), document A/CN.4/653

[3] *Yearbook ... 2013*, vol. I, 3181st–3186th meetings; see also *ibid*., vol. II (Part Two), paras. 66−107.

[4] *Ibid.*, vol. II (Part One), document A/CN.4/663.

[5] *Ibid*., document A/CN.4/659.

[6] *Ibid*., vol. I, 3186th meeting.

[7] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672.

[8] *Ibid*., para. 10.

[9] *Ibid*., vol. I, 3222nd–3227th meetings; see also *ibid*., vol. II (Part Two), paras. 137−185.

between the need for clarity in respect of the guidance offered and the need to maintain the flexibility inherent in custom as a source of international law. A number of issues raised in the report, such as the significance of inaction and the relevance of international organizations to the identification of customary international law, were highlighted as requiring further analysis and discussion.

5. Following the debate, the 11 draft conclusions proposed in the second report were referred to the Drafting Committee, which provisionally adopted eight draft conclusions. (The Committee was unable to consider two draft conclusions because of a lack of time, and one draft conclusion was omitted.) On 7 August 2014, the Chairman of the Drafting Committee presented an interim report to the plenary on the work of the Committee on the topic in 2014.[10] The eight draft conclusions provisionally adopted by the Committee were reproduced in an annex to the interim report. As stated by the Chair of the Committee, the Committee hoped to submit formally a set of draft conclusions, including those covered in the interim report (revised as necessary in the light of the present report and further discussion in the plenary and the Drafting Committee), for adoption by the Commission at its sixty-seventh session in 2015.

6. The eight draft conclusions provisionally adopted by the Drafting Committee in 2014 are divided into three parts: (*a*) introduction; (*b*) basic approach; and (*c*) a general practice. It is proposed that a fourth part, to include the draft conclusions from the second report not yet discussed, will be entitled "Acceptance as law (*opinio juris*)". Two further parts, to be entitled "Particular forms of practice and evidence" and "Exceptions to the general application of rules of customary international law", are suggested in the present report.

7. There was general support in the debate of the Sixth Committee of the General Assembly in 2014 for the preparation of a practical guide, in the form of a set of conclusions with commentaries, to assist practitioners in identifying rules of customary international law. Delegations fully supported the two-element approach, with several adding that the view according to which, in some fields, one constituent element alone would be sufficient to establish a rule of customary international law was not supported by international practice or in the jurisprudence. Some suggested exploring the variation in the respective weights of the two elements in specific fields of international law. While several delegations acknowledged that it was primarily the practice of States that was to be taken into account when identifying a rule of customary international law, some also emphasized the importance of the practice of international organizations in the formation and identification of customary rules, especially in instances where Member States had transferred competences to them.[11]

8. The present report should be read together with the two earlier reports of 2013 and 2014, the work of the Drafting Committee in 2014, and the debates in the Commission and in the Sixth Committee. It seeks to complete the set of draft conclusions proposed by the Special Rapporteur. In doing so, it addresses certain matters not covered in the second report, and others to which it was agreed the Commission would return in 2015. Each of the chapters into which this report is divided covers a specific area: chapter I addresses further the relationship between the two constituent elements; chapter II encompasses a more detailed enquiry into inaction as practice and/or evidence of acceptance as law; chapter III examines the role of treaties and resolutions adopted by international organizations and at international conferences; chapter IV addresses judicial decisions and writings; chapter V; returns to the issue of the practice of international organizations; chapters VI and VII examine two particular issues, namely, particular custom and the persistent objector; and chapter VIII suggests the future programme of work on the topic. For convenience, the draft conclusions proposed in the present report, which need to be read together with those proposed earlier by the Special Rapporteur and the Drafting Committee, are set out in an annex.

9. At its sixty-sixth session, in 2014, the Commission

> reiterate[d] its request to States to provide information, by 31 January 2015, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in:
>
> (*a*) official statements before legislatures, courts and international organizations; and
>
> (*b*) decisions of national, regional and subregional courts.[12]

In addition, the Commission indicated that it "would welcome information about digests and surveys on State practice in the field of international law".[13]

10. As of the date of submission of the present report, in addition to the contributions received in 2014,[14] another six contributions had been received.[15] Further contributions are welcome at any time.

11. Various institutions again organized meetings on aspects of the topic, which were both encouraging and stimulating. The Asian-African Legal Consultative Organization is discussing the identification of customary international law, and it is understood that its informal expert group on the identification of customary law has considered its Special Rapporteur's report and adopted a set of comments for consideration at the Organization's session in April 2015.[16] In addition, since the preparation of the second report, there have been further decisions of courts and tribunals, as well as writings, which are taken into account in the present report.

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[10] See *Yearbook ... 2014*, vol. I, 3242nd meeting; the full text of the Chairperson's interim report of 7 August 2014 may be found at http://legal.un.org/ilc, under the information on the sixty-sixth session of the Commission.

[11] See topical summary prepared by the Secretariat of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session (A/CN.4/678; available from the Commision's website), paras. 52–59.

[12] *Yearbook ... 2014*, vol. II (Part Two), para. 29.

[13] *Ibid*., para. 30.

[14] Belgium; Botswana; Cuba; Czech Republic; El Salvador; Germany; Ireland; Russian Federation; United Kingdom of Great Britain and Northern Ireland; and United States of America.

[15] Austria; Czech Republic; Finland; Germany; Republic of Korea; and United Kingdom.

[16] The fifty-fourth annual session of the Asian-African Legal Consultative Organization is scheduled to be held in Beijing from 13 to 17 April 2015, sometime after the date of submission of the present report.

Chapter I

Relationship between the two constituent elements

12. The need to consider further the relationship between the two constituent elements of customary international law was raised within the Commission and the Sixth Committee in 2014.[17] The issues highlighted in this regard included the temporal aspect of the two elements, and the application of the two-element approach in different fields of international law.

13. Customary international law, being general practice accepted as law, is formed by, and manifests itself in, instances of conduct that are coupled with *opinion juris*. As the International Court of Justice has repeatedly stated, "[n]ot 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 requiring it".[18] The two constituent elements of customary international law have been described as "not two juxtaposed entities, but rather only two aspects of the same phenomenon: a certain action which is subjectively executed or perceived in a certain fashion".[19]

14. While the two elements of customary international law are indeed "really inseparable; one does not exist without the other"[20] in seeking to ascertain whether a rule of customary international law has emerged, it is necessary to consider and verify the existence of each element separately.[21] This generally requires an assessment of different evidence for each element because, as explained in the second report, the very practice alleged to be prescribed by customary international law could usually not attest in itself to its acceptance as law:[22] "[t]he bare fact that such things are done does not mean that they have to be done".[23]

15. When seeking to identify the existence of a rule of customary international law, evidence of the relevant practice should therefore generally not serve as evidence of *opinio juris* as well: such "double counting" (repeat referencing[24]) is to be avoided.[25] As Thirlway has remarked,

> [t]here may well be overlap between the 'manifestations of practice' and the 'forms of evidence of acceptance' of such practice as law;

[17] *Yearbook ... 2014*, vol. II (Part Two), para. 153; topical summary prepared by the Secretariat … (see footnote 11 above), para. 53.

[18] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 44, para. 77. See also *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; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 122, para. 55.

[19] Stern, "Custom at the heart of international law", p. 92. See also Danilenko, *Law-making in the International Community*,pp. 81–82 ("although *opinio juris* is recognized as a separate element of custom, as a practical matter it can be made cognizable only through overt manifestations of State behavior. Within the framework of the customary law-making process, the rules of behavior created by evolving State practice are accepted as law through acts that also form part of practice in a broad sense. Moreover, the same acts and actions making up the relevant practice can express both the attitude of States towards the content of the emerging rule of conduct and the recognition of this rule as legally binding. It follows that the element of *opinio juris* cannot be entirely separated from practice"); 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"); Worster, "The transformation of quantity into quality: critical mass in the formation of customary international law", pp. 8–9 ("The objective and subjective elements are not separated … we do not conduct an inquiry into the sufficiency of practice and, only once that inquiry is confirmed, move to an inquiry into whether States hold *opinio juris*. Instead, we assess, or should assess, the sufficiency of practice when it is done with *opinio juris*, meaning that we are also looking for a critical mass of practice with *opinio juris*").

[20] Müllerson, "On the nature and scope of customary international law", p. 345; see also pp. 341, 344, 346–347 (adding that "like heads and tails [of a coin, the two elements] may be separated for analytical purposes but [] cannot exist independently from each other … the question whether there are customary norms without any of the two elements—practice and *opinio juris*—is an artificial (imagined) question. There is always some 'actual' practice, otherwise one could not simply speak of patterns of behaviour which may be (or may not be) legally binding", *ibid*., pp. 344 and 346).

[21] As stated by Mr. Hmoud, while there were merits to the arguments that the two elements intertwine and that formation and evidence of the two elements might combine in many instances, the fact remained that those were two separate matters for the purpose of identification" (see *Yearbook ... 2014*, vol. I, 3226th meeting; see also statement of 17 July 2014 (on file with the Codification Division). See also Pellet, "Article 38", p. 813 ("a splitting up of the definition of custom into two distinct elements—a 'material' or 'objective' one represented by practice and a 'psychological', 'intellectual' or 'subjective' one, usually called *opinio juris* … constitutes an extremely useful tool for 'discovering' customary rules"); Crawford, *Brownlie's Principles of Public International Law*, p. 23 ("the existence of a custom … is the conclusion drawn by 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?").

[22] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, paras. 72–74.

[23] Shaw, *International Law*, p. 53. See also *North Sea Continental Shelf* (footnote 18 above), at p. 44, para. 76 ("acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature"), and para. 77 ("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"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 253–254, paras. 65–68; *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 … that various international agreements … 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"); *Case of the S.S. "Lotus" (France/Turkey), Judgment No. 9 of 7 September 1927, P.C.I.J. Reports 1928, Series A, No. 10*, p. 28; Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, Case No. 002/19-09-2007-EEEC/OICJ (PTC38), Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Criminal, para. 53 ("A wealth of State practice does not usually carry with it a presumption that *opinio juris* exists").

[24] *Yearbook ... 2014*, vol. I, 3223rd meeting (Mr. Murase).

[25] See also *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 74; as suggested therein, "[a]pplying this rule to 'non-actual' practice may also serve to guarantee that abstract statements could not, by themselves, create law".

generally, this does not mean that given acts can constitute both, as that would amount to a return of the single-element theory.[26]

16. Customary international law has often been described in terms of a practice's hardening into law with the addition of (concomitant) *opinio juris*. Yet, it is increasingly recognized that, while the actual practice engaged in by States may well constitute "the initial factor to be brought into account",[27] not all rules of customary international law must "have their roots in the soil of actual usage".[28] In other words, it is possible that an acceptance that something ought to be the law (nascent *opinio juris*) may develop first, and then give rise to practice that embodies it so as to produce a rule of customary international law.[29] As stressed by the representative of South Africa in the Sixth Committee, in identifying a rule of customary international law, what mattered was that both elements should be present, rather than their temporal order.[30]

17. The two-element approach, widely supported within the Commission and by States within the context of the present topic, and in international practice more broadly and in case law, as well as in the literature,[31] applies to the formation and identification of all rules of customary international law. At the same time, as was noted in the second report, "[t]here may … be a difference in application of the two-element approach in different fields [of international law] (or, perhaps more precisely, with respect to different types of rules)".[32] This reflects the inherently flexible nature of customary international law, and its role within the international legal system. Accordingly, in some cases, a particular form (or particular instances) of practice, or particular evidence of acceptance as law, may be more relevant than in others; in addition, the assessment of the constituent elements needs to take account of the context in which the alleged rule has arisen and is to operate.[33] In any event, the essential nature of customary

[26] Thirlway, "Human rights in customary law: an attempt to define some of the issues", p. 502 (adding that "[t]he two-element theory necessarily implies that there has to be something present that can be described as State practice, and something present that indicates, or from which the conclusion can be drawn, that States consider that a rule of customary law exists"). 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*, pp. 136–141. At the same time, "[q]uite often, both elements coincide; even in the cases where it has proclaimed the validity of the theoretical distinction between practice and *opinio juris*, the [International] Court [of Justice] mixes them up" (Pellet, "Article 38", p. 827); but see Koroma, "The application of international law by the International Court of Justice", p. 101.

[27] Shaw, *International Law*, p. 54. See also Tomka, "Custom and the International Court of Justice", p. 208 (referring to the *Military and Paramilitary Activities* case when saying that "[b]ehind this inquiry into *opinio juris* there is, of course, an assumption that sufficient practice existed").

[28] To borrow the words of Thirlway, *International Customary Law and Codification*, p. 68.

[29] Of course, *opinio juris*, as strictly defined, cannot precede the practice that it is meant to accompany: rather, there may be a view that a rule should exist (or a mistaken view that it exists). If thereafter practice is observed consistent with this view, it will be easily referable to it. In that sense the *opinio* can, as it were, be backdated; but when it was expressed it was only *opinio*, not *opinio juris*. See also Wolfke, *Custom in Present International Law*, pp. 64–65; Daillier, Forteau and Pellet, *Droit international public*, p. 262 ("Traditionnellement, la pratique est à l'origine de l'*opinio juris*. C'est la répétition des précédents dans le temps qui fait naître le sentiment de l'obligation. On assiste cependent, dans certain cas, à une inversion du processus : l'expression d'un 'besoin de droit' … est à l'origine d'une pratique qui parachève la formation de la norme coutumière. Aux coutumes 'sages' s'opposent ce que l'on a appelé les coutumes 'sauvages'" ["Traditionally, the practice is at the origin of the *opinio juris*. It is the repetition of precedents over time that gives rise to the feeling of obligation. In some cases, however, the process is reversed: the expression of a 'need for law' … gives rise to a practice that completes the formation of the customary norm. 'Wise' customs are opposed to what have been called 'wild' customs"]); Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective*, pp. 80–85.

[30] *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 26th meeting (A/C.6/69/SR.26), para. 94. The point was also made in the debate at the sixty-sixth session of the Commission by Mr. Park, Mr. Murase and Mr. Nolte (*Yearbook … 2014*, vol. I, 3223rd and 3226th meetings. See also Cassese, *International Law in a Divided World*, p. 180 ("Of course, the two elements need not [both] be present from the outset").

[31] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/672, paras. 21–27. Mr. Huang explained in the debate at the sixty-sixth session that "[c]ustomary international law could be compared to a human being, with general practice forming the body, and *opinio juris*, the soul: in other words, both elements were vital" (*ibid.*, vol. I, 3226th meeting).

[32] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/672, para. 28. As stated by Mr. Šturma, admitting that in different areas of international law the weight put on practice and on *opinio juris* might be different does not imply, in his view, replacing the uniform theory of international custom by sectorial theories of customs in human rights law, international humanitarian law, international criminal law, etc. (*ibid.*, vol. I, 3226th meeting; see also statement of 17 July 2014); See also Mr. Park, Mr. Hassouna and Mr. Hmoud (*ibid.*, 3223rd, 3225th and 3226th meetings, respectively).

[33] See also Condorelli, "Customary international law: the yesterday, today, and tomorrow of general international law", p. 148 (referring to the ascertainment of customary international law when observing that "it is the operation that consists in gathering evidence to prove the social effect of the rules in question. This evidence may be multiple, and the weight of each piece may also be different in different situations: an extended period may sometimes be necessary, or at other times the evidence may work synchronously. In all cases it should be deemed sufficient if it enables the assessment that the rule sought indeed has social effect in the international community. In short, the object sought is single, and there is also a single method to use, but paths to go through to find it may be different: longer and more difficult here, faster there, and sometimes, perhaps, very fast"); Thirlway, "Human rights in customary law …", p. 503 ("It is of course possible to concede that both *opinio juris* and practice are needed to establish a customary rule of human rights law, but to hold that each element, but particularly practice, in this special domain may be of a different character from that generally required to establish custom"); *North Sea Continental Shelf* (footnote 18 above), at p. 230, dissenting opinion of Judge Lachs ("There are certain areas of State activity and international law which by their very character may only with great difficulty engender general law, but there are others, both old and new, which may do so with greater ease"), and 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 … Each fact requires to be evaluated relatively according to the different occasions and circumstances … 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"); 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").

international law as a general practice accepted as law must not be distorted.[34]

[34] See also Thirlway, *International Customary Law and Codification*, p. 145 ("The nature of the two [constitutive] elements in custom may also develop, provided development does not become distortion from the essential nature of custom"); Waldock, "General course on public international law", p. 49 ("The essential problem in each case … is to assess the consistency, duration and generality of the practice and to weigh them in the balance with other elements, such as the political, economic and social considerations which motivate the practice. In doing this, a judge or the legal adviser of a Government will draw upon his own knowledge of international affairs and of the attitudes and policies of States. But the ultimate test 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"). Simma and Paulus's words may also be relevant in this context: "So far, it seems, the traditional sources of international law have displayed enough flexibility to cope with new developments. Even if they may not satisfy the intellectual quest for unity in the international legal system, these sources have stood the test of time and have been universally accepted. As long as no alternative legal processes that would be universally acceptable are in sight, the old ones will simply have to do. And yet, the vision of an international law more amenable to the realization of global values remains compatible with the regime of traditional sources … to the extent these values find 'sufficient expression in legal form'" (Simma and Paulus, "The responsibility of individuals for human rights abuses in internal conflicts: a positivist view", p. 316).

18. The following draft paragraph 2 of draft conclusion 3 [4] is suggested:

"*Draft conclusion 3 [4]. Assessment of evidence for the two elements*

"…

"2. Each element is to be separately ascertained. This generally requires an assessment of specific evidence for each element."

Chapter II

Inaction as practice and/or evidence of acceptance as law

19. As mentioned in the second report, inaction (also referred to as passive practice, abstention from acting, silence or omission) "may be central to the development and ascertainment of rules of customary international law".[35] In the light of the discussions held in 2014, the Special Rapporteur has undertaken, to elaborate further thereon in the present report.[36]

20. Inaction is a form of practice that (when general and coupled with acceptance as law) may give rise to a rule of customary international law.[37] Well-known examples include refraining from exercising protection in favour of certain naturalized persons;[38] abstaining from the threat or use of force against the territorial integrity or political independence of any State;[39] and abstaining from instituting criminal proceedings in certain circumstances.[40] Even more than other forms of practice, inaction may at times be difficult to identify and qualify; in any event, as with other forms of practice, "bare proof of … omissions allegedly constituting State practice does not remove the need to interpret such … omissions" in an attempt to verify whether, indeed, they are accepted as law.[41] Where such acceptance cannot clearly be established, the inaction may be termed an "ambiguous omission".[42]

[35] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 42. See also paragraph 1 of draft conclusion 6 [7], as provisionally adopted by the Drafting Committee in 2014 (see footnote 10 above).

[36] *Yearbook ... 2014*, vol. II (Part Two), para. 180.

[37] See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at p. 99, para. 188 ("The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention"); Tunkin, "Remarks on the juridical nature of customary norms of international law", p. 421 ("The custom to abstain from action under certain circumstances may undoubtedly lead to the creation of a rule of conduct that may become a juridical norm. Obviously, everything said before about the elements of repetition, time, and continuity applies equally to the practice of abstinence"); Akehurst, "Custom as a source of international law", p. 10 ("State practice … can also include omissions and silence on the part of States"); Danilenko, "The theory of international customary law", p. 28 ("usual or habitual abstentions from specific actions may constitute a practice leading to a rule imposing a duty to abstain from such actions in similar situations, i.e., a practice constituting a prohibitive norm of international law"); Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, pp. xlv–xlvi ("If the practice largely consists of abstention combined with silence, there will need to be some indication that the abstention is based on a legitimate expectation to that effect from the international community"); Mendelson, "State acts and omissions as explicit or implicit claims", pp. 373–382; Koroma, "The application of international law by the International Court of Justice", p. 93; *Restatement of the Law Third,* § 102, comment *b* ("Inaction may constitute State practice").

[38] *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, at p. 22.

[39] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 18 above), at p. 99, para. 188.

[40] *Case of the S.S. "Lotus"* (see footnote 23 above). See also *Legality of the Threat or Use of Nuclear Weapons* (footnote 23 above), at p. 253, para. 65 (the Court referring to proponents of a prohibition attempting to rely on "a consistent practice of non-utilization of nuclear weapons by States"); *Jurisdictional Immunities of the State* (footnote 18 above), 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).

[41] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 23 above), at p. 423, dissenting opinion of Judge Shahabuddeen. Ireland suggested in the debate in the Sixth Committee that "[c]ontext was particularly important in the assessment of inaction as a form of practice, and was likely to play a greater role there than in the assessment of other forms of practice" (*Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 26th meeting (A/C.6/69/SR.26), para. 39).

[42] Thirlway, *The Sources of International Law*, p. 61.

21. Inaction may also serve as evidence of acceptance as law (*opinio juris*), when it represents concurrence in a certain practice. This is, for purposes of identifying a rule of customary international law. inaction of a different kind:[43] in essence, we are here concerned with the toleration by a State of a practice of another or other States, in circumstances that attest to the fact that the State choosing not to act considers such practice to be consistent with international law.[44] Such acquiescence, in the words of the Chamber of the International Court of Justice in *Gulf of Maine*, "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent".[45]

22. As there could be various reasons for a refusal or failure to act, including a lack of capacity to do so or a lack of direct interest,[46] not every instance of inaction will amount to concurrence: only "qualified silence",[47] as detailed in the following paragraphs, may be construed as concurrence in the relevant practice.[48] The interpretation of inaction should generally be made "in relative terms, account taken of the specific (sequence of) facts and the relationship between the States involved".[49]

23. First, inaction could be relevant only to establishing concurrence where reaction to the relevant practice is called for: as the International Court of Justice stated in *Malaysia/Singapore*, "[t]he absence of reaction may well amount to acquiescence … [t]hat is to say, silence may also speak, but only if the conduct of the other State calls for a response".[50] This implies that the relevant practice

[43] Mr. Hmoud noted that while it was recognized that inaction might be considered a negative action, there had to be a distinction between inaction as a conduct, which belonged to the objective element (practice), and inaction as representative of acquiescence, thus falling under the second, subjective element (see *Yearbook ... 2014*, vol. I, 3226th meeting; see also statement of 17 July 2014). See also Mr. Forteau's intervention in the debate at the sixty-sixth session of the Commission in 2014 (*ibid.*, vol. I, 3225th meeting); Danilenko, "The theory of international customary law", pp. 28–29 ("Under the heading of "passive" or "negative" practice a practice of [two different types] may be understood").

[44] Manley O. Hudson, as Special Rapporteur on article 24 of the statute of the Commission, listed "general acquiescence in the practice by other States" as an element required for the emergence of a rule of customary international law (*Yearbook ... 1950*, vol. II, document A/CN.4/16, p. 26, para. 11); elsewhere he refers to the necessary elements of customary international law as "the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time" (Hudson, *The Permanent Court of International Justice 1920–1942*, p. 609). See, for example, Special Tribunal for Lebanon, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing (Appeals Chamber), 10 November 2010, para. 47 ("The combination of a string of decisions in this field [of inherent powers of courts and tribunals], coupled with the implicit acceptance or acquiescence of all the international subjects concerned, clearly indicates the existence of the practice and *opinio juris* necessary for holding that a customary rule of international law has evolved"); Argentina, *Priebke, Erich s/ solicitud de extradición* (Argentinian Supreme Court, Court of Justice), case No. 16.063/94, 2 November 1995, para. 90. See also 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"); Shaw, *International Law*, p. 64 ("where States are seen to acquiesce in the behaviour of other States without protesting against them, the assumption must be that such behaviour is accepted as legitimate"); Akehurst, "Custom as a source of international law", p. 39 ("If actions by some States (or claims that they are entitled to act) encounter acquiescence by other States, a permissive rule of international law comes into being; if they encounter protests, the legality of the actions in dispute is, to say the least, doubtful"); 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 rejection of 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)"). MacGibbon has observed that acquiescence "imparts a welcome measure of controlled flexibility to the process of formation of rules of customary international law" (MacGibbon, "Customary international law and acquiescence", p. 145 (offering, however, a particular view on the relationship between *opinio juris* and acquiescence)).

[45] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 305, para. 130. The notion, in the present context, of inaction as concurrence borrows from ideas of acquiescence and estoppel in international law, which are normally applicable in a bilateral context; while the analogy may not be exact, it may nevertheless be helpful. See also MacGibbon, "The scope of acquiescence in international law", p. 145 ("The function of acquiescence may be equated with that of consent, which was described by Professor Smith as 'the legislative process of international law'; it constitutes a procedure for enabling the seal of legality to be set upon rules which were formerly in process of development and upon rights which were formerly in process of consolidation … its value lies mainly in the fact that it serves as a form of recognition of legality and condonation of illegality and provides a criterion which is both objective and practical"); Marques Antunes, "Acquiescence", para. 2 ("In international law, the term 'acquiescence'—from the Latin *quiescere* (to be still)—denotes consent. It concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State would be called for. Acquiescence is thus consent inferred from a juridically relevant silence or inaction").

[46] Mr. Kittichaisaree has similarly said that many plausible explanations could be made for a failure to protest interstate breaches other than the belief in the legality of the action, and Ms. Jacobsson stressed that while it was possible that inaction might serve as evidence of acceptance as law, the reverse could also be true: namely that inaction might not be interpreted as acceptance (see *Yearbook ... 2014*, vol. I, 3225th and 3226th meeting, respectively; see also statements of 17 July 2014). See also Crawford, *Brownlie's Principles of Public International Law*, p. 25 ("Silence may denote either tacit agreement or a simple lack of interest in the issue"); Shaw, *International Law*, p. 57 ("Failures to act are in themselves just as much evidence of a States' attitudes as are actions. They similarly reflect the way in which a nation approaches its environment … a failure to act can arise from either a legal obligation not to act, or an incapacity or unwillingness in the particular circumstances to act"). Cf. *North Sea Continental Shelf* (footnote 18 above), 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").

[47] Villiger, *Customary International Law and Treaties*, p. 39.

[48] See also MacGibbon, "The scope of acquiescence in international law", p. 183 ("To preclude its application to circumstances which do not warrant it, and to ensure its acceptance where appropriate, the doctrine [of acquiescence] is qualified by certain necessary safeguards").

[49] Marques Antunes, "Acquiescence", para. 19. See also Brownlie, "Some problems in the evaluation of the practice of States as an element of custom", p. 315 ("A minority of academics have asserted that, in the case of the Security Council, a failure to condemn a particular action by a State constituted approval of the action concerned. This approach is much too simplistic. Everything depends upon the context and the precise content of the records of the debates. Failure to express disapproval of the conduct of a State may have a number of procedural and political causes unconnected with the issue of legality").

[50] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12, at pp. 50–51, para. 121 (in the context of establishing sovereignty). In Ms. Escobar Hernández's words, "[i]naction must be assessed in the light of the surrounding circumstances and with special regard to whether the State could reasonably have been expected to act" (see *Yearbook ... 2014*, vol. I, 3226th meeting; see also statement of 17 July 2014). See also *North Sea Continental Shelf* (footnote 18 above), at p. 130, para. 31, separate opinion of Judge Ammoun; Bos, "The identification of custom in international law", p. 37 ("it should be emphasized that silence may not always be taken to mean acquiescence: for States cannot be deemed to live under an obligation of permanent protest against anything not

(*Continued on next page.*)

ought to be one that affects the interests or rights of the State failing or refusing to act;[51] at the same time, it has been suggested that "[i]n areas of relations affecting the common interests of all mankind the presence of a general interest of all States may give sufficient grounds for assuming that absence of protests implies acquiescence".[52]

24. Second, a State whose inaction is sought to be relied upon in identifying whether a rule of customary international law has emerged must have had actual knowledge of the practice in question or the circumstances must have been such that the State concerned is deemed to have had such knowledge.[53]

25. Third, and related to the requirement of knowledge of the practice in question, is the need for the inaction to be maintained over a sufficient period of time.[54]

26. It is proposed that draft conclusion 11, paragraph 3, in the second report (which has yet to be considered by the Drafting Committee) could read as follows:

"*Draft conclusion 11. Evidence of acceptance as law*

"…

"3. Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction."

(*Footnote 50 continued.*)

pleasing them. For legal consequences to ensue, there must be good reason to require some form of action"); MacGibbon, "The scope of acquiescence in international law", p. 143 ("Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection"). It will be recalled that paragraph 2 of draft conclusion 9 of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission in 2014, provides that "Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction" (*Yearbook ... 2014*, vol. II (Part Two), paras. 75–76).

[51] See also the intervention by Greece in the debate on the work of the Commission during the Sixth Committee in 2014 ("It [is] the conscious inaction of an interested State with regard to the practice in question, often considered in relation to an act, proposal or assertion of another State calling for a reaction, that might be relevant, not just any form of inaction", *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 26th meeting (A/C.6/69/SR.26), para. 29); *North Sea Continental Shelf* (footnote 18 above), at p. 229, dissenting opinion of Judge Lachs ("[States that] have acquiesced in [a practice] when faced with legislative acts of other States affecting them"); Tunkin, *Theory of International Law*, p. 139 ("Assuredly, not every silence can be regarded as consent. Particularly in those instances when the respective forming of a customary norm does not affect a State's interests at the given time, its silence cannot be considered to be tacit recognition of this norm. But in those instances when an emerging rule affects the interests of a particular State, the absence of objections after a sufficient time can, as a rule, be regarded as tacit recognition of this norm"); Akehurst, "Custom as a source of international law", p. 40 ("Failure to protest against an assertion *in abstracto* about the content of customary law is less significant than failure to protest against concrete action taken by a State in a specific case which has an immediate impact on the interests of another State"); Danilenko, *Law-making in the International Community*, p. 108 ("Under existing international law, absence of protests implies acquiescence only if practice affects interests and rights of an inactive State … Ascertainment of the fulfillment of … [this] requirement usually involves the evaluation of specific characteristics of practice taking into account, in particular, the sphere and subject matter of regulation. As a rule, not only direct but also indirect interests may be taken into account"); Skubiszewski, "Elements of custom and the Hague court", p. 846 ("The attitude of mere toleration, i.e. lack of protest linked to lack of express consent or acquiescence, is sufficient when the claims put forward by the participants in the practice do not impose any duties on the non-participants … But when a correlative duty follows from the right claimed in the practice, the attitude of non-participants—in order to contribute to the creation of custom—must be of a more explicit nature. That is, it must be either express consent or unequivocal acquiescence").

[52] Danilenko, *Law-making in the International Community*, p. 108.

[53] See also *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at pp. 138–139; Shaw, *International Law*, p. 58 ("acquiescence must be based upon full knowledge of the [alleged] rule involved. Where a failure to take a course of action is in some way connected or influenced or accompanied by a lack of knowledge of all the relevant circumstances, then it cannot be interpreted as acquiescence"); Charney, "Universal international law", pp. 536–537 ("acceptance may be established by acquiescence. The acquiescence of States is often not tantamount to knowing and voluntary consent. For acquiescence to acquire that status, the State must be aware of the subject of the consent and must know that failure to object will be taken as acceptance. Thus, acquiescence, if it obliges, must be tantamount to actual consent, but consent expressed by nonaction rather than by action"); Akehurst, "Custom as a source of international law", p. 39 ("acts or claims by one State which other States could not have been expected to know about carry very little weight, and no conclusion can be drawn from failure to protest against such acts or claims"); Villiger, *Customary International Law and Treaties*, p. 39 ("Of course, passive conduct can only amount to qualified silence if a State knows of the practice of other States and of the (emerging) customary rule"). In the *Gulf of Maine* case, Canada argued that "[t]he essence of the principle of acquiescence is one government's knowledge (actual or constructive) of the conduct or assertion of rights of the other government concerned, and its failure to protest that conduct or assertion of rights … The knowledge, coupled with silence, is taken to be a *tacit* acceptance" (*I.C.J. Pleadings*, vol. V, pp. 81–82). Arangio-Ruiz has suggested that "[p]articularly nowadays any action or omission of a State is known all over the world with the immediateness of a ray of light" (Arangio-Ruiz, "Customary law: a few more thoughts about the theory of 'spontaneous' international custom", p. 100).

[54] See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (footnote 45 above), at pp. 310–311, para. 151 ("too brief to have produced a legal effect"); *Fisheries case* (previous footnote), at p. 138 ("The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it"); Meijers, "How is international law made?", pp. 23–24 ("all States which could become bound through their inaction must have the time necessary to avoid implicit acceptance by resisting the rule"); Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, p. 94 ("Mere toleration is not the same as acceptance of practice as law … There are implications for the doctrine of acquiescence, the burden of proof for which is very high, presupposing long and consistent inaction accompanied by consciousness of legal change"); Sinclair, "Estoppel and acquiescence", p. 120 ("the Court has shown wisdom and restraint in requiring in effect that conduct that might arguably amount to acquiescence must be maintained over a certain period of time").

Chapter III

The role of treaties and resolutions

27. The practical importance, for the formation and identification of customary international law, of treaties and treaty-making (particularly multilateral treaty-making), and of resolutions of international organizations and conferences, is well recognized. With the advance of international organization and the codification of international law, customary

international law has been "increasingly characterized by the strict relationship between it and written texts".[55] In the words of Judge Tomka, "the increasing prevalence of the expression of legal views in precise written form—through treaties, codification works, resolutions and the like—has had significant effects for the way in which" customary international law may be ascertained.[56]

28. Such written texts may reflect already existing rules of customary international law (codification of *lex lata*); they may seek to clarify or develop the law (progressive development); or they may state what would be new law. Often the need is thus "not to clarify the rule of law, but to determine whether a clearly-expressed rule adopted in a [written] instrument in fact corresponded to customary law".[57]

29. Caution is required when seeking, through written texts, such as treaties and resolutions, to identify rules of customary international law.[58] As will be highlighted below, all the surrounding circumstances need to be considered and weighed.

30. The following sections deal with two forms of written texts adopted by States to which recourse is frequently had when rules of customary international law are to be identified. Similar considerations may apply to other written texts, such as those produced by the Commission, particularly when they, too, have been the object of action by States.

A. Treaties

31. Draft conclusion 6 [7], paragraph 2, as provisionally adopted by the Drafting Committee in 2014, includes "acts in connection with treaties" among the forms that State practice may take.[59] Draft conclusion 11 in the second report (which has not yet been considered by the Drafting Committee) includes "treaty practice" among the forms of evidence of acceptance of a general practice as law.[60] In the debates in the Commission and the Sixth Committee in 2014, it was suggested that the role of treaties be explored further in the third report. While the interaction between treaties and customary international law raises a number of important issues, in the present context we are concerned with the relevance of treaties and treaty-making to the formation and identification of customary international law.

32. The relevance of treaties to the identification of customary international law has been considered by the

[55] Treves, "Customary international law", para. 2 (adding, at para. 25, that "[t]he intensification of practice within international organizations and conferences, the adoption of multilateral treaties, and the existence and activity of specialized international tribunals has contributed to the acceleration of the formation of customary rules in these and other fields"). See also *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 291, dissenting opinion of Judge Tanaka ("The appearance of organizations such as the League of Nations and the United Nations, with their agencies and affiliated institutions, replacing an important part of the traditional individualistic method of international negotiation by the method of 'parliamentary diplomacy' (Judgment on the *South West Africa cases, I.C.J. Reports 1962*, p. 346), is bound to influence the mode of generation of customary international law"); Charney, "Remarks on the contemporary role of customary international law", p. 23 ("While customary law is still created in the traditional way, that process has increasingly given way in recent years to a more structured method … Developments in international law often get their start or substantial support from proposals, reports, resolutions, treaties or protocols debated in such [multilateral] forums"); Barboza, "The customary rule: from chrysalis to butterfly", p. 14 ("Customs, nowadays, are usually the product of the injection of texts in the body of existing practices"); Danilenko, *Law-making in the International Community*, pp. 79–80 ("The emergence, in the framework of international conferences and organizations, of new forms of State practice, made up of purely verbal claims and declarations, leads to an increasing 'formalization' of the customary law-making process. Such practice may establish a broad consensus that determines the outlines of preferred conduct of States before the emergence of actual practice, and thereby affects subsequent developments. Such a modified customary 'negotiating' process renders more cognizable elements of conscious will aimed at creating or modifying customary legal obligations"); Murphy, *Principles of International Law*, p. 98 ("An important dynamic within international law is the manner in which treaties shape and develop customary international law"); Condorelli, "Customary international law …", p. 151 ("More and more nowadays, international custom is perceived as *'consuetudo scripta'*: we find, that is, a broad correspondence between general customary norms and those written down in large international conventions of (basically) universal character"); Corten, *Méthologie du droit international public*, pp. 161–178 ("*Les sources documentaires pertinentes en vue de l'établissement d'une règle coutumière*" ["Relevant documentary sources for the establishment of a customary rule"]).

[56] Tomka, "Custom and the International Court of Justice", p. 196 (referring to the way in which the Court goes about identifying the content of a customary norm and adding, at p. 215, that "[t]he landscape of international law has changed in dramatic ways since international custom was first defined as a general practice accepted as law. Most notably, the content of international law has been increasingly specified through the adoption of binding and non-binding instruments purporting to codify the rules of international law"). See also Gaja, "The protection of general interests in the international community …", pp. 37 and 39 ("Rather than on a thorough analysis of the attitude of States, the [International] Court [of Justice] often relies on a text which carries some authority … In many instances the text in question is a codification convention, even if it is not applicable as a treaty to the dispute in hand … There are several decisions by the Court which take as authoritative, for ascertaining a rule of customary law, a declaration made by the General Assembly or a conference of States").

[57] Tomka, "Custom and the International Court of Justice", p. 205 (referring to codification conventions).

[58] See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at pp. 97–98, para. 184 ("The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. 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 … 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"); Sinclair, "The impact of the unratified codification convention", p. 220 ("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 analyzed 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"); Schachter, "Entangled treaty and custom", pp. 730–731 ("[C]aution is called for in respect of treaty rules. Various factors need to be assessed in evaluating the evidence of *opinio juris*. In many cases, the record of discussions, expert opinions, and close analysis of the rules in question enable a judgment to be made that there is a general belief that the rules are part of customary law, binding on all States. An important caveat is that conclusions as to general *opinio juris* cannot rest on the views of numerical majorities alone. An essential element is that the collectivity of States include the opinions of those States specially interested in the matter covered and of those which possess the ability and determination to give effect to their conviction concerning the legal obligation in question").

[59] Interim report of the Chairman of the Drafting Committee, 7 August 2014, annex (see footnote 10 above); see also *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 41 (*h*).

[60] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 76 (*f*).

Commission from time to time, as has been described in the Secretariat memorandum.[61] Indeed, as early as its 1950 report to the General Assembly, the Commission stated that:

A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law. For present purposes therefore, the Commission deems it proper to take some account of the availability of the materials of conventional international law in connexion with its consideration of ways and means for making the evidence of customary international law more readily available.[62]

33. The provisions of treaties do not in and of themselves constitute rules of customary international law,[63] but such provisions, as "an explicit expression of the will of States",[64] may offer valuable evidence of the existence (or otherwise) and content of such rules.[65] In particular, they may contain relatively precise formulations of possible customary rules, and reflect the views of States as to their nature (at least as of the time when the relevant treaty is concluded).[66] Treaties may thus allow a preliminary consideration of "whether a customary rule applicable to the case had already been identified before finding it necessary to examine the primary evidence of custom *de novo*";[67] the International Court of Justice has indeed said that it "can and must take them into account in ascertaining the content of the customary international law".[68]

34. Treaty texts alone cannot serve as conclusive evidence of the existence or content of rules of customary international law: whatever the role that a treaty may play *vis-à-vis* customary international law (see below), in order for the existence in customary international law of a rule found in a written text to be established, the rule must find support in external instances of practice coupled with

[61] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/659, para. 23 (footnote 53) and para. 29 (footnote 82).

[62] *Yearbook ... 1950*, vol. II, document A/1316, p. 368, para. 29.

[63] See also Boyle and Chinkin, *The Making of International Law*, p. 236 ("support for a treaty rule, however universal, cannot by itself create 'instant' law. Such [law-making] treaties will only create new law if supported by consistent and representative State practice over a period of time. That practice can in appropriate cases consist mainly of acquiescence, or the absence of inconsistent practice"); Bernhardt, "Custom and treaty in the law of the sea", p. 272 ("I think that at least one statement can be safely made: if only the treaty rule exists and if it is not supported by any additional proof, this is not enough for the emergence of a customary norm. Provisions in a treaty can only be considered as expressing customary norms if additional elements of State practice supported by *opinio juris* can be adduced"); Schachter, "Entangled treaty and custom", p. 723 ("Certainly there is no support by courts or scholars for concluding that a treaty becomes customary law solely by virtue of its conclusion or entry into force").

[64] Shihata, "The treaty as a law-declaring and custom-making instrument", p. 73.

[65] See *Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, 3 February 2012, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, para. 94 ("It must be recognised that treaty law and customary international law often mutually support and supplement each other. As such, treaty law may serve as evidence of customary international law either by declaring the *opinio juris* of States Parties, or articulating the applicable customary international law that had already crystallised by the time of the treaty's adoption"); Villiger, *Customary International Law and Treaties*, p. 132 ("conventional texts may—though not invariably so—offer *evidence of a customary rule*. Like codes and resolutions, such texts merely reflect or declare, but (on account of the independence of sources) do not actually constitute, the underlying customary rule the existence of which depends on other conditions of State practice and *opinio juris*, and which does not require the additional contractual basis for its binding force"); Shihata, "The treaty as a law-declaring and custom-making instrument", p. 89 ("In fact, every treaty has some evidential value beyond its contractual limits. This value differs in degree from one treaty to another, but the range of difference is not so great as to deprive a treaty of all evidential value or to make it in itself a conclusive evidence"); Charney, "International agreements and the development of customary international law", p. 990 ("Conferences held to negotiate international agreement provide a vehicle by which states communicate their views for the purpose of producing rules of law. Agreements reached at such fora do change nations' perceptions of their rights and duties. If this process were irrelevant to customary law development, some law may become frozen in time and fail to reflect movement realized at international negotiations. The gap that could develop between custom and treaty law might complicate interstate relations"); Lukashuk, "Customary norms in contemporary international law", p. 499 ("The content of multilateral and bilateral treaties represents the most lucid and authoritative evidence specifically of legal practice"); Weisburd, "Customary international law: the problem of treaties", p. 5 ("Treaties, like statutes, are legal documents, more or less precisely phrased and accessible with relative ease. The more weight given to them in the determination of customary law rules, the easier it is to make such determinations"); Baxter, "Multilateral treaties as evidence of customary international law", p. 278 ("[a] treaty to which a substantial number of States are parties must be counted as extremely powerful evidence of the law. Of course, as is true of any rule extracted from the State practice of a number of nations, the force of the purported rule is enhanced or diminished by the absence or presence of conflicting practice on the part of other States"); Wolfke, "Treaties and custom: aspects of interrelation", p. 36 ("the establishment of international customary rules is a cumbersome task in which treaties play a very important role"; adding that "[t]he evidential role of treaties is closely combined with their role in the custom-forming process").

[66] See also Baxter, "Multilateral treaties as evidence of customary international law", pp. 278 and 297 ("since the treaty speaks with one voice rather than [many], it is much clearer and more direct evidence of the state of the law than the conflicting, ambiguous and multi-temporal evidence that might be amassed through an examination of the practice of each of the individual [signatory] States … a structure of treaty law is more persuasive and authoritative than a structure constructed of the diverse and jumbled materials of State practice"); Schachter, "Entangled treaty and custom", pp. 721–722 ("The accessibility of the treaty—its black letter law—is an important practical factor"); Kirchner, "Thoughts about a methodology of customary international law", p. 231 ("Treaties in any case provide a reservoir for the language of a possible rule. They facilitate the [International] Court [of Justice]'s task of drafting the wording of the customary rules in question. This is to avoid the laborious task of forming general rules out of a sequence of individual acts. Instead, the Court can compare State practice with the contents of a rule previously drafted").

[67] Tomka, "Custom and the International Court of Justice", p. 201 (adding, p. 206, that "in the presence of a codification, the Court no longer proceeds by distilling a rule from instances of practice through pure induction, but rather by considering whether the instances of practice support the written rule").

[68] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 18 above), at p. 97, para. 183 (having come to the conclusion that there was a large overlap between the treaties in question and customary international law, the Court said that it "must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation … the Court … can and must take them into account in ascertaining the content of the customary international law"). See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at p. 30, para. 27 ("it cannot be denied that the [United Nations Convention on the Law of the Sea] is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law").

acceptance as law.[69] In the words of the *Continental Shelf* (*Malta v. Libyan Arab Jamahiriya*) judgment,

> [i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.[70]

35. There are at least three ways in which a treaty provision may reflect or come to reflect a rule of customary international law,[71] or, in other words, assist in determining the existence and content of the rule: the provision may (*a*) codify a rule that exists at the time of the conclusion of the treaty; (*b*) lead to the crystallization of a rule that may be emerging; or (*c*) lead to a general practice accepted as law, such that a new rule of customary international law comes into being. While it is helpful to note that these are three distinct processes, in a given case, they may shade into one another.

36. First, treaties may codify pre-existing rules of customary international law.[72] In these circumstances, they are in their "origins or inception"[73] declaratory of such rules, that is to say, "the framers of the treaty identify rules of customary international law existing at the commencement of the drafting of the codification treaty and give these rules expression in the form of *jus scriptum*".[74] The States parties to the Convention on the High Seas, for example, refer, in the preamble of the Convention to their desire "to codify the rules of international law relating to the high seas" and to "the following provisions as generally declaratory of established principles of international law". On the other hand, the drafters of the United Nations Convention on Jurisdictional Immunities of States and Their Property, while considering, in the preamble to the Convention that "the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law", express their belief that an international convention "would contribute to the codification and [progressive] development of international law and the harmonization of practice in this area". In other cases, the notion of codification may also be implicit in the text.[75]

37. Treaties purporting to codify rules of customary international law, however, "are not self-verifying on that point".[76] Codification conventions may (and often do)

[69] See also *North Sea Continental Shelf* (footnote 18 above), at p. 104, separate opinion of Judge Ammoun ("Proof of the formation of custom is not to be deduced from statements in the text of a convention; it is in the practice of States that it must be sought"); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 435, dissenting opinion of Judge Barwick ("Conventional law limited to the parties to the convention may become in appropriate circumstances customary law. On the other hand, it may be that even a widely accepted … treaty does not create or evidence a state of customary international law"); Shihata, "The treaty as a law-declaring and custom-making instrument", p. 90 ("one treaty in itself and in its inception unsupported by any prior practice cannot by itself form or prove the existence of a general rule, although it may mark the first step in the formation of such a rule"); Charney, "International agreements and the development of customary international law", p. 996 ("such [international conference] negotiations [and international agreements] provide useful evidence of new rules of international law … [but] they should be carefully viewed in the context of State practice and *opinio juris*"); Weisburd, "Customary international law", p. 6 ("treaties are simply one more form of State practice and [] one cannot answer questions as to the content of customary international law simply by looking to the language of treaties").

[70] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 68 above), at pp. 29–30, para. 27. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at p. 98, para. 184 ("Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but 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"); Boyle and Chinkin, *The Making of International Law*, p. 234 ("[a] treaty does not 'make' customary law, but … it may both codify existing law and contribute to the process by which new customary law is created and develops").

[71] The status of a treaty provision as codifying or developing a rule of customary international law may, of course, change according to the point in time at which the provision's status is assessed.

[72] Articles 4, 38 and 43 of the Vienna Convention on the Law of Treaties (hereinafter "1969 Vienna Convention") confirm the possibility of parallel treaty and customary rules. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at p. 47, para. 88 ("Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct"; *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. 424, para. 73 ("The fact that … [principles of customary and general international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions"); *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at pp. 94–96, p. 207, separate opinion of Judge Ni, and pp. 302–303, dissenting opinion of Judge Schwebel; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 24, para. 45, and pp. 30–31, para. 62; *Case concerning rights of nationals of the United States of America in Morocco* (footnote 40 above), at p. 220, dissenting opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Bengal Rau; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at p. 135, separate opinion of Judge Shahabuddeen; Weisburd, "Customary international law", pp. 19–20. For the range of opinions as to the effect of codifying treaties on the customary rules they purport to embody, see Villiger, *Customary International Law and Treaties*, pp. 151–153.

[73] *North Sea Continental Shelf* (see footnote 18 above), at p. 45, para. 81; see also at p. 242, dissenting opinion of Judge Sørensen ("There are treaty provisions which simply formulate rules of international law which have already been generally accepted as part of international customary law, and it is beyond dispute that the rules embodied and formulated in such provisions are applicable to all States, whether or not they are parties to the treaty").

[74] Dinstein, "The interaction between customary international law and treaties", p. 357. As Baxter explains, "[t]he 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": Baxter, "Treaties and custom", p. 56. See also Wolfke, "Treaties and custom …", 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 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": Weisburd, "Customary international law", p. 23.

[75] As in the case of the Convention on the Prevention and Punishment of the Crime of Genocide, in which the Parties "confirm" that genocide is a crime under international law (see also *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 15, at p. 23).

[76] Gamble, "The treaty/custom dichotomy: an overview", p. 310. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at pp. 97–98, para. 184 ("The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law,

(*Continued on next page.*)

contain provisions that develop the law[77] or represent particular arrangements decided on by the negotiating parties, and even a single provision may be only partly declaratory of customary international law.[78] There is also the possibility that the assertion in a treaty text regarding the status of customary international law is incorrect, or that customary international law has evolved since the treaty was concluded.[79] It is thus necessary in each case to verify whether the provision in question was indeed intended to codify custom, and whether it reflects existing customary international law, that is, it is necessary to confirm that "the existence of the rule in the *opinio juris* of States is confirmed by practice".[80] In doing so, one has to look to the statements and conduct of States: "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]".[81] The *travaux préparatoires* of the provision in question may suggest whether and to what extent the parties to the treaty considered the provision to be declaratory of existing international law;[82] statements made subsequent to the treaty may be relevant as well.[83] Examining practice outside the treaty, i.e., that of non-parties or of parties towards non-parties, may be particularly important.

38. Second, treaties (or, perhaps more accurately, treaty-making) may crystallize rules of customary international law that may be emerging. This occurs when the law evolves "through the practice of States on the basis of the debates and near-agreements at the conference … arising out of the general consensus revealed" at such conference.[84] In the words of Judge Sørensen: "[A] treaty purporting to create new law may be based on a certain amount of State practice and doctrinal opinion which has not yet crystallized into customary law. It may start, not from *tabula rasa*, but from a customary rule *in statu*

(*Footnote 76 continued.*)

and as applicable as such to those States. 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. … 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"); Murphy, *Principles of International Law*, p. 99 ("absent evidence to the contrary, there is a respectable argument that a new treaty is not codifying existing customary international law since, if it were, there would be no need for the treaty"); 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"); Guzman, "Saving customary international law", p. 162 ("one of the main functions of treaties is to establish new obligations among states—obligations that do not exist under [customary international law]. When faced with practice based on treaty obligations, then, it is difficult to know if this reflects *opinio juris*"); Sohn, "Unratified treaties as a source of customary international law", p. 237 ("a treaty may represent not the accepted law but a derogation from it as between the parties to it").

[77] The preamble to the United Nations Convention on the Law of the Sea, for example, refers to "the codification and progressive development of the law of the sea achieved in this Convention".

[78] See also Pocar, "To what extent is Protocol I customary international law?", p. 339 ("as the codification process necessarily requires an assessment of the customary rule or principle concerned as well as a written definition thereof, the resulting written text may be regarded as affecting its scope and content. Consequently, any precision or new element that may have been added—as is normally the case—by the treaty provision to the principle of customary law which it codifies must be checked carefully in order to establish whether it has come to be accepted as generally applicable. However, the addition of new elements by a treaty provision to a customary principle should be distinguished from specifications deriving by necessary implication from the accepted general customary principle").

[79] See also Wolfke, "Treaties and custom …", p. 35 ("a treaty could at most be an approximate replica of a living practice, like a picture of a living person").

[80] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 18 above), at p. 98, para. 184.

[81] Baxter, "Treaties and custom", pp. 43–44.

[82] See, for example, *Legal Consequences for States* (footnote 40 above), at p. 47, para. 94 ("The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject"). Where the *travaux préparatoires* indicate that the relevant provision generated significant opposition or required substantive compromises, for example, this may suggest that it did not reflect a customary rule. See also *North Sea Continental Shelf* (footnote 18 above), at p. 38, para. 62; Villiger, *Customary International Law and Treaties*, pp. 131−132 ("if the preparatory phases disclose inconsistencies in the practice of States, or if States reject or denounce the (declaratory) conventional rule, this will weaken the case for the customary rule").

[83] See Akehurst, "Custom as a source of international law", pp. 49−52.

[84] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 23, para. 52 ("[A]fter that Conference the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference"). See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 38, para. 24, and at p. 170, para. 23, dissenting opinion of Judge Oda ("It is however possible that, before the draft of a multilateral treaty becomes effective and binding upon the States parties in accordance with its final clause, some of its provisions will have become customary international law through repeated practice by the States concerned"); *Barcelona Traction* (footnote 40 above), at p. 305, separate opinion of Judge Ammoun ("Conventions which do not contemplate the codification of existing rules can nonetheless amount to elements of a nascent international custom"); Sohn, "Unratified treaties as a source of customary international law", pp. 245−246 ("The Court is thus willing to pay attention not only to a text that has codified a pre-existing customary law but also to one that has crystallized an 'emergent rule of international law'. It is sufficient for that purpose to have the rule in question adopted by an international conference by consensus or … without a dissenting voice … A new rule is created by its general acceptance by all States concerned … If most States, including almost all States having a special interest in the application of the rule, act in accordance with it, there is a clear presumption that the rule agreed upon at the conference, though the agreement has not yet been ratified, has become an accepted rule of customary international law"); Cassese, *International Law in a Divided World*, p. 183 ("An interesting feature of the present stage of development of the world community is the fact that customary international law develops on the margin, as it were, of diplomatic conferences set up to codify and progressively develop international law"); Jiménez de Aréchaga, "International law in the past third of a century", pp. 16−18; London Statement of Principles Applicable to the Formation of General Customary International Law, with commentary, resolution 16/2000 entitled "Formation of general customary international law", adopted at the Sixty-ninth Conference of the International Law Association, in London, on 29 July 2000 (hereinafter, "London Statement of Principles"), p. 760 ("if State practice is developing in parallel with the drafting of the treaty … the latter can influence the former (as well as vice-versa) so that the emerging customary law is indeed consolidated and given further definition. Similarly for the final stage—the adoption of a convention. Indeed, the longer the drafting and negotiating process takes, the more scope there may be for State practice to become crystallized in this way"); Henckaerts, "Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict", p. 183 ("In practice, the drafting of treaty norms helps to focus world legal opinion and has an undeniable influence on the subsequent behaviour and legal conviction of States").

nascendi."[85] It could then come to reflect a rule of customary international law that was "only *in statu nascendi* at the outset of the codification exercise…the embryonic custom will [] crystallize [not by drafting the treaty *per se* but] thanks to the reactions of Governments to the negotiations and consultations during the work in progress".[86] An important example is the development of the concept of the exclusive economic zone during the third United Nations Conference on the Law of the Sea (1973–1982), and its acceptance by States as customary international law even before the adoption of the United Nations Convention on the Law of the Sea in 1982 and its entry into force in 1994.[87]

39. Third, while "[i]t is a principle of international law that the parties to a multilateral treaty, regardless of their number or importance, cannot prejudice the legal rights of other States",[88] treaties may also provide the basis for the development of new rules of customary international law.[89] As the International Court of Justice observed, the process by which a rule of a conventional origin may pass into general international law "is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed".[90] This

[85] *North Sea Continental Shelf* (see footnote 18 above), at p. 243, dissenting opinion of Judge Sørensen (adding, at p. 244, that "a convention adopted as part of the combined process of codification and progressive development of international law may well constitute, or come to constitute the decisive evidence of generally accepted new rules of international law. The fact that it does not purport simply to be declaratory of existing customary law is immaterial in this context. The convention may serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally recognized legal rules may crystallize").

[86] Dinstein, "The interaction between customary international law and treaties", pp. 358–359 (explaining that "[t]he scenario is that, before the initiation of the treaty-making effort, custom has been burgeoning but has not yet blossomed. The on-going negotiations and consultations contribute to an acceleration of State practice—if it was desultory in the past, it now moves apace—and to securing the communal *opinio juris*. The treaty then articulates the crystallized custom as positive law … The key to successful crystallization is that it becomes evident in the course of the formulation of a treaty that a new customary *lex lata* has congealed").

[87] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 68 above), at p. 33, para. 34 ("It is in the Court's view incontestable that … the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law"). For the development of the concept of the exclusive economic zone, see, for example, Tanaka, *The International Law of the Sea*, pp. 124−125.

[88] *International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*, p. 128, at p. 165, separate opinion of Judge Read. See also *Fisheries Jurisdiction (United Kingdom v. Iceland)* (footnote 84 above), p. 3, at p. 90, separate opinion of Judge de Castro ("The existence of a majority trend, and even its acceptance in an international convention, does not mean that the convention has caused the rule to be crystallized or canonized as a rule of customary law"); 1969 Vienna Convention, art. 34.

[89] Article 38 of the 1969 Vienna Convention is entitled "Rules in a treaty becoming binding on third States through international custom" (and reads: "Nothing in articles 34 to 37 [dealing with treaties and third States] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such"). Article 38 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter, "1986 Vienna Convention") is in similar terms: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such". On article 38 of the Vienna Conventions, see Gaja, "Article 38".

[90] *North Sea Continental Shelf* (see footnote 18 above), at p. 41, para. 71; see also at p. 96, separate opinion of Judge Padilla Nervo ("A treaty does not create rights or obligations for a third State without its consent, but the rules set forth in a treaty may become binding upon a non-contracting State as customary rules of international law"); at p. 225, dissenting opinion of Judge Lachs ("It is generally recognized that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice. Treaties binding many States are, *a fortiori*, capable of producing this effect, a phenomenon not unknown in international relations"); and at p. 241, dissenting opinion of Judge Sørensen ("It is generally recognized that the rules set forth in a treaty or convention may become binding upon a non-contracting State as customary rules of international law or as rules which have otherwise been generally accepted as legally binding international norms"). See also *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I, Appeals Chamber, Special Tribunal for Lebanon, 16 February 2011, paras. 107−109; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, Trial Chamber, the International Tribunal for the Former Yugoslavia, 16 November 1998, *Judicial Reports 1998*, paras. 301−306 (remarking that "[t]his development [of a treaty provision becoming a part of customary international law] is illustrative of the evolving nature of customary international law, which is its strength"); *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, Special Court for Sierra Leone, 13 March 2004, para. 82; *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, International Tribunal for the Former Yugoslavia, 2 October 1995, *Judicial Reports 1994−1995*, para. 98 ("the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law"); *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011,* International Tribunal for the Law of the Sea, *ITLOS Reports 2011*, p. 10, at p. 47, para. 135 ("The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration [on Environment and Development]. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law"); *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 10 December 1998, *Judicial Reports 1998*, Part One, paras. 138 and 168 ("That these treaty provisions [prohibiting torture] have ripened into customary rules is evinced by various factors. First, these treaties … have been ratified by practically all States of the world … the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture … Secondly, no State has ever claimed that it was authorised to practice torture in times of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture … Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process"); *Michael Domingues v. United States*, Case 12.285, report No. 62/02, Inter-American Commission on Human Rights (2002), para. 104 ("The norms of a treaty can be considered to crystallize new principles or rules of customary law. It is also possible for a new rule of customary international law to form, even over a short period of time, on the basis of what was originally a purely conventional rule, provided that the elements for establishing custom are present"); *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2 Decision on Objections to Jurisdiction, 11 May 2005, ICSID, *International Review of Intellectual Property and Competition Law*, vol. 41 (2005), 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"); *Van Anraat v. The Netherlands* (decision), No. 65389/09, European Court of Human Rights, 6 July 2010, para. 88 ("As the International Court of Justice expounds … it is possible for a treaty provision to become customary international law. For this it is necessary that the provision concerned should, at all event potentially, be of a fundamentally norm-creating character such as could be

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"mechanism of expansion",[91] by which the application of rules set forth in treaty provisions may be extended to non-parties, "is not lightly to be regarded as having been attained".[92] It requires, first, "that the provision concerned should … be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law".[93] For example, such provisions are unlikely to include those providing a role for particular institutions established by the treaty.[94] It is further required that "State practice, including that of States whose interests are specially affected, should [be] both extensive and virtually uniform in the sense of the provision invoked;—and should moreover [occur] in such a way as to show a general recognition that a rule of law or legal obligation is involved".[95]

40. Many examples could be given of the ways in which the provisions of treaties, particularly so-called "law-making" treaties, reflect or come to reflect rules of customary international law. The law of the sea is a particularly rich field in this regard, extending from the influence of the Convention on the Continental Shelf on the acceptance of that concept in customary international law to the emergence of the concept of the exclusive economic zone.[96] Likewise, many of the provisions of the Vienna Convention

(*Footnote 90 continued.*)

regarded as forming the basis of a general rule of law; for there to be corresponding settled State practice; and for there to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*)"). But see Barboza, "The customary rule", p. 12 ("According to our view, however, it would be practically impossible that a custom could originate directly from a text. New though a certain field of law might be, it must have been preceded by some activities and those activities surely have given rise to practices moulded by necessity and principles applied by analogy. Had there not been *any activity*, it is hardly conceivable that a treaty deal with the subject").

[91] Barboza, "The customary rule", p. 4 (referring to a "pioneer [legal] community" of those States who, in drafting a convention, play "a pioneer role in the 'legislative' process" and whose "weight in international relations [owing to the participation, usually, of some of the world Powers and most of the States specially affected by the relevant topic of the convention] gives considerable strength to [that] community's invitation to join in").

[92] *North Sea Continental Shelf* (see footnote 18 above), at p. 41, para. 71. See also *Mondev International Ltd v. United States of America, ICSID Case No ARB(AF)/99/2, Award of 11 October 2002, ICSID Reports*, vol. 6, para. 111 ("It is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties"); Schwebel, "The influence of bilateral investment treaties on customary international law", p. 29 ("The process by which provisions of treaties binding only the parties to those treaties may seep into general international law and thus bind the international community as a whole is subtle and elusive"); Weil, "Towards relative normativity in international law?", pp. 433–438.

[93] *North Sea Continental Shelf* (see footnote 18 above), at pp. 41–42, para. 72. See also Verdier and Voeten, "Precedent, compliance, and change in customary international law: an explanatory theory", p. 426 (suggesting that the criterion of "norm-creating character" "appears to require that the rule be articulated in general terms, so as to potentially be universally binding"); Thirlway, *International Customary Law and Codification*, p. 84 ("it must be of such a kind that it can operate as a general rule"); Brölmann, "Law-making treaties: form and function in international law", p. 384; Jia, "The relations between treaties and custom", p. 92 (suggesting that "fundamentally norm creating" is "an ambitious task accomplishable only by means of multilateral treaties"); Villiger, *Customary International Law and Treaties*, pp. 177 and 179 ("General rules may be defined as intending to regulate *pro futuro*, with regard to a potentially unlimited, general number of subjects, rather than individualized ones … A further criterion … is that 'law-making' conventional rules are also of an abstract nature, i.e. potentially regulatory of an abstract number of situations, rather than concerning a concrete situation"). But see Kolb, "Selected problems in the theory of customary international law", pp. 147–148 ("Different interpretations of that sentence have been advanced, for example that the Court meant rules capable of binding states generally, or the fact that a provision does not contain too many exceptions which weaken its normative content. In any case, the 'fundamentally law-creating' criterion does not seem very convincing. It is based on some form of logical inversion. It is not because a rule is fundamentally law-creating that it may become customary; it is because it will have become customary through the practice of States that it may be termed, if this is desired, fundamentally law-creating. However, in such a case, the criterion becomes superfluous. It may only mean that in interpreting a provision with a view to establishing its customary nature, it may be reasonable to presume that an excessively narrow or specific norm does not easily qualify as general international law. But this is all. Even a very specific norm (e.g., setting a time-bar in figures), may become customary if States adopt it in their practice. Thus, what really counts is the effective practice of States and eventually their *opinio iuris*, not any intrinsic quality of the norm at stake. Moreover, one could add that every norm is by its very nature, to some extent, 'law-creating', i.e., normative or capable of generalisation. The question is one of degree, and thus for contextual interpretation"); London Statement of Principles (see footnote 84 above), pp. 763–764; Baxter, "Treaties and custom", p. 62.

[94] In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the International Court of Justice found that paragraph 1 of article 76 of the United Nations Convention on the Law of the Sea (outer limit of the continental shelf) reflected customary international law, but did not address subsequent paragraphs (*Judgment, I.C.J. Reports 2012*, p. 624, at p. 666, para. 118) ("The Court considers that the definition of the continental shelf set out in Article 76, paragraph 1, of [the United Nations Convention on the Law of the Sea] forms part of customary international law. At this stage … it does not need to decide whether other provisions of Article 76 of [the United Nations Convention on the Law of the Sea] form part of customary international law").

[95] *North Sea Continental Shelf* (see footnote 18 above), at p. 43, para. 74. See also Cheng, "Custom: the future of general State practice in a divided world", p. 533 ("In each instance, whether such a metamorphosis [of a treaty provision into a rule of general international law] has taken place or not is a question of fact to be established by concrete evidence, as in attempts to ascertain the existence of any rule of general international law"); Scott and Carr, "Multilateral treaties and the formation of customary international law", p. 82 ("multilateral treaties themselves cannot generally create 'instant' customary international law for all of the States in the international system, but rather must await their subsequent reactions"). The Court in *North Sea Continental Shelf* also said that if "a very widespread and representative participation in the convention … provided it included that of States whose interests were specially affected", is registered, that might suffice of itself to transform a conventional rule into a rule of customary international law (para. 73). In other words, a multilateral treaty could, in certain circumstances, "because of its own impact" (para. 70), give rise to a rule of customary international law. As has recently been written, however, "the Court was careful not to determine definitely whether the method was even a possible one … In any event, widespread participation in a codification convention has never, in the jurisprudence of the Court, been sufficient on its own for the confirmation of a customary rule" (Tomka, "Custom and the International Court of Justice", p. 207). See also London Statement of Principles (see footnote 84 above), pp. 763 and 765 ("it should be noted that the Court failed either to give examples or properly to develop the point. Too much emphasis should therefore probably not be placed on the few words it did utter. And certainly, evidence of a more than merely contractual intention will not normally be present in a convention … It follows from the foregoing analysis that a single plurilateral or bilateral treaty cannot instantly create general customary law 'of its own impact', and it seems improbable that even a series of such treaties will produce such an effect, save in (at most) the rarest of circumstances"); Schachter, "Entangled treaty and custom", pp. 724–726; Thirlway, *International Customary Law and Codification*, pp. 86–91. But see *Reservations to the Convention on Genocide* (footnote 75 above), at pp. 52–53, dissenting opinion of Judge Alvarez; *Prosecutor v. Sam Hinga Norman, Decision on Preliminary Motion based on Lack of Jurisdiction*, Case No. SCSL-2004-14-AR72(E), Appeals Chamber, Special Court of Sierra Leone, 31 May 2004, paras. 18–20 and 50.

[96] Treves, "Codification du droit international et pratique des États dans le droit de la mer"; Roach, "Today's customary international law of the sea".

on the Law of Treaties (hereinafter, "1969 Vienna Convention") already reflected customary international law or have since become regarded as such.[97] Among the most important rules in the Vienna Convention are those on the interpretation of treaties, which have repeatedly been found by international and domestic courts and tribunals to reflect customary international law, and as such have even been applied to treaties dating from long ago.[98] State immunity is another area where multilateral conventions have become central for the identification of rules of customary international law,[99] although different courts have on occasion reached different conclusions.[100]

41. The practice of parties to a treaty (among themselves) is likely to be chiefly motivated by the conventional obligation, and thus is generally less helpful in ascertaining the existence or development of a rule of customary international law.[101] Such practice is normally just that, sometimes serving as a means of interpretation of the treaty under the rules set forth in article 31, paragraph 3 (*b*), or article 32 of the 1969 Vienna Convention (a matter being considered by the Commission under the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"). As pointed out by Baxter, this may pose particular difficulty in ascertaining whether a rule of customary international law has emerged when a treaty attracts quasi-universal participation.[102] Such a problem does not arise with respect to the conduct of non-parties, and of parties towards nonparties, which may clearly constitute practice for purposes of identifying a rule set out in a treaty as having customary force as well.[103] In any event, as Crawford has recently said:

> State practice requires that the Baxter paradox hold—that is, that treaty participation is not enough. Custom is more than treaty, more even than a generally accepted treaty … [yet] this coexistence of custom and treaty suggests that the Baxter paradox is not actually a genuine paradox.[104]

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[97] See the section on "customary status" in respect of each article of the Vienna Convention in Corten and Klein, *The Vienna Convention on the Law of Treaties: A Commentary*. See also Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 5–28.

[98] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1059, para. 18 (applying the 1969 Vienna Convention rules on interpretation to a treaty of 1890). The case law is well-summarized by the Arbitral Tribunal in the *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*, Permanent Court of Arbitration, UNRIAA, vol. XXVII (United Nations publication, Sales No. E/F.06.V.8), pp. 33–125, at p. 62, para. 45. See also draft conclusion 1, paragraph 1, of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (and paras. (4)–(6) of the commentary thereto) provisionally adopted by the Commission in 2013: *Yearbook ... 2013*, vol. II (Part Two), paras. 38–39, pp. 17–19.

[99] See also O'Keefe and Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, p. xli ("There can be little doubt that the process of the Convention's elaboration has, through the close involvement of States, revealed, and where not simply revealed then crystallized, the content of the contemporary customary international law of State immunity. This is not to say that each and every substantive provision in its entirety is necessarily consonant with custom … both national and international courts have already looked to the Convention as persuasive evidence of today's customary rules"). See, in particular, *Jurisdictional Immunities of the State* (footnote 18 above), *passim* and especially at p. 123, para. 55 ("State practice of particular significance is to be found in … the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention").

[100] In its judgment of 5 February 2015 in *Benkharbouche and Anor v. Embassy of the Republic of Sudan* [2015] EWCA Civ 33, the Court of Appeal of England and Wales considered whether article 11 ("Contracts of employment") of the United Nations Convention on Jurisdictional Immunities of States and Their Property reflected customary international law: in doing so, the Court said (at para. 36) that "[i]t is … necessary to examine each of its provisions with care in order to establish whether it satisfies the stringent requirements to be considered customary international law"; after considering judgments and legislation of other jurisdictions, the Court (at para. 46) "found it impossible to conclude that there is any rule of international law which requires the grant of immunity in respect of employment claims by members of the service staff of a mission in the absence of some special feature". In considering the scope of the "territorial tort" exception under article 12 ("Personal injuries and damage to property") of that Convention, the International Court of Justice had to contend with the differing views of national courts (*Jurisdictional Immunities of the State* (footnote 18 above), at pp. 126–135, paras. 62–79).

[101] See, for example, *North Sea Continental Shelf* (footnote 18 above), at p. 43, para. 76 ("over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, 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 in favour of the equidistance principle"); *Case concerning rights of nationals of the United States of America in Morocco* (footnote 40 above), at p. 199; *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at p. 531, dissenting opinion of Judge 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, para. 37, separate opinion of Judge Abraham. Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), p. 14, at pp. 96–97, para. 181 ("the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it").

[102] Baxter, "Treaties and custom", p. 64 ("[t]he proof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases. The number of participants in the process of creating customary law may become so small that the evidence of their practice will be minimal or altogether lacking. Hence the paradox that as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty"). See also *Delalić* (see footnote 90 above), para. 302 ("The evidence of the existence of such customary law—State practice and *opinio juris*—may, in some situations, be extremely difficult to ascertain, particularly where there exists a prior multilateral treaty which has been adopted by the vast majority of States. The evidence of State practice *outside* of the treaty, providing evidence of separate customary norms or the passage of the conventional norms into the realms of custom, is rendered increasingly elusive, for it would appear that only the practice of non-parties to the treaty can be considered as relevant").

[103] See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. l ("This study takes the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question. Consistent practice of States not party has been considered as important positive evidence. Contrary practice of States not party, however, has been considered as important negative evidence. The practice of States party to a treaty *vis-à-vis* States not party is also particularly relevant").

[104] Crawford, "Chance, order, change: the course of international law", pp. 107 and 110. See also Kolb, "Selected problems in the theory of customary international law", pp. 145–146 (suggesting that the paradox is only real when stated in the abstract, as "in concrete cases contextual specificities usually dispel" it); Villiger, *Customary International Law and Treaties*, p. 155.

42. As noted in the Special Rapporteur's second report,[105] although the repetition of similar or identical provisions in a large number of bilateral treaties may give rise to a rule of customary international law or attest to its existence,[106] it does not necessarily do so. Here, too, the provisions (and the treaties in which they are incorporated) need to be analysed in their context and in the light of the circumstances surrounding their adoption. This is particularly so as "[t]he multiplicity of … treaties … is as it were a double-edged weapon":[107]

> [T]he 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 bse evidence of exceptions from general regulations.[108]

43. As was also suggested in the second report,[109] whether the States being considered have indeed signed and/or ratified the treaty,[110] and the ability of parties to make reservations to provisions of the treaty,[111] may also be relevant in assessing the existence of *opinio juris* with respect to the relevant provisions. Again, the particular circumstances surrounding the adoption of the treaty text must be examined carefully, along with the practice corresponding to its content.

44. The following draft conclusion is proposed (to be placed within a new part five, entitled "Particular forms of practice and evidence"):

"*Draft conclusion 12. Treaties*

"A treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question:

"(*a*) at the time when the treaty was concluded, codifies an existing rule of customary international law;

"(*b*) has led to the crystallization of an emerging rule of customary international law; or

"(*c*) has generated a new rule of customary international law, by giving rise to a general practice accepted as law."

B. Resolutions adopted by international organizations and at international conferences

45. It is widely accepted that resolutions adopted by States within international organizations and at

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[105] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 76 (*f*).

[106] See also Thirlway, *International Customary Law and Codification*, p. 59 ("a series of bilateral treaties concluded over a period of time by various States, all consistently adopting the same solution to the same problem of the relationships between them, may give rise to a new rule of customary international law"); *Mondev International Ltd v. United States of America* (see footnote 92 above), para. 125 ("current international law, whose content is shaped by the conclusion of more than 2,000 bilateral investment treaties and many treaties of friendship and commerce").

[107] *Barcelona Traction* (see footnote 40 above), at p. 306, separate opinion of Judge Ammoun.

[108] Wolfke, "Treaties and custom …", p. 36. See also *Ahmadou Sadio Diallo* (footnote 23 above), p. 582, at p. 615 ("The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the [Convention on the Settlement of Investment Disputes between States and Nationals of Other States], 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"); *Legality of the Threat or Use of Nuclear Weapons* (footnote 23 above), at pp. 317–318, dissenting opinion of Vice-President Schwebel ("Why conclude these [multiple] treaties if their essence is already international law …?"); Schachter, "Entangled treaty and custom", p. 732 ("States do not generally regard such standardized treaties as evidence of customary law since in most cases the bilateral agreements are negotiated *quid pro quo* arrangements"); Danilenko, *Law-making in the International Community*, p. 143; Kopelmanas, "Custom as a means of the creation of international law", p. 137; London Statement of Principles (see footnote 84 above), pp. 758–759 ("There is no presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content"); Bishop, "General course of public international law", pp. 229–230.

[109] See footnote 105 above.

[110] See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (footnote 84 above), at p. 38, para. 24 ("[the Court] could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law"); *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, at p. 277 ("The limited number of States which have ratified this Convention reveals the weakness of this argument [according to which the Convention in question has merely codified principles which were already recognized by custom]"); *Yearbook ... 1950*, vol. II, document A/1316, p. 368, para. 29 ("Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law"); 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"); Villiger, *Customary International Law and Treaties*, p. 165 ("unratified instruments do not invariably have detrimental effects [on the underlying rule of customary international law], just as a convention cannot create instant customary law"); *North Sea Continental Shelf* (footnote 18 above), at p. 226, dissenting opinion of Judge Lachs ("Delay in ratification of and accession to multilateral treaties is a well-known phenomenon in contemporary treaty practice … the number of ratifications and accessions cannot, in itself, be considered conclusive with regard to the general acceptance of a given instrument"); Silva, "Treaties as evidence of customary international law", p. 397 ("A nonratified convention will gain in authority in terms of general international law if it was approved by a large majority and received the ratifications of a large and representative number of States. *Contrariu sensu*, such a convention will lose strength if a long period of time lapses and very few States ratify or adhere to it. The importance of non-ratified general conventions will also accrue if it is subsequently supplemented by international practice, especially if the International Court of Justice took into account practice based on their provisions"); Thirlway, *International Customary Law and Codification*, p. 87 ("it must be borne in mind that any assessment of the significance of a ratification of a codifying treaty must be a cautious one, as must any assessment also be of abstentions from ratification").

[111] Guideline 3.1.5.3 of the Commission's Guide to Practice on Reservations to Treaties (2011) reads: "The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision". As the Commission explained in its commentary to this guideline, the International Court of Justice in *North Sea Continental Shelf* was quite circumspect about the deductions called for by the exclusion of certain reservations (para. (4) of the commentary). It was not true, the Commission said, that the Court had affirmed the inadmissibility of reservations in respect of treaty provisions reflecting customary law (para. (5) of the commentary). *Yearbook ... 2011*, vol. II (Part Three).

international conferences may, in certain circumstances, have a role in the formation and identification of customary international law. Indeed, among written texts to which reference is made in practice for the identification of rules of customary international law, such resolutions are accorded considerable importance.

46. In this context, courts and writers have paid special attention to resolutions of the General Assembly, a forum with near universal participation, and much of the present section will deal specifically with them. Such resolutions may be particularly relevant as evidence of or impetus for customary international law.[112] However, other meetings and conferences of States may be important, too.[113] Organs of international organizations[114] and international conferences with more limited membership may have a similar function, but will generally have less weight in evidencing general customary international law; they may, however, have a central role in the formation and identification of particular custom (in this regard, see chap. V below).

47. While such resolutions cannot in and of themselves create customary international law, they "may sometimes have normative value" in providing evidence of existing or emerging law.[115] Caution is required, however, when determining whether a given resolution does indeed do so: "in each case there is a process of articulation, appraisal

[112] Cahin, *La coutume internationale et les organisations internationales*, contains a wealth of learning on the resolutions of international organizations, and on all aspects of the role of international organizations with regard to customary international law. See also Castañeda, *Legal Effects of United Nations Resolutions*; Castañeda, "Valeur juridique des résolutions des Nations Unies"; Forteau, "Organisations internationales et sources du droit"; Cassese, *International Law in a Divided World*, p. 193 ("It stands to reason that the unique opportunity afforded by the [United Nations] for practically all members of the world community to get together and exchange their views cannot fail to have had a strong impact on the emergence or reshaping of customary rules").

[113] For example, the International Court of Justice has referred to the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975, Lausanne, *Imprimeries Réunies*): *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at p. 107, para. 204 ("it can be inferred that the text testifies to the existence … of a customary principle [of non-intervention] which has universal application").

[114] For example, the Security Council: see Corten, "La participation du Conseil de sécurité à l'élaboration, à la cristallisation ou à la consolidation de règles coutumières"; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at pp. 437–438, para. 81; *Tadić* (see footnote 90 above), para. 133 ("Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council"). In Security Council resolution 2125 (2013) on Somalia, paragraph 13, the Security Council underscored that "this resolution shall not be considered as establishing customary international law"; see also, in the same context, paragraph 8 of Security Council resolution 1838 (2008).

[115] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 23 above), at pp. 254–255, para. 70 ("The Court notes that General Assembly resolutions, even if they are not binding, 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*"). General Assembly resolution 3232 (XXIX) of 12 November 1974, which was adopted by consensus, contains the following provision: "*Recognizing* that the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice". See also *Legal Consequences for States* (footnote 40 above), at p. 31, and *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at pp. 31–33 (referring to the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960) as a "further important stage" in the development of international law concerning non-self-governing territories); *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at p. 103, para. 195 ("This description, contained in … the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law"); *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic,* ILR, vol. 62 (1982), p. 189 ("the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion"); resolutions and conclusions of the Thirteenth Commission on the elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective, Institute of International Law, *Yearbook*, vol. 62 (1987), Session of Cairo (1987), Part II, p. 66, conclusion 1 ("Although the Charter of the United Nations does not confer on the General Assembly the power to enact rules binding on States in their relations *inter se*, this organ can nevertheless make recommendations encouraging the progressive development of international law and its codification. This power is exercised through a variety of resolutions"); Abi-Saab, "La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté", pp. 53 and 56 ("*à l'heure actuelle la très grande majorité de la doctrine est d'avis que les résolutions normatives de l'Assemblée générale peuvent susciter les mêmes modes d'interaction avec la coutume que ceux que la Cour a identifié par rapport aux traités de codification, c'est-à-dire qu'elles peuvent produire les mêmes effets potentiels que ceux-ci, déclaratoires, cristallisants ou générateurs de règles coutumières*" ["at the present time, the overwhelming majority of the doctrine is of the opinion that the normative resolutions of the General Assembly may give rise to the same modes of interaction with custom as those identified by the Court in relation to codification treaties, i.e. they may produce the same potential effects as the latter, declaring, crystallizing or generating customary rules"]); Barberis, "Les résolutions des organisations internationales en tant que source du droit des gens", pp. 22–23 ("*l'Assemblée générale de l'O.N.U. est dépourvue, en général, du pouvoir de formuler des résolutions liant juridiquement les Etats [M]embres selon la Charte, et … elle n'a pas pu davantage acquérir cette faculté par la voie coutumière. Néanmoins, il est indubitable que les résolutions de l'Assemblée générale constituent un facteur important dans la formation de la coutume.*" ["the General Assembly of the United Nations is, in general, without the power to formulate resolutions that are legally binding on [M]ember States under the Charter, nor has it been able to acquire this power through customary channels. Nevertheless, there is no doubt that the resolutions of the General Assembly are an important factor in the formation of custom."]); Rosenne, *Practice and Methods of International Law, 1920–2005*, p. 111 ("Resolutions adopted by organs of intergovernmental organizations are today to be included in the general storehouse of international materials for which the … lawyer must have regard"); Thirlway, *International Customary Law and Codification*, p. 44 ("There can be no doubt that such [declaratory General Assembly] resolutions do have an important contribution to make to the development of international law … but this does not … give them a legislative character"); Tomuschat, "The concluding documents of world order conferences", pp. 567–568 and 563 ("International conferences do not qualify as law-making bodies. When governments draft a text summarizing the results of a conference, they generally do not act with the intention to create binding law. Rather, their aim is to indicate a political course of action to be pursued in the future … Even if agreement is reached in a final document, binding legal effects come into being solely if so wished by the parties concerned. Indeed, if governments intend to enter into a legal commitment, they always have the possibility to opt for an unequivocal treaty instrument … Nonetheless, it would be shortsighted to dismiss the outcome of all of these gatherings, to the extent that they have not materialized in binding legal instruments in the traditional sense, as pure political rhetoric not being susceptible of producing legal effects" (on "disclaimers and reservations", see also pp. 568–580)); Weil, "Towards relative normativity in international law?", p. 417 ("Resolutions, as the sociological and political expression of trends, intentions, wishes, may well constitute an important *stage* in the process of elaborating international norms; in themselves, however, they do not constitute the formal *source* of new norms").

and assessment".[116] Importantly, "[a]s with any declaration by a state, it is always necessary to consider what states actually mean when they vote for or against certain resolutions in international fora".[117] As States themselves often stress, the General Assembly is a political organ in which it is often far from clear that their acts carry juridical significance.[118] Establishing whether a given resolution has such normative value is thus a task to be carried out "with all due caution".[119] As the International Court of Justice has explained:

> [I]t 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. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[120]

48. In such an assessment, the particular wording used in a given resolution is of critical importance: "as with State practice, the content of the particular decision and the extent to which legal matters were considered must be examined before legal weight is ascribed".[121] Resolutions drafted "in normative language"[122] are those that may be of relevance, and the choice (or avoidance) of particular terms may be significant. The nature of the language used in the resolution "is said to illuminate the *intent* of the Member States as to the legal significance of the resolution".[123]

[116] Crawford, "Chance, order, change: the course of international law", pp. 112 and 90. See also Boyle and Chinkin, *The Making of International Law*, p. 225 ("Resolutions of international organizations and multilateral declarations by States may also have effects on customary international law. Whether … [they do] will depend on various factors which must be assessed in each case"); Treves, "Customary international law", at paras. 44–46.

[117] Boas, *Public International Law: Contemporary Principles and Perspectives*, p. 88. See also Shaw, *International Law*, p. 63.

[118] See also Divac Öberg, "The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ", p. 902 ("The [General Assembly] has the attractive quality of being very broadly representative of the existing States, as well as constituting a centralized, highly convenient means of simultaneously identifying the points of view of all present Member States on a specific topic. However, the [General Assembly] is also a political organ, which does not make it an ideal forum for establishing the law. States may indeed have reasons other than legal ones for voting the way they do, such as moral, political, or pragmatic (for instance, as part of a bargain deal). Moreover, a State may vote against a resolution because it finds that it goes too far, or not far enough. Besides, it is hardly fair to bind a State to a favourable vote, when States 'act within certain rules and mechanisms that normally affect the legal meaning of their votes' and when resolutions are imputed not to individual members but to the adopting body and organization. Finally, the State representatives who vote in the Assembly usually do not have the power to legally commit their States"); Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, pp. 434–435 ("Do we have the right to assume that a positive vote reflects the State's views about the law? This is quite uncertain. The vote may have been given as a political gesture, a confirmation of an alliance, for example, and wholly unrelated to what the State regards as custom. It may also have been given due to pressure exerted by a powerful State or in order to embarrass one's adversary. In neither case does it "reflect" any *opinio juris* in the State concerned. Moreover … it is possible (and frequent) to interpret [United Nations] decision-making in the light of the assumption—evidenced by the lack of full powers of State representatives—that it is non-binding"); Kirchner, "Thoughts about a methodology of customary international law", p. 235 ("We have to keep in mind that resolutions by their nature generally do not create legal obligations. States which do not use the form of a treaty, presumably, do not want to be bound at all").

[119] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 18 above), at pp. 99–100, para. 188.

[120] *Legality of the Threat or Use of Nuclear Weapons* (footnote 23 above), at p. 255, para. 70. See also Higgins, *Problems and Process: International Law and How We Use It*, p. 28 ("As with much of international law, there is no easy answer to the question: What is the role of resolutions of international organizations in the process of creating norms in the international system? To answer the question we need to look at the subject-matter of the resolutions in question, at whether they are binding or recommendatory, at the majorities supporting their adoption, at repeated practice in relation to them, at evidence of *opinio juris*. When we shake the kaleidoscope and the pattern falls in certain ways, they undoubtedly play a significant role in creating norms"); Sloan, "General Assembly resolutions revisited (forty years later)", p. 138 ("Many or all of the foregoing factors, in a mix appropriate for each resolution, may be taken into account in considering the various effects or weight to be given to a particular resolution. The factors may not be of equal relevance or importance with respect to different effects such as effectiveness, general acceptability as an interpretation, declaratory effect or binding force. Their significance may vary with individual resolutions"); Brownlie, "Presentation", p. 69 ("[*S*]*ome* General Assembly resolutions, not General Assembly resolutions in general, but *some* General Assembly resolutions, are important evidence of the state of general international law. The text of the resolution and the debates leading up to the resolution, the explanation of the votes by delegations, are all evidence, but no more than that, of the state of international law. When I say evidence I do not necessarily mean to say evidence that is favourable, or positive. Thus the evidence may reveal such differences of opinion on various aspects of the resolution that, viewed in terms of the criteria of customary international law, it suggests that we are still some distance away from customary international law-forming on a given subject"); Economidès, "Les actes institutionnels internationaux et les sources du droit international", p. 144 ("*si les conditions précitées sont réunies (contenu normatif, grande majorité etc.), ces résolutions peuvent évoluer en règles coutumières, à condition toutefois que les Etats les appliquent réellement dans les faits, ce qui est toujours indispensable à la création d'une coutume*" ["if the above-mentioned conditions are met (normative content, large majority, etc.), these resolutions may evolve into customary rules, provided, however, that the States actually apply them in practice, which is still indispensable for the creation of custom"]); Thirlway, *International Customary Law and Codification*, p. 65 ("It is essential to consider each possible type of resolution, if not each resolution on its merits, since the relative weight of the resolution itself and of the positions of Member States will vary according to the form and subject matter of the resolution in question").

[121] Crawford, *Brownlie's Principles of Public International Law*, pp. 194–195. See, for example, *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at pp. 102–103, para. 193; *Legality of the Threat or Use of Nuclear Weapons* (footnote 23 above), at p. 255, para. 72. See also Barberis, "Les résolutions des organisations internationales en tant que source du droit des gens", p. 34 ("*[N]'ont pas de caractère prescriptif les résolutions qui formulent des recommandations, émettent des vœux, incitent à adopter une conduite déterminée, sollicitent une collaboration, invitent à prendre certaines mésures ou emploient des expressions semblables. Les résolutions qui utilisent ce vocabulaire ne confèrent aucun droit et n'imposent aucune obligation sur le plan juridique; elles se bornent à contenir une recommandation ou une invitation, ce qui n'entre pas dans la sphère normative*" ["[R]esolutions that make recommendations, express wishes, call for specific conduct, request cooperation, invite action or use similar language are not prescriptive. Resolutions using this language do not confer any legal rights or obligations; they merely contain a recommendation or invitation, which is not normative."]).

[122] Tomka, "Custom and the International Court of Justice", p. 198. See also resolutions and conclusions of the Thirteenth Commission on the elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective, Institute of International Law (see footnote 115 above), p. 68, conclusion 10 ("The language and context of a resolution help to determine its normative purport. References to international law or equivalent phrases, or express omission of such formulations … are relevant but not in themselves determinative"); Boyle and Chinkin, *The Making of International Law*, p. 225 ("A law-making resolution or declaration need not necessarily proclaim rights or principles as law, but as with treaties, the wording must be 'of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law" (citing to the *North Sea Continental Shelf* cases)).

[123] Prost and Clark, "Unity, diversity and the fragmentation of international law: how much does the multiplication of international organizations really matter?", p. 362.

49. Also important in this regard are the circumstances surrounding the adoption of the resolution in question. These include, in particular, the method employed for adopting the resolution; the voting figures (where applicable); and the reasons provided by States for their position (for example, while negotiating the resolution or in an explanation of position, an explanation of vote, or another kind of statement). Clearly:

[T]he degree of support is significant. A resolution adopted by consensus or by unanimous vote will necessarily carry more weight than one supported only by a two-thirds majority of States. Resolutions opposed by even a small number of States may have little effect if those States are among the ones most immediately affected.[124]

50. In any event, as Higgins has put it:

[O]ne must take care not to use General Assembly resolutions as a short cut to ascertaining international practice in its entirety on a matter—practice in the larger world arena is still the relevant canvas, although [United Nations] resolutions are part of the picture. Resolutions cannot be a *substitute* for ascertaining custom; this task will continue to require that other evidences of State practice be examined alongside those collective acts evidenced in General Assembly resolutions.[125]

51. In cases where a resolution purports to declare the law (rather than seeks to advance a new rule, although in practice such a distinction is not always easy to make[126]), such resolutions (even if termed "declarations"[127]) do not constitute conclusive evidence and have to be carefully assessed. First, only in some circumstances, as suggested above, may the consent of States to the text "be understood as an acceptance of the validity of the rule or set of rules declared by the resolution".[128] Second, the rule concerned must also be observed in the practice of States.[129]

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[124] Boyle and Chinkin, *The Making of International Law*, p. 226 (adding that "even consensus adoption will not be as significant as it may at first appear if accompanied by statements which seriously qualify what has been agreed, or if it simply papers over an agreement to disagree without pressing matters to a vote"). See also *Legality of the Threat or Use of Nuclear Weapons* (footnote 23 above), at p. 255, para. 71 ("several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons"); Divac Öberg, "The legal effects of resolutions", pp. 900–901 ("Large majorities are thus crucial … It is [also] reasonable that those States which are actually engaged in a certain activity have a strong say in how the activity is regulated … [also relevant is] the mode of adoption of the resolution"); Akehurst, "Custom as a source of international law", pp. 6–7.

[125] Higgins, *Problems and Process*, p. 28.

[126] See also Divac Öberg, "The legal effects of resolutions", p. 896 ("Granted, in practice it can be hard to draw the line between what, on the one hand, is merely interpretive or declaratory and what, on the other hand, is truly creative").

[127] See also memorandum of the Office of Legal Affairs, document E/CN.4/L.610, para. 4 ("A 'declaration' or a 'recommendation' is adopted by resolution of a United Nations organ. As such it cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a 'declaration' rather than a 'recommendation' … However in view of the greater solemnity and significance of a 'declaration,' it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States"); Suy, "Innovation in international law-making processes", p. 190 ("The General Assembly's authority is limited to the adoption of resolutions. These are mere recommendations having no legally binding force for Member States. Solemn declarations adopted either unanimously or by consensus have no different status, although their moral and political impact will be an important factor in guiding national policies. Declarations frequently contain references to existing rules of international law. They do not create, but merely restate and endorse them. Other principles contained in such declarations may appear to be new statements of legal rules. But the mere fact that they are adopted does not confer on them any specific and automatic authority … The General Assembly, through its solemn declarations, can therefore give an important impetus to the emergence of new rules, despite the fact that the adoption of declarations per se does not give them the quality of binding norms"); *Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment (see footnote 65 above), para. 194 ("The 1975 Declaration on Torture is a non-binding General Assembly resolution and thus more evidence is required to find that the definition of torture found therein reflected customary international law at the relevant time").

[128] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 18 above), at p. 100, para. 188 ("The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves"). See also p. 184, separate opinion of Judge Ago ("There are … 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"); Detter, "The effect of resolutions of international organizations", p. 387 ("An overwhelming vote of the General Assembly may be an indication that a legal rule exists but it is no conclusive proof: all situations must be examined on their merit. If the recommendations in these cases reflect already existing law it is, naturally, not recommendations which are binding in these cases, by their own force: they are binding by the underlying source of obligation in treaties or in customary law"); Schachter, "Entangled treaty and custom", p. 730 ("Support for law-declaring resolutions in the [United Nations] General Assembly 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. Other factors may be involved"); Gaja, "The protection of general interests in the international community", p. 40 ("a resolution declaring the existence of a certain principle or rule of international law may be taken as an expression of the *opinio juris* of the quasi-totality of States: those which voted in favour or accepted the resolution by consensus. However, one reason for hesitating to give weight to such a resolution as an expression of *opinio juris* is that the resolution is often accepted as 'only a statement of political intention and not a formulation of law', as the United States Government put it when explaining its vote in favour of the resolution on non-intervention"); *Restatement of the Law Third, Restatement of the Law, The Foreign Relations Law of the United States*, vol. 1, § 103, comment *c* ("International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the States voting for it regard the law to be. The evidentiary value of such resolutions is variable. Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight").

[129] See also Bernhardt, "Custom and treaty in the law of the sea", p. 267 ("it must be admitted that verbal declarations cannot create customary rules if the real practice is different"); Schwebel, "United Nations resolutions, recent arbitral awards and customary international law", p. 210 ("To be declaratory is to be reflective of the perceptions and practice of the international community as a whole; if the mirror is broken, its reflection cannot be unbroken. Not only is virtual unanimity or, in the least, the purposeful support of all groups, required; conformity with the practice of States also is required, if what is declared to be the existing law is to be an accurate declaration of what actually exists. The General Assembly, not being endowed with legislative powers, cannot make or unmake the law simply by saying so (even unanimously and repeatedly). The States which come together in the General Assembly can only declare the law when they exceptionally mean to declare it and when they do so in conformity with the practice of States which underlies the law").

52. Resolutions may also "exert a strong influence on the development of international customary law".[130] This is the case when a resolution provides impetus for the growth of a general practice accepted as law in conformity with its text. Put differently, "[t]he resolution may provide a text about which the positions of States may coalesce, and here a hortatory effect may be relevant in influencing State conduct".[131] Similarly, a resolution may consolidate an emerging rule of customary international law.[132]

53. The General Assembly has recommendatory powers, and its resolutions are not binding as such.[133] As described above, such resolutions may very well play a significant part in the formation and identification of rules of customary international law;[134] they cannot, however, of themselves and *ipso facto* create customary international law. This reflects not only the terms of the Charter of the United Nations, but also the basic requirement for a general practice (accepted as law), in order for a rule of customary international law to emerge (or be ascertained):

> The most one could say [of General Assembly resolutions] is that overwhelming (or even unanimous) approval is an indication of *opinio juris sive necessitatis*; but this does not create law without any concomitant practice, and that practice will not be brought about until States modify their national policies and legislation.[135]

[130] Danilenko, "The theory of international customary law", p. 25.

[131] Sloan, "General Assembly resolutions revisited (forty years later)", p. 70. See also Supreme Court of El Salvador, Case No. 26-2006 (12 March 2007), pp. 14–15 ("[I]nternational declarations perform an indirect normative function, in the sense that they propose a non-binding but desirable conduct. … Declarations anticipate an *opinio juris* (a sense of obligation) which States must adhere to with a view to crystallizing an international custom in the medium or long term … [i]nternational declarations, even if not binding, contribute significantly to the formation of binding sources of international law, whether by anticipating the binding character of a certain State practice, or by promoting the conclusion of a treaty based on certain recommendations [included in such declarations]"); German Constitutional Court, Order of the Second Senate of 8 May 2007, 2 BvM 1-5/03, 1, 2/06, para. 39 ("The document [the draft articles on on responsibility of States for internationally wrongful acts of the Commission] was accepted by the United Nations General Assembly on 12 December 2001. This, however, leads neither *eo ipso* to customary-law application, nor to legally binding application for another reason, but may serve as an indication of a legal conviction as is necessary to form customary law"); *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. 406, dissenting opinion of Judge Sir Geoffrey Palmer ("It can confidently be stated that some of those principles stated in the Declaration [of the United Nations Conference on the Human Environment (the Stockholm Declaration)] have received such widespread support in State practice coupled with a sense on the part of States that they are legally binding that they have by now entered into the framework of customary international law"); resolutions and conclusions of the Thirteenth Commission on the elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective, Institute of International Law (see footnote 115 above), pp. 66 and 70, conclusions 1 and 23 ("Principles and rules proclaimed in the resolution can, initiate, influence or determine State practice that constitutes an ingredient of new customary law. A resolution can contribute to the consolidation of State practice … [or] to the formation of the *opinio juris communis*").

[132] See also Thirlway, *International Customary Law and Codification*, p. 70 ("It can certainly be accepted that a General Assembly resolution may contribute to the crystallization process, and that the existence of such a resolution declaring, or purporting to declare, the law will require only comparatively slight evidence of actual practice to support the conclusion that the rule in question has passed into general customary law. Nevertheless it must be emphasized that the Assembly cannot change the law or create new law … The idea of law being *created* by a General Assembly resolution is … inappropriate except in certain limited fields linked with the Charter"); resolutions and conclusions of the Thirteenth Commission on the elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective, Institute of International Law (see footnote 115 above), p. 69, conclusion 14 ("In situations where a rule of customary law is emerging from State practice or where there is still doubt whether a norm, though already applied by an organ or by some States, is one of law, a unanimously adopted resolution may consolidate a custom or remove doubts that might have existed").

[133] Except for budgetary and other matters internal to the United Nations. See also, for example, Schwebel, "The effect of resolutions of the U.N. General Assembly on customary international law", p. 301 ("It is trite but no less true that the General Assembly of the United Nations lacks legislative powers. Its resolutions are not, generally speaking, binding on the States Members of the United Nations or binding in international law at large. It could hardly be otherwise. We do not have a world legislature … not a phrase of the Charter suggests that it is empowered to enact or alter international law").

[134] But see *Western Sahara* (footnote 115 above), 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"); Cheng, "United Nations resolutions on outer space: 'instant' international customary law?", p. 37 ("there is no reason why an *opinio juris communis* may not grow up in a very short period of time among all or simply some Members of the United Nations with the result that a new rule of international customary law comes into being among them. And there is also no reason why they may not use an Assembly resolution to 'positivize' their new common *opinio juris*"); London Statement of Principles (see footnote 84 above), p. 772 ("Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption"); Lockwood, "Report on the trial of mercenaries: Luganda, Angola", pp. 195–197; Wolfrum, "Sources of international law", para. 43 ("repeated General Assembly resolutions adopted by consensus or unanimously may be considered State practice, thus establishing new customary international law").

[135] Suy, "Innovation in international law-making processes", p. 190. See also *South West Africa, Second Phase* (footnote 55 above), at pp. 169–170, separate opinion of Judge Van Wyk ("Applicants did not seek to apply the traditional rules regarding the generation of customary law. On the contrary Applicants' contention involved the novel proposition that the organs of the United Nations possessed some sort of legislative competence whereby they could bind a dissenting minority. It is clear from the provisions of the Charter that no such competence exists, and in my view it would be entirely wrong to import it under the guise of a novel and untenable interpretation of Article 38 (1) (*b*) of the Statute of this Court"); Buergenthal and Murphy, *Public International Law in a Nutshell*, p. 36 ("[h]ow States vote and what they say in international organizations is a form of State practice. Its significance in the law–making process depends upon the extent to which this State practice is consistent with the contemporaneous conduct and pronouncements of States in other contexts"); Tomka, "Custom and the International Court of Justice", p. 211 ("The resolution does not have any legal force of its own, and it must be considered whether there is indeed a general view, held by States, that the resolution expresses a binding rule of international law, such that instances of State practice in accordance with that rule could be said to be motivated by that rule"); Divac Öberg, "The legal effects of resolutions", p. 904 ("Because the resolutions only inform the *opinio juris*, while the practice element of customary law is, in current ICJ jurisprudence, extraneous, the resolutions do not have any actual and autonomous substantive effects. Their effects are, one may say, *pre-substantive*, laying the ground for a real substantive effect if the missing element is provided"); De Visscher, "Observations sur les résolutions déclaratives de droit adoptées au sein de l'Assemblée générale de l'Organisation des Nations Unies", p. 182 ("*Certes, les votes, même unanimes et répétés, de telles résolutions ne constitueront jamais la pratique interétatique qui est l'élément premier de toute coutume. Ces votes peuvent toutefois, quant à la genèse même d'une coutume, en constituer l'élément subjectif c'est-à-dire l'*opinio juris *ou la conviction de la juridicité de la norme. C'est ce que l'on désigne habituellement en parlant de consolidation ou de cristallisation d'une coutume en voie de formation. En outre, de tels votes fournissent un élément de preuve persuasif de l'existence d'une coutume contestée*" ["Admittedly, voting, even unanimous and repeated, of such resolutions will never constitute the inter-State practice that is the primary element of any custom. However, these votes may constitute the

In other words,

[t]he resolution does not have any legal force of its own, and it must be considered whether there is indeed a general view, held by States, that the resolution expresses a binding rule of international law, such that instances of State practice in accordance with that rule could be said to be motivated by that rule.[136]

Repetitive pronouncements in consecutive resolutions are no different in this regard.[137]

54. The following draft conclusion is proposed for inclusion in the new part five:

"*Draft conclusion 13. Resolutions of international organizations and conferences*

"Resolutions adopted by international organizations or at international conferences may, in some circumstances, be evidence of customary international law or contribute to its development; they cannot, in and of themselves, constitute it."

subjective element of the very genesis of a custom, i.e. the *opinio juris* or conviction of the legality of the norm. This is what is usually referred to as the consolidation or crystallization of a custom in the process of formation. In addition, such votes provide persuasive evidence of the existence of a contested custom."]); Weisburd, "The International Court of Justice and the concept of State practice", p. 363 ("There is a further problem beyond that presented by the knowledge of States and their representatives that General Assembly resolutions have no legal effect—one of logic … [A] vote for a resolution can indicate *opinio juris* only if it commits the voting State to the proposition that whatever rule the resolution asserts is legally binding. But if the vote is non-binding, it is unclear how it can commit the State to anything"); Mendelson, "The International Court of Justice and the sources of international law", p. 87 ("[A]lthough it is at any rate arguable that making a statement or casting a vote in the Assembly is a (weak) form of practice, to treat the same action as both practice and *opinio juris* seems, as already pointed out, to be a form of double counting, impermissible not only because of its inconsistency with the Court's identification of two separate elements of customary law, but also because the consequence would be 'instant (customary) law'. This is something that was not intended by the drafters of the Charter, and which, even today, States in general show no signs of welcoming").

[136] Tomka, "Custom and the International Court of Justice", p. 211 (adding that "[i]n the end, it is the 'general practice accepted as law' that constitutes the source of custom, but determining that States accept a certain General Assembly resolution as normative will be important evidence implying that concordant practice is accepted as law"). See also MacGibbon, "Means for the identification of international law", p. 22 ("The role of the resolution is … no more than indirect. It may initiate future practice; it may clarify or confirm past or present practice; it is part of the law-making process, but it is not in itself law-creative. The law-making or binding effect arises from the combination of the relevant practice and the *opinio juris*"); Dupuy, "Théorie des sources et coutume en droit international contemporain", pp. 67–68 ("*l'assentiment étatique au caractère juridiquement liant de ces règles [des déclarations de l'Assemblée générale] sera toujours nécessaire sous une forme ou sous une autre, qu'il s'agisse d'une déclaration formelle en sa faveur, d'une pratique effective attestant la conviction de son auteur, ou d'un silence tôt ou tard considéré comme approbateur*") ["State assent to the legally binding nature of these rules (of General Assembly declarations) will always be required in one form or another, whether it be a formal declaration in its favour, actual practice attesting to the conviction of its originator or silence that is sooner or later taken to be approval"].

[137] See also MacGibbon, "Means for the identification of international law", p. 17 ("Indeed the absence of any new conventional or customary rule of international law conferring on the General Assembly the law-making capacity which it presently lacks seems bound to defeat any attempt to ascribe legally binding effect either to a single General Assembly resolution *per se* or to a series or succession of such resolutions, however numerous. A recommendation is not translated into a legal obligation simply by being re-affirmed or re-cited, no matter how many times … Mere repetition works no magical change in the legal nature of a resolution"); *Legality of the Threat or Use of Nuclear Weapons* (footnote 23 above), at p. 532, dissenting opinion of Judge Weeramantry ("The declarations of the world community's principal representative organ, the General Assembly, may not themselves make law, but when repeated in a stream of resolutions, as often and as definitively … provide important reinforcement … [to a view whether something is legal or not] … under customary international law"); *Nuclear Tests (Australia v. France)* (footnote 69 above), at pp. 435–436, dissenting opinion of Judge 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 law now embraces a prohibition on the testing of nuclear weapons"). But see *South West Africa, Second Phase* (footnote 55 above), 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 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").

Chapter IV

Judicial decisions and writings

55. Judicial decisions and the teachings of publicists (writings) are subsidiary means for the determination of rules of international law (Art. 38, para. 1 (*d*), of the Statute of the International Court of Justice). As such, they are potentially relevant in respect of all the formal sources of international law, and this is especially so for customary international law.[138]

56. Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

…

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

57. The practical importance of judicial pronouncements and the writings of publicists for the identification of rules of customary international law was highlighted in the Secretariat memorandum, which noted that "the Commission has on many occasions considered judicial pronouncements and writings of publicists in its analysis of customary international law".[139] The memorandum

[138] And for general principles of law within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. These are a source of law distinct from customary international law, and as such are beyond the scope of the present topic. When accompanied by practice and *opinio juris* they may crystallize into rules of customary international law (Waldock: "there will always be a tendency for a general principle of national law recognised in international law to crystallise into customary law" ("General course on public international law", p. 62)). They may thus be viewed as a "transitory" source, in the sense that their repeated use at the international level may transform them into rules of customary international law: Pellet, "L'adaptation du droit international aux besoins changeants de la société internationale", p. 26.

[139] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/659, para. 30.

included five "observations" referring to these matters, with examples.[140]

A. Judicial decisions[141]

58. Decisions[142] of national courts may play a dual role in relation to customary international law: not only as State practice,[143] but also as a means for the determination of rules of customary international law.[144] In the latter capacity, they have to be approached with particular caution, since "national courts consider international law differently from international courts".[145]

59. While the decisions of international courts and tribunals as to the existence of rules of customary international law and their content are not "practice", they do serve an important role as "subsidiary means for the determination of rules of law".[146]

60. There is no doctrine of *stare decisis* in international law.[147] The decisions of international courts and tribunals cannot be said to be conclusive for the identification of rules of customary international law. Their weight varies depending on the quality of the reasoning, the composition of the court or tribunal, and the size of the majority by which they were adopted. In addition, it needs to be borne in mind that customary international law may have developed since the date of the particular decision.[148] Nevertheless, judicial pronouncements, especially of the International Court of Justice and of specialist tribunals, such as the International Tribunal for the Law of the Sea, are often seen

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[140] *Ibid.*, paras. 12 and 30–33. Observations 1 and 15–18 read:

"*Observation 1*

"To identify the existence of a rule of customary international law, the Commission has frequently engaged in a survey of all available evidence of the general practice of States, as well as their attitudes or positions, often in conjunction with the decisions of international courts and tribunals, and the writings of jurists."

"*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."

"*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."

"*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."

"*Observation 18*

"The writings and opinions of jurists have often been considered by the Commission in the identification of rules of customary international law."

[141] See Lauterpacht, "Decisions of municipal courts as a source of international law", p. 65; Lauterpacht, *The Development of International Law by the International Court*; Parry, *The Sources and Evidences of International Law*, pp. 91−103; Jennings, "The judiciary, national and international, and the development of international law", pp. ix−xiii; Jennings "Reflections on the subsidiary means for the determination of rules of law"; Jennings and Watts, *Oppenheim's International Law*, pp. 41−42; Rosenne, *The Law and Practice of the International Court 2000*, pp. 1552−1558; Daillier, Forteau, and Pellet, *Droit International Public*, paras. 259−260; Pellet, "Article 38", pp. 854–868, paras. 306–334; Crawford, *Brownlie's Principles of Public International Law*, pp. 37−42; Thirlway, *The Law and Procedure of the International Court of Justice*, pp. 247−252 and 1206−1210; Díez de Velasco Vallejo, *Instituciones de derecho internacional público*, pp. 127−131; Shaw, *International Law*, pp. 78−80.

[142] The term "decisions" in this context includes advisory opinions and orders in incidental proceedings. While international courts and tribunals are often organs of international organizations, their decisions are better viewed as subsidiary means for determining rules of law rather than as contribution as "practice" of the organization.

[143] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 41 (*e*). See also Gattini, "Le rôle du juge international et du juge national et la coutume internationale".

[144] This is sometimes questioned, but it is difficult to see why the decisions of national courts, in which questions of international law frequently arise, should be excluded from the term "judicial decisions" in Article 38, para. 1 (*d*). There is no reason to suppose that the drafters of the Statute intended such a result.

[145] Christopher Greenwood, "The contribution of national courts to the development of international law", Annual Grotius Lecture, London, 4 February 2014, summary available from www.biicl.org/documents/159_annual_grotius_lecture_2014_summary.pdf. For two recent studies of national courts, see Reinisch and Bachmayer, "Customary international law in Austrian courts"; and Pellet and Miron, *Les grandes décisions de la jurisprudence française de droit international public*.

[146] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 46; but see Bernhardt, "Custom and treaty in the law of the sea", p. 270 ("As is well known, Article 38 of the International Court's Statute mentions among the sources of international law judicial decisions, but only 'as subsidiary means for the determination of rules of law'. This formula underestimates the role of decisions of international courts in the norm-creating process. Convincingly elaborated 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"). In any event, decisions of international courts and tribunals and writings may be also secondary sources for identifying State practice: see *Yearbook ... 2013*, vol. II (Part One)., document A/CN.4/659, observation 17 and para. 33. See also Barberis, "Réflexions sur la coutume internationale", p. 34 ("*Le droit coutumier peut également être créé par le biais des décisions des tribunaux internationaux. Ainsi, on a considéré que la règle selon laquelle une Partie ne peut opposer à une autre le fait de n'avoir pas rempli une obligation ou de ne pas s'être servie d'un recours judiciaire si la première, par un acte contraire au droit, a empêché cette dernière de remplir l'obligation ou d'avoir recours à la juridiction, est 'un principe généralement reconnu par la jurisprudence arbitrale internationale'. Les règles principales qui constituent les bases de la procédure arbitrale ont été établies par la pratique des tribunaux arbitraux. Dans ce sens, on peut citer en premier lieu la norme selon laquelle tout juge est juge de sa propre compétence. Cette norme, connue généralement sous le nom de 'règle de la compétence de la compétence', tire son origine des sentences arbitrales ... La norme qui accorde à un tribunal la faculté d'édicter des mesures conservatoires relève aujourd'hui du droit coutumier et a été créée par la jurisprudence internationale. De même, certaines règles d'interprétation ont la même origine et, à titre d'exemple, on peut mentionner la règle de l'effet utile*" ["Customary law can also be created through the decisions of international tribunals. For example, it has been considered that the rule that a Party may not rely on the failure of another Party to fulfil an obligation or to avail itself of a judicial remedy if the former, by an act contrary to law, has prevented the latter from fulfilling the obligation or from availing itself of the remedy, is 'a principle generally recognized by international arbitral jurisprudence'. The main rules that form the basis of arbitral proceedings have been established by the practice of arbitral tribunals. In this sense, one can cite in the first place the norm according to which every judge is the judge of his own competence. This norm, generally known as the "rule of jurisdiction of jurisdiction", has its origin in arbitral awards … The norm that grants a tribunal the power to issue provisional measures is now customary law and has been created by international jurisprudence. Likewise, certain rules of interpretation have the same origin and, by way of example, one may mention the rule of *effet utile*"]).

[147] See Acquaviva and Pocar, "*Stare decicis*".

[148] See also Green, *The International Court of Justice and Self-Defence in International Law*, p. 25 ("there exists a danger for States and scholars in perceiving judgments [of international courts and tribunals] as an expression of international law, when in fact any judgment represents at best a 'freeze-frame' of that law").

as authoritative.[149] The same is true of certain arbitral awards.[150]

61. Examples of reliance upon judicial decisions for the identification of rules of customary international law are legion. The International Court of Justice frequently relies on its own previous decisions or those of its predecessor, the Permanent Court of International Justice. Indeed, it seems very reluctant to depart from its previous decisions.

B. Writings[151]

62. It is sometimes suggested that writings were particularly important for the systematization and even for the development of the law of nations in centuries past.[152] Their role is now seen as perhaps less prominent, but, depending largely on their quality, they remain a useful source of information and analysis for application to the identification of rules of customary international law.

63. The role of "the teachings of the most highly qualified publicists of the various nations"[153] as a subsidiary means for the determination of rules of law was well captured in the oft-cited words of Mr. Justice Gray in *The Paquete Habana* case: "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[154]

64. The views of authors must be considered while bearing in mind various factors, such as the extent to which they seek to reflect the positions of particular States or groups of States, what approach they have adopted with respect to the identification of customary international law, and whether they are seeking to promote a particular viewpoint or to formulate proposals for new rules of law.[155]

65. Among writings, special importance may be attached to collective works, in particular the texts and commentaries emerging from the work of the Commission,[156] but also to those of private bodies such as the Institute of International Law and the International Law Association. As with all writings, however, it is important, if not always easy, to distinguish between those that are intended to reflect existing law (codification, or *lex lata*) and those that are put forward as embodying progressive development (or *lex ferenda*). As has been said in connection with the Commission's articles on the responsibility of international organizations:[157] "[C]ourts and others should approach the articles…with a degree of circumspection. They should … weigh the evidence when determining the status of particular provisions within the draft."[158]

66. Examples of explicit reliance upon the writings of individual authors (as opposed to those of the Commission and certain other collective works) remain very rare in the case law of the International Court of Justice.[159] This does not necessarily mean that those writings are unimportant, and in fact they are often found in separate

[149] See also Crawford, "The identification and development of customary international law", keynote speech, Spring Conference of the International Law Association, British Branch, 23 May 2014 (Even if the Court's judgments have a binding effect only between the parties involved, and are merely "subsidiary means for the determination of rules of law", in practice they are treated as "authoritative pronouncements of the current state of international law". This is evident in State practice in response to the Court's decisions regarding customary international law. After *Nicaragua*, the customary character of common articles 1 and 3 of the 1949 Geneva Conventions is 'now taken for granted and almost never questioned". It is also apparent in the influence the Court exerts over other international courts and tribunals).

[150] There are various collections of arbitral awards, most notably the important United Nations publication, *Reports of International Arbitral Awards* (UNRIAA).

[151] See Schwarzenberger, "The province of doctrine of international law"; François, "L'influence de la doctrine des publicistes sur le développement du droit international"; Parry, *The Sources and Evidences of International Law*, pp. 103−108; Münch, "Zur Aufgabe der Lehre im Völkerrecht"; Lachs, "Teachings and teaching of international law"; Oraison, "Réflexions sur 'la doctrine des publicistes les plus qualifiés des différentes nations' "; Rosenne, *The Law and Practice of the International Court*, pp. 1558−1560; Pellet, "Article 38", pp. 868–870, paras. 335−339; Wood, "Teachings of the most highly qualified publicists (Art. 38 (1) ICJ Statute)"; Daillier, Forteau and Pellet, *Droit international public*, paras. 256−258; Díez de Velasco Vallejo, *Instituciones de derecho internacional público*, p. 131; Thirlway, *The Sources of International Law*, pp. 126−128; Shaw, *International Law*, pp. 80−81.

[152] Greig suggests that "before there existed any great wealth of State practice or judicial precedent, writers on international law held a pre-eminent position", Greig, *International Law*, p. 40.

[153] They are often referred to simply as "writings" or "the literature" (*doctrine* in French).

[154] *The Paquete Habana and The Lola*, United States Supreme Court [8 January 1900], 175 U.S. 677, at p. 700. Chief Justice Fuller, dissenting, warned of writers that "[t]heir lucubrations may be persuasive, but not authoritative" (at p. 720).

[155] Jennings, "Reflections on the subsidiary means for the determination of rules of law", pp. 328−329 ("These and other such sources of doctrine may or may not in particular instances make it clear whether they are dealing with the *lege lata* or the *lege ferenda* … Pressure groups creating doctrine often find it advantageous to blur the distinction and to dress their proposals as existing law"). See also Kammerhofer, "Law-making by scholars".

[156] Examples include the reference to the Commission's work on the law of treaties in *Military and Paramilitary Activities* in respect of *jus cogens* (*Military and Paramilitary Activities in and against Nicaragua* (see footnote 18 above), at pp. 100–101, para. 190); and reliance on the first reading of the draft articles on responsibility of States for internationally wrongful acts in *Gabčikovo-Nagymaros (Hungary/Slovakia)* (*Judgment, I.C.J. Reports 1997*, p. 7, at pp. 39–40, para. 50); the draft articles provisionally adopted on first reading and the commentaries thereto are reproduced in *Yearbook ... 1996*, vol. II (Part Two), pp. 58–73, while the draft articles adopted on second reading by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77). More recently, there have been references by the International Court of Justice to the final draft articles, for example in its 19 December 2005 judgment in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (*Judgment, I.C.J. Reports 2005*, p. 168, at p. 226, para. 160), where the Court referred to articles 4, 5, and 8 of the articles on responsibility of States. And in *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), the Court referred extensively to the Commission's articles on responsibility of States. See also Tomka, "Custom and the International Court of Justice", p. 202 ("the codifications produced by the International Law Commission have proven most valuable [to the Court in ascertaining whether a rule of customary international law exists], primarily due to the thoroughness of the procedures utilized by the [Commission]").

[157] General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ...2011*, vol. II (Part Two), paras. 87−88.

[158] Wood, "Weighing the articles on responsibility of international organizations", p. 66.

[159] Peil, "Scholarly writings as a source of law: a survey of the use of doctrine by the International Court of Justice".

or dissenting opinions, and in decisions of other international courts and tribunals and of domestic courts.[160]

[160] See, for example, *Yong Vui Kong v. Public Prosecutor*, [2010] 3 S.L.R. 489 [2010] SGCA 20, Supreme Court of Singapore, Court of Appeal, 14 May 2010, paras. 95 and 98; Order of the Second Senate of 8 May 2007, 2 BvM 1-5/03, 1, 2/06, German Constitutional Court, paras. 64–65; *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), paras. 25–29; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, Appeals Chamber, International Criminal Tribunal for Rwanda, 13 December 2004, para. 518; 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 (see footnote 23 above), para. 61 (referring also to a previous case of the International Tribunal for the Former Yugoslavia on the matter); *Delalić*, Case No. IT-96-21-T, Judgment (see footnote 90 above), para. 342; *Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment (see footnote 65 above), paras. 114–116; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgment, Appeals Chamber, International Tribunal for the Former Yugoslavia, 23 January 2014, para. 1647 (and the reference therein); Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, German Federal Constitutional Court, para. 47; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011,* International Tribunal for the Law of the Sea (see footnote 90 above), para. 169.

67. The following draft conclusion is proposed for inclusion in the new part five:

"*Draft conclusion 14. Judicial decisions and writings*

"Judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law."

Chapter V

The relevance of international organizations

68. The second report indicated that the practice of international organizations could also be relevant to the identification of customary international law.[161] This was for the most part supported within the Commission,[162] but various questions arose regarding the particular nature of such a role.[163] Draft conclusion 4 [5], paragraph 2, as provisionally adopted by the Drafting Committee in 2014, provided:

> In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

In a footnote to the report of the Chairman of the Drafting Committee, it was indicated that draft conclusion 4 [5] would be considered again at the Commission's sixty-seventh session in the light of the analysis of the question of the practice of international organizations in the present report. In a footnote to draft conclusion 6 [7], paragraph 3, it was similarly indicated that "[f]orms of practice of international organizations would be examined in the future".[164]

69. The Commission has recently had occasion to refer to the differences between States and international organizations. In its general commentary to the articles on the responsibility of international organizations, the Commission stated:

> International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ("principle of speciality"). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound.[165]

70. States remain the primary subjects of international law and, as explained in the Special Rapporteur's second report, it is primarily their practice that contributes to the formation, and expression, of rules of customary international law.[166] It is also States that (for the most part) create and control international organizations, and empower them to perform, as separate international legal persons, a variety of functions on the international plane in pursuit of certain goals common to their members.[167] It thus

[161] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, paras. 43–44. The second report proposed that the term "international organization" be defined (for the purposes of the draft conclusions) as "an intergovernmental organization". However, in 2014 the Drafting Committee felt that it might be premature to choose between the possible definitions pending consideration of the present report. The Special Rapporteur's intention is that the term "international organization" in the draft conclusions should refer to those organizations with international legal personality whose members are primarily States or other international organizations. The Special Rapporteur does not at present consider it necessary to include a definition in the draft conclusions, provided that an explanation is given in the commentary. This is a matter which the Drafting Committee may wish to consider further.

[162] The Commission recognized already in 1950 that "[r]ecords of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations" (*Yearbook ... 1950*, vol. II, document A/1316, p. 372, para. 78); see also *Yearbook ... 2013*, vol. II (Part One)., document A/CN.4/659, 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").

[163] See, for example, Mr. Murphy's intervention, *Yearbook ... 2014*, vol. I, 3224th meeting. For a subsequent reflection on some of the issues raised, see Wood, "International organizations and customary international law".

[164] See also interim report of the Chair of the Drafting Committee, 7 August 2014 (footnote 10 above), pp. 9–10.

[165] Para. (7) of the general commentary to the draft articles on the responsibility of international organizations, *Yearbook ...2011*, vol. II (Part Two), paras. 87–88. The text of the articles are contained in General Assembly resolution 66/100 of 9 December 2011, annex.

[166] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 43.

[167] See also Hannikainen, "The collective factor as a promoter of customary international law", p. 130 ("The rising importance of international organizations does not mean that they have risen above States or constitute a serious challenge to State sovereignty. States continue

generally "seems premature to equate such normative power [that some international organizations may hold] with genuinely autonomous law-making power";[168] at the same time, bearing in mind that indeed "[t]he 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",[169] the exercise by international organizations of their functions may certainly be of relevance for the identification of customary international law. This general notion found significant support in the Sixth Committee debate in 2014.[170]

71. At the outset, two distinctions should be made. First—and this is fundamental—we need to distinguish the practice of States within international organizations from that of the international organizations as such. While this may not always be easy to do (in particular in cases where the relevant organ of an organization is composed of States),[171] and while there is often a lack of clarity in the literature, in principle the practice of international organizations, as separate international legal persons, should not be assimilated to that of the States themselves (of "representatives of Members, that is to say, of persons delegated by their respective Governments, from whom they receive instructions and whose responsibility they engage").[172] The present report, like the second report of the Special Rapporteur, proceeds on the basis of the determination that, where appropriate, the practice of States within international organizations is to be attributed to States themselves.[173]

to be the leading actors in the international arena; as the founders and members of international organizations they are able to control these institutions created by them—even to dissolve them. At the same time it should be kept in mind that States have purposefully given international organizations different kinds of powers, even supranational powers to certain international organizations"); Roberts and Sivakumaran, "Law-making by nonstate actors: engaging armed groups in the creation of international humanitarian law", pp. 117−118 ("Normatively, State-empowered bodies are created and empowered by States, which creates a basis for arguing that any lawmaking powers exercised by such bodies are derived from State consent. In addition, after any initial delegation of lawmaking powers has been made, States retain a variety of formal and informal powers to sanction State-empowered bodies if they overreach in their lawmaking efforts … Any role that State-empowered bodies play in law creation is thus dependent on initial State consent and at least some level of ongoing State consent"); Parry, *The Sources and Evidences of International Law*, pp. 8−9 ("if any element of international legislation is to be discerned in the operations of international organizations, enthusiasts for such structures would do well to remember that the theory upon which they were built was one of delegation from the State"). States (both members of the organizations and non-members) may also object to the conduct of an international organization: see, for example, Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, p. 116 ("a State may wish to object in a persistent manner to the way in which delegated powers are being exercised *within* an organization precisely in order to prevent any future rule of custom that may result from the organization's acts binding the State and thus constraining its unilateral exercise of powers *outside* the context of the organization"); Alvarez, *International Organization as Law-Makers*, p. 593.

[168] Prost and Clark, "Unity, diversity and the fragmentation of international law", pp. 354 and 367−368 (adding that "[t]he decisive factor, for present purposes, is whether the organization is capable of expressing a truly autonomous will, i.e. one which is not only the sum of its members' individual wills, and whether this independent will is binding on the Member States … On this issue, there remains … wide-ranging debate … [international organizations], at this stage of development of the international legal community, are still largely incapable of instituting an emergence of a power which is truly separated from Sovereign States. Indeed, the institutional logic never eclipses the State logic. On the contrary, it presupposes, mirrors and to some extent magnifies the nation-State system" (*ibid*., pp. 354 and 367)). See also Klabbers, "International organizations in the formation of customary international law", p. 183 ("in order to say anything meaningful about the role of international organizations in the formation of customary international law, what is required is something of a perspective on the relationship between organizations and their members. On the one hand, those who regard organizations as little more than vehicles for their member States will have fairly little problem accepting the idea that acts of organs [of international organizations] can somehow be counted as acts of States. On the other hand, those who insist on the separate identity of the organization may be less easily inclined to consider acts of organizations as State acts").

[169] *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 178.

[170] See, for example, the statements on behalf of Austria, *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 25th meeting (A/C.6/69/SR.25), para. 106; France, *ibid.*, 22nd meeting (A/C.6/69/SR.22), paras. 30–31; Greece, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 31; Islamic Republic of Iran (international organizations relevant for the identification of customary international law "to the extent that it reflected the practice of States"), *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 9; Jamaica, *ibid.*, para. 37; Republic of Korea, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 70; the Netherlands, *ibid.*, 26th meeting (A/C.6/69/SR.26); Norway (on behalf of the Nordic countries), *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 130; Poland, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 57; Portugal, *ibid.*, para. 3; Romania, *ibid.*, para. 89; Slovakia, *ibid.*, 23rd meeting (A/C.6/69/SR.23), para. 88; Slovenia, *ibid.*, 20th meeting (A/C.6/69/SR.20), paras. 41–42; South Africa, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 93; Spain, *ibid.*, para. 102; Trinidad and Tobago, *ibid.*, para. 117; and the United States ("in some defined circumstances"), *ibid*., 27th meeting (A/C.6/69/SR.27), para. 15 (the statements are also on file with the Codification Division).

[171] As Ms. Jacobsson stated, "on occasion it might [] be difficult to separate [States and international organizations] in terms of their involvement" (see *Yearbook ... 2014*, vol. I, 3226th meeting; see also statement of 17 July 2014). See also Akehurst, "Custom as a source of international law", p. 11 ("the practice of international organizations can also create rules of customary law. It is true that most organs of most international organizations are composed of representatives of States, and that their practice is best regarded as the practice of States. But the practice of organs which are not composed of representatives of States, such as the United Nations Secretariat, can also create rules of customary law … Nor must one overlook the legal opinions of the United Nations Secretariat"); Wessel and Blockmans, "The legal status and influence of decisions of international organizations and other bodies in the European Union", p. 6 ("an important function of international organizations is to reveal State practice (and *opinio juris*) and to allow for a speedy creation of customary law, although one needs to remain aware of the distinction between State practice and the practice of an international organization"); DeBartolo, "Identifying international organizations' contributions to custom" ("Though such acts [in connection with resolutions of international organizations, for example] take place in an [international organization] forum, they are *State* acts, carried out by *State* officials (generally members of a State's delegation or permanent mission to the [international organization]), and as such constitute State practice, not [international organization] practice"); Alvarez, "International organizations: then and now", p. 333 ("Although some may prefer to describe them as merely 'arenas' for lawmaking action, [international organizations] … are for all practical purposes a new kind of lawmaking actor, to some degree autonomous from the States that establish them"); Johnstone, "Law-making through the operational activities of international organizations", p. 87 ("to the extent that international organizations act autonomously in engaging in [] practices, the law-making process is one step removed from State consent"); Wouters and De Man, "International organizations as law-makers", p. 208.

[172] To borrow the words of *Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, P.C.I.J., Series B, No. 12, 1925*, p. 29 (discussing, in a different context, the composition of the Council of the League of Nations).

[173] See also Treves, "Customary international law", para. 50 ("As subjects of international law, intergovernmental organizations participate in the customary process in the same manner as States. Ascertainment and assessment of such participation and of its relevance must, nevertheless, be made with particular caution: first, because of the limited scope of the competence of the organizations, and, secondly, because it may be preferable to consider many manifestations of such practice, such as resolutions of the General Assembly, as practice of the States involved more than of the organizations").

72. Another distinction to be made is that between conduct of the organization that relates to the internal operation of the organization (often referred to as "the practice of the organization", or "the established practice of the organization"; see the definitions of "rules of the organization" in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter, "1986 Vienna Convention") and in the articles on the responsibility of international organizations) and conduct of the organization in its relations with States, international organizations and others (external practice). While the former may in certain circumstances give rise to "a kind of customary law of the organization, formed by the organization and applying only to the organization",[174] it is in principle the latter that may be relevant to the formation and identification of customary international law.[175]

73. The fact that there is a great variety of international organizations calls for particular caution in assessing their practice and the weight to be attributed to it.[176] For example, the more member States the organization has,[177] or the more the practice of the organization is explicitly endorsed (in one way or another) by the member States, the greater the weight the practice may have. Such considerations reflect the centrality of States in the customary process.

74. Practice associated with international organizations might arise in different ways, although it may sometimes be difficult to draw clear lines between them. First, acts of international organizations may reflect the practice and convictions of their member States.[178] As discussed in chapter III above, resolutions of organs composed of States reflect the views expressed and the votes cast by States within them, and may thus constitute State practice or evidence of *opinio juris*.[179] Similarly, policies adopted

[174] Peters, "Subsequent practice and established practice of international organizations: two sides of the same coin?", pp. 630–631 (adding, however, that "[y]et it is not entirely that simple because at the same time established practice has a characteristic which is due to its origins in the organization: it is based to a large extent on secondary law of the organization, on the binding resolutions and decisions of its organs"). Such customary law would embrace "mainly rules referring to relations between the organs of organizations and between such organizations and the members of their staff" (Wolfke, *Custom in Present International Law*, p. 80). Such "custom" lies beyond the scope of the present topic.

[175] See also, for example, Pellet, "Article 38", pp. 816–817 ("the practice of the [international] organizations themselves, can also be of paramount importance in establishing the existence of the material element. In this respect, it is, however, necessary to make a distinction between the internal and purely institutional practice, giving rise to a customary rule within the 'proper law' of the organization concerned, on the one hand, and the contribution of the organization(s) to the formation of general rules of customary law applicable outside the framework of the organization on the other"); Barberis, Réflexions sur la coutume internationale", p. 33 ("S'agissant de la pratique des organisations internationales, il est nécessaire de distinguer entre l'activité que leurs organes déploient en leur sein et qui a trait à l'ordre juridique interne de l'organisation, et l'activité qu'ils déploient sur le plan international. L'activité déployée au sein de l'organisation peut donner naissance à des règles coutumières relevant de l'ordre juridique interne de cette organisation. … Toutefois, la pratique d'une organisation sur le plan international peut créer des normes coutumières internationales" ["With regard to the practice of international organizations, it is necessary to distinguish between the activity of their organs within the organization, which relates to the internal legal order of the organization, and the activity of the organization at the international level. The activity within the organization may give rise to customary rules of the internal legal order of the organization … However, the practice of an organization at the international level may give rise to customary international norms"]). For a different conceptual approach according to which nowadays "most decisions of international organizations have an internal and an external normative impact … [and] the line between internal and external law-making is fading", see Wouters and De Man, "International organizations as law-makers", p. 194. The memorandum by the Secretariat observes that "[o]n some occasions, the Commission has referred to the possibility of the practice of an international organization developing into a custom specific to that organization. Such customs may relate to various aspects of the organization's functions or activities, e.g. the treaty-making power of an international organization or the rules applicable to treaties adopted within the organization" (*Yearbook … 2013*, vol. II (Part One), document A/CN.4/659, observation 14).

[176] Malaysia suggested in the debate of the Sixth Committee in 2014 that "[s]ince international organizations differed in terms of their membership and structure, it should not be presumed that the acts or inaction of any of them represented the general practice of States for the purposes of establishing customary international law" (*Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 27th meeting (A/C.6/69/SR.27), para. 44); Singapore similarly stated that "considerable caution was required in assessing the relevance of the acts, including inaction, of international organizations. There were wide variations in the organizational structure, mandate, composition of decision-making organs and decision-making procedures of such organizations, all factors that had a bearing on such organizations' role, if any, in the formation of customary international law" (*ibid*., 26th meeting (A/C.6/69/SR.26), para. 65). See also Wouters and De Man, "International organizations as law-makers", p. 208 ("Whether actions of international organizations can be attributed to the State community as a whole is a complex question and the answer depends on such divergent factors as, *inter alia*, the nature of the organization (political vs. technical), the inclusiveness of its membership (universal and total vs. regional and limited), the composition of the relevant organ adopting a certain measure (plenary vs. partial) and the decision-making method applied (unanimity and consensus vs. majority)").

[177] See Cahin, *La coutume internationale et les organisations internationales*, for a comprehensive treatment of all aspects. See also Skubiszewski, "Forms of participation of international organizations in the lawmaking processes", p. 791 ("[i]nternational custom is modified and developed by the practice of States and international organizations, especially the universal ones"); Gunning, "Modernizing customary international law: the challenge of human rights", p. 225 ("The greater the number of States and the broader the representation of States which support the agency and hence delegated authority to the agency, the stronger the case that the agency's actions create customary law"); Alexandrowicz, *The Law-making Functions of the Specialised Agencies of the United Nations*, p. 98 ("Being mostly universal, the [Specialized] Agencies [of the United Nations] are a proper forum for the generation of customary rules which enjoy a world-wide acceptance").

[178] Crawford has written that "[t]he activities of international organizations do not feature in the sources of international law enumerated in Article 38 of the Statute of the International Court. But they are well placed to contribute to its development. This is due primarily to the capacity for international organizations to express collectively the practice of member States" (Crawford, *Brownlie's Principles of Public International Law*, p. 192). See also Gunning, "Modernizing customary international law", p. 222 ("The argument that international organizations should influence custom is based on the premise that the practices of international organizations … constitute a collective State action").

[179] See also Prost and Clark, "Unity, diversity and the fragmentation of international law", p. 360 ("[H]owever important resolutions might be in the contemporary customary process, it remains doubtful whether the legal authority really resides with [international organizations]. In the declaration, the crystallization and the process of 'instant' germination of custom, the autonomy of [international organizations] is in fact mainly formal, while the power to make law—the genuine and substantive legal authority—tends to remain in the hands of the [m]ember States. Again, this is, by no means, a denial of the role played by [international organizations] in the channeling and modeling of States' power. The fact remains, however, that where resolutions are regarded as constitutive, in whole or in part, of customary law, the inter-State dynamic is essentially preserved and the autonomy of [international organizations] is generally constrained by the permanence, behind the veil of the organization, of the [m]ember States"); Klabbers, "International organizations in the formation of customary international law", p. 188 ("In what is, conveniently perhaps, the leading case on both the formation of customary international law and the prohibition of the use of force in international law, the *Nicaragua* case, the [International Court of Justice] steadfastly adhered to the view that the activities of

by international organizations and acts performed by them are often closely considered and/or endorsed by their member States.

75. Second, the conduct of international organizations may serve to catalyse State practice. In essence, the work of international organizations on the international plane may prompt reactions by States, which may count as practice or attest to their legal opinions.[180] This is the case, for example, when international organizations introduce draft texts for debate by States, or engage in activities to which States respond. Similarly, reports produced or endorsed by organs of international organizations, or statements on their behalf, often provoke reaction by States. Resolutions calling on States to act, i.e., to adopt national legislation or other domestic measures, may also give rise to State practice.

76. Third, the practice of international organizations relating to the international conduct of the organization or international organizations generally may, as such, serve as relevant practice for purposes of formation and identification of customary international law.[181] To a great extent, this "is perhaps best exemplified in the acts of administrative or operational organs",[182] and relates to "operational activities" of the organizations that are akin to the activities undertaken by States, 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".[183] Such activities are extremely varied

international organizations and the results of international conferences were, at the end of the day, the work of States").

[180] See, for example*, Legality of the Threat or Use of Nuclear Weapons* (footnote 23 above), at p. 258, para. 81 (report of the Secretary-General "unanimously approved by the Security Council"). See also Cassese, *International Law in a Divided World*, p. 193 ("the [United Nations] encourages States to develop their views on matters on which they are often called upon to comment. This again ensures that a host of pronouncements are collected which would otherwise only be obtainable with difficulty"); Charney, "Universal international law", pp. 543–544; Vignes, "The impact of international organizations on the development and application of public international law", p. 829; Hannikainen, "The collective factor as a promoter of customary international law", p. 140 ("Resolutions are not the only important form of activity of international organizations for the creation of customary norms. Many international organs conduct dialogue with States with the purpose of persuading them to adopt certain good practices or forms of conduct. There are strong international organs which may not limit themselves to persuasion but can also employ forms of pressure *vis-à-vis* a member State"); Chen, *An Introduction to Contemporary International Law*, p. 346 ("Contrary to the lingering myth that such [international governmental] organizations enjoy little direct prescriptive competence, they play an increasingly important role as forums for the flow of explicit communications and acts of collaboration that create peoples' expectations about authoritative community policy. This is especially true of the United Nations and its affiliated agencies").

[181] See also Order of the Second Senate of 5 November 2003, 2 BvR 1506/03, German Federal Constitutional Court, para. 52 ("[M]ore recent developments on the international level, which are characterised by increasing differentiation and an increasing number of acknowledged subjects of international law, must be taken into consideration when ascertaining State practice. The acts of bodies of international organisations … therefore deserve special attention"); Jennings and Watts, *Oppenheim's International Law*, p. 47 ("[I]nternational organisations are themselves international persons. They can in their own right give rise to practices which may in time acquire the character of customary law or contribute to its development, there being nothing in Article 38 of the Statute of the International Court of Justice to restrict international custom to the practice of States only. However, the international personality of international organisations … imposes limits upon the areas of international law which their practices can directly affect"); Higgins, *Problems and Process*, p. 25 ("The repeated practice of the [United Nations] organ, in interpreting the treaty, may establish a practice that, if the treaty deals with matters of general international law, can ultimately harden into custom. Although organ practice may not be good evidence of the intention of the original State parties, it is of probative value as customary law. Here the United Nations is a participant in the international legal process"); Skubiszewski, "Forms of participation of international organizations in the lawmaking processes", p. 791 ("The application of customary international law by and in the organs of the organization may well lead to the growth of new rules"); Boisson de Chazournes, "Qu'est-ce que la pratique en droit international?", p. 38 ("*De manière générale, en tant que sujets de droit international, les organisations internationales contribuent au façonnement du droit international. Cette contribution revêt différents visages, montrant là encore le caractère pluriel de la pratique. … Ainsi une organisation internationale peut être véhicule de pratique pour ses États membres. Elle peut avoir sa propre pratique externe par l'intermédiaire de ses organes politiques et intégrés. Elle peut également développer des pratiques qui lui sont propres dans son ordre interne.*" ["Generally speaking, as subjects of international law, international organizations contribute to the shaping of international law. This contribution takes on different faces, again showing the plurality of practice. … Thus, an international organization may be a vehicle of practice for its member States. It may have its own external practice through its political and integrated organs. It may also develop its own practices within its internal order."]); Danilenko, "The theory of international customary law", p. 20 ("It is undisputed that the practice of States exerts a decisive influence on the formation of custom. At the same time, it is widely recognized that the practice of international organisations also contributes to the creation of customary rules in areas of their competence"); Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, p. xli ("International organisations have international legal personality and can participate in international relations in their own capacity, independently of their member States. In this respect, their practice can contribute to the formation of customary international law"); Lowe, "Can the European Community bind the member States on questions of customary international law?", p. 158 ("Nor am I asking whether such [European] Community statements may count as State practice under Article 38 (1) (*b*) of the [International] Court [of Justice] Statute. Clearly, in as much as they are acts of an international person, they can"); Akehurst, "The hierarchy of the sources of international law", p. 281 ("Many acts of international organizations are not sources of international law in their own right, *either because they are merely part of the practice from which customary international law develops*, or because they merely record agreements between (or promises by) 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"); London Statement of Principles (see footnote 84 above), p. 730 ("The practice of intergovernmental organizations in their own right is a form of 'State practice'").

[182] Sloan, "General Assembly resolutions revisited (forty years later)", p. 74 (suggesting that "[a]s international organizations are subjects of international law, organizational practice is also relevant to the creation of custom"). See also Schachter, "The development of international law through the legal opinions of the United Nations Secretariat", p. 93 (referring to interventions of the Secretary-General in important political controversies, which "have almost always been for the purpose of presenting legal statements").

[183] Johnstone, "Law-making through the operational activities of international organizations", p. 94 (discussing such activities, however, in a somewhat different context; and distinguishing these activities "from the more explicitly normative functions of international organizations, such as treaty making or adopting resolutions, declarations, and regulations by intergovernmental bodies"). See also Schmalenbach, "International organizations or institutions, general aspects", para. 78 ("some organizations operate in the same domain or in the same manner as States. In these cases, both contribute with their practice and their *opinio iuris* to the creation of the same rules of customary law, provided that the specific nature of international organizations does not demand modifications"); Crawford, *Brownlie's Principles of Public International Law*, p. 195 ("Organizations may make agreements with member and non-member States and with other organizations, and may present international claims and make official pronouncements on issues affecting them. Subject to what has been said about the need for care in evaluating acts of political organs, the practice of organizations provides evidence of the law. In addition, the behaviour of international organizations 'in the field' may influence the discourse of international law, and thereby indirectly influence the formation of custom").

and, depending on the functions and powers attributed to international organizations, may range from enforcement measures by the United Nations to the Secretariat's treaty depositary functions. Except in such fields, the acts and views of the Secretariat are unlikely to amount to practice.[184]

77. The contribution of international organizations as such to the formation and identification of rules of customary international law is most clear-cut in instances where States have assigned State competences to them: "When, as in the case of the [European Union], the international organization replaces, in whole or in part, its [m]ember States in international relations, its practice may be relevant in broader areas [than of just the legal subjects that are directly relevant to its participation in international relations]."[185] In essence, such practice may be equated with the practice of States. As explained in the second report of the Special Rapporteur, if one were not to equate the practice of such international organizations with that of States, this would mean not only that the organization's practice would not be taken into account, but also that its member States would themselves be deprived of or reduced in their ability to contribute to State practice.[186]

78. Further, where the practice of international organizations may be relevant, considerations set out in the present and earlier reports and draft conclusions that apply to the practice of States may be relevant, *mutatis mutandis*, to the practice of international organizations.[187]

79. In the light of the above, no change is proposed to draft conclusion 4 [5], paragraph 2, as provisionally adopted by the Drafting Committee in 2014, which reads: "In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law." However, in order to clarify the position with regard to non-State actors, as reflected in the debate in the Commission at its sixty-sixth session, it is proposed to omit "primarily" in draft conclusion 4 [5], paragraph 1 (as provisionally adopted by the Drafting Committee), and include a new paragraph 3:

"*Draft conclusion 4 [5]. Requirement of practice*

"…

"3. Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law."

[184] Corten, *Méthologie du droit international public*, p. 173 ("*Il arrive régulièrement que le secrétaire général des Nations unies exprime sa position au sujet de la licéité d'une operation militaire ... De telles prises de position ne manquent pas d'intérêt, dans la mesure où elles peuvent susciter des réactions officielles de la part des États membres de l'ONU. En tant que telle, cependent, une déclaration du secrétaire général n'est pas de nature à engager juridiquement les Nations unies en tant qu'organisation internationale, ni a fortiori les Etats membres de l'organisation*" ["The Secretary-General of the United Nations regularly expresses his position on the legality of a military operation … Such taking of position is not without interest, as it can provoke official reactions from Member States of the United Nations. As such, however, a declaration by the Secretary-General is not of a nature to legally bind the United Nations as an international organization, nor *a fortiori* the Member States of the Organization"]).

[185] Treves, "Customary international law", para. 52. See, for example, *Tadić* (see footnote 90 above), para. 115 (reference to declarations of the Council of the European Union).

[186] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 44. In the debate of the Sixth Committee in 2014, the representative of the European Union stressed that "[i]n areas in which, in accordance with the rules of the European Union treaties, only the Union could act … it was the Union's practice that should be taken into account with regard to the formation of customary international law alongside the implementation by the member States of the European Union legislation" (see *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee,* 25th meeting (A/C.6/69/SR.25), para. 79; statement also available from www.un.org/en/ga/sixth). See also Vanhamme, "Formation and enforcement of customary international law: the European Union's contribution", p. 130 ("It can [] be stated with confidence that all [European Union] external relations based on the [Treaty establishing the European Community] count as relevant practice under international law"); Hoffmeister, "The contribution of EU practice to international law". The European Union's founding treaties provide that the Union "shall contribute … to the strict observance and the development of international law" (consolidated version of the Treaty on European Union, art. 3, para. 5).

[187] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672, para. 43.

Chapter VI

Particular custom

80. The consideration of the present topic thus far has been directed towards "general" customary international law, that is, rules of customary international law that are "of general application, valid for all States".[188] There may, however, be rules of customary international law that are binding on certain States only. This has been recognized by the International Court of Justice[189] and by individual judges of the Court,[190] as well as by national

[188] *Delimitation of the Maritime Boundary in the Gulf of Maine Area,* (footnote 45 above), at pp. 292–293, para. 90 ("principles already clearly affirmed by customary international law, principles which, for that reason, are undoubtedly of general application, valid for all States").

[189] See *Colombian-Peruvian asylum case* (footnote 110 above), at p. 276 (where the Court addressed the argument of Colombia for "an alleged regional or local custom peculiar to Latin-American States"); *Case concerning rights of nationals of the United States of America in Morocco* (footnote 40 above), at p. 200 ("a local custom"); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at p. 39 ("a local custom"); *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at p. 105, para. 199 ("customary international law, whether of a general kind or that particular to the inter-American legal system"); *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, para. 21 ("not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America"); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 233, paras. 34 and 36 ("customary international law … either of universal scope or of a regional nature … universal or regional custom").

[190] See, for example, *Fisheries Jurisdiction (United Kingdom v. Iceland)* (footnote 84 above), at pp. 79 and 94, separate opinion of Judge de Castro ("regional customs or practices, as well as special customs");

courts,[191] Governments[192] and writers.[193] These are rules of "particular" custom, which have also been referred to as rules of "special" custom, and have manifested themselves, for the most part, as regional or local (bilateral) custom.[194]

81. While rules of particular custom often bind States of a certain geographical area or those constituting a community of interest,[195] they may also be bilateral. As the International Court of Justice stated in the *Right of Passage* case: "It is difficult to see why the number of States between which a local custom may be established on the basis of a long practice must necessarily be larger than two".[196] The distinction between general and particular customary international law is thus "conceptually simple … [g]eneral customary law applies to all States, while special custom concerns relations between a smaller set of States".[197]

82. Rules of particular custom evolve from a practice accepted as law among a limited number of States, and as such do not bind third States that have not participated in the practice or expressed a form of assent to being bound thereby.[198] They may "develop autonomously, or result from the disintegration of a general customary rule, or even a conventional rule",[199] allowing for the "taking into account, in the creation or adaptation of rules of restricted territorial scope, of geographical, historical and political circumstances which are peculiar to the [States] concerned".[200] The possibility is not to be excluded that such rules may evolve into rules of general customary international law over time.[201]

83. In ascertaining whether rules of particular customary international law exist, the International Court of Justice

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North Sea Continental Shelf (footnote 18 above), at p. 62, separate opinion of President Bustamante y Rivero ("a regional customary law"); *Barcelona Traction* (footnote 40 above), at pp. 290–291, separate opinion of Judge Ammoun.

[191] See, for example, *Nkondo v. Minister of Police and Another*, South African Supreme Court (Orange Free State Provincial Division), 7 March 1980, ILR, vol. 82 (1990), pp. 358 and 368–375 (Judge Smuts holding that there was no evidence of long standing practice between South Africa and Lesotho that had crystallized into a local customary right of transit free from immigration formalities); *Service of Summons in Criminal Proceedings* case, Austrian Supreme Court, 21 February 1961, ILR, vol. 38 (1969), pp. 133 and 135 (referring to the "general rules of international law applicable in Continental Europe").

[192] See, for example, the Swiss Federal Department of Foreign Affairs advice of 15 December 1993 that *non-refoulement* has evolved to be a rule of regional customary international law in Europe (Caflisch, "Pratique suisse en matière de droit international public 1993", pp. 601–603); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Supplementary replies from Belgium to the question put to it by Judge Greenwood at the close of the hearing held on 16 March 2012, paras. 21 and 37–38 (available from www.icj-cij.org).

[193] See, for example, Skubiszewski, "Elements of custom and the Hague court", p. 830 ("Generality [of practice] does not equal universality, and the term 'general' is here [in Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice] a relative one. In different fields of State external activities this term encompasses smaller or larger groups of States"); Thirlway, *The Sources of International Law*, pp. 88–89 ("If the practice and the *opinio juris* is not general, but confined to States belonging to an identifiable group, or otherwise linked by a common interest, a custom may still come into existence, but it will apply only between members of that group, and cannot be enforced upon, or relied upon in relation to, other States"); Mendelson, "The formation of customary international law", p. 191; *Restatement of the Law Third, Restatement of the Law, The Foreign Relations Law of the United States*, § 102, comments *b* and *e* (referring to both "particular customary law" and "[g]eneral and special custom"). The question of hierarchy between general and particular rules of customary international law is beyond the scope of the present topic.

[194] Basdevant has referred to "relative" custom (Basdevant, "Règles générales du droit de la paix", p. 486); Cohen-Jonathan to "local custom" (Cohen-Jonathan, "La coutume locale", p. 120); MacGibbon to "special or exceptional customs" (MacGibbon, "Customary international law and acquiescence", pp. 116–117). Akehurst proposed using "the term 'special custom' to cover regional customs and all other customs which are practi[s]ed by limited groups of States" (Akehurst, "Custom as a source of international law", p. 29); and Wolfke refers to "exceptional customary rules" (Wolfke, "Some persistent controversies regarding customary international law", p. 13). See also Degan, *Sources of International Law*, pp. 243–244 ("It would appear useful to introduce an order in this terminology, because not all the customary rules of this kind are the same … Nevertheless, all this sort of customary rules have some common features in international law. They should be therefore encompassed under the generic name of "*particular custom*", as distinct from general customary law"). But see , "Costumbre universal y particular" (arguing that it is wrong to speak of particular custom, as the differences as compared to general custom are so great that it is in fact a different legal source, with more to do with general principles of law or treaties than with custom).

[195] See also Koroma, "The application of international law by the International Court of Justice", p. 106 ("Special custom takes the form of a customary rule that has emerged between two States, a group of States, or in a particular region"); Wolfke, *Custom in Present International Law*, p. 90 ("The division of particular rules of customary international law may[] certainly also be based on various other than geographical criteria—for example, political, ethnic, economic, religious, membership in organizations, etc."); Villiger, *Customary International Law and Treaties*, p. 56 ("*Non-regional special* customary law is conceivable, for instance, among States sharing socioeconomic interests, or, ultimately, nothing but the interest in the customary rule"); Elias, "The relationship between general and particular customary international law", p. 72 ("*nothing is needed for the practice of a State to become relevant beyond interest in a particular subject-matter*, and [] the reasons for such interest may or may not be related to geography"); Rosenne, *Practice and Methods of International Law*, p. 68.

[196] *Right of Passage over Indian Territory* (see footnote 189 above), at p. 39 (adding that "[t]he Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States"). See also *Dispute regarding Navigational and Related Rights* (footnote 189 above), at pp. 265–266, paras. 140–144.

[197] D'Amato, "The concept of special custom in international law", p. 212. See also McDougal and Lasswell, "The identification and appraisal of diverse systems of public order", p. 178 ("some prescriptions are inclusive of the globe; other prescriptions recognize self-direction by smaller units"). Thirlway has remarked, however, that "in matters of local customary law in general it may often be difficult to ascertain exactly what are the boundaries of the 'community' to which the custom in question is to be treated as applying", Thirlway, *International Customary Law and Codification*, p. 135.

[198] See also Thirlway, *The Law and Procedure of the International Court of Justice*, pp. 1198–1200; MacGibbon, "Customary international law and acquiescence", p. 117 ("As with all types of customary rules, the process of formation is similar, namely, the assertion of a right, on the one hand, and consent to or acquiescence in that assertion, on the other").

[199] Villiger, *Customary International Law and Treaties*, p. 56.

[200] *Colombian-Peruvian asylum case* (footnote 110 above), at p. 333, dissenting opinion of Judge Azevedo, who refers there to diplomatic asylum in Latin America). Dupuy referred in this context to the advantage of "pluralisme coutumier" [customary pluralism] (Dupuy, "Coutume sage et coutume sauvage", p. 82).

[201] See also Barboza, "The customary rule", p. 14 ("A special custom, i.e. one binding for particular reasons a certain number of States may remain as such or change, by spreading, into a universal custom. A regional custom may stay as such forever or fall into desuetude and in both cases consent will be the key factor. It may also change into a universal custom").

has applied Article 38, paragraph 1 (*b*), of the Statute.[202] Given the nature of particular custom as binding only a limited number of States, however, it is necessary to identify clearly which States have participated in the practice and accepted it as law.[203] A strict criterion thus applies.[204]

84. The following draft conclusion is proposed, which could be placed in a new part six entitled "Exceptions to the general application of rules of customary international law":

"*Draft conclusion 15. Particular custom*

"1. A particular custom is a rule of customary international law that may only be invoked by and against certain States.

"2. To determine the existence of a particular custom and its content, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by each of them as law (*opinio juris*)."

[202] See *Colombian–Peruvian asylum case* (footnote 110 above), at pp. 276–277 ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. [It] must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right [or a duty] … This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'"). See also Crema, "The 'right mix' and 'ambiguities' in particular customs: a few remarks on the *Navigational and Related Rights* case", p. 66; Elias, "The relationship between general and particular customary international law", pp. 75−76. But see *North Sea Continental Shelf* (footnote 18 above), at pp. 130−131, separate opinion of Judge Ammoun; D'Amato, *The Concept of Custom in International Law*, pp. 249−250.

[203] *Colombian–Peruvian asylum case* (footnote 110 above), at p. 276. See also *Case concerning rights of nationals of the United States of America in Morocco* (footnote 40 above), at p. 200; *North Sea Continental Shelf* (see footnote 18 above), at pp. 130−131, separate opinion of Judge Ammoun ("while a general rule of customary law does not require the consent of all States, as can be seen from the express terms of [Article 38, paragraph 1 (*b*) of the Statute of the International Court of Justice] … it is not the same with a regional customary rule, having regard to the small number of States to which it is intended to apply and which are in a position to consent to it. In the absence of express or tacit consent, a regional custom cannot be imposed upon a State which refuses to accept it"); *Dispute regarding Navigational and Related Rights* (footnote 189 above), at p. 279, para. 24, Separate Opinion of Judge Sepúlveda-Amor; Waldock, "General course on public international law", p. 50 ("[I]n order to invoke a [general] custom against a State it is not necessary to show specifically the acceptance of the custom as law by that State; its acceptance of the custom will be presumed so that it will be bound unless it can adduce evidence of its actual opposition to the practice in question. The Court in applying a general custom may well refer to the practice, if any, of the parties to the litigation in regard to the custom; but it has never yet treated evidence of their acceptance of the practice as a *sine qua non* of applying the custom to them. The position is, of course, quite different in regard to a particular custom between two or three States, as in the *Right of Passage* case, because that is a derogation from the general law and the acceptance of the custom by the parties to the litigation themselves is the whole basis of the exceptional rule"); Pellet, "Article 38", pp. 830−831.

[204] See also Forteau, "Regional international law", para. 20 ("There is one alternative: either the custom claimed is general in character and the claimant has to prove the existence of a general practice accepted as law emanating from the majority of States; or it is considered as regional, local, or bilateral in character, and the claimant has to fulfil a rather strict criterion. In these cases, custom is of consensualist nature and it must be proven that 'the rule invoked … is in accordance with a constant and uniform usage practised by [all] the States' concerned (*Asylum Case* 276)"); Crawford, "Chance, order, change: the course of international law", pp. 246–247 ("The Court treated the existence of this 'alleged regional or local custom peculiar to Latin-American States' [in the *Asylum* case] as in effect a *bilateral* question … It seems clear that the Court, despite its invocation of Article 38 (1) (*b*) of its Statute, was applying a stricter standard of proof than it would have done to a 'universal' rule of general international law … This is not to imply that regional or local custom can *never* be relied on, just that it must be proved as between the particular States parties to the dispute; it makes no difference whether the 'region' in which the custom exists comprises two or twenty-two States … This point is well illustrated in the *Right of Passage* case"); Combacau and Sur, *Droit international public*, p. 72 ("*[P]uisque ces règles sont propres à certains États, il faut définir positivement le cercle des sujets concernés, ce qui ne peut être fait qu'en établissant leur participation directe. De l'autre et surtout, ces coutumes sont virtuellement en conflict, ou dérogatoires par rapport à des coutumes générales également obligatoires. Dès lors il faut établir que les États en cause se sont expressément affranchis dans leurs rapports mutuels, et seulement dans ces rapports, de la règle générale*" ["[S]ince these rules are specific to certain States, the subjects concerned must be positively defined, which can only be done by establishing their direct participation. On the other hand, and above all, these customs are virtually in conflict with, or derogatory from, general customs that are also obligatory. It must therefore be established that the States in question have expressly freed themselves in their mutual relations, and only in those relations, from the general rule"]); Shaw, *International Law*, pp. 65–66 ("In such cases [of regional or local custom], the standard of proof required, especially as regards the obligation accepted by the party against whom the local custom is maintained, is higher than in cases where an ordinary or general custom is alleged … a local custom needs the positive acceptance of both (or all) parties to the rule. This is because local customs are all exceptions to the general nature or customary law, which involves a fairly flexible approach to law-making by all States, and instead constitutes a reminder of the former theory of consent whereby States are bound only by what they assent to. Exceptions may prove the rule, but they need greater proof than the rule to establish themselves"); Degan, *Sources of International Law*, p. 245 ("For those States, or other subjects, which were passive in law-creating practice, which did not show any interest for it, and for which no *opinio juris* can be proved, a particular customary rule is a *res inter alios acta*, just as is a treaty in regard to third States to it. Exactly for these reasons there are important differences with regard to *the burden of proof* of particular customary rules in comparison with general custom"); Villiger, *Customary International Law and Treaties*, p. 56 ("The implication was that special rules differ from general rules only in that the special rules require for their formation *express (or implied) recognition* by the States adhering to the rule, on which States, incidentally, also rests the burden of proof" (referring to the judgment in the *Asylum* case)). But see *Colombian-Peruvian asylum case* (footnote 110 above), at p. 294, dissenting opinion of Judge Alvarez): "A principle, custom, doctrine, etc., need not be accepted by all of the States of the New World in order to be considered as a part of American international law [binding upon all the States of the New World]. The same situation obtains in this case as in the case of universal international law". Judge de Castro had said that "[t]he Court must apply [general customary international law] *ex officio*; it is its duty to know it as *quaestio iuris: iura novit curia*. Only regional customs or practices, as well as special customs, have to be proved", *Fisheries Jurisdiction (United Kingdom v. Iceland)* (footnote 84 above), at p. 79, separate opinion of Judge de Castro.

Chapter VII

Persistent objector

85. While rules of (general) customary international law "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",[205] it is widely held that a State that has persistently objected to an *emerging* rule of customary

[205] *North Sea Continental Shelf* (see footnote 18 above), at pp. 38−39, para. 63.

international law, and maintains its objection after the rule has crystallized, is not bound by it.[206] This is referred to as the "persistent objector rule".[207]

86. Decisions of international and domestic courts and tribunals have referred to the rule and, as emphasized in the London Statement of the International Law Association, there are no decisions that challenge it.[208] In the *Asylum* case, the International Court of Justice held that it could not: "find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include [the rule in question]."[209] In the *Fisheries case*, the Court similarly found that "the ten-mile rule has not acquired the authority of a general rule of international law. In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."[210] Individual opinions have referred to the rule in other cases.[211]

87. While it has been stated that the persistent objector rule has "played a surprisingly limited role in the actual legal discourse of States",[212] judicial proceedings, in particular, furnish a number of instances where States have sought to rely on the rule (and courts and tribunals have acknowledged its existence).[213] In

[206] The application of the rule of persistent objector in the context of peremptory norms of international law (*jus cogens*) is beyond the scope of the current topic.

[207] This is to be distinguished, of course, from a situation in which an emerging rule is met with opposition that prevents it from crystallizing into a binding (general) rule. In Judge Ammoun's words, "it is sufficiently well known for it to be unnecessary to dwell on the point, what the consequences are, for the growth of a custom, of opposition which is not thought to need to be so massive" (*Barcelona Traction* (footnote 40 above), at p. 308, separate opinion of Judge Ammoun). See also South Africa, *Kaunda and Others v. The President of the Republic of South Africa and Others*, Judgment of the Constitutional Court, 4 August 2004, para. 148, separate opinion of Judge Ngcobo ("One of the greatest ironies of customary international law is that its recognition is dependent upon the practice of States evincing it. Yet at times States refuse to recognise the existence of a rule of customary international law on the basis that State practice is insufficient for a particular practice to ripen into a rule of customary international law. In so doing, the States deny the practice from ripening into a rule of customary international law").

[208] London Statement of Principles (see footnote 84 above), p. 738.

[209] *Colombian-Peruvian asylum case* (footnote 110 above), at pp. 277–278. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 18 above), at p. 107, para. 203.

[210] *Fisheries case* (see footnote 53 above), at p. 131. Some authors have questioned the significance of the passages in the *Fisheries* and *Asylum* judgments as supporting the existence of the persistent objector rule: see, for example, Tomuschat, "Obligations arising for States without or against their will", pp. 284–287; Charney, "The persistent objector rule and the development of customary international law", pp. 9–11; Ragazzi, *The Concept of International Obligations* Erga Omnes, p. 62, footnote 79 (writing with respect to the *Asylum* case that "this case related to the existence of a local custom. Local customs do not produce general effects, and the claimant State must give evidence that the opposing State has consented to the rule. Therefore, the question of the persistent objector cannot really arise, in the strict sense, with respect to a local custom"). But see, in response, Mendelson, "The formation of customary international law", pp. 228–232; Kritsiotis, "On the possibilities of and for persistent objection", p. 129 ("For the Court … these cases [the *Asylum Case* of 1950 and the *Fisheries Case* of 1951] were both about the actualization of persistent objection in practice"); Akehurst, "Custom as a source of international law", pp. 24–25. See also Charlesworth, "Customary international law and the *Nicaragua* case", p. 30 ("In its discussion of whether a customary norm of non-intervention exists, the Court acknowledges the possibility that a persistent objector will not be bound by a rule of customary international law").

[211] See *North Sea Continental Shelf* (footnote 18 above), at p. 97, separate opinion of Judge Padilla Nervo, and p. 229, dissenting opinion of Judge Lachs; *South West Africa, Second Phase* (footnote 55 above), at p. 291, dissenting opinion of Judge Tanaka; *Legality of the Threat or Use of Nuclear Weapons* (footnote 23 above), at p. 312, dissenting opinion of Judge Schwebel.

[212] Stein, "The approach of the different drummer: the principle of the persistent objector in international law", p. 463. See also, for example, Dupuy, "À propos de l'opposabilité de la coutume générale: enquête brève sur l' 'objecteur persistant' ", p. 266 ("*Peu ou pas invoqué dans la pratique étatique, désertant les arrêts de la Cour, l'objecteur persistant semble décidément bien évanescent*" ["Rarely or not invoked in State practice and no longer in the Court's rulings, the persistent objector seems to be vanishing"]).

[213] See, for example, pleadings by the United Kingdom and Norway in the *Fisheries* case (*I.C.J. Pleadings, Fisheries Case (United Kingdom v. Norway)*, vol. I, Counter-Memorial of Norway, pp. 381–383, paras. 256–260; vol. II, Reply of the United Kingdom, pp. 428–429, paras. 162–164; vol. III, Rejoinder of Norway, pp. 291–296, paras. 346–353); Hong Kong, China, *Democratic Republic of the Congo v. FG Hemisphere Associates LLC,* Hong Kong Court of Final Appeal FACV Nos. 5, 6 & 7 of 2010 (2011), para. 121 ("Since I am not speaking of—and cannot speak of—the position in the Mainland, it is unnecessary for me to say whether I consider restrictive immunity to be a rule of customary international law. Nor is it necessary for me to decide whether persistent objection works. If it were necessary to do so, I would accept that China has been a persistent objector to restrictive immunity"); Germany, *Entscheidungen des Bundesverfassungsgerichts* [Decisions of the Federal Constitutional Court], Federal Constitutional Court, vol. 46, decision of 13 December 1977 (2 BvM 1/76), No. 32 (Tübingen, 1978), pp. 388–389, para. 6 ("This concerns not merely action that a State can successfully uphold from the outset against application of an existing general rule of international law by way of perseverant protestation of rights (in the sense of the ruling of the *International Court of Justice in the Norwegian Fisheries Case, ICJ Reports 1951*, p. 131); instead, the existence of a corresponding general rule of international law cannot at present be assumed"); Hong Kong, China, *C v. Director of Immigration*, Hong Kong Court of Appeal [2010] HKCA 159 (2011), para. 68 ("The concept of 'persistent objector' is a principle in public international law where 'a State … in the process of formation of a new customary rule of international law, disassociate[s] itself from that process, declare[s] itself not to be bound, and maintain[s] that attitude' (*Fitzmaurice*, pp. 99–100). Evidence of objection must be clear"); *Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland* (Arbitration under Annex VII of the 1982 United Nations Convention on the Law of the Sea), vol. I, Reply of Mauritius, 18 November 2013, p. 124, para. 5.11 ("The persistent objector rule requires a State to display persistent objection during the formation of the norm in question"); *Roach v. United States*, Case 9647, Report No. 3/87, Inter-American Commission on Human Rights, (1987), para. 52 ("The evidence of a customary rule of international law requires evidence of widespread State practice. Article 38 of the Statute of the International Court of Justice … defines 'international custom, as evidence of a general practice accepted as law.' The customary rule, however, does not bind States which protest the norm"); *Domingues v. United States*, Inter-American Commission on Human Rights (see footnote 90 above), paras. 48–49 ("Once established, a norm of international customary law binds all States with the exception of only those States that have persistently rejected the practice prior to its becoming law. While a certain practice does not require universal acceptance to become a norm of customary international law, a norm which has been accepted by the majority of States has no binding effect upon a State which has persistently rejected the practice upon which the norm is based … as customary international law rests on the consent of nations, a State that persistently objects to a norm of customary international law is not bound by that norm"); *BG Group Plc v. Republic of Argentina*, Final Award, 24 December 2007, UNCITRAL Arbitral Tribunal, para. 410, footnote 328; United States, *Siderman de Blake v. Republic of Argentina*, Court of Appeals for the Ninth Circuit, 965 F.2d (1992), p. 699, at p. 715, para. 54: "A State that persistently objects to a norm of customary international law that other States accept is not bound by that norm"; *Sabeh El Leil v. France* [GC], No. 34869/05, European Court

(*Continued on next page.*)

addition, there is other State practice in support of the rule.[214]

88. The existence of the persistent objector rule is widely endorsed in the literature,[215] although occasionally it has been questioned by certain writers.[216] In the words of Waldock: [T]he view of most international lawyers is that … when a custom satisfying the definition in Article 38 is established, it constitutes a general rule of international law which, subject to one reservation, applies to every State. The reservation concerns the case of a State which, while the custom is in process of formation, unambiguously and persistently registers its objection to the recognition of the practice as law."[217] Koroma likewise notes that the principle is well-established and accepted in international law.[218]

89. The Commission referred to the persistent objector rule in its recent Guide to Practice on Reservations to Treaties, stating: "[A] reservation may be the means by which a 'persistent objector' manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law."[219]

90. The persistent objector rule is perceived as a safeguard against the transformation of customary international law into "the sole preserve of the mighty",[220] and is particularly attractive because there is no possibility of dissent from an established rule. In addition, the rule "is often regarded as a logical consequence, if not an illustration, of the essentially consensual nature of customary international law".[221] Further reasons for the existence of

(*Footnote 213 continued.*)

of Human Rights, 29 June 2011, para. 54 (recalling that a treaty provision may also be binding on a non-party as customary international law "provided it has not opposed it"). See also Guillaume, "Avis d'*amicus curiae*", p. 20, para. 11 (arguing in an *amicus* brief solicited by the French Council of State that a State could be a persistent objector if the rule in article 53 of the 1969 Vienna Convention (*Jus cogens*) were customary international law; the judgment of the Council of State did not deal with *jus cogens* (see judgment No. 303678, 23 December 2011)).

[214] See, for example, the intervention by Turkey at one of the plenary meetings of the Third United Nations Conference on the Law of the Sea, where it was argued that "in the course of the preparatory stages of the Conference as well as during the Conference, [Turkey] has been a persistent objector to the 12-mile limit. As far as the semi-enclosed seas are concerned, the amendments submitted and the statements made by the Turkish delegations manifest Turkey's consistent and unequivocal refusal to accept the 12-mile limit on such seas. In view of the foregoing considerations, the 12-mile limit cannot be claimed *vis-à-vis* Turkey" (*Official Records of the Third United Nations Conference on the Law of the Sea, Final Part of the Eleventh Session and Conclusion of the Conference, Montego Bay, 6–10 December 1982*, vol. XVII, *Summary Records*, 189th meeting, p. 76, para. 150); Bellinger and Haynes, "A US Government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", p. 457, footnote 43 ("The U.S. Government believes that the doctrine [of the persistent objector] remains valid"). See also Danilenko, *Law-Making in the International Community*, p. 112 ("the possibility of effective preservation of the persistent objector status should not be confused with the legally recognized right not to agree with new customary rules").

[215] See, for example, Murphy, *Principles of International Law*, pp. 95–96; Lauterpacht, "International law—the general part", p. 66 ("although it is not necessary to prove the consent of every State, express dissent in the formative stage of a customary rule will negat[e] the existence of custom at least in relation to the dissenting State"); Skubiszewski, "Elements of custom and the Hague court", p. 846 ("once custom has been made, it binds States unless in the formative period they voiced their opposition"); Armstrong, Farrell and Lambert, *International Law and International Relations*, p. 180 ("It may be possible for a State through persistent objection not to be bound by an emerging rule of customary law (this possibility does not exist for established customary rules)"); Daillier, Pellet and Forteau, *Droit international public*, para. 231; Díez de Velasco Vallejo, *Instituciones de Derecho Internacional Público*, p. 140; Santulli, *Introduction au droit international*, pp. 54–55; Danilenko, "The theory of international customary law", p. 41 ("In accordance with existing international law, an individual State is not bound by customary rule, despite widespread practice and relevant *opinio juris*, if this State has persistently objected to an emerging rule"); Ragazzi, *The Concept of International Obligations* Erga Omnes, pp. 60–65; Quince, *The Persistent Objector and Customary International Law*. See also *Restatement of the Law Third, Restatement of the Law, The Foreign Relations Law of the United States*, § 102, comment *d* ("Although customary law may be built by the acquiescence as well as by the actions of States … and become generally binding on all States, in principle a State that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures."); Green, "Persistent objector teflon? Customary international human rights law and the United States in international adjudicative proceedings"; Koskenniemi, *From Apology to Utopia*, p. 443 ("Although case-law on the persistent objector is thin, doctrine has overwhelmingly assumed it").

[216] See, for example, Abi-Saab, "Cours général de droit international public", pp. 180–182; Charney, "The persistent objector rule and the development of customary international law"; Cassese, *International Law*, pp. 162–163; Dumberry, "Incoherent and ineffective: the concept of persistent objector revisited"; Lau, "Rethinking the persistent objector doctrine in international human rights law" (suggesting that consent has a non-absolute and diminishing role in international law and that the doctrine of the persistent objector, to human rights cases in particular, should be limited). Lowe responds as follows: "Some writers have doubted the validity of the principle of persistent objection, regarding it an anachronistic survival of the nineteenth-century consensualist view of international law. But once the limited scope of the principle, and its extremely limited invocation in practice, are understood, it is hard to see why such doubts persist. It is plainly right that a State should not be bound by obligations set out in a treaty to which it is not a Party. Why, then, should other States be able to bind the State by claiming that their practice has generated a rule of customary international law, if (and only if) the State has persistently made known its objection to the rule?" (Lowe, *International Law*, p. 58).

[217] Waldock, "General course on public international law", p. 49.

[218] Koroma, "The application of international law by the International Court of Justice", pp. 113–114.

[219] Para. (7) commentary to guideline 3.1.5.3 of the Guide to Practice on Reservations to Treaties, *Yearbook … 2011*, vol. II (Part Three).

[220] Mendelson, "The formation of customary international law", p. 227. See also Akehurst, "Custom as a source of international law", p. 26 ("If the dissent of a single State could prevent the creation of a new rule, new [customary] rules would hardly ever be created. If a dissenting State could be bound against its will, customary law would in effect be created by a system of majority voting; but it would be impossible to reach agreement about the size of the majority required, and whether (and, if so, what) the 'votes' of different States should be weighted. Moreover, States which were confident of being in a majority would adopt an uncompromising attitude towards the minority"); Elias, "Persistent objector", para. 2 ("the principle of the persistent objector furnishes an avenue for non-consenting States to exempt themselves from the majoritarian tendencies that have been identified as having come to characterize the process of creating customary international law since the middle of the 20th century"); Stein, "The approach of the different drummer" (arguing that in the contemporary highly self-conscious customary law-creation process, the persistent objector rule has an increasingly important part to play); London Statement of Principles (see footnote 84 above), p. 739 ("As a matter of policy, the persistent objector rule could be regarded as a useful compromise. It respects States' sovereignty and protects them from having new law imposed on them against their will by a majority; but at the same time, if the support for the new rule is sufficiently widespread, the convoy of the law's progressive development can move forward without having to wait for the slowest vessel").

[221] Elias, "Persistent objector", para. 2. See also Weil, "Towards relative normativity in international law?", pp. 433–434 (describing the ability of an individual State to opt out of an emerging rule of customary international law as "the acid test of custom's voluntarist nature" within the orthodox doctrine of the sources of international law); Murphy, *Principles of International Law*, p. 95 ("This 'persistent objector' rule

the persistent objector rule have been traced to the "fundamental ethical principles of significant state autonomy and unity in diversity" and the assertion that States themselves have come to recognize it as forceful.[222] It has been found to play "a number of important roles in the system of customary law" through, for example, allowing objecting States "the facility, in the short term, to adjust to the new realities that they may need to face" and enabling the "modification of the new rule in order to achieve an accommodation between the views of States that subscribe to the new rule and those of the objecting State or States",[223] as well as providing "a means whereby a State may protect its legal interests without using confrontational actions",[224] and reducing the costs to the international legal system caused by States' noncompliance with it (and to the objecting State itself by enabling it to avoid being in breach with international law).[225]

91. In the words of Fitzmaurice: "The essence of the matter is dissent from the rule *while it is in process of becoming one, and before it has crystallized into a definite and generally accepted rule of law*."[226] The line between objection and violation may not always be an easy one to draw,[227] but it is clear that once a rule of customary law has crystallized States may no longer invoke *de novo* the persistent objector rule.[228] There can be no "subsequent objector".[229] A State should object to a developing rule as early as possible.[230]

92. For persistent objection to be effective, it must be clearly expressed.[231] There is, however, "no requirement that a statement of position be made in a particular form or tone".[232] In particular, verbal objection, as opposed to a

is a nod to the centrality of State consent in international law"); Villiger, *Customary International Law and Treaties*, p. 17 ("the notion of persistent objection is *essential*, in view of the structure of the State community. If States are the law-creating subjects of international law, they may, for reasons of their own, *in casu* and for themselves, opt out of the law-making process"); Colson, "How persistent must the persistent objector be?", pp. 957–958 ("The principle of the persistent objector is the logical consequence of the consensual nature of the formation of international law"); Reisman *et al.*, *International Law in Contemporary Perspective*, p. 15 ("In line with the traditional conception of the consensual nature of international law, States that persistently object to a new limitation on their freedom to act by an emerging customary law may successfully avoid being bound by it").

[222] Lepard, *Customary International Law: A New Theory with Practical Applications*, p. 229; Fidler, "Challenging the classical concept of custom: perspectives on the future of customary international law", p. 209.

[223] Elias, "Persistent objector", para. 6.

[224] Colson, "How persistent must the persistent objector be?", p. 964.

[225] See Guzman, "Saving customary international law", p. 169 (demonstrating that rational choice theory of customary international law supports the persistent objector doctrine). But see Kelly, "The twilight of customary international law", pp. 523–526; Verdier and Voeten, "Precedent, compliance, and change in customary international law", pp. 427–429 (arguing that the doctrine has limited practical significance).

[226] Fitzmaurice, "The law and procedure of the International Court of Justice, 1951–54", p. 26.

[227] See also Colson, "How persistent must the persistent objector be?", p. 958 ("The line between these two stages [of States objecting to new trends in international legal practice and States objecting to trends that have crystallized into law] is never clear, except perhaps in retrospect"); Elias, "Some remarks on the persistent objector rule in customary international law", p. 38 ("There may well be cases in which the distinction between persistent objection and subsequent objection is difficult to draw, but in principle the distinction is not problematic").

[228] See, for example, *Colombian–Peruvian asylum case* (footnote 110 above), at p. 336, dissenting opinion of Judge Azevedo ("those occasional denials constitute violations of an already established rule, for a State cannot oppose a custom previously accepted"); McClane, "How late in the emergence of a norm of customary international law may a persistent objector object?", p. 7 ("By definition an objection after the norm has come into existence is a subsequent objection, and as such, is ineffective"); Akehurst, "Custom as a source of international law", p. 24 ("Opposition which is manifested for the first time after the rule has become firmly established is too late to prevent the State being bound"); Thirlway, *International Customary Law and Codification*, in matters of local customary law, p. 110 ("if there is general acceptance of the practice 'as law', and the dissentient States have not made their views heard until after the rule has crystallised and become firmly established, the rule will be binding on all, including the dissentient States"); Mendelson, "The formation of customary international law", p. 244 ("the persistent objector rule … applies only to those who make their objection at the time the general rule is emerging: there is no 'subsequent objector' rule"); Barberis, "Réflexions sur la coutume internationale", p. 39 ("*Un Etat ne peut se dégager des liens d'une norme coutumière que s'il s'y est opposé d'une manière claire et réitérée dès le moment de sa formation. … L'opposition claire et réitérée a un effet lorsqu'elle a commencé dès le moment de la formation de la norme coutumière mais devient inefficace si l'opposition se manifeste alors que la norme coutumière a déjà pris naissance*" ["A State can only free itself from the bonds of a customary norm if it has clearly and repeatedly opposed it from the moment of its formation. … Clear and repeated opposition has effect when it has commenced from the moment of the formation of the customary norm but becomes ineffective if the opposition manifests itself when the customary norm has already come into being"]).

[229] For the suggestion that subsequent objection ought to be permitted in certain circumstances, see Bradley and Gulati, "Withdrawing from international custom"; Guzman, "Saving customary international law", pp. 169–171; and the response to such a suggestion by Estreicher, "A post-formation right of withdrawal from customary international law?: Some cautionary notes".

[230] See Elias, "Persistent objector", para. 15 ("the State in question must express its objection as early as possible"); Kaczorowska, *Public International Law*, p. 41 ("a State should raise its objection as early as possible and react to unwelcome developments not only when the subject matter of new developments will affect directly its interest but also when, in the immediate future, those developments have no great relevance to that State").

[231] See, for example, Steinfeld, "Nuclear objections: the persistent objector and the legality of the use of nuclear weapons", p. 1652 ("The dissenting State should meet public statements of legal policy with a public objection if it plans to reserve a certain legal right under current international law"); Bederman, "Acquiescence, objection and the death of customary international law", p. 35 ("States are obliged to protest loud and often if they wish to avoid being bound by a norm of emerging global custom"); Mendelson, "The formation of customary international law", pp. 240–241 ("First of all, obviously the objection must be expressed: it is no use government officials and ministers voicing doubts amongst themselves, but not communicating them to the outside world. If a State which is directly affected by a practice does not object, it can in many instances reasonably be taken to have acquiesced or to be otherwise precluded from objecting to the rule"); MacGibbon, "Some observations on the part of protest in international law", p. 318 (a State must protest "vigorously and unambiguously"); Stern, "Custom at the heart of international law", p. 108. See also *Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland* (Arbitration under Annex VII of the 1982 United Nations Convention on the Law of the Sea), vol. I, Reply of the Republic of Mauritius (see footnote 213 above), p. 124, para. 5.11 ("The objection must be expressed: it is not sufficient for government officials to voice objections to themselves, but not communicate them outside the confines of their home working environment").

[232] Colson, "How persistent must the persistent objector be?", p. 969. See also Lepard, *Customary International Law*, p. 238 ("In short, it is not possible to assert that objection must take a particular form or manifest a certain level of intensity in every case"); Wolfke, *Custom in Present International Law*, p. 67 ("The ways of expressing effective individual dissent against the emergence of a custom may be various, express and indirect, that is tacit. The most effective are, of course, unequivocal, express protests against a practice, its acceptance as law or the ripe customary rule, for inference of dissent from

(*Continued on next page.*)

requirement for physical action, would suffice to preserve the legal position of the objecting State.[233] In practice, a State may deny that an emerging rule has become a rule of customary international law, or object to the applicability of the rule to itself, or do both.[234]

93. A State must maintain its objection both persistently and consistently, lest it be taken as having acquiesced.[235] It has been said that the objection "must be repeated as often as circumstances require (otherwise it will not be 'persistent')",[236] although it may be unrealistic to demand total consistency.[237] The State may, of course, abandon its objection at any time.

94. The burden of proving the right to benefit from the persistent objector rule lies with the objecting State, which must rebut the presumption that the relevant rule of customary international law, as such, is binding on it.[238]

95. The following draft conclusion, to be placed in part six, is proposed:

"*Draft conclusion 16. Persistent objector*

"A State that has persistently objected to a new rule of customary international law while that rule was in the process of formation is not bound by the rule for so long as it maintains its objection."

(*Footnote 232 continued.*)

simple conduct is much less conclusive and difficult to prove"). Some have argued that the objection must be principled (a "conscientious defection"), but see Postema, "Custom in international law: a normative practice account", p. 299; Lepard, *Customary International Law*, pp. 230–232. Stein argues that persistent objection should be permitted "whether on grounds of principle or expediency", yet suggests that "a requirement of substantive consistency" in objections could prove advantageous (Stein, "The approach of the different drummer, p. 476).

[233] See also London Statement of Principles (see footnote 84 above), p. 739 ("Verbal protests are sufficient: there is no rule that States have to take physical action to preserve their rights"); Guldahl, "The role of persistent objection in international humanitarian law", p. 55 ("Although it is established that evidence of State practice under customary international law in general may consist of both verbal and physical acts, such a requirement [for persistent objectors to actually exercise the right they claim] would ensure that this exception to the general application of customary international law would in fact only be relied upon in exceptional circumstances, by States that are truly committed to their position. It would also make a State's legal positions clearer. However, it could have adverse and indeed disastrous consequences, as in the case of a prohibition on the use of nuclear weapons, or, to give a less extreme example, in the case of belligerent reprisals being used against civilians. It is clear that such a requirement is not desirable, and it is generally not considered to be required"); Mendelson, "The formation of customary international law", p. 241 ("merely verbal objection, unaccompanied by physical actions to back up that objection, seems to be sufficient. Indeed, it would be subversive of world peace were it to be otherwise, as well as disadvantaging States lacking the military resources or the appropriate technical personnel to take such action"); Colson, "How persistent must the persistent objector be?", pp. 963–965 ("a statement of objection may be couched in a variety of ways and may be communicated through various means. National positions probably do not need to be expressed in deeds to form a valid legal objection. Words, clear but gently stated, are sufficient in international law to protect the position of the persistent objector"); Lepard, *Customary International Law*, at p. 239 ("Of course, even in cases in which persistent objection should be difficult, fundamental ethical principles such as the nonuse of force imply that unambiguous protest should not require nonverbal action (and especially military action) to impose implementation of the rule. Mere verbal protest should be sufficient").

[234] See also Elias and Lim, *The Paradox of Consensualism in International Law*, p. 106; Elias, "Persistent objector", para. 17 ("it would also appear that it does not matter whether objecting States express their objection or lack of consent in relation to the formation or existence of a rule, or whether they express their objection to the applicability of the rule in question to themselves only").

[235] See also Gaja, "The protection of general interests in the international community", p. 43 ("the opposition that the Court considered relevant [in the *Fisheries (United Kingdom v. Norway)* case] consisted in something more than a simple negative attitude to a rule. It concerned an opposition to 'any attempt to apply' the rule, with the suggestion that those attempts had failed. Thus what seems relevant, with regard to a dissenting State, is whether a rule has become effective also towards that State"); Crawford, "Chance, order, change: the course of international law", p. 247 ("Persistent objection … must be consistent and clear, and is not manifested by a simple failure to ratify a treaty"); Elias, "Persistent objector", para. 16 ("If a State does not maintain its objection, it may be considered to have acquiesced"); Kritsiotis, "On the possibilities of and for persistent objection", pp. 129–130 ("Objections must therefore be properly and appropriately timed, and they must be, in a manner of speaking, persistent; we can safely assume that sporadic or isolated objections will not do"); Mendelson, "The formation of customary international law", p. 241 ("the protests must be maintained. This is indeed implied in the word 'persistent' … if the State, having once objected, fails to reiterate that objection, it may be appropriate (depending on the circumstances) to presume that it has abandoned it").

[236] London Statement of Principles (see footnote 84 above), p. 739. See also Elias, "Persistent objector", para. 16 ("The more widespread and notorious the practice, the greater the evidence of objection that will be required of the objecting State, as lack of objection in the face of practice that is considered to be sufficiently general to result in a new rule can amount to acquiescence"); Steinfeld, "Nuclear objections: the persistent objector and the legality of the use of nuclear weapons", p. 1652 ("the nature of the custom itself must determine the nature of the objection required").

[237] See *Fisheries case* (footnote 53 above), at p. 138 ("The Court 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"); Colson, "How persistent must the persistent objector be?", p. 957 ("any answer to the question of 'how persistent must the persistent objector be' must take into account the context in which the principle is applied").

[238] See also Crawford, "Chance, order, change: the course of international law", p. 57 ("importantly, all the while, there is a rebuttable presumption of acceptance of the norm"); Dupuy, "Coutume sage et coutume sauvage", p. 78 ("*son inopposabilité [de la coutume] est subordonnée à la preuve, par l'État qui s'en prévaut, de protestations, déclarations manifestant clairement qu'il ne fait pas partie de la communauté juridique servant d'assise à la coutume*" ["its inopposability [of custom] is subject to proof, by the State availing itself of it, of protests and statements clearly showing that it is not part of the juridical community on which the custom is based"]).

Chapter VIII

Future programme of work

96. As indicated in the introduction, the present report seeks to complete the set of draft conclusions proposed by the Special Rapporteur.[239] The future programme of work depends on the progress made by the Commission at its session in 2015. If the Commission is able to adopt provisionally a set of draft conclusions, with commentaries, in 2015, then the Special Rapporteur, in his next report in 2016, will suggest any changes that might be made to the

[239] See para. 8 above.

conclusions and the commentaries, in the light of the debate in the Sixth Committee in 2015 and of any written observations received from Governments and others. The aim remains to conclude work on the topic, if possible, at the Commission's 2016 session, following a detailed and thorough review and revision at that session of the text of the draft conclusions and commentaries, as adopted in 2015.[240] It will be important, however, not to press forward with undue haste if more time appears to be needed.[241]

97. In the fourth report, the Special Rapporteur intends to consider, in addition to (but separate from) the draft conclusions and commentaries, practical means of enhancing the availability of materials on the basis of which a general practice and acceptance as law may be determined.[242]

98. The Special Rapporteur also intends to prepare, and circulate for review by members of the Commission, a bibliography relating to the topic.

[240] It will be recalled that a similar procedure was followed in connection with the Guide to Practice on Reservations to Treaties, a full version of which was provisionally adopted by the Commission in 2010, with the adoption of a final version one year later, in 2011 (see *Yearbook ... 2011*, vol. II (Part Two), paras. 54−64). It will be recalled that at the 2011 session the draft guidelines were considered in detail by a working group (chaired by Mr. Vásquez-Bermúdez).

[241] During the debate at the sixty-sixth session, Mr. Forteau recalled the wise saying, *festina lente* (see *Yearbook ... 2014*, vol. I, 3226th meeting; see also statement of 17 July 2014).

[242] See also *ibid.*, vol. II (Part One), document A/CN.4/672, para. 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").

Annex

Further proposed draft conclusions

Draft conclusion 3 [4]. Assessment of evidence for the two elements

….

2. Each element is to be separately ascertained. This generally requires an assessment of specific evidence for each element.

Draft conclusion 4 [5]. Requirement of practice

….

3. Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law.

Draft conclusion 11. Evidence of acceptance as law

….

3. Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction.

Part five

PARTICULAR FORMS OF PRACTICE AND EVIDENCE

Draft conclusion 12. Treaties

A treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question:

(*a*) at the time when the treaty was concluded, codifies an existing rule of customary international law;

(*b*) has led to the crystallization of an emerging rule of customary international law; or

(*c*) has generated a new rule of customary international law, by giving rise to a general practice accepted as law.

Draft conclusion 13. Resolutions of international organizations and conferences

Resolutions adopted by international organizations or at international conferences may, in some circumstances, be evidence of customary international law or contribute to its development; they cannot, in and of themselves, constitute it.

Draft conclusion 14. Judicial decisions and writings

Judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law.

Part six

EXCEPTIONS TO THE GENERAL APPLICATION OF RULES OF CUSTOMARY INTERNATIONAL LAW

Draft conclusion 15. Particular custom

1. A particular custom is a rule of customary international law that may only be invoked by and against certain States.

2. To determine the existence of a particular custom and its content, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by each of them as law (*opinion juris*).

Draft conclusion 16. Persistent objector

A State that has persistently objected to a new rule of customary international law while that rule was in the process of formation is not bound by the rule for so long as it maintains its objection.

PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

[Agenda item 8]

DOCUMENT A/CN.4/685

Second report on the protection of the environment in relation to armed conflicts, by Ms. Marie G. Jacobsson, Special Rapporteur

[*Original: English*]
[*28 May 2015*]

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Introduction[*]

1. At its sixty-fifth session, in 2013, the International Law Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic.[1]

2. The topic was first included in the long-term programme of work in 2011. Consideration of the topic had initiated with informal consultations that had begun during the sixty-fourth session of the Commission, in 2012, and continued at its sixty-fifth session, in 2013, when the Commission held more substantive informal consultations. Those initial consultations offered members of the Commission an opportunity to reflect and comment on the road ahead. The elements of the work discussed included the scope and general methodology, including the division of work into temporal phases, and the timetable for future work. The Special Rapporteur presented a preliminary report[2] at the Commission's sixty-sixth session, in 2014, on the basis of which the Commission held a general debate.[3]

3. The present report contains a brief summary of the debates held in 2014 by the Commission and by the Sixth Committee of the General Assembly during its sixty-ninth session. It also contains a summary of the responses received from States with regard to the specific issues identified by the Commission as being of particular interest to it.

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[1] *Yearbook ... 2013*, vol. II (Part Two), para. 131.

[2] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674.

[3] *Ibid.*, vol. II (Part Two), paras. 192–213. For a more comprehensive presentation of the debate, see *ibid.*, vol. I, 3227th to 3231st meetings.

Chapter I

Purpose of the present report

4. The focus of the present report is to identify existing rules of armed conflict that are directly relevant to the protection of the environment in relation to armed conflicts. The report therefore contains an examination of such rules. It also contains draft principles.

5. The law of armed conflict must be interpreted in the light of the realities of modern armed conflict. The nature of armed conflict varies considerably. Besides classic, inter-State wars, the world also faces non-international armed conflict, internationalized armed conflict and wars by proxy. Yet other descriptions of conflict have entered the scene, such as "cyberwar" and "asymmetric warfare". The first test to be done in any given case is to identify whether an armed conflict exists at all.[4]

6. The varied nature of armed conflicts is particularly challenging because any application of the law of armed conflict must begin with a classification of the conflict in question.[5] Unless such a classification is made, it is more or less impossible to comprehend which rules to apply. Not all rules applicable in relation to international armed conflict are considered applicable during non-international armed conflict. At the same time, it is clear that fundamental principles, such as the principle of distinction and the principle of humanity (the dictates of public conscience), reflect customary law and are applicable in all types of armed conflict. In addition, many provisions of international treaties reflect rules of a customary law nature and may therefore be applicable in all types of armed conflict.[6]

Method and sources

7. The present report contains information on State practice based on the information received directly from States. Such information has been obtained through either the responses of States to questions posed by the Commission or their statements on the topic in the debate in the Sixth Committee of the General Assembly. In addition, information has been obtained from the official websites of States and relevant organizations. Such information can be characterized as a primary source; however, as with any other topic considered by the Commission, such information is not comprehensive. A challenge lies in selecting which method to use in identifying applicable customary law rules. The International Committee of the Red Cross (ICRC) has made an impressive effort in this respect. Its momentous study on customary international humanitarian law (hereinafter, "ICRC customary law study") was published in 2005 following some ten years of compilation of material and analytical work.[7] The ICRC customary law study has no precedent. With its two volumes, 5,000 pages and 161 rules and commentaries and supporting material, it is, to quote one author, "a remarkable feat".[8] Yet it has been criticized for shortcomings in methodology and reliability.[9] In addition, it should be underlined that the study is, in and of itself, a snapshot of the applicable law at a given time. To mitigate the latter temporal shortcoming, additional material is continuously placed on the ICRC customary law web page.[10] In the view of the Special Rapporteur, the work by ICRC is far too valuable to neglect or even downplay. It is the most comprehensive compilation of legislative and regulatory measures, along with expressions of *opinio juris*, available in this field. To the extent that reference is made to the ICRC customary law study, it is done on the basis of the aforementioned premises.

8. For obvious reasons, it is far more difficult to acquire information on State practice in non-international armed conflict. Information on the practice by non-State actors is even more difficult to access. Such information is of certain interest even if it does not constitute State practice in the legal sense. The Commission's discussions in 2014 on the topic "Identification of customary international law" revealed a clear tendency within the Commission not to include practice by nonState actors as part of the concept of customary international law. As a result, the Special Rapporteur for that topic has suggested a clarifying rule stipulating that conduct by other non-State actors (with the possible exception of international organizations) not be considered "practice" for the purposes of the topic.[11]

9. All parties to armed conflict are subject to the rules of international humanitarian law. Leaving aside the question of whether non-State actors are eligible to create or to contribute to the formation of customary international law, for practical reasons the Special Rapporteur has been unable to examine the practice of non-State armed groups.[12]

[4] For a discussion on a possible definition of "armed conflict", see the preliminary report of the Special Rapporteur, *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, paras. 69–78.

[5] For a summary of the legal need for the classification of conflict, see Pejić, "Status of armed conflict". For a comprehensive discussion see the various contributions in Wilmshurst (ed.), *International Law and the Classification of Conflicts*.

[6] There are two steps in such an analysis: first, the provision needs to be identified as reflecting customary law and, second, the content of the rule will make it clear whether or not its customary law status covers both types of conflict.

[7] Henckaerts and Doswald-Beck (eds.), *Customary International Humanitarian Law*, vols. 1 and 2.

[8] Bethlehem, "The methodological framework of the study", p. 3.

[9] See, e.g., Bethlehem, "The methodological framework of the study"; Scobbie, "The approach to customary law in the study"; and Hampson, "Other areas on international law in relation to the study". See also McCormack, "An Australian perspective on the ICRC customary international humanitarian law study".

[10] The most recent update was made on 6 November 2014 and encompasses national legislation from Denmark, Djibouti, Poland, Somalia and Tajikistan (www.icrc.org/customary-ihl/eng/docs/home).

[11] The Special Rapporteur suggested that a new paragraph 3 be included in draft conclusion 4 [5] (Requirement of practice), as follows: "Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law" (see document A/CN.4/682, annex, reproduced in the present volume).

[12] In the context of non-international armed conflict, there are some non-State armed groups that may be well-organized and well-equipped, while others may be ill-equipped and poorly educated. It is rare that non-State armed groups use air and missile warfare in non-international armed conflict. However, there are indications that this might change, given the fact that non-State armed groups are already in possession of drones or missiles. There are signs that some non-State armed groups

(*Continued on next page.*)

During the preparation of the present report, the Special Rapporteur has had reason to recall the work of ICRC and nongovernmental organizations with regard to the dissemination of humanitarian law to such armed groups. The non-governmental organization Geneva Call,[13] the aim of which is to promote respect by armed non-State actors for international humanitarian norms in armed conflict and other situations of violence, has established a directory of humanitarian commitments by armed non-State actors, which consists of a database in which agreements between such actors and States can be found.[14] In general, however, not much of this kind of information is publicly available. For those reasons, the Special Rapporteur has been unable to examine the practice of nonState armed groups. This is somewhat regrettable because it is in the interaction between States and non-State armed groups that evidence of State practice may be identified.

10. The present report is based on an examination of relevant treaties on the law of war and on related disarmament treaties. Occasionally, it is difficult to categorize treaties as belonging to either type: humanitarian law treaties or disarmament treaties. The report contains a brief study of specially regulated areas, such as nuclear-weapon-free zones and natural heritage zones. This is done in direct response to suggestions by members of the Commission and States. To obtain an overview of those types of treaty regimes, it was considered appropriate to refer to them in the same report.

11. Furthermore, the report contains a section on relevant case law. Given the amount of case law with a possible connection to the topic, a careful selection has been made of the most pertinent cases.

(*Footnote 12 continued.*)

have their own air force. With respect to naval warfare, it can be noted that the naval wing of the Liberation Tigers of Tamil Eelam (LTTE) (the Sea Tigers) was important during the Sri Lankan civil war. It has been reported that the LTTE craft varied from heavily armed gunboats and troop carriers to ocean-going supply vessels and that they possessed a radar-evading stealth boat as well as sophisticated communication systems. It is further asserted that the Sea Tigers had a diving unit that tasked with infiltrating harbours to lay mines. See Manoharan, "Tigers with fins: naval wing of the LTTE".

[13] See www.genevacall.org.

[14] Available from http://theirwords.org/pages/home.

12. The literature on almost every single aspect of the law of armed conflict is immense. To make the report both readable and practical, direct references to literature in footnotes are strictly limited. A more extensive list of the literature consulted can be found in annex II to the present report. The report is already heavily loaded with footnotes. If considered appropriate, references to comments and analysis by authors that have contributed to the doctrine may be elaborated upon in future commentaries to draft principles.

13. The present report addresses the use of weapons as part of any means of warfare, because all weapons to be used in armed conflict are subject to the law of armed conflict. Rules and principles on, for example, precautions in attack, distinction, proportionality, military necessity and humanity apply equally. With few exceptions, such as with landmines, the law of armed conflict (*jus in bello*) does not contain specific rules pertaining to specific weapons. The report does not discuss the use of weapons that are prohibited in international treaties (such as chemical or biological weapons).

14. Situations of occupation are also not dealt with herein. The reason is that occupation often extends beyond the time when active military hostilities have ceased. In addition, compensation for breaches of the law of occupation may be linked to both compensation for a breach of a *jus ad bellum* rule and a rule that is connected with the obligation of the occupying power. There is a close connection to private property rights. Occupation will therefore be addressed in the third report of the Special Rapporteur.

15. The connection between the legal protection of natural resources and the natural environment may need further examination. States have highlighted that connection in their statements to the Sixth Committee and, reportedly, in their national legislation and regulations. The Security Council has, in many resolutions, addressed the connection between armed conflict and natural resources and much of the work of the United Nations Environment Programme (UNEP) focuses on the same issue. That connection relates to all three temporal phases of this work: preventive measures; conduct of hostilities; and reparative measures. A line, however, must be drawn; that is to say, natural resources as a cause of conflict will not be addressed *per se*.

Chapter II

Consultations in the Commission at its sixty-sixth session

16. At its sixty-sixth session, in 2014, the Commission held a general debate on the basis of the preliminary report submitted by the Special Rapporteur.[15]

17. There was broad recognition of the importance of the topic and its overall purpose. Members generally agreed that the focus of the work should be to clarify the rules and principles of international environmental law applicable in relation to armed conflicts. Several members agreed with the Special Rapporteur that the Commission should not modify the law on armed conflict. On the other hand, some members were of the view that, in the light of the minimal treatment of the environment in the law of armed conflict, further elaboration of environmental obligations in armed conflict might be warranted.

18. There was general support for the temporal, three-phased approach adopted by the Special Rapporteur, with some members indicating that such an approach would facilitate the work. It was suggested that the temporal distinction would enable the Commission to focus on

[15] *Yearbook ... 2014*, vol. II (Part Two), paras. 192–213. For a more comprehensive presentation of the debate, see *ibid.*, vol. I, 3227th to 3231st meetings. For information on the phases of work outlined by the Special Rapporteur, see *Yearbook ... 2013*, vol. II (Part Two), paras. 135–136.

preparation and prevention measures in phase I and reparation and reconstruction measures in phase III. Some other members, however, raised concerns regarding an overly strict adherence to the temporal approach, noting that the Special Rapporteur herself had made clear in her report that it was not possible to make a strict differentiation between the phases. In developing guidelines or conclusions, several members were of the view that it would be difficult and inadvisable to maintain a strict differentiation between the phases, as many relevant rules were applicable during all three phases.

19. The weight that should be accorded to phase II, namely, obligations relating to the protection of the environment during an armed conflict, was the subject of considerable debate. Several members were of the view that phase II should be the core of the project given that consideration of the other two phases was inherently linked to obligations arising during armed conflict. According to those members, the law of armed conflict relevant to the protection of the environment was limited and did not reflect the present-day realities of armed conflict and the risk it poses to the environment. Several other members stressed that, as proposed by the Special Rapporteur, the Commission should not focus its work on phase II, as the law of armed conflict was *lex specialis* and contained rules relating to the protection of the environment.

20. There was also substantial discussion of limitations on the scope of the topic. Some members were of the view that the issue of weapons should be excluded from the topic, as proposed by the Special Rapporteur, while some others argued that a comprehensive treatment of the topic would necessarily include consideration of weapons. It was suggested that it could be clarified that the work on the topic was without prejudice to existing rules on specific weapons.

21. Finally, questions were raised about the proposal to consider non-international armed conflicts. While there was widespread agreement with the proposal to address such conflicts, some members indicated that their inclusion would necessitate study of whether non-State actors were bound by the law of armed conflict or by obligations that were identified as arising under phases I and III.

Chapter III

Debate in the Sixth Committee of the General Assembly at its sixty-ninth session

22. Some 32 States addressed the topic during the sixty-ninth session of the Sixth Committee of the General Assembly, based on the report of the Commission on the work of its sixty-sixth session.[16] A large number of States indicated the importance of the topic[17] and several made substantive statements. Three delegations expressed concerns about the feasibility of the topic.[18]

23. A large number of delegations welcomed the temporal approach adopted by the Special Rapporteur[19] and agreed that it was not possible to draw a strict dividing line between the three phases (i.e. prior to, during and after an armed conflict).[20] A few delegations reiterated their doubts as regards the feasibility of the temporal methodology[21] and one remarked that a thematic approach might be considered instead.[22] Three States commented that the Commission should consider embarking on a progressive development exercise if the existing protection regime were held to be insufficient.[23]

24. The approach of the Special Rapporteur in defining and limiting the scope of the topic was welcomed by a

[16] Austria, *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 25th meeting (A/C.6/69/SR.25), paras. 109–111; Belarus, *ibid*., 26th meeting (A/C.6/69/SR.26), paras. 26–28; Czech Republic, *ibid*., para. 41; Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), *ibid*., 25th meeting (A/C.6/69/SR.25), paras. 131–134; France, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 33; Greece, *ibid*., 26th meeting (A/C.6/69/SR.26), paras. 32–34; Hungary, *ibid*., 24th meeting (A/C.6/69/SR.24), para. 38; India, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 110; Indonesia, *ibid*., 27th meeting (A/C.6/69/SR.27), paras. 67–68; Iran (Islamic Republic of), *ibid*., 27th meeting (A/C.6/69/SR.27), paras. 11–13; Israel, *ibid*., 25th meeting (A/C.6/69/SR.25), paras. 86–87; Italy, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 53; Japan, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 77; Republic of Korea, *ibid*., 27th meeting (A/C.6/69/SR.27), paras. 73–74; Malaysia, *ibid*., paras. 47–49; Netherlands, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 52; New Zealand, *ibid*., 27th meeting (A/C.6/69/SR.27), paras. 2–4; Peru, *ibid*., 25th meeting (A/C.6/69/SR.25), paras. 122–126; Poland, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 61; Portugal, *ibid*., paras. 6–9; Romania, *ibid*., paras. 86–87; Russian Federation, *ibid*., 25th meeting (A/C.6/69/SR.25), paras. 99–102; Singapore, *ibid*., 26th meeting (A/C.6/69/SR.26), paras. 66–67; South Africa, *ibid*., para. 96; Spain, *ibid*., para. 104; Switzerland, *ibid*., paras. 44–45; United Kingdom of Great Britain and Northern Ireland, *ibid*., paras. 15–16; and United States of America, *ibid*., 27th meeting (A/C.6/69/SR.27), paras. 24–25. The statements are also on file with the Codification Division.

[17] Norway (on behalf of the Nordic countries, *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 131; Czech Republic, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 41; South Africa, *ibid.*, para. 96; India, ibid., para. 110; New Zealand, *ibid.*, 27th meeting (A/C.6/69/SR.27), paras. 2–4; Republic of Korea, *ibid.*, paras. 73–74, and statement on file with the Codification Division; and Poland, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 61, and statement on file with the Codification Division.

[18] France, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 32; Russian Federation, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 99; and Spain, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 104.

[19] Norway (on behalf of the Nordic countries), *ibid*., 25th meeting (A/C.6/69/SR.25), para. 133; Portugal, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 6; Belarus, *ibid*., para. 27; Greece, *ibid*., para. 32; Czech Republic, *ibid*., para. 41; Singapore, *ibid*., para. 66; India, *ibid*., para. 110; New Zealand, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 3; and Indonesia, *ibid*., para. 67.

[20] Norway (on behalf of the Nordic countries), *ibid*., 25th meeting (A/C.6/69/SR.25), para. 133; Portugal, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 6; Singapore, *ibid*., para. 66; New Zealand, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 3; and Indonesia, *ibid*., para. 67.

[21] Italy, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 53; Russian Federation, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 101; Spain, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 104; and Republic of Korea, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 73.

[22] Italy, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 53.

[23] Portugal, ibid., 26th meeting (A/C.6/69/SR.26), para. 7; Iran (Islamic Republic of), ibid., 27th meeting (A/C.6/69/SR.27), para. 11; and New Zealand, ibid., 27th meeting (A/C.6/69/SR.27), paras. 2–4 and statement on file with the Codification Division.

number of delegations,[24] with others expressing the view that the topic should not be unduly limited.[25] The issue of whether protection of cultural and natural heritage should be addressed as part of the topic was raised by a large number of delegations.[26] In addition, various views concerning the precise scope of the topic were voiced, including on whether to consider issues relating to human rights,[27] indigenous peoples,[28] refugees,[29] internally displaced persons[30] and the effect of weapons on the environment.[31]

25. In relation to the environmental principles identified in the Special Rapporteur's preliminary report, a number of delegations emphasized their relevance to the continued work on the topic.[32] The appropriateness of considering some of those principles in the current context was nonetheless questioned by another delegation.[33] In particular, a number of delegations drew attention to the issue of whether the principle of sustainable development and the need for environmental impact assessment as part of military planning should be included.[34] With regard to the latter, the view was expressed that an analysis thereof would be welcome.[35] A number of delegations urged the Commission to consider the environmental principles identified in the report and their characteristics in order to determine their applicability in the context of the topic.[36]

26. While some delegations questioned the need to develop definitions of the terms "environment" and "armed conflict",[37] others were of the view that such definitions could prove useful. The view was also expressed that the Commission should develop broad working definitions in order not to limit prematurely its consideration of the topic.[38] The definition of "environment" adopted by the Commission in the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities was supported by a number of delegations as an appropriate starting point.[39] Concerning the term "armed conflict", some delegations were of the view that the definition contained in international humanitarian law should be retained.[40] The definition provided in the *Tadić* case[41] was also referenced, as was the definition contained in the work of the Commission on the effects of armed conflicts on treaties.[42] While some delegations questioned the appropriateness of addressing situations of non-international armed conflicts and conflicts between organized armed groups or between such groups within a State,[43] a number of others considered that such situations should be addressed.[44] Some delegations expressed the view that situations of limited intensity of hostilities should not fall within the scope of the topic.[45]

27. It was observed by some delegations that it was premature to take a stance on the final form of the work of the Commission on the topic.[46] Nonetheless, a number of

[24] Israel, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 87; Russian Federation, *ibid*., para. 102; Norway (on behalf of the Nordic countries), *ibid*., para. 133; United Kingdom, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 16; and Netherlands, *ibid*., para. 52.

[25] Italy, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 53; and Peru, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 124.

[26] Italy, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 53; Israel, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 87; Russian Federation, *ibid*., para. 102; Austria, *ibid*., para. 110; United Kingdom, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 16; Greece, *ibid*., para. 32; Czech Republic, *ibid*., para. 41; Romania, *ibid*., para. 87; Malaysia, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 47; and Indonesia, *ibid*., para. 68.

[27] Italy, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 53; Israel, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 87; United Kingdom, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 16; Greece, *ibid*., para. 34; Switzerland, *ibid*., para. 45; South Africa, *ibid*., para. 96; India, *ibid*., para. 110; and Malaysia, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 47.

[28] Israel, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 87; Russian Federation, *ibid*., para. 102; United Kingdom, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 16; and United States, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 24.

[29] Israel, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 87; Russian Federation, *ibid*., para. 102; India, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 110; Iran (Islamic Republic of), *ibid*., 27th meeting (A/C.6/69/SR.27), para. 13; and Malaysia, *ibid*., para. 47.

[30] Russian Federation, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 102; Peru, *ibid*., para. 124; and Malaysia, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 47.

[31] Israel, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 87; Russian Federation, *ibid*., para. 100; Peru, *ibid*., para. 124; Portugal, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 7; United Kingdom, *ibid*., para. 16; Singapore, *ibid*., para. 66; and Romania, *ibid*., para. 87.

[32] Peru, *ibid*., 25th meeting (A/C.6/69/SR.25), paras. 123-126; Belarus, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 28; Greece, *ibid*., para. 33; Malaysia, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 48; Indonesia, *ibid*., para. 68; and Czech Republic, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 41.

[33] United States, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 24.

[34] Greece, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 33; Spain, *ibid*., para. 104; United Kingdom, *ibid*., para. 16; and United States, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 24.

[35] Romania, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 87.

[36] Singapore, *ibid*., 26th meeting (A/C.6/69/SR.26), paras. 66–67; Indonesia, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 68; and United States, *ibid*., para. 24.

[37] France, *ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 33; Romania, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 86; and Netherlands, *ibid.*, para. 52, and statement on file with the Codification Division.

[38] Republic of Korea, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 74, and statement on file with the Codification Divison; New Zealand, *ibid.*, para. 4; Malaysia, *ibid.*, para. 48; Switzerland, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 44, and statement on file with the Codification Division; and Austria, *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 110 and statement on file with the Codification Division.

[39] Austria, *ibid*., para. 110; and New Zealand, *ibid*., 27th meeting (A/C.6/69/SR.27), para. 4.

[40] Austria, *ibid*., 25th meeting (A/C.6/69/SR.25), para. 110; Belarus, *ibid*., 26th meeting (A/C.6/69/SR.26), para. 27; Netherlands, *ibid*., para. 52; and France, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 33, and statement on file with the Codification Division

[41] *Prosecutor v. Duško Tadić a/k/a "Dule",* Judgment, Case No. IT-94-1-A72, Appeals Chamber, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, International Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, pp. 353 *et seq.*, at para. 70. See statement by Switzerland (*Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 26th meeting (A/C.6/69/SR.26), para. 44).

[42] Republic of Korea, *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 27th meeting (A/C.6/69/SR.27), para. 73.

[43] Belarus, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 28; Iran (Islamic Republic of), *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 13; Spain, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 104, and statement on file with the Codification Division; and France, *ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 33, and statement on file with the Codification Division.

[44] Austria, *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 110; Portugal, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 8; Switzerland, *ibid.*, para. 44; Indonesia, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 68; and Republic of Korea, *ibid.*, para. 73.

[45] Austria, *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 110; Portugal, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 8; and United Kingdom, *ibid.*, para. 16.

[46] Portugal, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 9; and South Africa, *ibid.*, para. 96.

delegations mentioned their preference for non-binding guidelines[47] or for a handbook.[48]

[47] Israel, *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 86; United Kingdom, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 16; Singapore, *ibid.*, para. 67; and Republic of Korea, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 74, and statement on file with the Codification Divison.

[48] Italy, *ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 53.

28. During the debate, a number of States gave examples of national and regional practice in the form of, for example, legislation, case law and military manuals. The Special Rapporteur remains grateful for those helpful comments and encourages other States to provide such examples of national practice for the purposes of the work of the Commission on this topic.

Chapter IV

Responses to specific issues on which comments would be of particular interest to the Commission

29. In its report on the work of its sixty-sixth session, the Commission, in accordance with established practice, sought information on specific issues on which comments would be of particular interest to it.[49] The request partly repeated the request made by the Commission at its sixty-fifth session.[50] However, clarification of the request was made, whereby the Commission expressed the wish for "information from States as to whether they have any instruments aimed at protecting the environment in relation to armed conflict", with examples of such instruments to include but not be limited to "national legislation and regulations; military manuals, standard operating procedures, rules of engagement or status of forces agreements applicable during international operations; and environmental management policies related to defence-related activities".[51]

30. The following States responded to the request of the Commission: Austria, Belgium, Cuba, Czech Republic, Finland, Germany, Peru, Republic of Korea, Spain and United Kingdom of Great Britain and Northern Ireland.

31. Austria commented that it was party to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and to the Protocols additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of armed conflicts. Austria noted that both contained provisions on the protection of the environment in armed conflicts.[52]

32. In addition, Austria reported that recent amendments to its Criminal Code had criminalized the launching of an attack in connection with an armed conflict in the knowledge that such an attack would cause widespread, long-term and severe damage to the natural environment. Further regulations drafted by the relevant ministry included internal rules for the Armed Forces concerning the protection of the environment. Those comprised guidelines on: protecting the environment during multinational operations and exercises both in Austria and abroad; implementing rules for the protection of the environment during multinational operations and exercises abroad; and implementing rules for exploration and surrender in the area of environmental protection during operations abroad. In addition, a regulation on duty of the Armed Forces to look to environmental protection had also been issued. Environmental protection had been included in regulations concerning the duty of the army regarding tactical and operational processes.

[49] *Yearbook ... 2014*, vol. II (Part Two), para. 31.

[50] *Ibid.* "The Commission requests information from States, by 31 January 2015, 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, including 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 in relation to armed conflict."

[51] *Ibid.*, para. 32.

[52] Note verbale dated 11 March 2015 from the Permanent Mission of Austria to the United Nations, addressed to the Secretariat. Austria also refers to its statements to the Sixth Committee of the General Assembly in 2013 and 2014 (both which were attached to the note verbale).

33. Belgium reported that its Penal Code provided that war crimes envisaged in the 1949 Geneva Conventions and in the 1977 Additional Protocols I and II thereto, as well as in article 8, paragraph 2 (*f*), of the Rome Statute of the International Criminal Court, constituted crimes under international law and should be punished in accordance with the relevant provisions of the Code.[53] Among those crimes, launching a deliberate attack in the knowledge that such an attack would cause widespread, long-term and severe damage to the natural environment that would be excessive in relation to the concrete and direct military advantage anticipated had also been included.[54] Belgium also reported that it had developed an operational manual for all of the operations of its military forces; the manual would be published in the near future.

34. Cuba reported that its National Defence Act stipulated that the country's defence preparedness should be compatible with the protection of the environment. That included an obligation to reconcile economic development with the protection of the environment.[55]

35. The Czech Republic responded that it had no separate national law or regulation concerning the protection of the environment in connection with the prohibition of methods and means of warfare causing widespread, long-term

[53] Note verbale dated 28 April 2015 from the Permanent Mission of Belgium to the United Nations, addressed to the Secretariat.

[54] Belgium, Penal Code, art. 136 *quater*, para. 1 (22).

[55] Note verbale dated 3 February 2015 from the Permanent Mission of Cuba to the United Nations, addressed to the Office of the Secretary-General.

or severe damage to the environment.[56] However, the obligations arising from the international treaties that formed part of the legal order of the Czech Republic (including the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques) were applied directly on the basis of its Constitution.

36. The Professional Soldiers Act of the Czech Republic required soldiers to respect the international rules of war and international humanitarian law, as well as national law. The Field Regulations of the Land Forces of the Army of the Czech Republic essentially reiterated those obligations but also contained very specific provisions directly relevant to the country's obligations in relation to the protection of the environment in the context of the law of armed conflict. Article 49 contained a general rule to the effect that, in the context of all activities of the Armed Forces, it was necessary to bear in mind the need to respect international humanitarian law and the need to protect the population, the environment and cultural heritage, among other things. Article 57 declared that measures to protect the Armed Forces from the undesirable effects of their own weapons and other equipment included measures to protect the environment. Those measures were based on conventions adopted that prohibited the use of military and any other means that altered the environment. In addition, commanders should, insofar as necessary, restrict the use of means and methods of warfare that had widespread, long-term or severe effects affecting the environment.

37. In addition, the basic regulations of the Armed Forces of the Czech Republic mentioned the obligation to protect the environment, albeit as a general clause with no direct relation to the law of armed conflict.

38. Germany submitted a brief presentation on the Federal Armed Forces Regulations on Environmental Protection in Armed Conflicts.[57] Measures by the Armed Forces to ensure the protection of the environment while on mission included those on ground and water protection, control of emissions, the safe disposal of medical waste, a closed-cycle economy and waste management. Germany advised that, to fulfil their duty of care, the federal Armed Forces protected the lives and health of their members as well as their other employees, including when they were on mission. During missions abroad, German environmental law provided the basis for efforts to protect nature and the environment. When undertaking tasks, the principle of providing the best possible protection for the relevant personnel while limiting damage as much as possible applied.

39. Germany reported that, in principle, its national law applied only to its territory and to federal Armed Forces' watercraft and aircraft. As a general rule, however, German national legislation and standards applied to missions abroad, where German environmental law provided the basis for efforts to protect nature and the environment insofar as international law provisions, intergovernmental treaties or applicable local law did not stipulate otherwise. In addition, legal arrangements in relation to the protection of the environment were incorporated into the instructions for each mission.

40. Germany stated that, during missions and exercises led by the North Atlantic Treaty Organization (NATO), the provisions of the NATO Military Principles and Policies for Environmental Protection[58] and its Standardization Agreements must be respected.

41. Germany noted that protecting the environment was an ongoing task at all leadership levels and part of all phases of the planning and conduct of operations, and that the legal arrangements were incorporated into the instructions for each mission. It reported that the designated lead nation was responsible for the basic environmental protection regulations during multinational missions. Apart from that, Germany was responsible for rectifying environmental damage caused by the federal Armed Forces, in accordance with applicable international law.

42. Ground and water protection was specifically mentioned by Germany. Accidents and incidents involving, for example, field tank installations that had caused or could cause environmental damage, in particular ground or water contamination, were to be documented in an environmental condition report.

43. Finland reported that, in general, Finnish environmental law was rarely binding outside Finland but, in certain cases, Finnish citizens could be subject to Finnish criminal law when travelling abroad.[59] According to the environmental policy of the Finnish Armed Forces, the Finnish defence forces strove for the same level of environmental protection in military crisis management as when operating in Finland.[60] In addition, the environmental law of the host State was respected. Finland explained that the word "respected" had been carefully selected because it did not imply that the local legislation would at all times be followed. The principle was that the operation came first, meaning that, if conditions were difficult, a lower level of environmental protection would at times be justified. According to Finland, that interpretation was based on NATO doctrines and used by, for example, the forces of the United States of America.

44. Finland had not taken the stance that Finnish environmental law should apply to its deployed forces, although it expected the same level of engagement whenever possible. It pointed out that such application could be difficult in practice given that Finnish regulatory control was heavily based on a permit system.

[56] Note verbale dated 13 February 2015 from the Permanent Mission of the Czech Republic to the United Nations, addressed to the Secretary of the International Law Commission.

[57] Note verbale dated 4 February 2015 from the Permanent Mission of Germany to the United Nations, addressed to the Office of Legal Affairs of the Secretariat. Germany also referred to its note verbale No. 475/2013 (see *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, para. 22).

[58] NATO Military Principles and Policies for Environmental Protection, MC 469/1, 13 October 2011.

[59] Note verbale dated 30 January 2015 from the Permanent Mission of Finland to the United Nations, addressed to the Office of Legal Affairs of the Secretariat.

[60] International Organization for Standardization (ISO) standard 14001. See also *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, paras. 31–33. 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.

45. In response to a second question posed by the Commission, Finland noted that there was plenty of documentation that helped in protecting the environment during armed conflict. Reference was made to NATO doctrines and Standardization Agreements on how environmental issues were to be included in operational planning, as well as to the educatory part of NATO school courses.[61]

46. Finland, Sweden and the United States had together developed a manual (joint guidebook) on environmental policy in military operations.[62] Finland also hosted a biannual conference on defence and the environment.

47. Peru reported that it had no national legislation that explicitly addressed the protection of the environment in relation to armed conflicts.[63] Peru was neither party to any international convention that explicitly dealt with the topic nor had it been involved in any international dispute relating to that topic.

48. With reference to General Assembly resolution 56/4 of 5 November 2001, in which the General Assembly had declared 6 November each year as the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict, Peru noted that it had been inspired by the principle that the environment needed protection against damage that, in times of armed conflict, impaired ecosystems and natural resources for a long time, often long beyond the period of conflict. Such damage would undermine the sustainability upheld in international instruments to which Peru was party, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention), the Convention on Biological Diversity, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer and the United Nations Framework Convention on Climate Change.

49. Given that the framework for peacetime obligations to respect the environment was well established, Peru suggested that the topic of protection of the environment should be studied by analysing the Geneva Conventions in accordance with the national and international framework for respect of the environment. Consideration should be given to treaties concerning the arms trade in times of war and its implications for the aforementioned instruments, along with its direct impact on human beings, the environment, ecosystems, public health and sustainability.

50. In analysing the consequences for the environment, Peru observed that all negative impacts would need to be assessed, including the pollution caused by the leakage of fuels and chemicals unleashed by bombs; the indiscriminate plundering of natural resources by armed contingents; the dangers posed by mines to land, housing and lives; unexploded ordnance and other remnants of war; and the negative impact of mass movements of people on water, biodiversity and ecosystems. Peru noted that mass displacements of people in conflict zones had led to severe deforestation, soil degradation and excessive exploitation of underground water resources in the vicinity of huge camps established for displaced persons.

51. New technologies posed unknown threats to the environment and would also need to be taken into consideration. Peru underlined that parties to hostilities had a responsibility to abide by international rules and agreements, such as the Geneva Conventions, which governed the conduct of war. Some of those rules, such as the prohibition against the deliberate destruction of farmland, were important for the environment.

52. Peru stressed that it was committed to the recommendations of the Special Rapporteur aimed at implementing the principles of prevention and precaution during armed conflicts. Those principles were recognized not just in the Declaration of the United Nations Conference on the Human Environment[64] and the Declaration on Environment and Development (hereinafter, "Rio Declaration"),[65] but also in the country's 1993 Constitution (currently in effect), which recognized the principle of sustainability, respect for the right to a balanced and appropriate environment and the protection of biodiversity, in its national environmental policy, which was geared towards stewardship of natural resources, and in specific environmental legislation embodied in national environment protection programmes.

53. Peru provided a non-exhaustive list of regulations that could have a bearing on the Special Rapporteur's work. The list covered the following: national law (Law regulating the ground transportation of hazardous materials and waste, and National Regulations governing the Ground Transportation of Hazardous Materials and Waste, which included the transportation of weaponry); a regional treaty (Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco)); and multilateral agreements (including the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, the Treaty on the Non-Proliferation of Nuclear Weapons, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and the Comprehensive Nuclear-Test-Ban Treaty).

54. The Republic of Korea submitted information on both its national legislation and relevant international agreements to which it was party.[66] The Act on National Defence and Military Installations Projects required

[61] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, paras. 45–46.

[62] *Environmental Guidebook for Military Operations* (2008). Available from www.defmin.fi/files/1256/Guidebook_final_printing_version.pdf. See also *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, para. 40.

[63] Note verbale dated 24 February 2015 from the Permanent Mission of Peru to the United Nations addressed to the Secretariat.

[64] 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.

[65] *Ibid., Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I: Resolutions adopted by the Conference, resolution 1, annex I.

[66] Note verbale dated 19 February 2015 from the Permanent Mission of the Republic of Korea to the United Nations addressed to the Secretariat.

permission and reporting in accordance with the Clean Air Conservation Act and the Forest Protection Act. According to the Environmental Impact Assessment Act, national defence and military facility installation projects were subjected to environmental assessment (Strategy Environmental Assessment).

55. The status-of-forces agreement between the Republic of Korea and the United States, initially signed in 1966, had no provisions concerning the protection of the environment.[67] Environmental provisions had, however, been affixed in 2001 to its subagreements. They reflected the increasing concern over the environment, in particular with regard to the environmental contamination deriving from the United States military bases. In the same year, those countries adopted the Memorandum of Special Understandings on Environmental Protection. The Memorandum explicitly set forth a policy to remedy contamination that presented known imminent and substantial endangerment to human health.

56. Furthermore, the Republic of Korea reported that its rules on the service of military personnel imposed obligations on military personnel to protect the natural ecosystem and environment and to set up measures to prevent environmental pollution in the discharge of their duties. Under the rules, a commander was obliged to guide military personnel in order that they protect the environment. The Republic of Korea concluded by referring to its Constitution, according to which generally recognized rules of international law had the same effect as its national laws. Accordingly, articles 35, paragraph 3, and article 55 of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Additional Protocol I) applied.

57. In its response,[68] Spain advised that it had no legal instrument that specifically regulated the issue of interest to the Commission and that Spain was not party to any international treaty on the topic.

58. Spain noted that the only reference to armed conflict in Spanish environmental legislation was contained in Act No. 26/2007 of 23 October 2007 on environmental liability.[69] The Act regulated the responsibility of operators to prevent, avoid and remedy environmental damage, in accordance with the Constitution, the principle of prevention and the polluter-pays principle. The Act expressly excluded environmental damage resulting from an armed conflict, without specifying whether such conflict was international or non-international. Also excluded were activities of which the main purpose was to serve national defence or international security, and activities of which the sole purpose was to protect from natural disasters.

59. Spain reported that its Penal Code defined a series of actions as offences against natural resources and the environment and as offences relating to the protection of flora and fauna. The section on offences against persons and property to be protected in the event of armed conflict stipulated that anyone who, in the context of an armed conflict, used or ordered the use of methods or means of combat that were prohibited or were intended to cause unnecessary suffering or superfluous injury, or that were designed to or could reasonably be expected to cause excessive, lasting and serious damage to the natural environment, thus compromising the health or survival of the population, or who ordered that no quarter should be given, should be penalized with a term of imprisonment between 10 and 15 years, without prejudice to the penalty imposed for the resulting damage. Spain further reported that there was no national case law of relevance for the present topic arising from that legislation.

60. In its response,[70] the United Kingdom referred to the Standardization Agreements that set out the NATO doctrine on the protection of the environment. Two examples were Standardization Agreement No. 2581, concerning environmental protection standards and norms for military compounds in NATO operations and environmental protection standards and best practices for NATO camps in NATO operations,[71] and Standardization Agreement No. 2594, on best environmental protection practices for sustainability of military training areas.[72] The United Kingdom also referred to its military doctrine and *The Manual of the Law of Armed Conflict*, issued by the Ministry of Defence.[73]

[67] Agreement between the United States of America and the Republic of Korea (Seoul, 9 July 1966), available from www.usfk.mil/About/SOFA/.

[68] Note verbale dated 17 March 2015 from the Permanent Mission of Spain to the United Nations addressed to the Secretariat.

[69] Spain, *Official Gazette*, No. 255, 24 October 2007, p. 43229.

[70] Letter dated 18 February 2015 from the Permanent Mission of the United Kingdom to the United Nations addressed to the Secretary-General.

[71] NATO, Standardization Agreement No. 2581, concerning environmental protection standards and norms for military compounds in NATO operations and environmental protection standards and best practices for NATO camps in NATO operations, 14 July 2010, NSA(JOINT)0769(2010)EP/2581.

[72] NATO, Standardization Agreement No. 2594, on best environmental protection practices for sustainability of military training areas, 31 March 2014, NSA(JOINT)0413(2014)EP/2594.

[73] The joint doctrine publication and *The Joint Service Manual of the Law of Armed Conflict* (Joint Service Publication 383, 2004 ed.), are available from www.gov.uk/government/collections.

Chapter V

Practice of States and international organizations

61. During the debate in the Sixth Committee, a number of States referred to their legislation, regulations and case law, as well as environmental policy considerations, in relation to armed conflicts. For example, New Zealand remarked that a draft manual on the law of armed conflict, which contained provisions on the relationship between the protection of the environment and armed conflict, was being prepared to replace the New Zealand *Military*

Manual of 1992. The latter already contained provisions on protecting the environment from long-term, severe and widespread damage. When finalized, the provisions of the revised manual would constitute orders issued by the Chief of Defence Force pursuant to the Defence Act of 1990.[74]

62. Peru observed in its remarks to the Sixth Committee that the principles of precaution and prevention were recognized by its Constitution, which also acknowledged sustainable development and the right to a balanced environment, as well as the protection of biodiversity.[75]

63. Malaysia underscored in its statement to the Sixth Committee that measures to protect and preserve the environment within the administrative and operational scope of the Malaysian Armed Forces were generally based on national legislation, primarily the Environmental Quality Act of 1974, as well as enabling laws, such as the National Forestry Act of 1984 and the Wildlife Conservation Act of 2010. Moreover, the Malaysian Armed Forces were reviewing a number of their rules of engagement, with steps being taken to incorporate provisions relating to environmental protection, such as procedures for the storage and disposal of petrol, oil and lubricants, the disposal of waste in the field, a prohibition against hunting of wildlife in operational areas, and appropriate management of military lands that would limit environmental degradation.[76]

64. Poland provided information about national acts that had been developed, such as the Ordinance of the Minister of National Defence identifying bodies with oversight responsibilities for environmental protection. Reports on the fulfilment of those requirements by organizational units of the Polish Armed Forces were drawn up annually.[77]

65. Hungary observed that, in addition to being a party to several international treaties that directly or indirectly ensured the protection of the environment during armed conflicts, such as Additional Protocol I to the Geneva Conventions, the World Heritage Convention, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and the Rome Statute, relevant NATO standards were considered primary applicable legislation. To comply with the principles and requirements laid down in those instruments, the Ministry of Defence had developed an environmental protection doctrine that stipulated a comprehensive system of tasks relating to environmental protection based on national and European Union laws as well as NATO standards.[78]

66. Romania commented that the Committee for Administering the Mechanism for Promoting Implementation and Compliance with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal could prove useful in accessing additional information on the practice of States and international organizations.[79]

67. In addition to the information on State practice provided by a number of States in direct response to the invitation issued by the Commission and during the Sixth Committee debate, information was communicated to the Commission and to the Special Rapporteur in connection with her preliminary report issued in 2014.[80] This strengthened the Special Rapporteur's conviction that a considerable number of States have legislation or regulations in force aimed at protecting the environment in relation to armed conflicts.[81] The Special Rapporteur remains grateful for the helpful information already provided and expresses the hope that even more States will follow in providing such examples of State practice.

A. Additional information on State practice

68. In addition to the information provided by States in their statements to the Sixth Committee and in response to the request by the Commission in its annual report, information on State practice is also available through the web page of ICRC. The ICRC customary international humanitarian law web page contains extensive information on the codification, interpretation and application of international humanitarian law by States. This is second-hand information and, for the purposes of the present report, needs to be treated as such, given that the Special Rapporteur has not been in a position to evaluate the original information provided by States to ICRC. ICRC itself provides a disclaimer of caution, albeit more focused on the comprehensiveness of the information than on its content.[82] At the same time, the information available on the web page is too important to be disregarded. For the purposes of the present report, it seems sufficient to focus on the State practice upon which ICRC has developed the three rules in the ICRC customary law study that regulate the protection of the environment, namely, rules 43 to 45.[83]

69. The most extensive practice relates to the obligation not to cause widespread, long-term and severe damage and to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. Practice in relation to the application of general principles on the conduct of hostilities to

[74] New Zealand, *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 27th meeting (A/C.6/69/SR.27), para. 2.

[75] Peru, *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 126.

[76] Malaysia, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 49, and statement on file with the Codification Division.

[77] Poland, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 61, and statement on file with the Codification Division.

[78] Hungary, *ibid.*, 24th meeting (A/C.6/69/SR.24), para. 38.

[79] Romania, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 86.

[80] Including practice of some ten States and additional practice of regional organizations such as NATO, see *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, chaps. III and IV.

[81] See also *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, para. 24.

[82] ICRC provides a disclaimer that the content of the National Implementation Database, legislation and case laws, is drawn from information collected by the Advisory Service and sent to it by States. "Whilst the database content is not necessarily exhaustive, it provides a comprehensive overview on [international humanitarian law] implementation measures taken by all States" (www.icrc.org/ihl-nat). The Special Rapporteur also notes some inconsistencies in the manner in which the information is provided.

[83] The text of the rules can be found in Henckaerts, "Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict", p. 202.

the natural environment (rule 43) is more limited; only 10 States are reported to have included such instructions in their military manuals.[84] National legislation is, however, more extensive; reportedly, some 23 States have such legislation.[85]

70. With regard to practice relating to due regard for the natural environment in military operations (rule 44), nine States have instructions in their military manuals.[86] Only one has adopted national legislation on this issue.[87]

71. The reported practice relating to rule 45 (Causing serious damage to the natural environment) is more extensive. The information is divided into two sections. The first deals with widespread, long-term and severe damage, and the second with environmental modification techniques, that is, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. According to the information provided, at least 26 States have regulated the question on the protection of the environment relating to widespread, long-term and severe damage in their military manuals[88] and some 36 have adopted relevant national legislation.[89]

72. With regard to the second part of the rule (Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques), 15 States have included instructions in their military manuals[90] and 3 have adopted relevant national legislation.[91]

73. Only one national case law has been reported, the so-called *Agent Orange* case in the United States.[92]

74. The ICRC customary international humanitarian law web page also contains relevant State practice relating to other rules contained in its customary law study.[93] Rather than a comprehensive overview, the web page provides examples of State practice. Of particular interest is the State practice reported in relation to the principle of precautions in attack and the principle of proportionality. The United States has noted that both of those principles contribute to protecting natural resources from collateral damage.[94] Several States appear to have military manuals that require them to gather intelligence also on the natural environment as part of the principle of precautions in attack.[95] At least two States make a connection between the protection of works and installations containing dangerous forces and the protection of the environment.[96] Natural resources have been considered by the United States as benefiting from protection equivalent to that afforded to civilian objects and thus immune from intentional attack, while the same State has also qualified natural resources as legitimate targets in situations where they may be of value to the enemy.[97] Regarding situations of occupation, the manual of the United Kingdom explicitly prohibits the extensive destruction of the natural environment that is not justified by military necessity.[98]

75. At least five States[99] have adopted in their military manuals language very similar to article 2, paragraph 4, of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), annexed to 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 (hereinafter, "Convention on Certain Conventional Weapons"), while Cameroon, in its manual, has taken it a step further by expressly stating that incendiary weapons cannot be used against the environment.

[84] Australia, Belgium, Burundi, Chad, Côte d'Ivoire, Italy, Mexico, Netherlands, United Kingdom and United States.

[85] Australia, Belgium, Burundi, Canada, Congo, Czech Republic, Democratic Republic of the Congo, Denmark, Finland, France, Georgia, Germany, Iraq, Ireland, Netherlands, New Zealand, Nicaragua, Norway, Senegal, Slovakia, South Africa, Spain and United Kingdom.

[86] Australia, Burundi, Cameroon, Côte d'Ivoire, Netherlands, Republic of Korea, Ukraine, United Kingdom and United States.

[87] Denmark.

[88] Argentina, Australia, Belgium, Benin, Burundi, Canada, Central African Republic, Chad, Colombia, Côte d'Ivoire, France, Germany, Italy, Kenya, Netherlands, New Zealand, Peru, Russian Federation, South Africa, Spain, Sweden, Switzerland, Togo, Ukraine, United Kingdom and United States. The former Socialist Federal Republic of Yugoslavia is omitted by the Special Rapporteur.

[89] Armenia, Australia, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Burundi, Canada, Colombia, Congo, Croatia, Denmark, Estonia, Ethiopia, Georgia, Germany, Ireland, Kazakhstan, Kyrgyzstan, Mali, Netherlands, New Zealand, Norway, Peru, Republic of Korea, Republic of Moldova, Russian Federation, Serbia, Slovenia, South Africa, Spain, Tajikistan, Ukraine, United Kingdom, Uruguay and Viet Nam. The former Socialist Federal Republic of Yugoslavia is omitted by the Special Rapporteur.

[90] Australia, Burundi, Canada, Chad, France, Germany, Indonesia, Israel, Netherlands, New Zealand, Republic of Korea, Russian Federation, Sierra Leone, South Africa and Spain.

[91] Denmark, Senegal and Uruguay.

[92] *Vietnam Association for Victims of Agent Orange/Dioxin et al. v. Dow Chemical Co. et al.* (District Court for the Eastern District of New York) Memorandum, Order and Judgment of 28 March 2005, 373 F. Supp. 2d 7 (2005), affirmed in Court of Appeals for the Second Circuit Decision of 22 February 2008, 517 F.3d 76 (2008).

[93] Such information relates to rule 8 (Definition of military objectives), rule 12 (Definition of indiscriminate attacks), rule 14 (Proportionality in attack), rule 15 (Precautions in attack), rule 17 (Choice of means and methods of warfare), rule 42 (Works and installations containing dangerous forces), rule 50 (Destruction and seizure of property of an adversary), rule 51 (Public and private property in occupied territory), rule 54 (Attacks against objects indispensable to the survival of the civilian population), rule 70 (Weapons of a nature to cause superfluous injury or unnecessary suffering), rule 71 (Weapons that are by nature indiscriminate), rule 74 (Chemical weapons), rule 75 (Riot control agents), rule 76 (Herbicides), rule 84 (The protection of civilians and civilian objects from the effects of incendiary weapons), and rule 147 (Reprisals against protected objects). The relevant State practice is found at www.icrc.org/customary-ihl/eng/docs/v2.

[94] United States, Department of Defense, Report to Congress on International Policies and Procedures regarding the Protection of Natural and Cultural Resources during Times of War, 19 January 1993, p. 202.

[95] Australia, Benin, Central African Republic, Peru and Togo. The Kenyan Manual contains a similar requirement when evaluating the effects of weapons and ammunition.

[96] The Israeli *Manual on the Rules of Warfare* (2006) considers "the ban on attacking installations if doing so would damage the environment" as customary law, and under the Lithuanian Criminal Code (1961), as amended in 1998, it is a war crime to undertake "a military attack against an object posing a great threat to the environment and people—a nuclear plant, a dam, a storage facility of hazardous substances or other similar object—knowing that it might have extremely grave consequences".

[97] United States, Department of Defense, Report to Congress (see footnote 94 above), pp. 202 and 204.

[98] United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* (see footnote 73 above), para. 11.91.

[99] Australia, Canada, Côte d'Ivoire, Germany and Russian Federation.

76. Express prohibition of reprisals against the natural environment are found in the military manuals of a number of States, such as Australia, Canada, Chad, Côte d'Ivoire, Croatia, Germany, Hungary, Italy, the Netherlands, New Zealand, Peru, Spain, Ukraine and the United Kingdom.

B. Secretary-General's bulletin on observance by United Nations forces of international humanitarian law

77. The Secretary-General promulgated a bulletin on observance by United Nations forces of international humanitarian law in 1999.[100] It contains one reference to the protection of the environment, repeating the wording of article 35, paragraph 3, of Additional Protocol I.[101] One author considers the customary law nature of the rules on the protection of the environment at the time of the promulgation of the bulletin to be debateable but notes that, one decade later, they were either already or in the process of becoming customary international law.[102] The author points out that prohibitions on employing a method of combat intended or expected to cause long-term, widespread and severe damage to the natural environment, on destroying objects indispensable to the survival of the civilian population, and on attacking installations containing dangerous forces which may result in their release and consequent severe losses among the civilian population, were innovative at the time of their adoption in the 1977 Additional Protocols to the Geneva Conventions and remained so at the time of their inclusion in the bulletin. She underlines that, given their importance to human survival and the likely catastrophic consequences that their violation would entail for the natural environment and the civilian population at large, the three prohibitions were included in the bulletin in fine disregard of their less than customary international law nature and as a statement of the United Nations undertaking to abide by the highest standards of international humanitarian law in the conduct of its military operations.[103]

78. Almost a decade later, the United Nations had developed environmental policies for its peace operations through its environmental policy for United Nations field missions of June 2009. A few years later, in 2012, UNEP, the Department of Peacekeeping Operations and the Department of Field Support launched a joint report, *Greening the Blue Helmets*.[104] The basis of the report is that United Nations peacekeeping operations should lead by example. The report therefore identifies good practice and behaviour and shows how peacekeeping operations can help to support and build national capabilities for better environmental management.[105] Given that the focus of the present report is on the law of armed conflict, it suffices here to mention the broader work by the United Nations in the context of peacekeeping operations. There are reasons to return to that work in a subsequent report.[106]

C. Resolutions of the Security Council

79. The Security Council has addressed the protection of the environment and natural resources in relation to armed conflicts in many of its resolutions. As at 31 December 2014, the Council had adopted 2,195 resolutions, of which 242 (or 11 per cent) addressed natural resources in some manner.[107] This is a clear indication of the connection between the threat to international peace and security and the protection of the environment and natural resources.

80. Of the 242 resolutions, relatively few explicitly address wartime pollution or spoliation of the environment. Those that do include resolution 540 (1983), to the extent that it relates to the obligation to refrain from harming marine life during the Iran-Iraq war, and resolution 687 (1991), which concerns presumed liability for environmental damage as a result of the unlawful invasion and illegal occupation of Kuwait by Iraq. Resolution 661 (1990) should also be mentioned in this context.

81. With the establishment, pursuant to Security Council resolutions 687 (1991) and 692 (1991), of the United Nations Compensation Commission to adjudicate claims, including environmental claims, other resolutions are indirectly relevant, namely, resolutions 986 (1995), 1153 (1998), 1483 (2003) and 1546 (2004), as they relate to the general operation of the Commission. Those resolutions will be discussed in a subsequent report on the post-conflict phase.

82. The Security Council has on several occasions condemned the targeting of oil installations, pipelines and other facilities.[108] In some resolutions, it has referred to the need to protect oil installations, albeit without any direct reference to the protection of the environment.[109]

83. The Security Council has in numerous resolutions addressed the use of natural resources (gold, diamonds, minerals, charcoal and opium poppy, among others) in financing armed conflict. Afghanistan stands out as a

[100] ST/SGB/1999/13 of 6 August 1999.

[101] The only difference is that the phrase "means of warfare" is omitted in the bulletin. Section 6.3 reads: "The United Nations force is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment".

[102] Shraga, "The Secretary-General's bulletin on the observance by the United Nations forces of international humanitarian law: a decade later", p. 368. The author is a former Principal Legal Adviser at the United Nations Office of Legal Affairs.

[103] *Ibid*., p. 371. The applicability of the law of occupation is not addressed in the Secretary-General's bulletin, *ibid*., p. 375.

[104] *Greening the Blue Helmets, Environment, Natural Resources and UN Peacekeeping Operations* (UNEP, 2012). Information on the work done by the United Nations can be found at www.un.org/en/peacekeeping/issues/environment/approach.shtml. One of its basic documents is the *Environmental Guidebook for Military Operations* (see footnote 62 above). It is a non-binding guidebook aimed at giving operational planners "the necessary tools to incorporate environmental considerations throughout the life cycle of the operation".

[105] *Greening the Blue Helmets*..., p. 5. Another key theme is related to "the role that peacekeeping operations play in stabilizing countries where violent conflicts are financed by natural resources".

[106] For a recapitulation of the work done by the United Nations, see, e.g., Sancin, "Peace operations and the protection of the environment".

[107] In addition to these resolutions, many other resolutions address natural resources after conflict; these are not cited herein, since the present report is primarily focused on actions *in bello*.

[108] Security Council resolutions 2046 (2012), 2051 (2012) and 2155 (2014).

[109] Security Council resolutions 2046 (2012), 2075 (2012) and 2156 (2014).

particular case. Although many resolutions are framed in the context of terrorism and violence,[110] they are an indication of the role that natural resources play in the context of financing terrorism and/or armed conflict.

84. The Security Council has on numerous occasions addressed natural heritage and natural resources in the context of the conflict in the Central African Republic and the Democratic Republic of the Congo. In the preamble to resolution 2121 (2013), it condemned the devastation of natural heritage and noted that poaching and trafficking of wildlife were among the factors that fuelled the crisis in the Central African Republic. In resolution 2127 (2013), adopted some months later, it condemned the illegal exploitation of natural resources in the Central African Republic, which contributed to the perpetuation of the conflict (para. 16). Moreover, resolution 2134 (2014) contains provisions on sanctions for individuals that have been providing support for armed groups or criminal networks through the illicit exploitation of natural resources, including diamonds and wildlife and wildlife products, in the Central African Republic (para. 37 (*d*)). Lastly, in resolution 2149 (2014), the Council concluded that one of the prioritized tasks within the mandate of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic should be to advise the transitional authorities on efforts to keep armed groups from exploiting natural resources (para. 31 (*d*)).

85. With regard to the Democratic Republic of the Congo, a number of resolutions have been adopted that relate to natural resources and the environment. For example, Security Council resolutions 1291 (2000), 1304 (2000), 1323 (2000), 1332 (2000), 1376 (2001), 1991 (2011), 2021 (2011) and 2053 (2012) all relate to the country's natural resources and express the Council's concern at their exploitation. From February 2001 onwards, the tone of resolutions concerning the country changed and focused on the plunder (or pillage) of its natural resources during armed conflict.[111]

86. The linkage between natural resources and armed conflicts has also been emphasized in Security Council resolutions on Liberia,[112] Libya,[113] Sierra Leone[114] and Somalia.[115] On specific topics, resolutions on the Kimberley Process,[116] as well as those concerning the linkages between the illegal exploitation of natural resources and the proliferation and trafficking of arms,[117] have underscored the importance of natural resources and protection of the natural environment during armed conflict.

87. In conclusion, whereas a large number of the resolutions deal with areas that fall outside the scope of the present topic and while a number of the relevant resolutions bear mainly on the post-conflict phase, which is to be dealt with in the Special Rapporteur's next report, the sheer volume of resolutions provides ample evidence of the importance that the Security Council has assigned to environmental protection in times of armed conflict.

D. Other organizations

88. As indicated in the preliminary report, NATO has a wide-ranging ambition to take the protection of the environment into account in its operational planning and when engaging in missions.[118] Member States are required to follow the NATO Standardization Agreements. So-called partnership States often adhere to the same standards, partly as a matter of policy and partly because of the requirements of interoperability. Some NATO member States and partnership States have referred to this in their statements to the Sixth Committee of the General Assembly and in their responses to the Commission.[119]

89. The European Union also has adopted standards and rules with the aim of greening military operations. In 2012, its member States agreed for the first time on the European Union military concept on environmental protection and energy efficiency for European Union-led military operations,[120] the aim of which is to establish the principles and the responsibilities to meet the requirements of environmental protection during such operations. The Military Concept aims to provide strategic guidance for the consideration of environmental protection during all phases of European Union-led military operations. It also extends to the protection of cultural property.[121] Also

[110] Security Council resolutions 1746 (2007), 1806 (2008), 1817 (2008), 1917 (2010), 1974 (2011), 2041 (2012), 2069 (2012), 2096 (2013) and 2160 (2014). Earlier resolutions, including 1659 (2006), 1662 (2006) and 1868 (2009), are not as explicit about the role of poppy in financing the Taliban and Al-Qaida. It should also be noted that the resolutions to which reference is made are only some of the relevant resolutions on Afghanistan.

[111] See, e.g., Security Council resolutions 1341 (2001), 1457 (2003), 1499 (2003), 1533 (2004), 1565 (2004) and 1592 (2005). It should be noted in this context that such pillaging and plundering, although not noted by the Security Council specifically in the resolution, is a war crime; see, e.g., the Charter of the International Military Tribunal (Nürnberg Charter), art. 6 (*b*), the Statute of the International Tribunal for the Former Yugoslavia, Security Council resolution 827 (1993) of 25 May 1993, annex, art. 3 (*e*), and Geneva Convention IV, art. 33.

[112] Security Council resolutions 1343 (2001) (resolution on Sierra Leone, citing Liberia), 1408 (2002) and 1478 (2003).

[113] See Security Council resolution 2146 (2014), concerning banning of illicit crude oil export and safeguarding of the country's national resources, and resolution 2174 (2014), regarding sanctions against individuals and entities providing support for armed groups through the illicit exploitation of crude oil or any other natural resources.

[114] Security Council resolution 1306 (2000).

[115] Security Council resolutions 2036 (2012), 2060 (2012), 2111 (2013) and 2124 (2013).

[116] Security Council resolution 1459 (2003), which observes that diamonds fuel conflict.

[117] Security Council resolution 2117 (2013).

[118] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, paras. 45–46.

[119] See *ibid*., Finland (para. 32), Germany (para. 22), Denmark (para. 30) and NATO (paras. 45 and 46). See also the present report, responses by Germany (para. 40 above), Finland (para. 45 above) and United Kingdom (para. 60 above). Hungary also referred to the NATO Standardization Agreements and other relevant documents in its statement to the Sixth Committee at the sixty-ninth session, *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 24th meeting (A/C.6/69/SR.24), para. 38 (see para. 65 above).

[120] European Union military concept on environmental protection and energy efficiency for European Union-led military operations (EEAS 13758/12, dated 14 September 2012). The engagement of the European Community in the matter dates back to a time when the European Union (at that time, European Communities) did not have any military component. See, e.g., Bothe *et al*., *Protection of the Environment in Times of Armed Conflict*.

[121] For a discussion of the concept, see Fischhaber, "Military concept on environmental protection and energy efficiency for EU-led operations …".

adopted was the Concept for European Union-led Military Operations and Missions, agreed upon by the European Union Military Committee on 19 December 2014, in accordance with which environmental awareness is to be considered in all phases of such operations and missions and in predeployment training.[122]

90. The Special Rapporteur has not been in a position to obtain information from other regional organizations, such as the African Union, and would therefore welcome any additional information from those organizations.

E. Conclusions

91. As shown above, a considerable number of States have legislation or regulations in force aimed at protecting the environment in relation to armed conflicts. An increasing number of States and international organizations have adopted measures to ensure that the environment is protected during military operations. The measures range from policies to legally binding regulations. It is also possible to conclude that the adoption of measures relating to the planning of a military operation as well as a post-conflict operation is increasingly frequent. The measures are, in many cases, more stringently formulated than corresponding national rules applicable during an armed conflict as such. In the latter situations, States rely on the international treaties by which they are bound (such as the Additional Protocols to the Geneva Conventions and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques), including well-established principles of international humanitarian law.[123] Only one State, Finland, has stated that the operation comes first, by which it means that, if conditions are difficult, a lower level of environmental protection is sometimes justified. According to Finland, its interpretation is based on NATO doctrines and is used by, for example, United States forces. States have not otherwise addressed whether environmental treaties cease to be applicable during an armed conflict. Some States (primarily Latin American and Caribbean States) have indicated that provisions aimed at protecting the environment and promoting sustainable development enshrined in their national legislation (including constitutions) continue to apply should an armed conflict occur.

[122] European External Action Service document, EEAS 00990/6/14 Rev.6.

[123] See also *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, para. 24.

Chapter VI

Legal cases and judgments

92. International jurisprudence on the protection of the environment in relation to armed conflicts is not all that extensive, but it does exist.

93. To identify such cases, the Special Rapporteur has reviewed the jurisprudence of international and regional courts and tribunals.

94. In particular, the analysis aimed to identify existing case law that either: (*a*) applied provisions of international humanitarian treaty law that directly or indirectly protect the environment during times of armed conflict; or (*b*) considered, explicitly or implicitly, that there is a connection between armed conflicts and the protection of the environment. In addition, cases relating to the situation of peoples and civilian populations have also been reviewed.

95. The analysis primarily included a thorough review of judgments and advisory opinions rendered by the following international courts and tribunals: the International Court of Justice, the Permanent Court of International Justice, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone. The jurisprudence of three regional courts has also been studied, namely, the African Court on Human and Peoples' Rights, the Inter-American Court of Human Rights and the European Court of Human Rights. Given that the latter has handed down some 17,000 judgments,[124] it was necessary to limit the review to the most pertinent cases.[125] In addition to the jurisprudence of the courts mentioned above, the review also comprised relevant jurisprudence of the Nuremberg Military Tribunals, the United Nations War Crimes Commission and the International Tribunal for the Law of the Sea.[126]

96. Strictly speaking, a distinction must be made between the protection of the environment as such and the protection of natural objects in the natural environment and natural resources.[127] This is not without problem. The law of occupation applicable during armed conflict contains rules governing the protection of property and natural resources that are relevant to the discussion of the protection of the environment as such. Some of these cases are included in the review, partly because they are directly relevant and partly to serve as an illustration.

[124] Ichim, *Just Satisfaction under the European Convention on Human Rights*, p. i.

[125] See, e.g., Fact sheet on armed conflict, November 2014, published by the European Court of Human Rights.

[126] The Permanent Court of International Justice and the African Court of Human and Peoples' Rights have not delivered any judgments or advisory opinions that meet the criteria described above. In this regard, it is worth noting that the "Permanent Court of International Justice did not deal with the laws of war in any of its decisions" (Kress, "The International Court of Justice and the law of armed conflicts", p. 263). Indeed, "for a range of reasons, States chose … not to use the [Permanent Court] as a means of addressing (or mounting pressure in) highly contentious disputes" (Tams, "The contentious jurisdiction of the Permanent Court", p. 28). Cases from the United Nations Compensation Commission are not included, since the focus of most of these cases is on compensation. They will be dealt with in the Special Rapporteur's next report.

[127] See chap. VII of the present report below, on law applicable during armed conflict.

97. There may also be a close link between human rights and international humanitarian law.[128] In this respect, it is worth considering the following recurring statement of the International Court of Justice:

> [T]he 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.[129]

98. This was not the first time that the Court had addressed human rights and humanitarian concerns. It had previously done so in the *Corfu Channel* case[130] and later, notably, in *Military and Paramilitary Activities in and against Nicaragua*.[131] The view has also been confirmed by other courts, such as the International Tribunal for Rwanda.[132]

99. The link between the protection of property and livelihood brings human rights into the analysis. There is a considerable amount of case law that addresses these matters. Although the protection of property and livelihood has a different and much earlier origin than the protection of the environment, the case law is of interest because the idea of protecting nature and its natural resources has a connection with a more recent ambition to protect the environment as such.

100. The Inter-American Court of Human Rights has also addressed issues relating to the protection of the right of indigenous peoples to their lands and natural resources.

A. Cases where the court or tribunal has applied provisions of international humanitarian treaty law that directly or indirectly protect the environment during times of armed conflict

101. The International Court of Justice, in a few of its decisions, has applied international humanitarian treaty law in addressing the need to protect the environment during times of armed conflict.

102. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice stated that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives",[133] supporting its approach by referring to the terms of principle 24 of the Rio Declaration. The Court noted that article 35, paragraph 3, and article 55 of Additional Protocol I provided additional protection for the environment. It concluded that

> [t]aken 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.[134]

103. The Court does not mention the environment in the operative section of its advisory opinion but draws the general conclusion that "it follows from the abovementioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law".[135]

104. It is clear that the Court has embraced the rules regarding the protection of the environment in its analysis. At the same time, the formulation is rather sweeping and difficult to connect to a particular rule of humanitarian law. This sweeping formulation is likely to be due to the fact that the Court did not deliver a unanimous advisory opinion (it was adopted with the President's casting vote) and has been criticized by some of the dissenting judges.[136]

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[128] For a comprehensive overview, see Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*.

[129] *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 Court quotes this passage in *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, stating 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".

[130] *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at p. 22. The Court remarked that the obligations incumbent upon the Albanian authorities to provide notification of the existence of a minefield in Albanian territory were not based "on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".

[131] "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflict; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (*Corfu Channel ...*)". *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. 113–114, para. 218.

[132] "In this respect, it is important to recall a recent statement of the [International Committee of the Red Cross] that, 'It should be stressed that in war time international humanitarian law coexists with human rights law, certain provisions of which cannot be derogated from. Protecting the individual *vis-à-vis* the enemy, (as opposed to protecting the individual *vis-à-vis* his own authorities) is one of the characteristics of the law of armed conflict. A State at war cannot use the conflict as a pretext for ignoring the provisions of that law'". *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, International Tribunal for Rwanda, Judgment, 21 May 1999, para. 622.

[133] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 242, para. 30. The question posed to the Court reads: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?". The question has both an element of *jus ad bellum* and of *jus in bello*.

[134] *Ibid.*, para. 31.

[135] *Ibid.*, at pp. 265–266, para. 105, subpara. (2), sect. E. For the purposes of the present report, there is no need to analyse the second part of the operative part of the opinion: "However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". This has been criticized, *inter alia*, for conflating *jus ad bellum* and *jus in bello* and for creating an exception to the application of international humanitarian law. See, e.g., Dinstein, *War, Aggression and Self-defence*, p. 173.

[136] See in particular, the dissenting opinion of Judge Higgins, *Legality of the Threat or Use of Nuclear Weapons* (see footnote 133 above), at pp. 583–584, at paras. 2, 7, 9 and 10.

105. The Eritrea-Ethiopia Claims Commission has also touched upon the issue of directly applying humanitarian law in relation to environmental protection. The two-year war between the two countries had resulted in extensive environmental damage, and Ethiopia sought damages for the destruction by the Eritrean forces of gum arabic and resin plants, the loss of trees and seedlings and damage to terraces.[137] Ethiopia primarily argued that the damage was the result of a violation by Eritrea of the *jus in bello*; alternatively, it claimed that it was a result of a violation of the *jus ad bellum*. The Commission, however, rejected both approaches for lack of proof and stated that the allegations and evidence of destruction of environmental resources fell well below the standard of widespread and long-lasting environmental damage required for liability under international humanitarian law.[138]

106. In *Armed Activities on the Territory of the Congo*, the International Court of Justice considered that it had ample credible and persuasive evidence to conclude that officers and soldiers of the Uganda People's Defence Forces were involved in the looting, plundering and exploitation of the natural resources of the Democratic Republic of the Congo and that the military authorities had not taken any measures to put an end to those acts. It concluded also that, whenever members of the Uganda People's Defence Forces were involved in the looting, plundering and exploitation of natural resources in the territory of the Democratic Republic of the Congo, they had acted in violation of the *jus in bello*, which prohibited the commission of such acts by a foreign army in the territory in which it was present.[139]

107. The Court found that Uganda was responsible for acts of looting, plundering and exploitation of the natural resources of the Democratic Republic of the Congo, for violating its obligation of vigilance in regard to those acts and for failing to comply with its obligations under article 43 of the Regulations concerning the Laws and Customs of War on Land as an occupying Power.[140]

108. It is also noteworthy that, even as early as 1948, the United Nations War Crimes Commission stated in the *Polish Forestry* case that the Germans had wilfully felled the Polish forests without the least regard to the basic principles of forestry and had therefore committed a war crime.[141]

B. Cases where the court or tribunal has considered, explicitly or implicitly, that there is a connection between armed conflicts and the protection of the environment

109. In addition to the cases discussed above, the International Court of Justice has considered the explicit or implicit connection between armed conflicts and the protection of the environment on three separate occasions. First, in the 1986 *Military and Paramilitary Activities in and against Nicaragua*, the Court indicated that the protection of human rights, a strictly humanitarian objective, could not be compatible with, *inter alia*, the mining of ports or destruction of oil installations.[142] Second, in 1995 *Request for an Examination of the Situation*, the request was dismissed, but the Court noted that its decision was "without prejudice to the obligations of States to respect and protect the natural environment".[143] Lastly, in its order from 2000 concerning the request for provisional measures in *Armed Activities on the Territory of the Congo*, the Court mentioned that the "resources present on the territory of the Congo, particularly in the area of conflict, remain extremely vulnerable, and that there is a serious risk that the rights at issue in this case … may suffer irreparable prejudice".[144]

C. Cases where the court or tribunal has addressed the situation of peoples and civilian population

110. The International Court of Justice has dealt with the situation of peoples in the *Legal Consequences of the Construction of a Wall*. The Court stated that with the construction of the wall there had been "serious repercussions for agricultural production"[145] and found that Israel had the obligation to make reparation for the damage caused by the requisition and destruction of agricultural holdings.[146]

111. The International Criminal Court also addressed the situation of peoples in its trials of two Congolese militia leaders accused of war crimes and crimes against humanity in the attack on the village of Bogoro from January to March 2003. The attackers had looted and destroyed livestock, religious buildings and homes owned and occupied by the Bogoro population.[147] The Court noted that the destroyed and looted property belonging to the civilian

[137] *Ethiopia/Eritrea,* Eritrea–Ethiopia Claims Commission, *Final Award: Ethiopia's Damage Claims, 17 August 2009*, UNRIAA, vol. XXVI (Sales No. B.06.V.7), p. 631, at p. 754, para. 422.

[138] *Ibid.*, *Partial Award: Central Front Claim—Ethiopia's Claim 2, 28 April 2004*, UNRIAA, vol. XXVI, p. 155, at pp. 187, para. 100; see also *ibid., Final Award: Ethiopia's Damage Claims* (see previous footnote), at p. 754, para. 425. For a full account of the case, see Murphy, Kidane and Snider, *Litigating War: Arbitration of Civil Injury by the Eritrea–Ethiopia Claims Commission.*

[139] *Armed Activities on the Territory of the Congo* (see footnote 129 above), pp. 251–252, paras. 242 and 245.

[140] *Ibid.*, at p. 253, para. 250. Article 43 of the Regulations, reads: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

[141] See *Polish Forestry*, case No. 7150, in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 496.

[142] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 131 above), pp. 134–135, para. 268.

[143] *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.

[144] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 111, at p. 128, para. 43.

[145] *Legal Consequences of the Construction of a Wall* (see footnote 129 above), at pp. 189–190, para. 133.

[146] *Ibid.*, at p. 198, para. 152.

[147] *Prosecutor v. Germain Katanga*, *Judgment pursuant to Article 74 of the Statute*, Case No. ICC-01/04-01/07, Trial Chamber, 7 March 2014, paras. 924 and 932; *Prosecutor v. Mathieu Ngudjolo, Judgment pursuant to Article 74 of the Statute*, Case No. ICC-01/04-02/12, Trial Chamber, 18 December 2012, paras. 334 and 338. The decisions of the International Criminal Court can be consulted on the Court's website, at www.icc-cpi.int/.

population of Bogoro was essential to their daily lives and important for their survival.[148]

112. In several cases, the International Tribunal for the Former Yugoslavia has addressed the situation of people in circumstances where there has either been wanton destruction of cities, towns or villages or devastation not justified by military necessity.[149] The Tribunal has also touched upon the issue of how certain property or economic rights can be considered fundamental enough that their denial constitutes persecution, such as cases in which the complete destruction of homes and property constitutes a destruction of the livelihood of a certain population.[150]

113. The International Tribunal for Rwanda has addressed these questions as well, although it is worth noting that, as opposed to the Statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Court, its Statute does not give it the power to prosecute individuals for acts against property.[151] In several cases, however, the International Tribunal for Rwanda has discussed the destruction of property and, while not addressing its legality *per se*, has considered it for the purpose of establishing the crime of genocide.[152] Most of the cases concern the burning and destruction of homes and churches; in *Emmanuel Rukundo*, however, the actions also included the killing of cattle and the decimation of banana plantations.[153]

114. In *Nuon and Khieu*, the Extraordinary Chambers in the Courts of Cambodia found certain Khmer Rouge officials and soldiers to be guilty of the crime against humanity "of other inhumane acts through forced transfer of the population" because they had, among other things, "sought to flush out those in hiding by cutting off the water supply".[154]

115. The Special Court for Sierra Leone, in several cases, addressed the situation of people in relation to the offence of acts of terrorism under article 4, paragraph 2 (*d*), of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II). In *Alex Tamba Brima et al.*, the Trial Chamber concluded that property as such was not protected from acts of terrorism, but that the "destruction of people's homes or means of livelihood and … their means of survival" amounted to such acts.[155]

116. The situation of indigenous peoples and their property rights in the event of armed conflict has been addressed by the Inter-American Court of Human Rights on a number of occasions. Several cases have examined the destruction of the peoples' communities, houses, livestock, harvests and other means of survival, which has led the Court to find various human rights violations, *inter alia*, the right to humane treatment and the right to property.[156] It should be noted that, while some of the cases do not reach the threshold of an armed conflict (they refer to "acts of violence"), the Court's reasoning regarding the connection

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[148] *Katanga, Judgment pursuant to Article 74 of the Statute* (see previous footnote), paras. 952–953 and 1659; see also *Prosecutor v. Germain Katanga, Judgment pursuant to Article 76 of the Statute*, Case No. ICC-01/04-01/07, Trial Chamber, 23 May 2014, paras. 44 and 51–52.

[149] *Prosecutor v. Milomir Stakić, Judgment*, Case No. IT-97-24-T, Trial Chamber, 31 July 2003, paras. 761–762; see also *Prosecutor v. Mladen Naletilic, aka "Tuta" and Vinko Martinovic, aka "Štela", Judgment*, Case No. IT-98-34-T, Trial Chamber, 31 March 2003, para. 578; *Prosecutor v. Radoslav Brđanin, Judgment*, Case No. IT-99-36-T, Trial Chamber, 1 September 2004, paras. 600 and 636–639; *Prosecutor v. Radoslav Brđanin, Judgment*, Case No. IT-99-36-A, Appeals Chamber, 3 April 2007, paras. 337 and 340–342; *Prosecutor v. Pavle Strugar, Judgment*, Case No. IT-01-42-T, Trial Chamber, 31 January 2005, paras. 283 and 297; *Prosecutor v. Enver Hadžihasanović and Amir Kubura, Judgment*, Case No. IT-01-47-T, Trial Chamber, 15 March 2006, paras. 39 and 48; *Prosecutor v. Naser Orić, Judgment*, Case No. IT-03-68-T, Trial Chamber, 30 June 2006, paras. 583, 585 and 587; *Prosecutor v. Milan Martić, Judgment*, Case No. IT-95-11-T, Trial Chamber, 12 June 2007, paras. 92–93, 355, 360 and 374; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Judgment*, Case No. IT-04-82-T, Trial Chamber, 10 July 2008, paras. 351 and 380; *Prosecutor v. Ante Gotovina et al., Judgment* (Volume II of II), Case No. IT-06-90-T, Trial Chamber, 15 April 2011, paras. 1765–1766.

[150] *Prosecutor v. Zoran Kupreškić et al., Judgment*, Case No. IT-95-16-T, Trial Chamber, 14 January 2000, *Judicial Reports 2000*, vol. II, p. 1399, at paras. 630–631; see also *Prosecutor v. Tihomir Blaškić, Judgment*, Case No. IT-95-14-A, Appeals Chamber, 29 July 2004, paras. 146–148; *Prosecutor v. Dario Kordić and Mario Čerkez, Judgment,* Trial Chamber, Case No. IT-95-14/2-T, 26 February 2001, paras. 203, 205–207; *Stakić* (see previous footnote), paras. 763–768; *Prosecutor v. Blagoje Simić et al., Judgment*, Trial Chamber, Case No. IT-95-9-T, 17 October 2003, paras. 98–103; *Prosecutor v. Miroslav Deronjić, Sentencing Judgment*, Trial Chamber, Case No. IT-02-61-S, 30 March 2004, paras. 121–122; *Prosecutor v. Momčilo Krajišnik, Judgment*, Trial Chamber, Case No. IT-00-39-T, 27 September 2006, paras. 778 and 783; *Prosecutor v. Milan Milutinović et al., Judgment* (vol. I of IV), Case No. IT-05-87-T, Trial Chamber, 26 February 2009, para. 207; *Prosecutor v. Vujadin Popović et al., Judgment*, Trial Chamber, Case No. IT-05-88-T, 10 June 2010, paras. 986–987; *Prosecutor v. Vlastimir Đorđević, Judgment* (vol. I of II), Trial Chamber, Case No. IT-05-87/1-T, 23 February 2011, paras. 1597–1598.

[151] Statute of the International Tribunal for the Former Yugoslavia (see footnote 111 above), arts. 2–3; Rome Statute, art. 8, para. 2 (*b*) (iv).

[152] *Prosecutor v. Jean-Paul Akayesu, Judgment*, Case No. ICTR-96-4-T, Trial Chamber, 2 September 1998, *Reports of Orders, Decisions and Judgements 1998*, vol. I, pp. 44 *et seq.*, at paras. 714–715; *Prosecutor v. Elizaphan and Gérard Ntakirutimana, Judgment and Sentence*, Cases Nos. ICTR-96-10 and ICTR-96-17-T, Trial Chamber, 21 February 2003, paras. 828–831; *Prosecutor v. Athanase Seromba, Judgment*, Case No. ICTR-01-66-T, Trial Chamber, 13 December 2006, paras. 334 and 365; *Prosecutor v. François Karera, Judgment and Sentence*, Case No. ICTR-01-74-T, Trial Chamber, 7 December 2007, paras. 168 and 539; *Prosecutor v. Siméon Nchamihigo, Judgment and Sentence*, Case No. ICTR-01-63-T, Trial Chamber, 12 November 2008, para. 284.

[153] *Prosecutor v. Emmanuel Rukundo, Judgment*, Case No. ICTR-2001-70-T, Trial Chamber, 27 February 2009, paras. 106, 108 and 566.

[154] *Prosecutor v. Nuon Chea and Samphan Khieu, Judgment*, Case 002/01, Trial Chamber, 7 August 2014, paras. 510, 551 and 552.

[155] *Prosecutor v. Alex Tamba Brima et al., Judgment*, SCSL-04-16-T, Trial Chamber, 20 June 2007, *The Law Reports of the Special Court for Sierra Leone,* vol. I, book I, para. 670; see also *Prosecutor v. Moinina Fofana and Allieu Kondewa, Judgment*, SCSL-04-14-T, Trial Chamber, 2 August 2007, paras. 172–173; *Prosecutor v. Issa Hassan Sesay et al., Judgment*, SCSL-04-15-T, Trial Chamber, 2 March 2009, para. 115; *Prosecutor v. Charles Ghankay Taylor, Judgment*, SCSL-03-01-T, Trial Chamber, 18 May 2012, paras. 2006 and 2192.

[156] *Plan de Sánchez Massacre v. Guatemala, Judgment (Merits),* Series C, No. 105, 29 April 2004, paras. 42 (7) and 47; *Plan de Sánchez Massacre v. Guatemala, Judgment (Reparations)*, Series C, No. 116, 19 November 2004, para. 73; *Ituango Massacres v. Colombia, Judgment (Preliminary Objections, Merits, Reparations and Costs)*, Series C, No. 148, 1 July 2006, paras. 182–183; *Massacres of El Mozote and nearby places v. El Salvador, Judgment (Merits, Reparations and Costs)*, Series C, No. 252, 25 October 2012, paras. 136 and 180; *Santo Domingo Massacre v. Colombia, Judgment (Preliminary Objections, Merits and Reparations)*, Series C, No. 259, 30 November 2012, paras. 228–229 and 279; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Judgment (Preliminary Objections, Merits, Reparations and Costs),* Series C, No. 270, 20 November 2013, paras. 346, 352, 354, 356 and 459.

between the indigenous peoples and land is of relevance. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* is a landmark case in which the Court discussed at length the right of indigenous peoples to their property. While not pertaining specifically to the realm of armed conflict, the case discussed in detail common law rights to land arising out of both cultural and agricultural history and uses. To the extent that ownership of land becomes an issue in an armed conflict scenario, language such as this could prove useful in understanding the legal relationship of indigenous or other peoples to the land in question. The case also discussed the harm that can be done to a people as a result of environmentally adverse activities.[157]

117. Cases of the Inter-American Court of Human Rights show that land does not have to be owned to receive protection. In particular, the Court has referenced article 21 of the American Convention on Human Rights, which protects the close relationship between indigenous peoples and their lands and with the natural resources on their ancestral territories and the intangible elements arising from them,[158] and the Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organization.[159] In *Río Negro Massacres v. Guatemala*, the Court discussed the impact on indigenous communities of the destruction of their natural resources and determined that

> the culture of the members of the indigenous communities corresponds to a specific way of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral component of their cosmovision, religious beliefs and, consequently, their cultural identity.[160]

[157] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment (Merits, Reparations and Costs)*, Series C, No. 79, 31 August 2001, paras. 151 and 164. For the discussion of the right to indigenous property, see paras. 140 *et. seq.*

[158] *The Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment (Merits and Reparations)*, Series C, No. 245, 27 June 2012, paras. 145 and 156.

[159] *Ibid*., para. 163.

[160] *Río Negro Massacres v. Guatemala, Judgment (Preliminary Objection, Merits, Reparations and Costs)*, Series C, No. 250, 4 September 2012, para. 177, footnote 266. The Court makes a cross-reference to the *Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment (Merits, Reparations and Costs)*, Series C, No. 125, 17 June 2005, para. 135, and the *Case of Chitay Nech et al. v. Guatemala, Judgment*, Series C, No. 212, 25 May 2010, para. 147. See also *Afro-Descendant Communities* (footnote 156 above), paras. 346, 352, 354, 356 and 459. The protection offered by article 21 is also mentioned in the latter case, see *ibid.*, para. 346.

118. The European Court of Human Rights has primarily addressed the situation of peoples as a matter of private property rights. Protection of the environment *per se* is not addressed.[161] In a manner similar to that of the Inter-American Court of Human Rights, the European Court has characterized the destruction of homes and other property as a violation of the prohibition of inhuman and degrading treatment,[162] the right to property[163] and the right to respect for one's private and family life and home.[164]

119. It is also worth mentioning that, during the Nuremberg Trials, acts such as plundering, pillage and spoliation of villages, towns and districts were considered war crimes.[165] A number of those decisions dealt with situations of military occupation and discussed how the law of armed conflict (notably, the law of military occupation) applied to the economic exploitation of natural resources, plunder and looting.[166] Notably, this case law verified that there are limitations to the permissible use of natural resources of occupied States.[167]

[161] See, e.g., *Menteş and Others v. Turkey*, 28 November 1997, *Reports of Judgments and Decisions 1997-VIII*, paras. 13, 21, 23 and 76; *Orhan v. Turkey*, No. 25656/94, 18 June 2002, paras. 379–380; *Isayeva and Others v. Russia*, Nos. 57947/00 and two others, 24 February 2005, paras. 171 and 230–233; *Esmukhambetov and Others v. Russia*, No. 23445/03, 29 March 2011, paras. 150 and 174–179; *Chiragov and Others v. Armenia* [GC], No. 13216/05, ECHR 2015, para. 103; *Benzer and Others v. Turkey*, No. 23502/06, 12 November 2013, paras. 133, 184, 207 and 212–213.

[162] *Menteş* (see previous footnote), para. 76; *Benzer* (see previous footnote), paras. 207 and 212–213.

[163] *Orhan* (see footnote 161 above), paras. 379–380; *Esmukhambetov* (see footnote 161 above), paras. 174–179.

[164] *Orhan* (see footnote 161 above), paras. 379–380.

[165] *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Nuremberg, 1947), pp. 240–241, 296–297 and 324–325; *Law Reports of Trials of War Criminals*, vol. VIII (London, His Majesty's Stationery Office, 1949), p. 31; *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, vol. XI/2 (Washington, D.C., United States Government Printing Office, 1950), pp. 1253–1254; *ibid.*, vol. IV (Washington, D.C., United States Government Printing Office, 1950), p. 455; *ibid.*, vol. VII (Washington, D.C., United States Government Printing Office, 1953), p. 179; *ibid.*, vol. XIV (Washington, D.C., United States Government Printing Office, 1952), pp. 698–699 and 746–747.

[166] *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (see previous footnote), pp. 240–241, 296–297 and 324–325.

[167] *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, vol. VII (see footnote 165 above), p. 179; *ibid.*, vol. XIV (see footnote 165 above), pp. 698–699 and 746–747.

Chapter VII

Law applicable during armed conflict

A. Treaty provisions on the protection of the environment and the law of armed conflict

120. The need to protect the environment in times of armed conflict dates back to ancient times.[168] Those early rules were closely connected with the need of individuals to have access to natural resources essential for their survival, such as clean water. Given the conditions under which war was then conducted, as well as the means and methods used, there was limited risk of extensive environmental destruction. In pace with military technology developments after the Second World War, however, that risk grew. Yet it was not until 1976 that the protection of the environment as such was addressed in a treaty explicitly applicable in

[168] For a brief historical background, see Hulme, *War Torn Environment: Interpreting the Legal Threshold*, pp. 3–4. See also *Yearbook ... 2011*, vol. II (Part Two), annex V, para. 3.

armed conflict. Older treaties made no reference to the environment and the only protection offered to was through property rights and natural resources.[169]

121. Discussion of the protection of the environment in relation to armed conflicts is therefore of recent modern history, and scholars have written extensively on the subject.[170] ICRC has also profoundly engaged with the topic.[171] States, however, have taken a cautious approach and attempts to codify new rules have generally been disavowed. This cautious approach should be placed in context, given that States were equally cautious in developing other areas of the law on armed conflict. Furthermore, the possible connection to issues concerning the use of nuclear weapons was of concern.

122. The number of legal instruments relating to the law on armed conflict is considerable. Most regulate the conduct of hostilities and protection of civilian population in international armed conflict. Only a few address non-international armed conflict. However, a significant development has taken place over the past two decades, as a number of treaties have also embraced non-international armed conflict in their area of application.[172] The most notable development was the amendment made to the Convention on Certain Conventional Weapons to ensure that the Convention would also be applicable in situations of non-international armed conflict.

123. Nevertheless, many legal and political challenges arise when attempts are made to regulate the conduct of hostilities in non-international armed conflict. As such, it is unsurprising that some of the developments in this area of law take place outside the sphere of multilateral treaty negotiations, such as in courts and through national legislation. International and regional courts also tend to view the matter through the lens of human rights.[173]

1. Fundamental treaty provisions: Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Additional Protocol I and the Rome Statute

124. The most well-known provisions that are germane to the protection of the environment are found in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, in Additional Protocol I and in the Rome Statute. These three treaties have been widely ratified. As at 12 February 2015, there were 174 States parties to Additional Protocol I, 76 States parties to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and 123 States parties to the Rome Statute.[174] As a starting point, it is worth recalling the key articles in these instruments.

125. The most relevant article in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques is article I, paragraph 1 of which reads:

> Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

126. An environmental modification technique is considered a "technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space" (art. II). This means that the Convention covers a very narrowly defined environmental modification technique. Furthermore, the use of such a technique needs to be deliberate. In essence, as one commentator put it, "the actual scope of [the Convention on the Prohibition

[169] None of the following treaties and declarations contains any reference to protection of the environment as such: Declaration (IV, 3) concerning expanding bullets; Hague Convention II and the Regulations concerning the Laws and Customs of War on Land; Convention for the Exemption of Hospital Ships, in Time of War, from The Payment of all Dues and Taxes Imposed for the Benefit of the State; Hague Convention III; Hague Convention IV; Hague Convention V; Hague Convention VI; Hague Convention VII; Hague Convention VIII; Hague Convention IX; Hague Convention XI; Hague Convention XIII; Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; Convention on Maritime Neutrality; Treaty for the Limitation and Reduction of Naval Armaments, (Part IV, article 22, relating to submarine warfare); Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact); Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April, 1930; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Nürnberg Charter; Affirmation of the Principles of International Law recognised by the Charter of the Nürnberg Tribunal, General Assembly resolution 95 (I) of 11 December 1946; Convention on the Prevention and Punishment of the Crime of Genocide.

[170] The compilations of selected literature contained in *Yearbook ... 2011*, vol. II (Part Two), annex V, appendix II, *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, annex, and annex II to the present report serve as examples of the extensive literature on this topic.

[171] For example, by developing Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, document A/49/323, annex. Important and substantive work was done in the context of the ICRC customary law study. See also ICRC, report on strengthening legal protection for victims of armed conflicts, document 31IC/11/5.1.1, prepared for the thirty-first International Conference of the Red Cross and Red Crescent, Geneva, October 2011.

[172] This includes the Protocol II to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. For a study of the development, see Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts*.

[173] See chapter VI of the present report, above, on legal cases and judgments.

[174] An additional 16 States are signatories to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 3 to Additional Protocol I and 31 to the Rome Statute. Although signatories are not bound by the treaty, it is worth recalling that a State that has signed a treaty is obliged to refrain from acts which would defeat the object and purpose of a treaty, "until it shall have made its intention clear not to become a party to the treaty" (art. 18 (*a*) of the Vienna Convention on the Law of Treaties). The United States has done so with respect to the Rome Statute. The United States signed the Rome Statute on 31 December 2000. On 6 May 2002, the Government of the United States informed the depositary (the Secretary-General of the United Nations) that it did not intend to become a party to the treaty and that, "[a]ccordingly, the United States has no legal obligations arising from its signature on December 31, 2000". Israel (on 28 August 2002) and the Sudan (on 26 August 2008) have also informed the depositary of their intention not to become parties to the treaty and that, as a consequence, they have no legal obligations arising from their signatures. *Multilateral Treaties Deposited with the Secretary-General* (available from http://treaties.un.org), chap. XVIII.10.

of Military or Any Other Hostile Use of Environmental Modification Techniques] is fairly narrow".[175] States have also shown considerable scepticism towards the review of the Convention. Two review conferences have been held, in 1984 and 1992. Attempts to hold a third conference have not been successful.[176]

127. In Additional Protocol I to the Geneva Conventions, the most pertinent articles are articles 35 and 55, which read:

Article 35. Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

3. 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.

Article 55. Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

128. In the Protocol, article 35 appears in part III, section I, which deals with methods and means of warfare. Article 55 appears under part IV (Civilian population), section I, which deals with general protection against effects of hostilities, and chapter III thereof, concerning civilian objects. The placement of the articles is of relevance. Article 35, paragraph 3, is an absolute prohibition, as is the case with the other prohibitive rules in that article. Article 55 is an obligation of care that stipulates that the absolute prohibition against "the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population" is included in that obligation.

129. A few States have made declarations with regard to articles 35 and 55. France and the United Kingdom have expressed similar understandings of how the risk of environmental damage is to be assessed, namely, objectively and on the basis of the information available at the time.[177]

130. Several States have made declarations with regard to the applicability of Additional Protocol I only to conventional weapons or to its non-applicability to the use of nuclear weapons, namely, Belgium,[178] Canada,[179] France,[180] Germany,[181] Italy,[182] the Netherlands,[183] Spain[184]

[175] Schmitt, "Humanitarian law and the environment", p. 280.

[176] In 2013, the Secretary-General invited the States parties to express their views on the convening of a third review conference but the number of positive replies received did not meet the minimum number required for affirmative responses. Letter dated 27 January 2014 from the Secretary-General addressed to Member States (reference ODA/63-2013/ENMOD), available from www.unog.ch.

[177] France, interpretative declaration made at the time of ratification, 11 April 2001: "*Le gouvernement de la République française considère que le risque de dommage a l'environnement naturel résultant de l'utilisation des méthodes ou moyens de guerre, tel qu'il découle des dispositions des paragraphes 2 et 3 de l'article 35 et de celles de l'article 55, doit être analysé objectivement sur la base de l´information disponible au moment où il est apprécié*" ["The Government of the French Republic considers that the risk of damage to the natural environment resulting from the use of methods or means of warfare, as it follows from article 35, paragraphs 2 and 3, and article 55, must be analysed objectively on the basis of the information available at the time when it is assessed."]. United Kingdom, reservations, 2 July 2002, regarding art. 35, para. 3, and art. 55: "The United Kingdom understands both of these provisions to cover the employment of methods and means of warfare and that the risk of environmental damage falling within the scope of these provisions arising from such methods and means of warfare is to be assessed objectively on the basis of the information available at the time." Available from the ICRC web page: https://ihl-databases.icrc.org/.

[178] Belgium, interpretative declaration made at the time of ratification, 20 May 1986: "The Belgian Government, in view of the *travaux préparatoires* for the international instrument herewith ratified, wishes to emphasize that the Protocol was established to broaden the protection conferred by humanitarian law solely when conventional weapons are used in armed conflicts, without prejudice to the provisions of international law relating to the use of other types of weapons." Available from the ICRC web page: https://ihl-databases.icrc.org/.

[179] Canada, statement of understanding upon ratification, 20 November 1990: "It is the understanding of the Government of Canada that the rules introduced by Protocol I were intended to apply exclusively to conventional weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons." Available from the ICRC web page: https://ihl-databases.icrc.org/.

[180] France (see footnote 177 above): "*Se référant au projet de protocole rédigé par le comité international de la Croix-Rouge qui a constitué la base des travaux de la conférence diplomatique de 1974–1977, le gouvernement de la République française continue de considérer que les dispositions du protocole concernent exclusivement les armes classiques, et qu'elles ne sauraient ni réglementer ni interdire le recours à l'arme nucléaire, ni porter préjudice aux autres règles du droit international applicables à d'autres activités, nécessaires à l'exercice par la France de son droit naturel de légitime défense*" ["Having reference to the draft protocol drawn up by the International Committee of the Red Cross, which formed the basis for the work of the Diplomatic Conference of 1974–1977, the Government of the French Republic continues to consider that the provisions of the Protocol relate exclusively to conventional weapons, and that they can neither regulate nor prohibit the use of nuclear weapons, nor prejudice other rules of international law applicable to other activities necessary for the exercise by France of its inherent right of self-defence."].

[181] Federal Republic of Germany, declaration made at the time of ratification, 14 February 1991: "It is the understanding of the Federal Republic of Germany that the rules relating to the use of weapons introduced by Additional Protocol I were intended to apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons." Available from the ICRC web page: https://ihl-databases.icrc.org/.

[182] Italy, declaration made at the time of ratification, 27 February 1986: "It is the understanding of the Government of Italy that the rules relating to the use of weapons introduced by Additional Protocol I were intended to apply exclusively to conventional weapons. They do not prejudice any other rule of international law applicable to other types of weapons." Available from the ICRC web page: https://ihl-databases.icrc.org/.

[183] Netherlands, declaration made at the time of the ratification (for the Kingdom's territory within Europe and the Netherlands Antilles and Aruba), 26 June 1987: "It is the understanding of the Government of the Kingdom of the Netherlands that the rules introduced by Protocol I relating to the use of weapons were intended to apply and consequently do apply solely to conventional weapons, without prejudice to any other rules of international law applicable to other types of weapons." Available from the ICRC web page: https://ihl-databases.icrc.org/.

[184] Spain, interpretative declaration made at the time of ratification, 21 April 1989: "It is the understanding [of the Government of Spain] that this Protocol, within its specific scope applies exclusively to conventional weapons, and without prejudice to the rules of International Law governing other types of weapons." Available from the ICRC web page: https://ihl-databases.icrc.org/.

and the United Kingdom.[185] Ireland[186] has made a reference to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*,[187] and the Holy See has expressed concern over the inadequacy of the Additional Protocol given the ruinous devastation that would ensue from nuclear war.[188] Some of those declarations and reservations were made after the Court had handed down its advisory opinion. During the Court's proceedings, a considerable number of States submitted written statements and comments, in some of which the legality of the threat or use of nuclear weapons was also assessed by reference to rules that afford protection to the environment.[189] It should be noted that many statements and comments also provided an analysis of other pertinent international conventions.

131. The third treaty that contains a directly relevant provision on the protection of the environment during armed conflicts is the Rome Statute. Its article 8, paragraph 2 (*b*) (iv), includes among serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, the act of:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[190]

132. Only one State, France, made a declaration that directly refers to the protection of the environment in relation to armed conflicts upon ratification of the Rome Statute.[191] The connection between the protection of the environment and the use of nuclear weapons is made clear in the declaration. New Zealand,[192] Egypt[193] and Sweden[194] also raised the applicability of the Rome Statute to the use of nuclear weapons, while the United Kingdom explicitly referred to its statement made upon ratification of Additional Protocol I.[195]

(a) *Belligerent reprisals*

133. Although considerably restricted, a belligerent reprisal is still and under certain circumstances a lawful

[185] United Kingdom, reservation made at the time of ratification (see footnote 177 above), 28 January 1998: "It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons." Available from the ICRC web page: https://ihl-databases.icrc.org/.

[186] Ireland, declarations and reservation in relation to Additional Protocol I, 19 May 1999: "In view of the potentially destructive effect of nuclear weapons, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*." With respect to article 55, Ireland declared that: "In ensuring that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage and taking account of the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment thereby prejudicing the health or survival of the population, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Ireland will interpret and apply this Article in a way which leads to the best possible protection for the civilian population." Available from the ICRC web page: https://ihl-databases.icrc.org/.

[187] See footnote 133 above.

[188] Holy See, declaration at the time of ratification, 21 November 1985. Available from the ICRC web page: https://ihl-databases.icrc.org/.

[189] States that delved into an analysis of rules furnishing protection to the environment, but nevertheless found that the threat or use of force would not be illegal in any circumstance include France, the United Kingdom and the United States. Views to the contrary were taken, e.g., by Egypt, the Islamic Republic of Iran, the Marshall Islands, Nauru and the Solomon Islands. The written statements and comments are available from www.icj-cij.org/en/case/95/written-proceedings.

[190] The caveat that must be made with this provision (and several other provisions in the Rome Statute) is that for the purposes of securing accountability for war crimes (i.e., serious violations), it imports a standard of military necessity much higher than that traditionally understood from international humanitarian law. Furthermore, the references "clearly excessive" and "overall military advantage" are not the standards within international humanitarian law. These were compromises at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court so as to ensure that the Court's judges do not apply the standard too strictly and put themselves in the military commanders' shoes *ex post*.

[191] France declared that "the risk of damage to the natural environment as a result of the use of methods and means of warfare, as envisaged in article 8, paragraph 2 (*b*) (iv), must be weighed objectively on the basis of the information available at the time of its assessment". It had also stated that: "The provisions of article 8 of the Statute, in particular paragraph 2 (*b*) thereof, relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defence, unless nuclear weapons or the other weapons referred to herein become subject in the future to a comprehensive ban and are specified in an annex to the Statute by means of an amendment adopted in accordance with the provisions of articles 121 and 123". France, interpretative declaration upon ratification, 9 June 2000, United Nations, *Treaty Series*, vol. 2187, pp. 614–616.

[192] New Zealand stated in a declaration that "it would be inconsistent with principles of international humanitarian law to purport to limit the scope of article 8, in particular article 8(2) (*b*), to events that involve conventional weapons only" (para. 1). New Zealand finds support for this view in the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, (paras. 2–3). New Zealand, interpretative declaration upon ratification, 7 September 2000, United Nations, *Treaty Series*, vol. 2187, pp. 622–623.

[193] Upon signature, Egypt declared that its understanding of article 8 shall be as follows "[t]he provisions of the Statute with regard to the war crimes referred to in article 8 in general and article 8, paragraph 2 (*b*) in particular shall apply irrespective of the means by which they were perpetrated or the type of weapon used, including nuclear weapons, which are indiscriminate in nature and cause unnecessary damage, in contravention of international humanitarian law". Egypt also stated that "Article 8, paragraph 2 (*b*) (xvii) and (xviii) of the Statute shall be applicable to all types of emissions which are indiscriminate in their effects and the weapons used to deliver them, including emissions resulting from the use of nuclear weapons". Egypt, declaration upon signature, 26 December 2000, *Multilateral Treaties Deposited with the Secretary-General* (available from http://treaties.un.org), chap. XVIII.10.

[194] Sweden made a general statement with regard to the war crimes specified in article 8 of the Statute which relate to the methods of warfare, by recalling the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* (see footnote 133 above), and "in particular paragraphs 85 to 87 thereof, in which the Court finds that there can be no doubt as to the applicability of humanitarian law to nuclear weapons". Sweden, declaration made upon ratification, 28 June 2001, United Nations, *Treaty Series*, vol. 2187, p. 631.

[195] The United Kingdom declared that "[t]he United Kingdom understands the term 'the established framework of international law', used in article 8 (2) (*b*) and (*e*), to include customary international law as established by State practice and *opinio juris*. In that context the United Kingdom confirms and draws to the attention of the Court its views as expressed, *inter alia*, in its statements made on ratification of relevant instruments of international law, including the Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8th June 1977". United Kingdom, declaration upon ratification, 4 October 2001, United Nations, *Treaty Series*, vol. 2187, p. 633.

tool during armed conflict. It may be used as a retaliatory action by one of the parties to the conflict against another. There is no legal definition of the concept but its meaning is reasonably clear.

134. The ICRC customary law study describes a belligerent reprisal as "an action that would otherwise be unlawful but that in exceptional cases is considered lawful under international law when used as an enforcement measure in reaction to unlawful acts of an adversary".[196] Others have described the concept in different words.[197]

135. The Commission addressed the term "reprisals" in its work on State responsibility when it had to determine the boundary between countermeasures and reprisals. The Commission noted that the term "reprisals" in recent times had been limited to action taken in time of international armed conflict:

> More recently, the term "reprisals" has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term "countermeasures" covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.[198]

136. Although reprisals are not strictly prohibited during armed conflict, their use is severely restricted under international law. First, reprisals against protected persons are absolutely prohibited under all circumstances. The same is true for collective punishment of protected civilians. Reprisals are also forbidden against protected objects.[199] Additional Protocol I and the Convention on Certain Conventional Weapons list prohibited targets by including historical monuments, works of art or places of worship, objects indispensable to the survival of the civilian population, attacks against the natural environment by way of reprisals, and works or installations containing dangerous forces (i.e. dams, dykes and nuclear electrical generating stations), even where they are military objectives.[200] There is still no treaty-based (conventional) prohibition or restriction of reprisals relating to the means and methods of warfare as such.[201]

137. Article 55, paragraph 2, of Additional Protocol I clearly stipulates that attacks against the natural environment by way of reprisals are prohibited. As noted above, article 55 is placed in section I of part IV (Civilian population), which deals with general protection against effects of hostilities and, more specifically, in chapter III, entitled "Civilian objects". This implies a perception of the environment as a civilian object.[202]

(b) *Scope of application*

138. The provisions of Additional Protocol I are applicable in international armed conflict, as identified in article 2 common to the 1949 Geneva Conventions. Such conflicts also include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.[203] This raises two questions: whether there is any corresponding customary rule with the same content that would also be applicable to non-parties to the Protocol, and whether the content of such corresponding customary rules is applicable also in non-international armed conflict.

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[196] ICRC customary law study, vol. I, p. 513.

[197] See, for example:

"Belligerent reprisals consist of acts which, if they could not be justified as reprisals, would constitute violations of the law which regulates the conduct of war or armed conflict … The better view is … that belligerent reprisals may lawfully be taken only in response to a prior violation of the law of armed conflict and not in retaliation for an unlawful resort to force" (Greenwood, "The twilight of the law of belligerent reprisals", pp. 40–42).

"Because reprisals are a reaction to a prior serious violation of international humanitarian law, 'anticipatory' reprisals or 'counter-reprisals' are not permissible, nor can belligerent reprisals be a reaction to a violation of another type of law. In addition, as reprisals are aimed at inducing the adversary to comply with the law, they may not be carried out for the purpose of revenge or punishment". ICRC customary law study, vol. I, p. 515.

"Reprisals are stern measures taken by one State against another for the purpose of putting an end to breaches of the law of which it is the victim or to obtain reparation for them. Although such measures are in principle against the law, they are considered lawful by those who take them in the particular circumstances in which they are taken, i.e., in response to a breach committed by the adversary.

In this particular context we do not intend to deal with reprisals in general, but only in the context of armed conflict, i.e., in *jus in bello*. In the law of armed conflict, reprisals exercised by the belligerents can be defined as compulsory measures, derogating from the ordinary rules of such law, taken by a belligerent following unlawful acts to its detriment committed by another belligerent and which intend to compel the latter, by injuring it, to observe the law" (Zimmermann, "Part V, Section II—Repression of breaches of the Conventions and of this Protocol", paras. 3426–3427).

"Unlawful reprisals do not render lawful the recourse to counter-reprisals by the adversary consisting of measures which are, even as a reprisal, prohibited.

The prohibition of reprisals cannot be suspended because of material violation of treaties of humanitarian law. This might be derived directly from the definition of reprisals, the *raison d'être* of the specific above-mentioned prohibitions. Any doubt which might arise from Article 60 of the Vienna Convention of 29 May 1969 on the Law of Treaties, which provides for termination or suspension after a material breach of a treaty, is removed by the same article. Indeed this article states that its provisions are subject to specific treaty provisions applicable in the event of a breach (paragraph 4), in particular those relating to the protection of the human person in treaties of a humanitarian character, including provisions prohibiting reprisals (paragraph 5)". *Ibid*., paras. 3458–3459.

"At most, such measures [reprisals] could now be envisaged in the choice of weapons and in methods of combat used against military objectives". Pilloud and Pictet, "Article 51: Protection of the civilian population", para. 1985.

In *List et al. (The Hostages Trial)* in 1947/48, the United States Military Tribunal at Nuremberg held that: "A reprisal is a response to an enemy's violation of the laws of war which would otherwise be a violation on one's own side." United States Military Tribunal Nuremberg, *The Hostages* Trial, Judgment of 19 February 1948, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, vol. XI/2 (see footnote 165 above), p. 1248.

[198] Para. (3) of the commentary to chapter II (Countermeasures) of part three of the draft articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 128.

[199] Kalshoven, *Belligerent Reprisals*, pp. 321–322, and *Reflections on the Law of War: Collected Essays*. At page 767 of the latter, he writes the following: "The Geneva Conventions of 1949 categorically prohibit reprisals against protected persons and objects in situations of international armed conflict" (originally published in Kalshoven, "Belligerent reprisals revisited").

[200] Additional Protocol I, arts. 54, para. 4; 55, para. 2; and 56, para. 4.

[201] Kalshoven, *Belligerent Reprisals*, p. 323.

[202] See ICRC customary law study, vol. I, p. 525.

[203] Additional Protocol I, art. 1, paras. 3–4.

139. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques does not expressly address whether it is applicable in international and/or non-international armed conflict. The Convention obliges States "not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party" (art. 1, para. 1). This is an inter-State obligation and clearly covers a situation in which two States are engaged in an armed conflict. It says nothing about a parallel obligation when one State is engaged in a non-international armed conflict on its own territory or whether it is applicable when a coalition of States is operating on the territory of another State that has consented to their involvement in the conflict.

140. The Rome Statute covers both international and non-international armed conflict but makes a clear distinction between crimes committed in international armed conflict and crimes committed in non-international armed conflict (art. 8). Paragraph 2 (*b*) (iv) of article 8, cited above, is applicable in international armed conflict. There is no corresponding provision applicable in non-international armed conflict (art. 8, para. 2 (*c*)). That the International Criminal Court does not have jurisdiction over "widespread, long-term and severe damage to the natural environment" in noninternational armed conflict does not necessarily imply that it would be lawful to cause such damage. The Statute deals only with crimes under the jurisdiction of the Court. Hence, a conclusion *a contrario* cannot automatically be drawn.

2. Other treaties referring to the protection of the environment in relation to armed conflicts

141. Apart from the above-mentioned treaties, the protection of the environment is also addressed in other treaties on the law of armed conflict. Of relevance is the fourth preambular paragraph of the Convention on Certain Conventional Weapons.[204] The paragraph repeats the wording of article 35, paragraph 3, of Additional Protocol I in that 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. Protocol III to the Convention on Certain Conventional Weapons, on the use of incendiary weapons, states that "it is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives". No State has made a statement that specifically mentions the environment in the context of the use of incendiary weapons.[205]

[204] The fourth preambular paragraph reads: "Also recalling that 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."

[205] It is noteworthy that the Protocol was preceded by a resolution adopted in 1974 on napalm and other incendiary weapons and all aspects of their possible use, in which the General Assembly: "*Condemn*[*ed*] the use of napalm and other incendiary weapons in armed conflicts in circumstances where it may affect human beings or may cause damage to the environment and/or natural resources". General Assembly resolution 3255 B (XXIX) of 9 December 1974, para. 1.

142. The Technical Annex to Protocol II to the Convention on Certain Conventional Weapons, on the use of mines, booby traps and other devices, requires that the marking of mines "should be visible, legible, durable and resistant to environmental effects as far as possible" (para. 1 (*d*)), thus protecting the weapon from the environment rather than the other way around.

143. A similar requirement is found in the Technical Annex to Protocol V to the Convention on Certain Conventional Weapons (para. 2 (*i*)). In addition, States are required to apply appropriate explosive ordnance logging, tracking and testing procedures, which should include information on, among other things, "where the explosive ordnance has been, under what conditions it has been stored, and to what environmental factors it has been exposed" (para. 3 (*b*) (v)).

144. It is noteworthy that treaties that have the character of disarmament treaties reveal an increasing awareness of the need to take environmental aspects into account in the handling and destruction processes. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972) obliges each State party to observe all necessary safety precautions to protect populations and the environment in implementing their undertakings and, *inter alia*, to destroy, or to divert to peaceful purposes, all agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention (art. II). The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993) contains a number of environmental safeguard requirements throughout the entire destruction process.[206] The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997) allows a State party that considers that it will be unable to destroy or ensure the destruction of all antipersonnel mines that it has undertaken to destroy or ensure the destruction of to request an extension of the deadline. Such a request should contain information on "the humanitarian, social, economic, and environmental implications of the extension" (art. 5, para. 4 (*c*)). In addition and as a matter of transparency, each State party should report to the Secretary-General of the United Nations the environmental standards to be observed when the mines are destroyed (art. 7, para. 1 (*f*)). The Convention on Cluster Munitions (2008) likewise imposes the obligation on States to ensure that destruction methods comply with applicable international standards for protecting public health and the environment (art. 3, para. 2) and that signs and other hazardous area boundary markers should, as far as possible, be visible, legible, durable and resistant to environmental effects (art. 4, para. 2 (*c*)). Any request for extension of the time frame for destruction should contain an evaluation of the environmental implications of the proposed extension (art. 4, para. 6 (*h*)). In addition and as a matter of transparency, States are obliged to report the environmental standards used in their programme for destruction (art. 7, para. 1 (*e*) and (*f*)).

[206] See arts. IV, para. 10, V and VII, para. 3, and Annex on Implementation and Verification, specifically parts IV (A), para. 32, VI, para. 7, and X, para. 50.

145. In summary, it can be noted that there are limited treaty provisions under the law of armed conflict that are of direct relevance to the protection of the environment during armed conflicts. There is a notably long list of treaties and resolutions that do not contain any reference to the protection of the environment.[207] At the same time, it should be noted that provisions in early treaties may very well contribute to the protection of the environment, while their main objective may have been to protect civilian property.

B. Principles

146. The most fundamental principles of the law of armed conflict are the principles of distinction, proportionality and precautions in attack, as well as the rules on military necessity.[208] All of them are reflected in specific provisions in treaties on the law of armed conflict. The Martens clause, or, in other words, the principle of humanity, will be addressed in the Special Rapporteur's next report because this principle is of overarching character and therefore particularly relevant in analysing also the pre-conflict and post-conflict phases.

1. Principle of distinction

147. The principle of distinction is a fundamental rule of the law of armed conflict. It exists to ensure respect for and protection of the civilian population and civilian objects. At the same time, it identifies what may be lawfully targeted during an armed conflict. Accordingly, it is both a prohibitive and a permissive rule.

148. The principle of distinction is codified in article 48 of Additional Protocol I as a basic rule and obliges parties to the conflict to direct their operations only against military objectives.[209] The principle is supported by article 51 of Additional Protocol I, which provides additional protection for the civilian population,[210] and by article 52, which makes it clear that civilian objects may not be the object of attack or reprisals. The principle is considered to be a rule of customary law both in international and non-international armed conflict, the repeated violations of it notwithstanding.[211] It covers both means and methods of warfare and is confirmed by international case law.[212] It is repeated in military manuals and handbooks.[213]

149. Article 52, paragraph 1, of Additional Protocol I specifies that civilian objects shall not be the object of attack or of reprisals and that civilian objects are "all objects which are not military objectives as defined in paragraph 2".[214] The article provides that,

> [i]n so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage.

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[207] Geneva Convention I; Geneva Convention II; Geneva Convention III; Geneva Convention IV; Resolutions of the Diplomatic Conference, *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I (Federal Political Department, Bern, 1950), pp. 361–362; Additional Protocol II; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; resolution XXIII on human rights in armed conflicts adopted by the International Conference on Human Rights on 12 May 1968, *Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968*, A/CONF.32/41; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; Resolution by the Institute of International Law on "The distinction between military objectives and non-military objectives in general and particularly the problems associated with weapons of mass destruction" adopted on 9 September 1969, *Yearbook*, vol. 53 (1969), Session of Edinburgh (1969), Part II, p. 375 (available from www.idi-iil.org, *Publications and works/Resolutions*), also Schindler and Toman, *The Laws of Armed Conflicts*, pp. 265–266; European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes; Annex I to Additional Protocol I to the Geneva Conventions; Regulations concerning identification, as amended on 30 November 1993; Convention for the Elimination of Mercenarism in Africa; Resolution on small-calibre weapon systems of 28 September 1979, adopted at the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, document A/CONF.95/15; Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, document A/CONF.95/15, annex I; Convention on Certain Conventional Weapons and amended article 1 thereof, and Protocols I, II, III and IV thereto; International Convention against the Recruitment, Use, Financing and Training of Mercenaries; Statute of the International Tribunal for the Former Yugoslavia (see footnote 111 above); Statute of the International Tribunal for Rwanda, Security Council resolution 955 (1994), annex; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; Additional Protocol III to the Geneva Conventions; Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 138; Arms Trade Treaty.

[208] The prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is not addressed in the present report, since this rule aims at protecting the combatants from the certain detrimental consequences of the choice of means or methods of warfare. It is not related to the protection of civilians or civilian objects.

[209] Article 48 (Basic rule) reads: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

The principle of distinction had a long legal history before it was codified in Additional Protocol I, but this historical background is not addressed in the present report. The term "military objective" had not been defined before the adoption of the Additional Protocol I.

[210] Article 51 makes it clear that the civilian population or individual civilians shall not be the object of attack and that indiscriminate attacks are prohibited (see paras. 2 and 4).

[211] The ICRC customary law study correctly remarks that violations of the principle are often condemned by the Security Council, vol. I, p. 7.

[212] See, for example, *Legality of the Threat or Use of Nuclear Weapons* (see footnote 133 above), p. 257, and *Ethiopia/Eritrea*, Eritrea–Ethiopia Claims Commission, *Partial Award: Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims, 1, 3, 5, 9–13, 14, 21, 25 and 26,* decision of 19 December 2005, UNRIAA, vol. XXVI (Sales No. B.06.V.7), pp. 291–349.

[213] See examples in ICRC customary law study, vol. I, p. 4, note 9.

[214] Article 52 (General protection of civilian objects) reads: "1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

"2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

"3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."

The formulation in paragraph 2 of article 52 indicates that a civilian object is a "thing", as opposed to a more abstract configuration. At the same time, private land, crops and natural resources may very well be considered civilian objects. It is sometimes difficult to distinguish between the protection of the environment as such and the protection of natural objects and natural resources. To give an example, assume that a fisher has exclusive fishing rights to the marine resources in a bay or particular sea area and a belligerent uses the area in violation of the law of armed conflict by dumping dangerous, long-lasting chemicals, although this action offers no definite military advantage. Does this mean that the use violates the fisher's private (economic) rights only, or could it also be a violation of the obligation of care to protect the natural environment against widespread, long-term and severe damage?[215]

150. The prohibition of attacks against civilian objects, the civilian population and civilians is repeated in other treaties, such as Protocol II to the Convention on Certain Conventional Weapons, on the use of mines, booby traps and other devices.

151. It is possible to conclude that the natural environment is civilian in nature and therefore not in itself a military objective. As with other civilian objects, it may be subject to attack if it is turned into a military objective. The following draft principle is therefore suggested:

"*Draft principle 1*

"The natural environment is civilian in nature and may not be the object of an attack, unless and until portions of it become a military objective. It shall be respected and protected, consistent with applicable international law and, in particular, international humanitarian law."

2. Principle of precautions in attack

152. The obligation to take precautions in attack in accordance with Additional Protocol I must not be confused with the precautionary principle or approach often referred to in environmental treaties. They are two different legal concepts that stem from different sources and are to be applied in different contexts. The precautionary principle demands action, even without scientific certainty as to any harm. This stands in contrast to another environmental law principle, namely, the principle of prevention. This principle focuses on harm based on actual or constructive knowledge.[216] Both principles were addressed in 2014 in the preliminary report.[217] The applicability of the principles outside situations of armed conflict is beyond doubt and verified in case law.[218] The extent of their application depends on the legal basis for their applicability and the factual circumstances at hand. One issue concerns whether the principles are applicable also during an armed conflict. A distinction will have to be made between the applicability of the principles outside situations of armed conflict and their possible applicability to the conduct of hostilities.

153. Although general applicability of the principles cannot be excluded, there is little indication that they would be applicable during the conduct of hostilities as such, at least as they are understood in a peacetime environmental law context.

154. At the same time, it is important to recall that an important element of the law of armed conflict is the requirement to take precautionary measures in order to spare the civilian population, individual civilians and civilian objects. The obligation to take precautions against the effect of attacks is of a relatively new date, and its aim is to protect civilian populations from the effects of attack.[219] The customary law status of the rule has been affirmed in various forums.[220] Article 57, paragraph 2, of Additional Protocol I contains an elaborate list of what is meant by such precautions, which are required to be taken in planning, deciding or conducting an attack.[221] The environment is not mentioned in the article but, to the extent that the environment is considered a civilian object, it will be covered under the precautionary measures to be applied in relation to such object.

155. "Precautions in attack", as the rule often is referred to, do not have a standing of their own. The precise meaning of "feasible precautions" is not found in Additional Protocol I but has to be applied in a context of other legal rules. This stands in contrast to the

[215] See Additional Protocol I, art. 55.

[216] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, para. 137.

[217] *Ibid*., paras. 133–147.

[218] *Ibid*.

[219] Rogers, *Law on the Battlefield*, pp. 120–121.

[220] *Ethiopia/Eritrea*, Eritrea–Ethiopia Claims Commission, *Partial Award* (see footnote 212 above), p. 330.

[221] Article 57 (Precautions in attack) reads:

"1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

"2. With respect to attacks, the following precautions shall be taken:

"(*a*) Those who plan or decide upon an attack shall:

"(i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

"(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

"(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

"(*b*) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

"(*c*) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

"3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

"4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

"5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects."

precautionary principle, which is an autonomous principle (some say an approach).

156. Feasible precautions are defined in article 3, paragraph 10, of the amended Protocol II to the Convention on Certain Conventional Weapons as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations".[222] Although the requirement to take feasible precautions reflects customary law, the precision reflected in article 3 is not necessarily a reflection of a generally applicable interpretation of the rule.[223] It is worth noting that States have expressed their interpretation of the term "feasible precautions" upon ratification of Additional Protocol I.[224]

157. Nevertheless, there is a basic common sense rationale behind the two concepts, that is, every action requires some planning and moderation. At the same time, they may need to act based upon available information.

158. The aim of the obligation to take precautions in attack is, as noted, to enhance the protection of the civilian population, individual civilians and civilian objects in order to ensure that they are not subject to incidental loss of life, injury and damage. It can be said to buttress the rule that only military objectives may be targeted.

159. The rule reflects the reality that civilians and civilian objects cannot be entirely protected in time of war. Incidental loss and damage will occur.

160. The following draft principle is proposed:

"*Draft principle 2*

"During an armed conflict, fundamental principles and rules of international humanitarian law, including the principles of precautions in attack, distinction and proportionality and the rules on military necessity, shall be applied in a manner so as to enhance the strongest possible protection of the environment."

3. Principle of proportionality

161. The third fundamental principle of relevance to the present report is the principle of proportionality, a rule of customary international law. The principle is reflected in article 51, paragraph 5 (*b*), of Additional Protocol I, and repeated in its article 57. In addition, the Rome Statute provides that, within the established framework of international law, a war crime is: "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects … which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" (art. 8, para. 2 (*b*) (iv)).[225] Needless to say, there is an ongoing debate on what is considered "concrete and direct overall military advantage". States generally accept the principle but avoid providing information on its precise application. At the same time, it has been underlined that it should be interpreted with a *bona fide* outcome in mind. The Special Rapporteur is of the view that it is not the task of the Commission to attempt to establish the parameters of the application of the principle, the implications of which are always likely to be debated both within and outside the legal and military communities. Furthermore, evaluation of what is "proportionate" may well develop over time. Such a development is likely to be influenced both by increased scientific knowledge and by advancement in strategic and tactical military thinking, as well as technological development. In addition, societal values change over time and are also likely to influence the understanding of the concept. It therefore suffices to refer to the existence of the principle as such.

162. The International Court of Justice has emphasized the importance of this principle in protecting the environment. In *Legality of the Threat or Use of Nuclear Weapons*, it did not consider that "the treaties [on international humanitarian law] 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", and continued by stating:

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[222] See also article 1, para. 5, of Protocol III to the Convention on Certain Conventional Weapons, which states: "'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."

[223] The heading of article 3 of the amended Protocol II makes it clear that it sets out "[g]eneral restrictions on the use of mines, booby-traps and other devices". The formulation is unchanged from the original text in Protocol II to the Convention on Certain Conventional Weapons.

[224] For example, upon ratification of Additional Protocol I, Spain interpreted the term "feasible" as meaning that "the matter to which reference is made is practicable or practically possible taking into account all circumstances at the time when the situation arises, including humanitarian and military considerations". Belgium declared that: "in view of the *travaux préparatoires*, the expression 'feasible precautions' in Article 41 must be interpreted in the same way as the 'feasible precautions' mentioned in Articles 57 and 58, that is, those that can be taken in the circumstances prevailing at the moment, which include military considerations as much as humanitarian ones". The Netherlands declared that: "[T]he word 'feasible' is to be understood as practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations". Algeria stated that the expressions "'feasible precautions' (Art. 41, para. 3), 'everything feasible' (Art. 57. para. 2) and 'to the maximum extent feasible' (Art. 58) are to be interpreted as referring to precautions and measures which are feasible in view of the circumstances and the information and means available at the time", Algeria, interpretative declaration made at the time of accession, 16 August 1989, at para. 1. Canada stated that: "[T]he word 'feasible' means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations". Germany stated that it understood the word "feasible" to mean "that which is practicable or practically possible, taking into account all circumstances ruling at the time including humanitarian and military considerations". The United Kingdom stated that it understood the term "feasible" as used in the Protocol to mean "that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations". The United Kingdom further stated that the obligation mentioned in article 57, para. 2 (*b*), of the 1977 Additional Protocol I only applied to "those who have the authority and practical possibility to cancel or suspend the attack". France stated that it considered that the term "feasible" as used in the Protocol meant "*ce qui est realisable ou ce qui est possible en pratique, compte tenu des circonstances du moment, y compris les considerations d'ordre humanitaire et militaire*" ["that which can be realized or which is possible in practice, taking into account all circumstances ruling at the time, including humanitarian and military considerations"]. The declarations and understandings in relation to Additional Protocol I can be consulted on the ICRC website, at http://ihl-databases.icrc.org.

[225] See also the comments in footnote 190 above.

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.[226]

163. It is interesting to note that the Court refers to principle 24 of the Rio Declaration in support of this conclusion. Principle 24 reads: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

164. The following draft principle is therefore suggested:

"*Draft principle 3*

"Environmental considerations must be taken into account when assessing what is necessary and proportionate in the pursuit of lawful military objectives."

165. In addition to the treaty provisions and principles of international humanitarian law referred to above, the Special Rapporteur will address below relevant rules in the ICRC customary law study and some international manuals on the law of armed conflict.

C. ICRC study on customary international humanitarian law

166. As mentioned in the introduction to the present report, the momentous ICRC customary law study was published in 2005 after some 10 years of compilation of material and analytical work.[227] The study has no precedent. In addition to the documents on State practice made available by the study, ICRC has also drawn conclusions with regard to the status of the law it examined. As a result, the study contains three rules relating to the protection of the environment. They appear in under part II, "Specifically protected persons and objects". The first is rule 43, which states that the general principles on the conduct of hostilities apply to the natural environment. ICRC concludes that "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts".[228]

167. Rule 43 is based on the principle of distinction, the prohibition of destruction of property not justified by military necessity, the principle of proportionality and other rules affording protection to the natural environment.

168. The second, rule 44, addresses the obligation of due regard for the natural environment in military operations. It reads:

Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimise, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.[229]

169. ICRC considers that State practice establishes this rule "as a norm of customary international law applicable in international, and arguably also in non-international, armed conflicts".[230]

170. Rule 44 is based on the obligation to take all feasible precautions to avoid or minimize damage to the environment, the precautionary principle and the continued application of (international) environmental law during armed conflict.

171. The third, rule 45, refers to a situation in which there is a risk of causing serious damage to the natural environment. It reads:

The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.[231]

172. ICRC concludes that this rule also reflects customary international law applicable in international, and arguably also in non-international, armed conflicts. According to the commentary attached to rule 45,

it appears that the United States is a "persistent objector" to the first part of this rule. In addition, France, the United Kingdom and the United States are persistent objectors with regard to the application of the first part of this rule to the use of nuclear weapons.[232]

173. Rule 45 is based on article 35, paragraph 3, of Additional Protocol I, which prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment", and on extensive State practice prohibiting the deliberate destruction of the natural environment as a form of weapon.

174. There is yet another rule of direct relevance, rule 42, which concerns works and installations containing dangerous forces. It reads:

Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population.[233]

175. ICRC considers that State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.[234]

176. Rule 42 is based on the detailed rules contained in article 56 of Additional Protocol I and in article 15 of Additional Protocol II. The first sentence of the two provisions is identical:

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

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[226] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 133 above), p. 242, para. 30.

[227] ICRC customary law study, vol. I.

[228] *Ibid.*, p. 143.

[229] *Ibid.*, p. 147.

[230] *Ibid.*

[231] *Ibid.*, p. 151.

[232] *Ibid.*

[233] *Ibid.*, p. 139.

[234] *Ibid.*

177. It should be noted that Additional Protocol I contains several exceptions to this clear-cut prohibition, stipulating that the special protection against attack provided by paragraph 1 of article 56 shall cease in essence if the objects listed are turned into military objectives by being used in regular, significant and direct support of military operations. A similar exception is not found in Additional Protocol II.

178. Rule 42 contains an obligation of particular care that in one respect goes beyond the formulation found in article 56 of Additional Protocol I and article 15 of Additional Protocol II, given that it also includes other installations located at or in the vicinity of works and installations containing dangerous forces. ICRC is of the view that the rule should equally apply to other installations, such as chemical plants and petroleum refineries, and explains:

> The fact that attacks on such installations may cause severe damage to the civilian population and the natural environment implies that the decision to attack such installations, in case they become military objectives, requires that all necessary precautions be taken when attacking them.[235]

179. Undeniably, the conclusions reached by ICRC are more than a qualified guess. They are built on extensive and widespread State practice and represent practice from all geographical areas and all major legal systems. Nevertheless, as mentioned above, the methodology and conclusions of the Study have been criticized.[236]

D. Manuals on international law applicable in armed conflict

180. It is not uncommon for legal, military and technical experts to analyse and develop suggestions on the identification and development of international law applicable in armed conflict. The tradition dates back to the nineteenth century. For obvious reasons, the resultant military manuals (originally of a national character, later to be elaborated as international manuals) are not binding on States or any other party to an armed conflict, yet they have played a notable role in the development of customary international humanitarian law. The manuals are often a reflection of operational needs and realities and have therefore frequently come to serve as a basis for national practice or as inspiration for rules of engagement at the national or international level. Given that States are increasingly reluctant to enter into new binding treaty agreements on international humanitarian law while at the same time needing to adjust their operational policies, such manuals may reveal a trend, that is, a possible transition from "soft law" into practice by States. The rules are often a reflection of existing practice (although not necessarily accompanied by *opinio juris* and they may (or may not) develop into customary international law. Given that international experts often draft the manuals together with experts from ICRC, the manuals tend to reflect different concerns and most often reflect existing national manuals and rules of engagement. The final text is therefore always a compromise. It is therefore worth considering what some of the most prominent manuals have to say about the protection of the environment in relation to armed conflicts, namely, the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* of 1994 (hereinafter, "San Remo Manual"),[237] the *Manual on the Law of Non-International Armed Conflict* of 2006 (hereinafter, "NIAC Manual"),[238] the *Manual on International Law Applicable to Air and Missile Warfare* of 2009 (hereinafter, "HPCR Manual")[239] and the *Tallinn Manual on the International Law Applicable to Cyber Warfare* of 2012 (hereinafter, "Tallinn Manual").[240]

1. San Remo Manual

181. The San Remo Manual refers to the protection of the environment in several instances.[241] It can be said to be the most broad-minded of all of the manuals in terms of the protection of the environment during armed conflicts. This should considered in the light of the background of the development of the law of the sea resulting in the adoption of the United Nations Convention on the Law of the Sea, whereby new jurisdictional zones (the exclusive economic zone and archipelagic waters) were introduced together with recognition of a 12 nautical mile territorial sea and a new definition of the continental shelf. This changed the legal character of important areas of operations for States engaged in armed conflict. The previous division of the maritime space into either a narrow sea territory (internal waters and territorial sea) or the high seas was replaced by a three-tiered division of the maritime water column: sovereign waters; areas in which the coastal State had well-defined sovereign rights and clearly stipulated jurisdictional rights; and areas in which the principle of the freedom of the high seas was applicable without any further restrictions.[242] The exclusive economic zone was characterized as having a *sui generis* legal status.[243] It was in the *sui generis* areas that the coastal States enjoyed exclusive jurisdiction with regard to the protection of the environment, save for the immunity of warships and other government ships operated for non-commercial purposes.

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[235] *Ibid*., p. 142.

[236] See chapter I of the present report, above. For the rules relating to the protection of the natural environment, see Hulme, "Natural environment.

[237] Doswald-Beck, ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (hereinafter, "San Remo Manual"). The text was adopted in 1994. Some of the experts who participated in the work on the San Remo Manual also took part in the work on the HPCR Manual.

[238] Schmitt *et al*., *The Manual on the Law of Non-International Armed Conflict with Commentary*. The Manual reflects the results of a major project launched by the International Institute of International Law under the directorship of Dieter Fleck. According to the foreword, the project itself is not entirely finished, *ibid*. at p. ii. Although it should therefore be read with caution, it seems worthy of referring to it within the context of the present topic.

[239] Harvard School of Public Health, Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare*. The final text was adopted in 2009.

[240] Schmitt, ed., *The Tallinn Manual on the International Law Applicable to Cyber Warfare*. The text was finalized in 2012.

[241] For a discussion on the developments in the protection of the environment in the naval context, see Heintschel von Heinegg and Donner, "New developments in the protection of the natural environment in naval armed conflicts".

[242] The area of operations in the air space was affected to the extent that States extended their territorial seas. Certain seabed areas of operations became also subject to a new legal regime due to the modified rules regarding the continental shelf.

[243] For the application of the provisions of Part VII of the United Nations Convention on the Law of the Sea, concerning the high seas, see articles 6 and 58 of the Convention.

182. It should be recalled that, at the time of the elaboration of the San Remo Manual, the Iran-Iraq war and the Iraq/Kuwait war were fresh in the minds of many. In addition, the protection of the environment during armed conflict was also subject to much attention at the United Nations.[244]

183. The San Remo Manual includes "damage to or the destruction of the natural environment" in its definition of collateral casualties or collateral damage.[245] It was the first time that "natural environment" had been included in the definition of "collateral damage". The commentary makes it clear that this was intentional so as to ensure that collateral damage applied also to the natural environment. Different standards were to be used in assessing whether an attack would cause excessive collateral damage; probable incidental damage to civilian life would be considered with more care than that to the environment.[246]

184. The San Remo Manual also introduces the application of the principle of due regard[247] into the naval war context. This imposes an additional duty on the belligerent States to observe not only the law of armed conflict at sea, but also to "have due regard for the rights and duties of the coastal State, *inter alia*, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment".[248]

185. Moreover, it introduces an obligation for a belligerent to notify the coastal State if the belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State.[249]

186. The San Remo Manual furthermore addresses the protection of the environment in the section on basic rules and target discrimination. Rule 44 states that: "Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited." This is a general obligation that is not reflected in the wording of any of the existing treaties. The closest formulation is to be found in article 55 of Additional Protocol I.[250] Article 55 reflects the general point that the choice of methods and means of warfare is not unlimited. Seventeen years after the adoption of Additional Protocol I, the San Remo Manual took this one step further, with rule 44 the result of lengthy discussions. A reference to the "due regard formula" without any qualifications was not accepted, primarily owing to the lack of "hard law" rules to the contrary.[251]

187. Lastly, enemy vessels and aircraft are exempt from attack if they are designated or adapted exclusively for responding to pollution incidents in the marine environment.[252] Such vessels are also exempt from capture.[253] Both rules are innovative.[254]

2. NIAC Manual

188. The NIAC Manual contains only one rule on the protection of the natural environment, which provides that "damage to the natural environment during military operations must not be excessive in relation to the military advantage anticipated from those operations".[255] The authors of the NIAC Manual claim that the rule contained in articles 35, paragraph 3, and 55 of Additional Protocol I, which addresses damage to the natural environment in terms of "widespread, long-term, and severe damage" in the context of international armed conflict, has not been accepted as customary international law in either international or non-international armed conflict.

189. At the same time, it is asserted that "the natural environment is a civilian object" and, as such, parts of the environment therefore benefit from all the rules regarding protection of civilian objects. It is noted that, just as other civilian objects, they "may become military objectives by virtue of their nature, location, purpose or use".[256] The NIAC Manual also notes that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques

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[244] See *Yearbook ... 2011*, vol. II (Part Two), annex V, paras. 10–16.

[245] Rule 13 (*c*) reads: "'collateral casualties' or 'collateral damage' means the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives".

[246] San Remo Manual, explanation of rule 13, para. 13.10.

[247] For a discussion on the principle of due regard in the law of the sea context, see, e.g., Soons, *Marine Scientific Research and the Law of the Sea*, and Walker, *Definitions for the Law of the Sea: Terms not Defined by the 1982 Convention*.

[248] Rule 34 reads: "If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard for the rights and duties of the coastal State, *inter alia*, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf." It should be noted that "neutral" is defined in rule 13 (*d*) of the San Remo Manual as "any State not party to the conflict". The definition and its implication was controversial; see the accompanying explanation of rule 13, paras. 13.11–13.14.

[249] Rule 35 reads: "If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, *inter alia*, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment".

[250] The placement of the article in part IV (Civilian population), section I (Protection against the effect of hostilities), under chapter III (Civilian objects), is relevant in this context.

[251] San Remo Manual, explanation of rule 44, paras. 44.1–44.10.

[252] The relevant part of rule 47 of the Manual reads: "The following classes of enemy vessels are exempt from attack: … (*h*) vessels designated or adapted exclusively for responding to pollution incidents in the marine environment." There is no parallel rule in the HPCR Manual; see rule 47 which deals with the protection of civilian aircraft in general terms.

[253] The relevant part of rule 136 reads: "The following vessels are exempt from capture: … (*g*) vessels designed or adapted exclusively for responding to pollution incidents in the marine environment when actually engaged in such activities." There is no parallel rule in the HPCR Manual but see rule 67, under which aircraft granted safe conduct are exempt from capture as prize.

[254] San Remo Manual, explanation of rule 47, para. 47.52 (*h*), and explanation of rule 136, para. 136.1.

[255] NIAC Manual, rule 4.2.4.

[256] *Ibid.*, commentary to rule 4.2.4, para. 1.

prohibits "modifying" the environment as a method of combat if doing so results in widespread, long-lasting or severe effects on the environment.[257] This indicates that the authors consider the Convention applicable also in a non-international armed conflict.

3. HPCR Manual

190. The HPCR Manual contains the most restrictive formulations with regard to the protection of the environment. It explicitly addresses the environment in two rules under its section M, entitled "Specific protection of the natural environment". The rules are worth quoting in extenso. The first, rule 88, is a general rule providing that "[t]he destruction of the natural environment carried out wantonly is prohibited". The second, rule 89, concerns the specifics of air or missile operations; it states that "[w]hen planning and conducting air or missile operations, due regard ought to be given to the natural environment".

191. The two rules were the result of an intense debate among the experts who produced the HPCR Manual.[258] Earlier drafts of the HPCR Manual contained several more rules with regard to the protection of the environment. The only two that endured were the above-mentioned rules 88 and 89. They represent the lowest common denominator. This does not mean, however, that the rules and principles protecting the environment are weaker than the bare minimum standard reflected in rules 88 and 89. First, some States are bound by treaty rules that take their obligations further than what is contained in rules 88 and 89. Second, States may restrict their military choices at the national level, for example through national laws or regulations, rules of engagement and national environmental policies, thereby increasing environmental protection.[259]

192. During the elaboration of the HPCR Manual, references to standards of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques were removed, partly because they were not considered to reflect customary law. This included the words "widespread, long-lasting or severe", contained in article I, paragraph 1, of the Convention. This is understandable, given that the use of "or" instead of "and" (as in Additional Protocol I) has long been subject to resistance and criticism, and the wording can therefore hardly claim customary law status. Slightly more troubling is the inability of the experts to agree to include wording reflected in articles 35 and 55 of Additional Protocol I. At present, there are 174 parties to the Protocol. This includes four of the five permanent members of the Security Council. The fifth, the United States, has only signed the Protocol. Few of the 174 States have made declarations and/or reservations in relation to articles 35 and 55. The most significant declarations and reservations relate to the non-applicability of the Protocol to other than conventional weapons (i.e. the use of nuclear weapons).[260]

193. As mentioned above, the San Remo Manual includes "damage to and destruction of the natural environment" in its definition of collateral casualties or collateral damage. In contrast, the HPCR Manual does not explicitly include the natural environment in its definition of collateral damage. Its definition reads: "'Collateral damage' means incidental loss of civilian life, injury to civilians and damage to civilian objects or other protected objects or a combination thereof, caused by an attack on a lawful target."[261]

194. This does not however, mean that the natural environment is excluded from being subject to "collateral" damage. To the extent that it is considered a civilian object or other protected object or a combination thereof, it would indeed be subject to such damage. There is no explanation in the commentary as to why the reference was deleted.[262]

195. There are two other significant differences between the San Remo and HPCR Manuals. The first relates to the area of operations. This is quite logical. Although the law of armed conflict applies to all situations in which an armed conflict is occurring, there is a distinction to be made between operations on the territories of the belligerents and operations on the territory of a non-belligerent (neutral) State.[263] Clearly, naval operations cannot be conducted without consideration of such a State's sovereign rights and prescribed jurisdiction in an exclusive economic zone. This does not mean, however, that military operations may not be conducted in the exclusive economic zone of a non-belligerent (neutral) State. It simply means that the outcome of the test of reasonableness (based on the due regard principle) may be different than it would have been had the operation been conducted on the high seas.[264] This is reflected in the San Remo Manual, but there is no need for a similar differentiation in the HPCR Manual because there is no such thing as an exclusive economic zone in airspace.

196. The second obvious difference is found between the section on basic rules and target discrimination (rule 44 in the San Remo Manual) and the two rules in the HPCR Manual.

197. It is not likely that modern naval operations would be conducted in isolation from other military operations. On the contrary, they are likely to be held jointly with air forces. Assuming that a State wishes to incorporate both the San Remo Manual and the HPCR Manual into its military handbook, how would the discrepancy between the rules in the two manuals be reconciled? The experts did address the interaction of air and naval warfare.[265] This included a discussion on the protection of the environment, as formulated in the San Remo Manual. The views expressed by some experts notwithstanding, the wording

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[257] *Ibid.*, commentary to rule 4.2.4, para. 2.

[258] The project was launched by the Program on Humanitarian Policy and Conflict Research at Harvard University in 2003 with the aim of restating existing international law applicable to air and missile warfare.

[259] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, paras. 23–47.

[260] See paragraph 126 above.

[261] HPCR Manual, rule 1 (*l*).

[262] *Ibid.*, commentary to the definition of "collateral damage", p. 33, para. 2.

[263] There is no reason to address these rules for the purposes of the present report.

[264] Note that the exclusive economic zone and the high seas are considered international waters.

[265] The discussion was based on a critical analysis, presented by one of the experts, Professor Wolff Heintschel von Heinegg. He had previously also participated in the work whose outcome was the San Remo Manual.

in rule 44 of the San Remo Manual differs from that in the HPCR Manual and, more specifically, there are three significant differences. First, according to the San Remo Manual, methods and means of warfare "should be employed with due regard for the natural environment", compared with "due regard ought to be given" in rule 89 of the HPCR Manual. Second, there is no reference in the HPCR Manual to the idea that "relevant rules of international law" should be taken into account. Third, there is no reference to "military necessity" in the HPCR Manual.

198. The reference to "due regard" appears in both documents.[266] It is not entirely clear what is meant in this context. As pointed out, "due regard" has its origin in the law of the sea, where it has served as a basic principle to ensure the freedom of the high seas since the days of the Netherlands legal scholar and philosopher, Hugo Grotius. It was introduced in the San Remo Manual to illustrate the balance of rights and obligations of parties involved in armed conflict and those that are not. The principle is also applicable *mutatis mutandis* to exclusive economic zones.[267]

199. Lastly, it should be mentioned that the HPCR Manual deliberately does not address the issue of reprisals because the experts convened to produce it decided that the Manual was to be "designed for operational use in the conduct of hostilities (*jus in bello*)" and not "implementation and enforcement of the law in the relations between States".[268]

4. Tallinn Manual

200. The Tallinn Manual is of considerable interest when it comes to the protection of the environment during armed conflict. It is worth recalling that cyberwarfare is subject to the same set of rules as any other kind of warfare.[269]

201. The Tallinn Manual refers to the protection of the environment on several occasions. Most importantly, it contains a specific section on the natural environment. Rule 83 makes it clear that "the natural environment is a civilian object and as such enjoys general protection from cyber attacks and their effects". The accompanying commentary explains that the rule adequately reflects customary law in international armed conflict because it "is based on the principle of distinction as well as the prohibition on attacking civilian objects".[270]

202. Rule 83 furthermore proclaims the following: "States Party to Additional Protocol I are prohibited from employing cyber methods or means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment."

203. The formulation reflects the fact that the experts convened to produce the Manual were divided as to whether the prohibitions in article 35, paragraph 3, and article 55, paragraph 1, of Additional Protocol I reflected customary international law. They decided to overcome their divergence of views by drafting the corresponding rule to apply only to States that were parties to the Protocol.[271]

204. There is no explicit clause stating that wanton destruction of the environment is prohibited. It is clear, however, from the commentary that the experts presumed that this would be the case. It is explained that "wanton" means that "the destruction is the consequence of a deliberate action taken maliciously, that is, the action cannot be justified by military necessity",[272] and suggested that "it would be unlawful to use cyber means to trigger a release of oil into a waterway simply to cause environmental damage".[273]

205. Although Additional Protocol I does not apply to non-international armed conflict, certain experts took the position that its provisions on the environment apply as a matter of customary law in such conflicts.

206. The Tallinn Manual repeats the prohibition of reprisals under Additional Protocol I by stating that the natural environment and dams, dykes and nuclear electrical generating stations may not be the object of a cyberattack by way of reprisal.[274]

207. Based on the State practice, relevant conventions and legal doctrine the following draft principle is proposed:

"*Draft principle 4*

"Attacks against the natural environment by way of reprisals are prohibited."

E. Conclusions

208. There has been no development on the protection of the environment in relation to armed conflicts in the field of treaty law. Only three treaties directly address the

[266] The expression occasionally appears in treaties, such as in: Additional Protocol I, art. 64, para. 1; Geneva Convention III, annex I, sect. II, para. 1; and Geneva Convention IV, art. 95.

[267] United Nations Convention on the Law of the Sea, arts. 87 and 58.

[268] HPCR Manual, introduction, sect. D. Other themes were also excluded, two of which are of relevance for the discussion of the protection of the environment in relation to armed conflict, namely, individual criminal responsibility and human rights.

[269] The Group of experts drafting the Tallinn Manual concluded that general principles of international law apply in cyberspace (see Tallin Manual, p. 13). The same conclusion has been drawn by the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, established by the General Assembly. The Group based its recommendations on the premise that international law is applicable to information and communication technologies, see document A/68/98, in particular paras. 11, 16, 19, and 23. The Secretary-General of the United Nations expressed appreciation of "the report's focus on the centrality of the Charter of the United Nations and international law as well as the importance of States exercising responsibility" (*ibid*., foreword).

[270] Tallinn Manual, commentary to rule 83, para. 1. There was full agreement that the environment is a civilian object and protected as such until it becomes a military objective.

[271] This is a technique that was used on a couple of occasions to overcome the different views on whether a particular provision reflects customary international law.

[272] Tallinn Manual, commentary to rule 83, para. 5.

[273] *Ibid*.

[274] *Ibid*., rule 47. It is correctly noted that the concept of reprisals does not exist in non-international armed conflict, *ibid*., commentary 3 to rule 47, para. 3.

matter: the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Additional Protocol I and, albeit in a different manner, the Rome Statute. Given the number of States parties to those treaties, it appears possible to conclude that the relevant provisions in those treaties are standard-setting. This is the conclusion in the ICRC customary law study. At the same time, some States have made reservations, interpretative declarations or statements to those provisions. They fall generally into two categories: one relates to the use of nuclear weapons, the other to the targeting process. This means that States will continue to have different views on the precise implications of the provisions, such as the threshold of the prescribed environmental damage.

209. At the same time, other treaties reveal an increasing ambition to protect the environment.

Chapter VIII

Protected zones and areas

A. Demilitarized zones

210. It is not uncommon for physical areas to be assigned a special legal status as a means to protect and preserve the area. This can be done through international agreements or through national legislation. Under certain conditions, such areas are not only protected in peacetime, but also are immune from attack during an armed conflict. Environmental damage in the zone resulting from armed activities will not occur, provided that prohibitions concerning the zone are respected.

211. The first category that comes to mind is that of demilitarized zones. The term "demilitarized zones" has a special meaning in the context of the law of armed conflict. Such zones are established by the parties to the conflict and it implies that the parties are prohibited from extending their military operations to that zone if such extension is contrary to the terms of their agreement.[275] The ICRC customary law study considers that the rule reflects a norm of customary law in both international and non-international armed conflicts.[276] Demilitarized zones are frequently established for various reasons (military, humanitarian, political); for example, as a measure to prevent a conflict from worsening or as a step towards a peace treaty. The political dimension of a legally designated demilitarized zone is evidenced by the importance that the Security Council attaches to such zones. Breaches of agreements on demilitarized zones are often criticized by the Security Council and parties are called upon to adhere to them.

212. There are also other kinds of demilitarized zones. Such zones may have been set up in peacetime and may be unrelated to an ongoing armed conflict. They may be referred to as demilitarized zones, zones of peace, areas for peaceful purposes, nuclear-weapon-free zones and nuclear-free zones, to mention but a few examples. Some members of the Commission have referred to the relevance of such zones in the course of the discussion of the topic under review, and it is against that background that the following comments are made.

213. The concept of "demilitarization" has no clear-cut authoritative definition in public international law, yet is a well-established notion both within and outside a legal context. As to the terms used, it is clear that international law does not require that a particular area must have been subject to any form of militarization before it can obtain demilitarized status.[277]

214. Demilitarization has often been defined in terms of an obligation on a State not to station military forces or not to maintain military installations in certain areas of its territory. It is often asserted that demilitarization carries with it a duty to disarm and/or a prohibition on arms in the demilitarized area, and is thus an infringement of a State's territorial sovereignty. According to that view, demilitarization is not construed as preventing a State from using its right to defend its territory from external threats.[278] The numerous examples of demilitarized areas in history and in the world of today[279] clearly indicate, however, that they are not, and cannot, be treated as equivalent cases. It would appear pertinent to categorize them with regard to the legal status of territory subject to a demilitarization regime,[280] and possible to determine three primary categories, the first of which comprises demilitarized areas under the sovereignty of a State, such as the Åland Islands regime or the Svalbard Archipelago. A second category of demilitarized areas consists of those placed under the control of a limited group of States or international organs, such as the demilitarized zone between the Democratic People's Republic of Korea and the Republic of Korea. The third category would comprise demilitarized areas outside

[275] Additional Protocol I, art. 60, para. 1.

[276] ICRC customary law study, vol. I, pp. 120–121. Making a demilitarized zone an object of attack is a grave breach of Additional Protocol I. See Additional Protocol I, art. 85, para. 3 (*d*).

[277] It goes without saying that "peaceful purposes" and "demilitarization" are not synonyms. Hence it is not sufficient to assign an area to be used for "peaceful purposes" and thereby automatically achieve the result that the area in question has become "demilitarized". Furthermore, a "zone of peace" is not unanimously defined, although the existence and contents of such zones have been well researched (see, e.g., Subedi, *Land and Maritime Zones of Peace in International Law*).

[278] See, e.g., the definition in Delbrück, "Demilitarization", p. 150. A similar definition is found in Björkholm and Rosas, *Ålandsöarnas Demilitarisering och Neutralisering* (in Swedish). The Åland Islands are both demilitarized and neutralized. Björkholm and Rosas list as further examples of demilitarized and neutralized areas Spitzbergen, Antarctica and the Strait of Magellan. *Ibid*., p. 17. See Hannikainen, "The continued validity of the demilitarised and neutralised status of the Åland Islands", p. 616.

[279] See, e.g., Delbrück, "Demilitarization", pp. 150–152. On demilitarized areas in Europe, see Ahlström, *Demilitariserade och Neutraliserade Områden i Europa* [Demilitarized and Neutralized Areas in Europe], in Swedish.

[280] For a different way of categorizing, see Black *et al.*, *Neutralization and World Politics*, p. xi.

national jurisdiction, such as the international seabed area and outer space.[281]

215. The term "zones of peace" could be held to be conceptually distinct from demilitarized areas, but conceptual differences have been blurred by the recent development of transforming "zones of peace" into legally binding treaties. Accordingly, there exists a grey area.[282] "Peaceful purposes" is yet another concept that lacks a legal definition. It follows from some treaties, such as the Antarctic Treaty,[283] which consider "peaceful purposes" more of a policy concept than a legal concept. It does not in itself carry with it particular legal obligations. The concept is, however, an indicator of the object and purpose of a treaty.[284]

216. The United Nations Convention on the Law of the Sea introduced the application of the concepts "peaceful use" and "peaceful purposes" in the law of the sea context. Similar provisions cannot be found in preceding treaties on the law of the sea. The Convention provides that the "high seas shall be reserved for peaceful purposes" (art. 88). The introduction of the notion of peaceful purposes does not mean that military activities are banned on the high seas and other sea or seabed areas.[285] The dispute settlement procedure of the Convention bears evidence of this. The compulsory dispute settlement mechanism is applicable to such activities unless a State declares in writing that it does not accept the compulsory procedures entailing binding decisions provided for by the Convention (art. 298, para. 1 (*b*)). Most international lawyers agree that article 88 does not prohibit military activities.[286] From this conclusion, it follows that military activities at sea do not necessarily contravene the peaceful purposes objective. Consequently, a military activity can be considered compatible with the peaceful purposes objective and therefore could be considered a legal activity.

217. The traditional freedom of the high seas relevant in this context is the right to peaceful military use of the high seas. That right has strongly survived in the post-Second World War legal order. Few lawyers, and to an even lesser degree State practice, consider military patrolling, military manoeuvres or even weapon testing as contrary to the freedom of the high seas, let alone the peaceful purposes objective in article 88 of the United Nations Convention on the Law of the Sea. Other provisions of the Convention strengthen the interpretation that peaceful military use of the high seas is highly safeguarded. Having said that, it should be recalled that any use of the high seas is subject to the principle of due regard as set forth in article 87, paragraph 2, of the Convention. As regards the application of the principle of due regard, its application to areas designated exclusive economic zones are more complex than its application to high seas areas. Some countries have claimed that foreign military manoeuvres in their exclusive economic zone are prohibited.[287] To find provisions banning a certain military use of the high seas, one has to go to another system of rules: primarily the Charter of the United Nations, according to which no act of aggression is allowed, but also, for example, environmental and disarmament treaties. Article 88 of the Convention does not intend to demilitarize the high seas. This is underlined by the fact that attempts have been made to demilitarize specific areas of the sea, such as the Indian Ocean, by means of special agreements in parallel to the already established basic rule that the high seas shall be reserved for peaceful purposes.[288] Article 301 of the Convention also addresses

[281] See United Nations Convention on the Law of the Sea, art. 141; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (as of 1 January 2015, the Treaty had 103 parties, including all nuclear States); and Treaty on the Prohibition on the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof.

[282] See, e.g., Subedi, *Land and Maritime Zones of Peace in International Law*, and Prawitz, "The concept of nuclear-weapon-free zones, with special reference to East Asia", p. 651. Subedi has described "zones of peace" as attempts "to insulate the areas within them from militarization and outside interference that stops short of outright aggression", see p. xli.

[283] Art. I. Antarctica is undoubtedly demilitarized. It is not included in any of the three categories because of the different views of States with respect to its status.

[284] It encumbers "measures of a military nature" but is not limited to, or identical to, such measures. See, for example, report of the Secretary-General, Study on the naval arms race, A/40/535, paras. 186–188 (referring to articles 88, 242, para. 1, and 246, para. 3, of the United Nations Convention on the Law of the Sea). Note that the notion "military purpose" is found, e.g., in the Statute of the International Atomic Agency, article III (A) 5, but also in other Agency statutes (see Pinto, "Maritime security and the 1982 United Nations Convention on the Law of the Sea", p. 32 and footnotes 94–95), likewise without being defined. It is not an easy task to define "peaceful purposes", as proved by Subedi. If international law in general offers little contribution to the meaning of "peaceful purposes", the Antarctic Treaty offers more, and indeed Subedi also reverts to the Antarctic Treaty after having failed in finding a specific definition elsewhere. Subedi, *Land and Maritime Zones of Peace in International Law*, p. 59.

[285] Article 58, para. 2, provides that article 88 applies insofar as such activities are not incompatible with that part of the Convention (i.e. Part V) that deals with the exclusive economic zone. It should be noted that article 141, which deals with the peaceful purposes objective in relation to the Area, is worded differently in that it provides that the Area shall be open to use *exclusively* for peaceful purposes. It is noteworthy that the Convention places an obligation on the Review Conference to ensure the use of the Area exclusively for peaceful purposes (art. 147, para. 2).

[286] Pinto, "Maritime security and the 1982 United Nations Convention on the Law of the Sea", p. 35.

[287] For example, when ratifying the Convention in 1988, Brazil stated that it understood that the provisions of the United Nations Convention on the Law of the Sea "do not authorize other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons and explosives … without the consent of the coastal State" (quoted from Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: Declarations and statements with respect to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10 1982*, United Nations publication Sales No. E.97.V.3, p. 22). A similar statement had been made upon its signature of the United Nations Convention on the Law of the Sea (*ibid*., p. 4). India, upon ratification in 1995, made a statement almost identical to that of Brazil, with the addition that India also includes the continental shelf (*ibid*., p. 31). Contrary to the Brazilian view, Germany has stated, in 1994 that the rights and jurisdiction of the coastal State in the exclusive economic zone "do not include the rights (*sic*) to obtain notification of military exercises or manoeuvres or to authorize them" (*ibid*., p. 29). Italy made the same declaration in 1995 (*ibid*., p. 31). Authors who take as a starting point the principle of the freedom of the high seas and the wording of the Convention that, according to article 88, the high seas shall be reserved for "peaceful purposes" tend to support the Brazilian interpretation.

[288] Churchill and Lowe, *The Law of the Sea*, pp. 313–314. See the corresponding article on the seabed, which reads "*exclusively* for peaceful purposes"*. As to the connection between the Indian Ocean as a zone of peace and the Antarctic Treaty, see, e.g., Moneta, *La Antartida en el sistema international del futuro* (in Spanish), pp. 22–23.

the peaceful uses of the sea, although those words are mentioned only in the title and refer simply to the obligation to refrain from the use of force.

218. Maritime areas that are part of a demilitarized or nuclear-weapon-free zone provide a particular legal challenge, given the special status of an exclusive economic zone. Although it is possible to categorize exclusive economic zones as a category *sui generis*, for the purpose of navigation as well as military activity they are considered international waters.[289] The legal consequence is that States cannot regulate areas outside their sovereignty or mandate of jurisdiction in a manner that is binding for third States.

B. Nuclear-weapon-free zones

219. In 1975, the General Assembly adopted the definition of a "nuclear-weapon-free zone". This requires a treaty or a convention as a base.[290] This probably remains the case as regards the establishment of a nuclear-weapon-free zone, whereas it does not describe the reality of today as regards the establishment of peace zones, that is, zones of peace which can be established also on other grounds, although of course their legal implications will be limited. A zone of peace can therefore be regarded as a lighter concept, such as the stage before an area is made a legally binding nuclear-free zone or a demilitarized zone. Land and maritime zones of peace and nuclear-free or nuclear-weapon-free zones are, or attempt to be, regional confidence-building and disarmament measures. Their value has been debated and often either embraced or strongly criticized.[291] Yet not only are they increasing in number, but there is a tendency to transform them or to reformulate their bases into legally binding treaties. The Treaty of Tlatelolco and the Treaty of Rarotonga belong to the earliest examples. Since 1996, several nuclear-weapon-free zones and zones of peace have been established.[292] It has been claimed that the international community encourages the establishment of such zones.[293] Some of the zones apply to the sovereign territories of the parties, such as the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba), the Treaty on a Nuclear-Weapon-Free Zone in Central Asia (Treaty of Semipalatinsk) and the Treaty on the South-East Asia Nuclear-Weapon-Free Zone (Treaty of Bangkok).

220. The above-mentioned treaties are all legally binding, and some provide for the accession of States located outside the area of application of the treaty. It has been considered of great importance that nuclear-power States located geographically outside the area of application accede to the so-called "guarantee protocols".[294] It is notable that none pretends to establish objective regimes valid *erga omnes* in that all of them contain accession, withdrawal and review clauses.

221. One of the most sensitive issues in negotiating peace zone treaties has always been the area of application. The Treaty of Bangkok includes the exclusive economic zones of the parties to the Treaty and the airspace over the continental shelf (art. 1 (*a*) and (*b*)). At the same time, the Treaty provides that none of its provisions shall prejudice the rights of or the exercise of those rights by any other States under the provisions of the United Nations Convention on the Law of the Sea (art. 2 of the Convention). Freedom of the high seas and the rights of passage are explicitly mentioned in the Treaty. The Treaty of Pelindaba also contains a "non-prejudice" clause with regard to the rights or exercise of rights under the principle of the freedom of the seas (art. 2, para. 2). Both treaties also have compliance mechanisms and impose obligations on the parties to cooperate with the International Atomic Energy Agency.

222. In addition, the General Assembly has on several occasions adopted resolutions establishing zones of peace or nuclear-weapon-free zones in areas of the sea, such as the Indian Ocean and the southern hemisphere (i.e. the South Atlantic) and adjacent areas.[295] General Assembly resolutions are not legally binding but do signal a political ambition. Initially, none of the five nuclear-weapon States that are permanent members of the Security Council was happy with the establishment of such sea area peace zones. Their views in fact mirrored a difference in perspective regarding the law of the sea. The States initially averse to them have, despite this and always at a late stage, decided to participate in the discussions on the establishment of such zones.

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[289] Archipelagic waters are a category of their own and will not be addressed here.

[290] The definition is found in General Assembly resolution 3472 (XXX) B, of 11 December 1975, entitled "Comprehensive study of the question of nuclear-weapon-free zones in all its aspects". For a limited definition of "nuclear-weapon State", see Treaty on the Non-Proliferation of Nuclear Weapons, art. IX, para. 3. Subedi notes that the concept "zones of peace" first appeared in international law in the 1970s, Subedi, *Land and Maritime Zones of Peace in International Law*, p. xlii.

[291] Although Subedi does not give any references in his conclusion, the Special Rapporteur agrees with his description as regards the two schools of thought in this context, namely, those who regard the establishment of regional zones as unnecessary because "the [United Nations] is striving to achieve world peace" and those who see "no relation of opposition between zonal and universal approach to peace; the zonal approach is both complementary and supplementary to the universal approach", Subedi, *Land and Maritime Zones of Peace in International Law*, p. xliv. There is also, however, another dimension that has to do with control (particularly by the major powers).

[292] The General Assembly has adopted numerous resolutions on the matter, see for example resolution 60/58 on nuclear-weapon-free southern hemisphere and adjacent areas. For examples of literature on the subject, see Subedi, *Land and Maritime Zones of Peace in International Law* and Prawitz, "The concept of nuclear-weapon-free zones, with special reference to East Asia".

[293] Prawitz, "The concept of nuclear-weapon-free zones, with special reference to East Asia", p. 661 and note 46, referring to the principles and objectives for nuclear non-proliferation and disarmament adopted at the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, contained in document NPT/CONF.1995/32/DEC.2, annexed to *Final Document of the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Part I, Organization and work of the Conference*, NPT/CONF.1995/32 (Part I).

[294] It has also been proposed that nuclear-weapon-free zones be established in other areas, such as the Middle East and North-East Asia. Prawitz, "The concept of nuclear-weapon-free zones, with special reference to East Asia", pp. 668–669, and Subedi, *Land and Maritime Zones of Peace in International Law*, pp. 115–134.

[295] Implementation of the Declaration of the Indian Ocean as a Zone of Peace, General Assembly resolution 50/76 of 12 December 1995, which recalled a number of other resolutions such as resolution 2832 (XXVI) of 16 December 1971, resolution 49/82 of 15 December 1994, and zone of peace and cooperation of the South Atlantic, resolution 50/18 of 27 November 1995.

223. On the basis of the discussion above, it is not possible to conclude that demilitarized zones or nuclear-weapon-free zones will automatically continue to exempt the area concerned from all military activities and thereby indirectly spare the environment. Every treaty needs to be analysed on the basis of its wording, objective and purpose. However, if a demilitarized zone is established as a treaty "declaring, creating or regulating a permanent regime or status or related permanent rights" such as a treaty "neutralizing part of the territory of a State", it may be a considered a treaty that continues to operate during armed conflict, according to the draft articles on the effect of armed conflict on treaties.[296]

C. Natural heritage zones and areas of major ecological importance

224. In 2014, some members of the Commission suggested that cultural heritage should be included in the present report, because to do otherwise would lead to inconsistencies. Most speakers, however, remained of the view that cultural heritage should be excluded. In summing up the debate, the Special Rapporteur underlined that the issues relating to cultural property, cultural heritage and natural landscape were complex. There exists an intricate relationship between environment and cultural heritage, in particular when speaking of the aesthetic or characteristic aspects of the landscape. This relates also to indigenous peoples' rights to their environment as a cultural and natural resource.[297] There is a gap between the protection of cultural property and cultural heritage in relation to armed conflicts. This gap is caused by the fact that the World Heritage Convention of the United Nations Educational, Scientific and Cultural Organization, by including in the definition of cultural heritage (art. 1) "works of man or the combined works of nature and man" (such as aesthetic aspects of landscapes), provides a broader definition (in this respect) than the term "cultural property" under the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[298] and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. In this context, it is worth recalling that the Commission has included "non-service values such as aesthetic aspects of the landscape" in the definition of the environment in the draft principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities. This includes the enjoyment of nature because of its natural beauty and the recreational attributes and opportunities associated with it.[299]

225. In this context, particular weight should be given to the protection of areas of major ecological importance that are susceptible to the adverse consequences of hostilities.[300] A proposal to furnish special protection to areas of major ecological importance was made at the time of the drafting of the Additional Protocols to the Geneva Conventions, when a conference working group submitted a proposal providing that "[p]ublicly recognized nature reserves with adequate markings and boundaries declared as such to the adversary shall be protected and respected except when such reserves are used specifically for military purposes".[301] The proposal—formulated in the infancy of international environmental law—was not adopted.

226. The proposal should be viewed against the comparable system of specially protected areas that exists for cultural property. The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict establishes a system of so-called "enhanced protection", under which cultural property of special significance for humanity is entered on a list and the parties to the Protocol undertake never to use it to back up military operations (art. 10). A similar system of listed sites also exists under the World Heritage Convention, which requires States "not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage" (art. 6, para. 3). It also provides for the inscription on the List of World Heritage in Danger of any world heritage endangered by "the outbreak or the threat of an armed conflict" (art. 11, para. 4).

227. Moreover, the World Heritage Convention imposes duties on States parties in relation to natural heritage properties as well. Under that instrument, the World Heritage Committee establishes and updates a world heritage list of cultural heritage and natural heritage properties (the World Heritage List) considered of outstanding universal value. Listing requires the consent of the State concerned. In addition, the Committee maintains the List of World Heritage in Danger, which includes sites for the conservation of which major operations are necessary and for which assistance has been requested under the Convention.[302] A property forming

[296] *Yearbook ... 2011*, vol. II (Part Two), draft articles on the effects of armed conflicts on treaties, para. 100, art. 7 and annex (Indicative list of treaties referred to in article 7, subpara. (*b*).

[297] The situation of the Marsh Arab community after the Ba'athist drainage projects under Saddam Hussein, begun during the Iran–Iraq war in the 1980s, provides a tragic example of a situation in which a lack of protection of the environment during armed conflict may carry with it devastating consequences for the peoples that are dependent on the land for their survival. See Roselli, "At the intersection of human rights and the environment in Iraq's Southern Marshes". See also International Law and Policy Institute, "Protection of the natural environment in armed conflict: an empirical study", pp. 21–23.

[298] That Convention renders clear that there are certain movables or immovables that are different from the rest due to their great importance to the cultural heritage of peoples. The Convention thus singles out "cultural property" from the mass of civilian property. Within the category of cultural property, it then goes on to differentiate immovables of very great importance. However, this latter type of property of very great importance does not correspond fully to the concept of "cultural heritage".

[299] Para. (20) of the commentary to principle 2 (Use of terms) of the draft principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), p. 69. See also *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674, paras. 79–80.

[300] Droege and Tougas, "The protection of the natural environment in armed conflict—existing rules and need for further legal protection", p. 43.

[301] See Pilloud and Pictet, "Article 55: Protection of the natural environment", p. 664, paras. 2138–2139. The proposal on draft article 48 *ter* came from the working group of Committee III.

[302] In accordance with article 2, natural heritage is defined and delineated into three main categories: natural features; geological and physiographical formations; and natural sites. Article 2 provides as follows:

"For the purposes of this Convention, the following shall be considered as 'natural heritage':

part of the cultural and natural heritage is listed only if it is "threatened by serious and specific dangers", including the outbreak of an armed conflict, as expressly stated in article 11, paragraph 4 (see art. 2).

—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."

228. At present, 197 properties forming part of natural heritage are listed on the World Heritage List.[303] Some of these are included in the List of World Heritage in Danger in accordance with article 11, paragraph 4, of the World Heritage Convention.

229. The following draft principle is proposed:

"*Draft principle 5*

"States should designate areas of major ecological importance as demilitarized zones before the commencement of an armed conflict, or at least at its outset."

[303] For the properties listed on the World Heritage List, see http://whc.unesco.org.

Chapter IX

Future programme of work

230. The third report of the Special Rapporteur will include proposals on post-conflict measures, including cooperation, sharing of information and best practices, and reparative measures.

231. The third report will attempt to close the circle of all three temporal phases and will consist of three parts. The first will focus on the law applicable after an armed conflict. The second will address issues that have not yet been discussed, such as occupation. The third will contain a summary analysis of all three phases. This will hopefully assist the Commission in deciding how to proceed with the topic. The Special Rapporteur wishes to reiterate that, 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 subsequent stage. 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".

232. The Special Rapporteur will continue consultations with other entities, such as ICRC, the United Nations Educational, Scientific and Cultural Organization and UNEP, as well as regional organizations. It would also be of great value if the Commission were to reiterate its request to States to provide examples of rules of international environmental law, including regional and bilateral treaties, which have continued to apply in times of international or non-international armed conflict as well as post-armed conflict. Furthermore, it would also be of assistance if States could continue to provide examples of national legislation relevant to the topic and case law in which international or national environmental law has been applied.

Annex I

Protection of the environment in relation to armed conflicts: proposed draft principles

PREAMBLE

Scope of the principles

The present principles apply to the protection of the environment in relation to armed conflicts.

Purpose

These principles are aimed at enhancing the protection of the environment in relation to armed conflicts through preventive and restorative measures.

They also are aimed at minimizing collateral damage to the environment during armed conflict.

Use of terms[304]

For the purposes of the present principles

(*a*) "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" 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.

[304] Submitted in the preliminary report, *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674 , chap. VII.

DRAFT PRINCIPLES

Principle 1

The natural environment is civilian in nature and may not be the object of an attack, unless and until portions of it become a military objective. It shall be respected and protected, consistent with applicable international law and, in particular, international humanitarian law.

Principle 2

During an armed conflict, fundamental principles and rules of international humanitarian law, including the principles of precautions in attack, distinction and proportionality and the rules on military necessity, shall be applied in a manner so as to enhance the strongest possible protection of the environment.

Principle 3

Environmental considerations must be taken into account when assessing what is necessary and proportionate in the pursuit of lawful military objectives.

Principle 4

Attacks against the natural environment by way of reprisals are prohibited.

Principle 5

States should designate areas of major ecological importance as demilitarized zones before the commencement of an armed conflict, or at least at its outset.

Annex II

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PROTECTION OF THE ATMOSPHERE

[Agenda item 9]

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Second report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur*

[*Original: English*]
[*2 March 2015*]

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Introduction

1. The present report follows the first report on the same topic,[1] submitted by the Special Rapporteur in February 2014 for consideration at the sixty-sixth session of the International Law Commission, following the Commission's decision at its sixty-fifth session in 2013[2] to include the topic in its current programme of work.

2. The first report discussed the rationale for pursuing the project, as well as basic approaches to the topic,[3] followed by a brief historical analysis of the evolution of international law relating to the protection of the atmosphere.[4] The report then provided a comprehensive (but not necessarily exhaustive) account of the major sources of law, including treaty practice, jurisprudence of international courts and tribunals, customary international law, non-binding instruments, domestic legislation and domestic court cases.[5] Finally, the Special Rapporteur proposed three draft guidelines: draft guideline 1 on the use of terms, draft guideline 2 on the scope of the guidelines, and draft guideline 3 on the legal status of the atmosphere.

3. At its sixty-sixth session, the Commission considered the first report at its 3209th to 3214th meetings, during May and June 2014.[6] Members of the Commission recognized that the protection of the atmosphere was an extremely important and urgent endeavour for humankind, raising the concern, supported by scientific data, that air pollution, ozone depletion and climate change pose a threat to the atmosphere. While a few members criticized the Special Rapporteur for liberally interpreting the terms of the Commission's 2013 understanding, others responded with a quite different suggestion,

[1] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667.

[2] *Yearbook ... 2013*, vol. II (Part Two), para. 168. The topic was included on the following understanding: (*a*) work on the 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 this understanding.

[3] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667, paras. 10–19.

[4] *Ibid.*, paras. 20–28.

[5] *Ibid.*, paras. 29–63.

[6] *Ibid.*, vol. I, 3209th to 3214th meetings. See also *ibid.*, vol. II (Part Two), para. 79.

namely, to abolish the understanding entirely and adopt an unconstrained approach to the project. The Special Rapporteur's relatively liberal interpretation of the understanding[7] seemed to fall between two disparate perspectives: one seeking to limit work on the topic to a rigid, restrictive interpretation of the understanding; and the other calling for its abandonment. The Special Rapporteur's middle-ground approach, involving a method of liberal interpretation while remaining within the structure of the understanding, received support from a significant number of members. The Special Rapporteur has continued in the same fashion in the present second report, while acknowledging the multiple alternative viewpoints expressed at the sixty-sixth session.[8]

4. As noted above, the Special Rapporteur proposed three draft guidelines in the first report. While the majority of the members of the Commission supported sending the guidelines to the Drafting Committee, the Special Rapporteur decided not to request that the Commission do so during the sixty-sixth session. The Special Rapporteur made that decision based on his intention to review the issues raised by members and to submit revised draft guidelines to the Commission at its sixty-seventh session in 2015. The new set of draft guidelines proposed by the Special Rapporteur are contained in paragraphs 17, 22, 39, 59 and 77 of, and the annex to, the present report.

5. In October and November 2014, at the sixty-ninth session of the General Assembly, the Sixth Committee considered the Commission's discussion of the topic, as reflected in chapter VIII of the Commission's report to the General Assembly on the work of its sixty-sixth session.[9] More than 28 States presented their views. A large number of delegations shared the Special Rapporteur's view on the importance and timeliness of this project,[10] while a few delegations questioned the suitability of the topic.[11] A few other delegations pointed out the particular complexities of the topic, which warrant special attention and treatment by the Commission.[12] Some delegates also commented on the proposed guidelines, which are referred to in the relevant paragraphs of the present report.[13]

6. In its report on the work of its sixty-sixth session, the Commission indicated that it would welcome any information concerning the practice of States with regard to atmospheric protection.[14] Replies to the Commission's

[7] The Special Rapporteur indicated his interpretation of the understanding in his first report as follows: "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 related to the subject by taking treaty practice into consideration either as State practice or *opinio juris*" (*ibid.*, vol. II (Part One), document A/CN.4/667, footnote 13).

[8] *Ibid.*, 3209th to 3214th meetings.

[9] *Ibid.*, vol. II (Part Two), chap. VIII.

[10] *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, Tonga (on behalf of the 12 Pacific small island developing States), 20th meeting (A/C.6/69/SR.20), para. 7; Denmark (on behalf of the Nordic countries), *ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 13; Austria *ibid.*, para. 20; Federated States of Micronesia, *ibid.*, para. 24; Romania, *ibid.*, para. 45; Italy, *ibid.*, para. 52; Germany, *ibid.*, 23rd meeting (A/C.6/69/SR.23), para. 39; Japan, *ibid.*, para. 73; Cuba, *ibid.*, para. 79; Israel, *ibid.*., para. 82; El Salvador, *ibid.*, para. 92; Malaysia, *ibid.*, 24th meeting (A/C.6/69/SR.24), para. 31; Palau, *ibid.*, paras. 40–42; Portugal, *ibid.*, para. 75; Islamic Republic of Iran, *ibid.*, paras. 82–83; Algeria, *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 3; Viet Nam, *ibid.*, para. 16–18; India, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 112; Indonesia, *ibid.*, 27th meeting (A/C.6/69/SR.27), paras. 60–62. Enthusiastic support for the topic was expressed by the Federated States of Micronesia, which encouraged the Commission to develop and adopt draft guidelines on the protection of the atmosphere in an expeditious manner and to provide the foundation for an all-inclusive international mechanism (*ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 27). Palau also expressed its strong support by stating that, as a small island nation, it was committed to exploring ways to alleviate further degradation of the atmosphere and also by referring to the fact that its Senate had adopted a resolution urging the President of Palau to express strong support for the Commission's work (*ibid.*, 24th meeting (A/C.6/69/SR.24, para. 40). Germany expressed the view that protection of the atmosphere was a topic of utmost importance for humanity as a whole, and hoped that the Commission's work on the topic would counteract the increasing fragmentation of international environmental law through horizontal analysis and cross-cutting approaches that extended beyond individual environmental regimes (*ibid.*, 23rd meeting (A/C.6/69/SR.23, para. 39). Austria stated that, while an all-encompassing regime for the protection of the atmosphere would be desirable in order to avoid fragmentation, it would be useful to identify the rights and obligations of States that could be derived from existing legal principles and rules applicable to the protection of the atmosphere (*ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 20). The Islamic Republic of Iran noted that, while the task assigned to the Special Rapporteur was fraught with difficulties, this did not mean that the importance of the legal issues surrounding the topic should be downplayed, and also that the approach to the topic should allow ample flexibility in order to fulfil the task of identifying custom regarding the topic and any gaps in the existing treaty regime (*ibid.*, 24th meeting (A/C.6/69/SR.24), para. 82). Italy and Japan stressed that the shared recognition of the topic's extreme importance for humankind should be the basis for the Commission's work, which should be carried out in a cooperative and constructive manner, notwithstanding differences of approach among its members (*ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 51, and 23rd meeting (A/C.6/69/SR.23), para. 73, respectively). Indonesia stated that the work of the Commission on this topic would enable the international community to prevent environmental degradation by preserving and conserving the atmosphere, which is a limited natural resource, while also supporting the suggestion that the modalities of the use of the atmosphere should be considered in greater detail (*ibid.*, 27th meeting (A/C.6/69/SR.27), para. 60). Many delegates expressed the view that, while the Special Rapporteur and the Commission should proceed with the work on the topic with caution and prudence on the basis of the 2013 understanding, it should be interpreted and applied with sufficient flexibility.

[11] Russian Federation, *ibid.*, 21st meeting (A/C.6/69/SR.21), para. 135; France, *ibid.*, 22nd meeting (A/C.6/69/SR.22), paras. 34–35; United Kingdom of Great Britain and Northern Ireland, *ibid.*, 23rd meeting (A/C.6/69/SR.23), para. 32; United States, *ibid.*, 24th meeting (A/C.6/69/SR.24), paras. 65–66. The Member States expressed doubts about the feasibility of the topic, seeing it as highly technical and falling outside the mandate of the Commission. They stressed the importance of following strictly the 2013 understanding in order to ensure that the Commission's work might be of some value to States, while minimizing the risk that it would complicate and inhibit important ongoing and future negotiations on issues of global concern (see, e.g., United States of America, *ibid.*, para. 66).

[12] China, *ibid.*, 23rd meeting (A/C.6/69/SR.23), paras. 54–55; Spain, *ibid.*, 24th meeting (A/C.6/69/SR.24), paras. 23–24; Republic of Korea, *ibid.*, 25th meeting (A/C.6/69/SR.25), paras. 28–29. China noted that the Commission's work should be carried out in a prudent and rigorous manner and be oriented towards providing a constructive complement to the various relevant mechanisms and political and legal negotiation processes under way, hoping that the Commission would continue to strengthen its research on relevant theories and practices in a rigorous manner, avoid using ambiguous concepts and gradually clarify relevant guidelines (*ibid.*, 23rd meeting (A/C.6/69/SR.23), paras. 54–55).

[13] See paragraphs 9, 21 and 28 below.

[14] *Yearbook ... 2014*, vol. II (Part Two), para. 27.

request were received from Cuba, Finland, the Federated States of Micronesia, the Republic of Korea and the United States of America over the period from 31 January to 19 February 2015.

7. During and after the sixty-sixth session of the Commission, in 2014, the Special Rapporteur maintained contact with representatives of interested governmental and non-governmental organizations. It has been agreed that an interactive dialogue will be held, at an informal meeting of the Commission in May 2015, between the members of the Commission and scientists and experts associated with the United Nations Environment Programme (UNEP), the World Meteorological Organization (WMO) and the United Nations Economic Commission for Europe.

Chapter I

General guidelines: proposal of the Special Rapporteur based on the debate held at the sixty-sixth session of the Commission

8. As already mentioned, the Special Rapporteur proposed three draft guidelines in his first report: draft guideline 1 on the use of terms, draft guideline 2 on the scope of the draft guidelines, and draft guideline 3 on the legal status of the atmosphere.[15] Taking into consideration the discussion during the sixty-sixth session of the Commission as well as additional scientific research-related feedback, the Special Rapporteur submits herein a new set of draft guidelines, which incorporates some changes made to the original proposals presented in the first report. It is hoped that this second set of draft guidelines reflects an adequate response to the insightful suggestions offered by members of the Commission during the discussion at its sixty-sixth session.

A. Definitions

1. Atmosphere

9. The Special Rapporteur's first report proposed a legal definition of the atmosphere in draft guideline 1. This definition should reasonably correspond to and reflect the characteristics of the atmosphere as identified in the scientific literature. The definition proposed in the first report was intended to serve as a working definition specifically for the present project. While a few members of the Commission thought that a definition of the atmosphere would not be necessary, the majority of the members generally agreed with the Special Rapporteur that it was both necessary and desirable to provide such a definition. The delegates who touched on this point in the meetings of the Sixth Committee at its sixty-ninth session, in 2014, generally favoured the insertion of a definition.[16] The Special Rapporteur believes that, for the present topic, a working definition of the atmosphere is a matter of practical necessity. Any attempt to articulate guidelines for the protection of the atmosphere would benefit from a common understanding on what such guidelines are intended to cover.

10. As described in the first report, 80 per cent of air exists in the troposphere and 20 per cent in the stratosphere. It was therefore thought natural to delimit the scope of the topic to these two layers, where threats of air pollution, ozone depletion and climate change mainly arise, and with regard to which more or less complete scientific findings have been established. Some members, however, addressed the question whether to include the upper spheres (comprising the mesosphere and the thermosphere) within the definition of the atmosphere proposed in draft guideline 1.[17] It should be noted that the upper atmosphere constitutes only 0.0002 per cent of the atmosphere's total mass, which represents a relatively insignificant portion of the area that these proposed guidelines are intended to protect. However, as noted by one member of the Commission,[18] it is true that, according to some (albeit inconclusive) scientific findings, supplementary, if limited, effects of climate change on the mesosphere (up to some 85–95 km above the earth)[19] are

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[15] Special Rapporteur's original proposal of draft guidelines in his first report (*ibid.*, vol. II (Part One), paras. 70, 78 and 90, respectively) was as follows:

"*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.

"*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.

"*Draft guideline 3. Legal status of the atmospher*e

"(*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."

[16] The view was expressed that the use of technical terms seemed inevitable, as defining the boundaries of the atmosphere would inevitably involve technicalities and that the definition put forward might be regarded as an initial definition, subject to the formulation of a legal definition to be complemented by technical commentaries (Islamic Republic of Iran, *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 24th meeting (A/C.6/69/SR.24), para. 83). With regard to the technical nature of defining the atmosphere, there was some agreement with the view that input was needed from scientific experts about the atmosphere and other technical information (Japan, *ibid.*, 23rd meeting (A/C.6/69/SR.23), para. 74). One delegate stated that the natural characteristics of atmospheric circulation should be added as a component of the definition (Indonesia, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 61).

[17] Mr. Sean Murphy, Mr. Hussein A. Hassouna, Mr. Ernest Petrič, Mr. Mathias Forteau (*Yearbook ... 2014*, vol. I, 3211th meeting) and Mr. Ki-Gab Park (*ibid.*, 3210th meeting).

[18] Mr. Kriangsak Kittichaisaree (*Yearbook ... 2014*, vol. I, 3210th meeting).

[19] See Smith *et al.*, "Simulations of the response of mesospheric circulation and temperature to the Antarctic ozone hole".

discernible.[20] It is therefore proposed that the specific references to the troposphere and the stratosphere in draft guideline 1 not be included, as had originally been proposed in the first report. Further, the word "envelope" may be preferable to the word "layer" in order to eliminate confusion with specific layers of the atmosphere.[21] Finally, as the term "airborne substances" is used by scientists to indicate those substances related specifically to health damage and risk, a broader term, namely, "degrading substances",[22] has been chosen for use in this revised version of the definitional draft guideline.

11. Transcontinental transport of polluting substances is recognized as one of the major problems posed to the present-day atmospheric environment,[23] with the Arctic, as one depository of deleterious pollutants, becoming the region most seriously affected by their worldwide spread.[24] Thus, as proposed in the first report,[25] and in draft guideline 1 (*a*) contained in paragraph 17 below, the definition of the atmosphere needs to address *both* the substantive aspect of the atmosphere as an envelope of gases, and the functional aspect of the atmosphere as a medium within which the transport and dispersion of degrading substances occurs.

2. Air pollution

12. In order for the topic to be appropriately addressed, the term "air pollution" needs to be defined. A definition of "air pollution" can be found in article 1 of the Convention on Long-range Transboundary Air Pollution, which provides that

> [f]or the purposes 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 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 "air pollutants" shall be construed accordingly.

This definition is used widely in the relevant literature.[26] It may also be noted that article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea defines the term "pollution" as "such *deleterious** effects as harm to living resources and marine life, *hazards** to human health".[27] While the term "air pollution" is sometimes used broadly to include global deterioration of atmospheric conditions such as ozone depletion and climate change, the term is used here in a narrow sense, in line with the above-mentioned treaty practice, that is, excluding the global issues from the definition of air pollution. In the present report, it is considered appropriate to address the broader issues through the use of the phrase "atmospheric degradation", which includes air pollution (in a narrow sense), ozone depletion and climate change, as discussed below (see paras. 14–16 below).

13. A few members of the Commission at its sixty-sixth session[28] suggested that the term "energy", as it relates to the introduction of pollutants into the atmosphere, be removed or limited so as to exclude radioactive and nuclear emissions. The Special Rapporteur considers that retaining the term "energy" is important to the work of the Commission on the protection of the atmosphere. The term appears in both the Convention on Long-range Transboundary Air Pollution[29] and the United Nations Convention on the Law of the Sea[30] when "pollution" is being defined. It should also be noted that heat and light released into the atmosphere from large cities has already been recognized as a concern of the international community.[31] Furthermore, the Commission should not ignore

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[20] According to findings of the Antarctic Division of the Australian Department of the Environment and Energy, it is reported, although not conclusively, that certain greenhouse effects manifest themselves in the mesosphere (see www.antarctica.gov.au/about-antarctica/environment/atmosphere/studying-the-atmosphere/hydroxyl-airglow-temperature-observations/climate-change-in-the-mesosphere, "Hydroxyl airglow temperature observations—climate change in the mesosphere"). A separate study by Rashid Khosravi *et al.* shows that the long-term increase in the well-mixed greenhouse gases alters the thermal structure and chemical composition of the mesosphere significantly (Khosravi *et al.*, "Response of the mesosphere to human-induced perturbations and solar variability calculated by a 2-D model"). Furthermore, the above-mentioned study by Smith, *et al.*, reveals that the ozone hole in the stratosphere above Antarctica could influence circulation patterns in the mesosphere (Smith *et al.*, "Simulations of the response of mesospheric circulation and temperature to the Antarctic ozone hole"). Scientists are now considering the possibility of injecting certain particles into mesosphere in order to control climate (see, for example, Keith, "Photophoretic levitation of engineered aerosols for geoengineering"). Thus, the mesosphere may be included in the coverage of direct human activities in the future, though at present such activities remain hypothetical. (The Special Rapporteur would like to express his appreciation to Zhou You of Peking University Graduate School of Law, China (graduate of its Science Department) for supplying this and other scientific information.)

[21] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667, para. 69. The IPCC 5th assessment report, Working Group III, Annex I, glossary, defines the "atmosphere" as "[t]he gaseous envelope surrounding the earth." IPCC, Climate Change 2014, www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_annex-i.pdf.

[22] The term "atmospheric degradation" will be defined in draft guideline 1 (*c*).

[23] See Fuglesvedt *et al.*, "Transport impacts on atmosphere and climate: metrics"; Shen *et al.*, "Analysis of transpacific transport of black carbon during HIPPO-3: implications for black carbon aging"; Wuebbles, Lei and Lin, "Intercontinental transport of aerosols and photochemical oxidants from Asia and its consequences"; Lin, Wuebbles and Liang, "Effects of intercontinental transport on surface ozone over the United States: present and future assessment with a global model".

[24] Several pollution threats to the Arctic environment have been identified, such as persistent organic pollutants and mercury, which originate mainly from sources outside the region. These pollutants end up in the Arctic from southern industrial regions of Europe and other continents via prevailing northerly winds and ocean circulation. See Koivurova, Kankaanpää and Stepien, "Innovative environmental protection: lessons from the Arctic", p. 297.

[25] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/667, para. 70.

[26] See Kiss, "Air pollution", p. 72.

[27] Article 212 of the Convention provides an obligation to prevent airborne pollution of the sea. To that extent, the definition of "pollution" in this Convention is relevant to air pollution.

[28] Mr. Pavel Šturma (*Yearbook ... 2014*, vol. I, 3212th meeting) and Mr. Ki Gab Park (*ibid.*, 3210th meeting). The discussion of "energy" was held in connection with the original draft guideline 2 on scope contained in the first report.

[29] Art. 1, subpara. (*a*).

[30] Art. 1, para. 1 (4), includes "the introduction … of substances or energy into the marine environment". See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667, footnote 207.

[31] WMO/International Global Atmospheric Chemistry, "Impact of Megacities on Air Pollution and Climate"; Simon and Leck, "Urban adaptation to climate/environmental change: governance, policy and planning"; Arnfield, "Two decades of urban climate research: a review of turbulence, exchanges of energy and water, and the urban heat island"; Gartland, *Heat Islands: Understanding and Mitigating Heat in Urban Areas*. See, in general, Stone, *The City and the Coming Climate: Climate Change in the Places We Live*. (The Special Rapporteur is grateful to Terblanche Deon, Director of the Atmospheric Research and Environment Branch, WMO, for supplying the above information.)

(*Continued on next page.*)

the serious problem of nuclear emissions, especially in the light of the 2011 Fukushima nuclear disaster,[32] which is a powerful reminder of the potential dangers of nuclear and radioactive pollution in a world with over five hundred nuclear power plants. While the Commission need not explicitly mention radioactive substances in the draft guidelines, it is important to at least refer to the question of "energy" pollution as broadly conceived. Including such language, however, does not mean that the draft guidelines will in any way entail interference with States' nuclear energy policies, which of course encompass matters falling within the purview of their domestic affairs. As included in draft guideline 1, energy as a general concept is designed to be effective but flexible: such inclusion involves following prior treaty practice and accurately addressing the topic of atmospheric protection, while specifically refraining from mentioning radioactive or other specific substances, pursuant to the 2013 understanding. The proposed draft guideline 1, subparagraph (*b*), on "air pollution" is contained in paragraph 17 below.

3. Atmospheric degradation

14. It may be noted that, as regards non-treaty sources of international law, a leading academic institution, and major domestic court decisions, have employed the term "air pollution" or "pollution" broadly rather than narrowly in order to cover such issues as stratospheric ozone depletion and climate change. Article 1, paragraph 1, of the resolution of the Institute of International Law of 1987 on transboundary air pollution provides that

> [f]or 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.[33]

15. In relation to the concept of air pollution in the context of domestic courts, the Supreme Court of the United States, in the 2007 *Massachusetts v. Environmental Protection Agency* case,[34] discussed in part the meaning of "air pollutant" under title II, section 202 (*a*) (1), of the Clean Air Act, according to which the term "air pollutant" means "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive … substance or matter which is emitted into or otherwise enters the ambient air".[35] In the course of the proceedings, the United States Environmental Protection Agency asserted that title II, section 202 (*a*) (1), of the Act[36] did not authorize the Agency to regulate greenhouse gases, since such gases are not agents of air pollution in the traditional sense, and therefore could not be classified as air pollutants within the meaning of the Act. However, the Court held that the Act defined "air pollutant" so sweepingly that the term embraces "all airborne compounds of whatever stripe".[37] The Court therefore concluded that "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant', … [the Environmental Protection Agency] has the statutory authority to regulate emissions of such gases from new motor vehicles".[38] In response to this Court decision, the Environmental Protection Agency determined that emissions of greenhouse gases from new motor vehicles would be subject to the requirements under the Act's provisions relating to prevention of significant deterioration of air quality and title V of the Act. However, in the 2014 *Utility Air Regulatory Group v. Environmental Protection Agency* case, the Supreme Court pronounced that "where the term 'air pollutant' appears in the Act's operative provisions [such as the prevention of significant deterioration and title V, the Agency] has routinely given it a narrower, context-appropriate meaning".[39] Given the extensive use by the Congress of the United States of the term "air pollutant", the Court concluded that, when interpreting the prevention of significant deterioration and title V permitting requirements, the meaning of that term is narrower than the comprehensive definition recognized by the Court in *Massachusetts v. Environmental Protection Agency* under title II.[40]

(*Footnote 31 continued.*)

See also Rich and Longcore, eds., *Ecological Consequences of Artificial Night Lighting*; Cinzano and Falchi, "The propagation of light pollution in the atmosphere"; Bashiri and Hassan, "Light pollution and its effects on the environment". (The Special Rapporteur is grateful to Peter H. Sand for supplying this and other valuable information.)

[32] The emissions from the Fukushima nuclear facilities equated to 7 to 23 per cent of that from the Chernobyl power plant disaster, and were far less than what was disseminated by the atmospheric nuclear tests conducted by the nuclear weapon States in the 1950s and 1960s. For one of the key nuclides, caesium-137 with a lifetime of 30 years, the total release from Fukushima was estimated at 6-20 petabecquerel (PBq), compared with the Chernobyl release of 85 PBq. The weapons testing releases of caesium-137 in the 1950s and 1960s were in total about ten times higher when compared with the release in Chernobyl. See United Nations Scientific Committee on the Effects of Atomic Radiation, *Sources, effects and risk of ionizing radiation, 2013 Report to the General Assembly with scientific annexes, vol. I*, scientific annex A, "Levels and effects of radiation exposure due to the nuclear accident after the 2011 great east-Japan earthquake and tsunami" (United Nations publication, Sales No. E.14.IX.1), para. B12. The report of the Committee without its annexes appears as *Official Records of the General Assembly*, *Sixty-eighth Session, Supplement No. 46* and corrigendum (A/68/46 and Corr.1). (The Special Rapporteur is grateful to Gerhard Wotawa of the Central Institute for Meteorology and Geodynamics, Vienna, for supplying the above scientific information.)

[33] Resolution by the Institute of International Law on "Transboundary air pollution" adopted on 20 September 1987, Institute of International Law, *Yearbook, vol. 62 (1988), Session of Cairo (1987), Part II*, p. 296 (available from www.idi-iil.org, *Resolutions*).

[34] *Massachusetts v. Environmental Protection Agency*, United States Supreme Court decision of 2 April 2007 (549 U.S. 497 (2007)). See also Zasloff, "*Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438".

[35] United States Code, Title 42, sect. 7602 (*g*). For domestic legislation of the United States, see also the written comments provided to the Commission by the United States, 10 February 2015 (see para. 6 above) pp. 2–5.

[36] Section 202 (*a*) (1) of the Clean Air Act stipulates the authority of the Environmental Protection Agency to prescribe by regulation the emission of any air pollutant from new motor vehicles, providing that "[t]he Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare", United States Code, Title 42, sect. 7521 (*a*) (1).

[37] *Massachusetts v. Environmental Protection Agency* (see footnote 34 above), p. 529.

[38] *Ibid.*, p. 532.

[39] United States, *Utility Air Regulatory Group v. Environmental Protection Agency*, United States Supreme Court decision of 23 June 2014, 134 S. Ct. 2427 (2014).

[40] It may be noted that the Court in the *Utility Air Regulatory Group v. Environmental Protection Agency* first reaffirmed the broad "Clean Air Act wide" interpretation of the term "air pollutant" that the Court had announced in *Massachusetts v. Environmental Protection*

16. States vary as to the definition of "pollutant" in their domestic laws.[41] There is no problem as regards employing the term "air pollution" narrowly or broadly in a domestic law or in the matter of its interpretation by a domestic court.[42] In the setting of international law, however, the term should be used strictly as defined in treaties. Whatever harm may be caused by ozone depletion and climate change, it should be clearly distinguished from the harm caused by transboundary air pollution. It is therefore proposed that in the work on the present topic, the term "degrading substances" be used to refer to a broad range of atmospheric problems, including transboundary air pollution, stratospheric ozone depletion,[43] climate change[44] and any other alterations of the atmospheric conditions resulting in deleterious effects on human life and health and the Earth's natural environment, as proposed in draft guideline 1 (*c*).

17. It is therefore proposed that draft guideline 1 read as follows:

"*Draft guideline 1. Use of terms*

"For the purposes of the present draft guidelines,

"(*a*) 'atmosphere' means the envelope of gases surrounding the Earth, within which the transport and dispersion of degrading substances occurs;

"(*b*) 'air pollution' means the introduction by human activities, directly or indirectly, of substances or energy into the atmosphere, resulting in deleterious effects on human life and health and the Earth's natural environment;

"(*c*) 'atmospheric degradation' includes air pollution, stratospheric ozone depletion, climate change and any other alterations of atmospheric conditions resulting in significant adverse effects on human life and health and the Earth's natural environment."

[Definition of other terms will be proposed at later stages.]

B. Scope

18. The second draft guideline proposed by the Special Rapporteur in his first report was intended to clearly designate the scope of the topic. Thus, paragraph (*a*) of draft guideline 2 indicated that the topic addresses only "anthropogenic" environmental degradation, which may take the form of the introduction of "deleterious substances or energy" into the atmosphere or the alteration of its "composition", that has or is likely to have "significant adverse effects" on the human and the natural environment. Paragraph (*b*) stated simply that the draft guidelines refer to basic principles of international environmental law and emphasized their interrelationship with regard to atmospheric protection. Draft guideline 2 proved less controversial than the other draft guidelines during the deliberation by the Commission at its sixty-sixth session. While a few members questioned whether the topic encompasses domestic and local pollution,[45] the Special Rapporteur assured the Commission that the draft guidelines would be rightly limited to "transboundary" atmospheric damage, as indicated in the first report.

19. A few members of the Commission raised specific concerns with regard to the phrase "deleterious substances",[46] as contained in draft guideline 2, arguing that it is too broad and may capture a range of activities with only minor atmospheric effects. However, if the reference to "deleterious substances" is rightly considered in the context of the second clause of draft guideline 2, paragraph (*a*), it is clear that the term is qualified by the phrase "that have or are likely to have significant adverse effects". Thus, the language contained in draft guideline 2 appropriately limits the scope of the project to certain human activities and deleterious substances with a significant adverse

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Agency, but then ruled that, in certain of the operative provisions of the Clean Air Act, the term "air pollution" should be interpreted by the Environmental Protection Agency to have a narrower meaning. Specifically, with respect to prevention of significant deterioration and title V (major sources), the Court ruled that, with respect to greenhouse gas, the term "air pollutant" should be interpreted to encompass only those air pollutants (including greenhouse gas) emitted in such quantities that enable them to be "sensibly regulated". Thus, in the operative provisions, the term "air pollution" may be interpreted in a quantitative sense. Qualitatively, however, it appears that the Act's wide definition still holds. Even under the Court's ruling, the Agency is free to regulate greenhouse gas emissions from 83 per cent of United States stationary sources nationwide. (The Special Rapporteur is grateful to Thomas J. Schoenbaum of the University of Washington, Seattle, for his insightful comments on these United States Supreme Court cases.)

[41] For instance, the Environment Protection Act of the Federated States of Micronesia gives a broad definition of "pollutant" which allows its government office rather expansive regulatory authority to deter the introduction of substances into the atmosphere that might pose risks to human health, welfare, or safety (written comments provided to the Commission by the Federated States of Micronesia, 31 January 2015 (see para. 6 above), p. 3). The Environmental Act of Cuba, title VI, chapter VII, regulates protection of the atmosphere. It provides, *inter alia*, for "[r]educing and controlling the release of pollutants into the atmosphere from artificial or natural sources, whether stationary or mobile, so as to ensure that air quality complies with regulatory standards, for the purpose of protecting the environment and, in particular, human health, and fulfilling the country's international commitments" (art. 118 *b*) (written comments provided to the Commission by Cuba of 3 February 2015 (*ibid.*), p. 3). Furthermore, the 1990 Clean Air Conservation Act of the Republic of Korea provides for regulation of "air pollution and climate/ecosystem-changing substances" and cooperation with other nations in regard to these substances (written comments provided to the Commission by the Republic of Korea of 19 February 2015 (*ibid.*), p. 1).

[42] In fact, while the United States "has sophisticated and detailed statutory and regulatory regimes in a variety of areas of atmospheric protection", it must be noted that "these [United States domestic] regimes are designed to address their unique problems in unique ways, and are not subject to general rules …" (written comments provided to the Commission by the United States, 10 February 2015 (*ibid.*), p. 2).

[43] Article 2 of the Vienna Convention on the Protection of the Ozone Layer, provides that "[t]he Parties shall take appropriate measures … to protect human health and the environment against adverse effects resulting or likely to result from human activities which *modify or are likely to modify** the ozone layer".

[44] As defined in article 1, para. 2, of the United Nations Framework Convention on Climate Change, "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".

[45] Mr. Sean Murphy (*Yearbook ... 2014*, vol. I, 3211th meeting) and Sir Michael Wood (*ibid.*, 3212th meeting).

[46] Mr. Sean Murphy and Mr. Hussein A. Hassouna (*ibid.*, 3211th meeting).

impact. Other members[47] expressed objections to the language contained within the second clause, suggesting that the term "significant" should be more clearly articulated. On this point, the Special Rapporteur noted that the Commission has frequently employed the term "significant" in its work,[48] including in the 2001 draft articles on the prevention of transboundary harm from hazardous activities.[49] In that case, the Commission chose not to define the term, recognizing that the question of "significance" requires a factual determination, rather than a legal one.[50]

20. One member suggested that draft guideline 2, subparagraph (*a*), contained terms encompassing a few substantive concepts, for example, "deleterious substances" and "significant adverse effects", and argued that such substantive terms should be removed and, instead, discussed together with the general principles in whose formulation they play a role.[51] However, the inclusion of substantive terms within draft articles or guidelines describing the scope of a topic is consistent with the recent work practice of the Commission. Article 1 of the draft articles on the prevention of transboundary harm from hazardous activities provides that: "The present articles apply to activities not prohibited by international law which involve a risk of significant transboundary harm through their physical consequences." Here, important substantive concepts relating to transboundary harm, such as "risk", "harm" and "significant harm", were incorporated into the article on scope. Following this successful model, draft guideline 2 is proposed in a form containing the minimum number of substantive concepts.

21. During the debate held during the meetings of the Sixth Committee at its sixty-ninth session, it was stated that, while the terms used to describe the scope of the work were sufficiently precise,[52] some clarifications were desired with regard to the terms "human activities", "deleterious substances", "energy"[53] and, specifically, "interrelationships".[54] The Special Rapporteur has tried to respond to these concerns as much as possible in the present report. It was agreed that the distinction between "atmosphere" and "airspace" must be maintained.[55]

22. As stressed by the Special Rapporteur in his first report, it is of crucial importance to differentiate between the concept of the atmosphere and that of airspace. These are two entirely different concepts within international law. While airspace is a static, area-based institution over which the State has "complete and exclusive sovereignty", the atmosphere is a dynamic, fluctuating substance which is in constant movement around the Earth and across national boundaries. Since the atmosphere is invisible, intangible and non-separable, it cannot be subjected to State sovereignty, jurisdiction or control.[56] The Special Rapporteur originally proposed draft guideline 3 (*b*) as a saving clause regarding the legal concept of "airspace". However, he now considers it more appropriate to include this saving clause in draft guideline 2 on scope. Draft guideline 2 will therefore read as follows:

"*Draft guideline 2. Scope of the guidelines*

"(*a*) The present draft guidelines address human activities that directly or indirectly introduce deleterious

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[47] Mr. Kriangsak Kittichaisaree (*ibid.*, 3210th meeting) and Mr. Hussein A. Hassouna (*ibid.*, 3211th meeting).

[48] See the Special Rapporteur's summation of the debate (*ibid.*, 3214th meeting).

[49] The draft articles and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2006, annex.

[50] See para. (4) of the commentary to draft article 2, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 98, at p. 152, which states that "*significant is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'*. The harm must lead to a real detrimental effect … [and] [s]uch detrimental effects must be susceptible of being measured by factual and objective standards"; and para. (7) of the commentary to draft article 2, *ibid.*, at p. 153, which states "[t]he term 'significant', while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation at a particular time might not be considered 'significant' because at that specific time scientific knowledge or human appreciation had not reached a point at which much value was ascribed to that particular resource."

Examples of provisions employing the word "significant" in treaties and other instruments include:

(*a*) articles adopted by the Commission:

(i) art. 1 of the draft articles on prevention of transboundary harm from hazardous activities;

(ii) art. 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses;

(iii) art. 6 of the draft articles on the law of transboundary aquifers (the draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2008*, vol. II (Part Two), paras. 53–54; see also General Assembly resolution 63/124 of 11 December 2008, annex);

(*b*) other treaty provisions:

(i) art. 2, paras. 1–2, of the Convention on Environmental Impact Assessment in a Transboundary Context;

(ii) Memorandum of Intent between the United States and Canada concerning transboundary air pollution (5 August 1980; United Nations, *Treaty Series*, vol. 1274, No. 21009, p. 235).

[51] See Mr. Georg Nolte (*Yearbook ... 2014*, vol. I, 3213th meeting).

[52] It was stated further that the references to alteration of the composition of the atmosphere and significant adverse effects could provide an appropriate starting point, and that reference to basic principles of international environmental law would be inevitable, as it would be impossible to examine rights and obligations of States without expounding upon the relevant principles (Islamic Republic of Iran, *Official Records of the General Assembly, Sixty–ninth Session, Sixth Committee*, 24th meeting (A/C.6/69/SR.24), para. 83).

[53] Malaysia, *ibid.*, para. 31.

[54] Indonesia, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 62. For clarification, the Special Rapporteur has added in the present report the words "with other relevant fields of international law".

[55] Denmark on behalf of the Nordic countries, *ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 13.

[56] In fact, the Commission has been hesitant to apply the notions of State jurisdiction and control to environmental resources not clearly regarded as confined within a State's territory, as shown by two relevant instruments governing different types of water resources. In the 2008 draft articles on the law of transboundary aquifers, draft article 3, concerning the sovereignty of aquifer States, provides that "[e]ach aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located in its territory. It shall exercise its sovereignty in accordance with international law and the present articles". (*Yearbook ... 2008*, vol. II (Part Two), p. 19, para. 53, at p. 20) Significantly, there is no comparable article in the Convention on the Law of the Non-Navigational Uses of International Watercourses. This can be explained by the fact that aquifers are confined bodies of water, sealed in a reservoir and over which the aquifer State can exercise sovereignty. The Convention, in contrast, governs unconfined running water, over which the watercourse State cannot exercise sovereignty. The atmosphere is much more akin to international watercourses than aquifers in this regard, especially given that it flows even faster than watercourses, regularly surpassing hundreds of kilometres per hour and therefore is not suitable to be subject to State sovereignty, jurisdiction or control. See Special Rapporteur's summation of the debate (*Yearbook ... 2014*, vol. I, 3214th meeting).

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 with other relevant fields of international law;

"(*c*) Nothing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law."

23. As proposed in the Special Rapporteur's first report, the third draft guideline, which concerned the legal status of the atmosphere, framed its protection of the atmosphere as a "common concern of humankind". Many members of the Commission voiced concerns about the use of this designation and the concept's specific legal content. Since, as was discussed, the proposed guideline contains certain normative elements that may not be accurately described under the heading "general guidelines", the Special Rapporteur has placed the original draft guideline 3 under the designation "basic principles". Consequently, the debate of the Commission held at its sixty-sixth session is summarized in chapter III of the present report (see paras. 26–27 below).

Chapter II

Basic principles concerning the protection of the atmosphere

A. Status of the principles

24. The present report discusses the basic principles concerning the protection of the atmosphere and in this regard proposes pertinent draft guidelines reflecting those principles. Accordingly, it may be proper to clarify the role of the basic principles at the outset. While there is some divergence of views among legal experts on the definition of principles, their nature, status and role, and their function and effect,[57] it seems generally to be the case that the term "principle" signifies a high level of legal authority.[58] It is generally understood that principles are not merely aspirational, but have a certain legal significance. Most fundamentally, "[a]ll that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration".[59] Thus, principles encompass key factors that must be taken into account by decision makers. In other words, principles can "set limits, or provide guidance, or determine how conflicts between other rules or principles will be resolved".[60] This point was made by the International Court of Justice in the *Gabčikovo-Nagymaros Project* case, where it observed, when discussing the principle of sustainable development, that "new norms and standards have been developed, set forth in a great number of instruments during the last two decades" and that "[s]uch new norms have to be taken into consideration, and such new standards given proper weight".[61] Similarly, the Commission stated in paragraph (5) of the general commentary to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities that

> [t]he draft principles are … intended to contribute to the process of development of international law in this field, both by providing appropriate guidance to States in respect of hazardous activities not covered by specific agreements, and by indicating the matters that should be dealt with in such agreements.[62]

B. Principles to be covered by the present draft guidelines

25. Principles can emerge from treaty practice, jurisprudence of international courts and tribunals, non-legally binding international instruments, national legislation and jurisprudence of domestic courts, and other State practice, and may evolve into rules of customary international law.[63] Since the Commission's mandate encompasses the codification and progressive development of international law, the principles identified as applicable to atmospheric protection for the purposes of this project are limited to those that are either established or emergent as customary international law.[64] The present report focuses on basic principles relevant to the protection of the atmosphere. They include the common concern of humankind, the general obligations of States, international cooperation, *sic utere tuo ut alienum non laedas*, sustainable development, equity, prevention and precaution, and the interrelationship with other relevant fields of international law. The report considers the first three principles, beginning with the degradation of atmospheric conditions as a common concern of humankind.

[57] See, in general, Eto, "Significance of principles in international adjudication" (in Japanese); Wolfrum, "General international law (principles, rules and standards)"; Petersen, "Customary law without custom? …"; Kolb, "Principles as sources of international law". See also Beyerlin, "Different types of norms in international environmental law: policies, principles, and rules"; International Law Association, "First report of the Committee on Legal Principles relating to Climate Change", pp. 355–357, and "Second report of the Committee on Legal Principles relating to Climate Change", pp. 439–442.

[58] It seems to be the shared view of most authors that the difference between "rules" and "principles" relates merely to the generality and fundamentality of the norm (e.g., Weil, "Le droit international en quête de son identité: cours général de droit international public", p. 150), while others see it in terms of a qualitative difference (Eto, "Significance of principles in international adjudication", p. 734).

[59] Dworkin, *Taking Rights Seriously*, pp. 24–27, in particular p. 26.

[60] Boyle, "Some reflections on the relationship of treaties and soft law", p. 907.

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

[62] The draft principles and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.

[63] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667, paras. 29–63.

[64] With regard to the notion of "emergent rules of customary international law", see *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 41.

Chapter III

Degradation of atmospheric conditions as a common concern of humankind

A. Debates held at the sixty-sixth session of the Commission and during the meetings of the Sixth Committee at its sixty-ninth session

26. In his first report, the Special Rapporteur stated that the atmosphere is a natural resource essential for sustaining life on Earth and maintaining the integrity of ecosystems, and consequently that the protection of the atmosphere is a "common concern of humankind". In line with General Assembly resolution 43/53 of 6 December 1988 and the first paragraph of the preamble to the United Nations Framework Convention on Climate Change, the Special Rapporteur indicated that it would be most appropriate to characterize the legal nature of such protection as a common concern rather than as a common property or a common heritage. In the light of the growing recognition of the linkages between transboundary air pollution and global climate change, the first report applied the concept of common concern to atmospheric problems as a whole. "Common concern" implies, and provides the basis for, cooperation of all States on matters of a similar importance to all nations.[65]

27. During the debate held at the sixty-sixth session of the Commission, in 2014, several members expressed their agreement with the Special Rapporteur that the protection of the atmosphere is indeed a common concern of humankind, while stressing the need for further elaboration of the issue.[66] There were several questions raised by members with regard to the qualification, in the first report, of the protection of the atmosphere as a common concern of humankind. First, it was noted that the concept of common concern still might not be clear or established in international law and lack sufficient support in State practice. Second, although global issues such as ozone depletion and climate change might be included under the heading of common concern, doubt was expressed whether transboundary air pollution confined to a limited impact within the bilateral relations of States could be properly labelled as such. Third, it was felt that the link between the concept of common concern and *erga omnes* obligations needed further clarification. Fourth, a point was raised questioning the appropriateness of employing the concept of common concern before specific obligations of States had been prescribed in the draft guidelines. Fifth, it was stated that, in the context of legal policy, the concept of common concern was too weak and that, the concept of common heritage should be used instead, with respect to protection of the atmosphere. The Special Rapporteur sought to answer all these questions in his summation at the conclusion of the debate at the Commission's sixty-sixth session,[67] and it is hoped that further substantiation and clarification will be provided in the following sections.

28. During the debate during the meetings of the Sixth Committee at its sixty-ninth session, in 2014, the way in which delegates referred to the concept of common concern was, to a large extent, similar to the way in which the concept was referred to at the debate held during the sixty-sixth session of the Commission. Several States expressed support for the concept of common concern proposed by the Special Rapporteur,[68] while noting further, by way of clarification, that it was not the protection of the atmosphere, but rather its deteriorating condition, that constituted "the common concern of humankind".[69] Some delegations objected to the use of the term within the framework of the topic: it was considered that the concept was vague and controversial, and that its content was not only difficult to define but also subject to various interpretations.[70] The qualification of the atmosphere as a natural resource whose protection was a "common concern of humankind" still left open the question of which particular obligations could be derived therefrom.[71] It was suggested, however, that such an affirmation would not necessarily entail substantive legal norms that directly set out legal relationships among States, but, rather, would represent an acknowledgement that the protection of the atmosphere was not an exclusively domestic matter.[72] Although some delegations had no objection, in principle, to this qualification, they suggested that it required further consideration by the Commission in its subsequent work, including with respect to its relationship with other environmental principles and concepts.[73] It was stressed by some delegations that from a legal perspective, the topic required an integrated approach that treated the atmosphere as a single global unit, since it was a dynamic and fluid substance in constant movement across national boundaries.[74]

29. It is appropriate to first address the suggestion of employing the concept of "common heritage" rather than that of "common concern of humankind" before turning to the other questions specifically related to the concept of common concern. It was the view of a few members of the Commission at its sixty-sixth session that the concept of

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[65] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667, paras. 86–90.

[66] Mr. Dire D. Tladi, Mr. Hussein A. Hassouna, Mr. Bernd H. Niehaus, Mr. Ernest Petrič (*ibid.*, vol. I, 3211th meeting), Mr. Marcelo Vázquez-Bermúdez, Mr. Nugroho Wisnumurti (*ibid.*, 3212th meeting) and Mr. Eduardo Valencia-Ospina (*ibid.*, 3213th meeting).

[67] *Ibid.*, 3214th meeting.

[68] Federated States of Micronesia, *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 22nd meeting (A/C.6/69/SR.22), para. 24; Japan, *ibid.*, 23rd meeting (A/C.6/69/SR.23), para. 74; Cuba, *ibid.*, para. 79; El Salvador, *ibid.*, para. 92; Palau, *ibid.*, 24th meeting (A/C.6/69/SR.24), para. 42; Islamic Republic of Iran, *ibid.*, para. 83; and Indonesia, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 60.

[69] Indonesia, *ibid.*

[70] France, *ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 35; United Kingdom, *ibid.*, 23rd meeting (A/C.6/69/SR.23), para. 32; China, *ibid.*, para. 55; Poland, *ibid.*, para. 62; Spain, *ibid.*, 24th meeting (A/C.6/69/SR.24), para. 24; Viet Nam, *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 18; India, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 112.

[71] Austria, *ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 21.

[72] Japan, *ibid.*, 23rd meeting (A/C.6/69/SR.23), para. 74; Indonesia, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 60.

[73] Cuba, *ibid.*, 23rd meeting (A/C.6/69/SR.23), para. 79; Spain, *ibid.*, 24th meeting (A/C.6/69/SR.24), para. 24; Islamic Republic of Iran, *ibid.*, para. 83; India, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 112; Indonesia, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 60.

[74] Palau, *ibid.*, 24th meeting (A/C.6/69/SR.24), para. 42; Viet Nam, *ibid.*, 25th meeting (A/C.6/69/SR.25), para. 18.

common concern may be too weak to provide an effective legal regime for such an important problem as the protection of the atmosphere, and that the stronger concept of a "common heritage" framework should be used instead.[75] It was noted that while the 1979 Agreement governing the activities of States on the moon and other celestial bodies provided a "common heritage of mankind" label for the moon and its natural resources (art. 11, para. 1), the common heritage regime for the moon never took full effect. It may also be noted that the concept of "common heritage" seems to have acquired new meaning in the course of the negotiations on the United Nations Convention on the Law of the Sea during the 1970s. Since then, the concept has been understood to require a far-reaching institutional apparatus for the implementation of protective mechanisms such as the one provided for in Part XI of the Convention, which nonetheless needed to undergo fundamental changes as a result of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. Thus, the concept of common heritage has failed to gain traction beyond the quite limited success within the Convention regime of the deep seabed. In addition to the aforementioned difficulties, the initial conceptualization of plant genetic resources as part of the common heritage was almost immediately retracted,[76] and a similar argument for the consideration of climate change and biodiversity as part of the common heritage did not find support in the final draftings of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity (hereinafter, "1992 Rio Conventions"). While in its preamble, the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage formulates the notion that "parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole", it has been observed that "in tone and consequence, this feels more like 'common concern' than 'common heritage', certainly as understood within the institutional context of [the United Nations Convention on the Law of the Sea]".[77] Thus, "common concern" should be the preferred term with respect to the protection of the atmosphere, as was the case in the 1992 Rio Conventions.[78] It conveys the appropriately strong sense of purpose without potentially creating burdensome implementation requirements *à la* United Nations Convention on the Law of the Sea or disagreement about overreach, which has been a problem in the past when the implementation of a "common heritage" standard has been attempted.

[75] See Mr. Chris Maina Peter (*Yearbook ... 2014*, vol. I, 3212th meeting) and Mr. Amos S. Wako (*ibid.*, 3213th meeting).

[76] Bowman, "Environmental protection and the concept of common concern of mankind", p. 501.

[77] French, "Common concern, common heritage and other global(-ising) concepts: rhetorical devices, legal principles or a fundamental challenge?", p. 349; Brunnée, "Common areas, common heritage, and common concern", p. 565; Birnie, Boyle and Redgwell, *International Law and the Environment*, pp. 128–130; Shelton, "Common concern of humanity"; Shelton, "Equitable utilization of the atmosphere …"; Stec, "Humanitarian limits to sovereignty: common concern and common heritage approaches to natural resources and environment".

[78] See *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667, paras. 87–88. It may be noted that the notion of common concern is "conceptually more open ended" than that of common heritage which is inherently limited by its focus on certain resources. It should also be noted "the concept [of common heritage] is targeted more narrowly at specific environmental processes or protective actions". Brunnée, "Common areas, common heritage, and common concern", p. 564.

B. The "common concern of humankind" concept in treaty practice

30. The concept of the common concern of humankind has been clearly and fully established, and to a sufficient extent, in State practice and the relevant literature. The well-known first paragraph of the preamble to the United Nations Framework Convention on Climate Change acknowledges that "change in the Earth's climate and its adverse effects are a *common concern of humankind**". Likewise, the preamble to the Convention on Biological Diversity declares the parties thereto to be "[c]onscious … of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere", and affirms that "the conservation of biological diversity is a *common concern of humankind**".[79] In its preamble, the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, adopted in 1994, utilized phrases similar to "common concern", including "centre of concerns", "urgent concern of the international community" and "problems of global dimension" in the context of combating desertification and drought.[80] It should be noted that in those conventions, which enjoy universal acceptance,[81] virtually all States agreed that there was a strong need for the international community's collective commitment to tackling these global problems.[82] In this regard, the main benefit of employing the term "common concern" in prior relevant environmental treaty practice has been to encourage participation, collaboration and action rather than discord, which the Special Rapporteur finds especially important with regard to the topic at hand.

31. The Special Rapporteur considers employment of the term "common concern of humankind" to be justified in the transboundary context based on contemporary treaty practice. The Minamata Convention on Mercury, in

[79] The scope of application of the Convention on Biological Diversity clearly includes the atmosphere. See article 2, para. 1 (on the use of terms), which provides that "biological diversity" means "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems *and the ecological complexes of which they are part**", and article 4, para. (*b*) (on jurisdictional scope), which provides that the Convention is applicable "[i]n the case of processes and activities, *regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction**". The term "biosphere" refers to "sphere of life" or the "space where life exists or may exist". It is "the nature system comprised of the atmosphere, lithosphere, and hydrosphere, or air, soil, rock, minerals and water of the Earth, all of which support living organisms". Mische, "Ecological security and the need to re-conceptualize sovereignty".

[80] It goes without saying that desertification and drought have much to do with atmospheric conditions.

[81] As of 15 February 2015, the United Nations Framework Convention on Climate Change has 196 Parties, the Convention on Biological Diversity 195 and the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 195.

[82] It may be noted that, although the Vienna Convention on the Protection of Ozone Layer, which has 197 Parties, does not employ the term "common concern", it nonetheless expresses, in its preamble, a similar foundational idea by postulating that the "measures to protect the ozone layer … require international co-operation and action". The Montreal Protocol on Substances that Deplete the Ozone Layer (also with 197 Parties) cautions, in its preamble, against "the potential climatic effects of emissions of these [ozone-depleting] substances".

its preamble, recognizes mercury as "a chemical of *global concern** owing to its long-range atmospheric transport".[83] The Minamata Convention has been characterized in the recent work of leading researchers[84] as a treaty that identifies and seeks to tackle a particular threat. To that extent, it follows the Stockholm Convention on Persistent Organic Pollutants, which took a more descriptive approach, noting in its preamble that "persistent organic pollutants … are *transported, through air**, water and migratory species, *across international boundaries and deposited far from their place of release**, where they accumulate in terrestrial and aquatic ecosystems". The draft guidelines for the protection of the atmosphere follow the pattern of both conventions, which affirm the need for a collective response to the threats of environmental risk owing to its global nature, even if at its origin, the harm is of a transboundary nature.

32. Furthermore, it should be noted that the Protocol to Abate Acidification, Eutrophication and Ground-level Ozone, adopted in 1999, was amended on 4 May 2012 to include black carbon and tropospheric ozone, which have certain adverse effects on both transboundary air pollution and climate change.[85] The text of the preamble to the amended 1999 Protocol reads, in part, as follows:

> *Concerned also* that emitted [chemical substances] are transported in the atmosphere over long distances and may have adverse transboundary effects,
>
> *Recognizing* the assessments of scientific knowledge by international organizations, such as the United Nations Environment Programme, and by the Arctic Council, about the human health and climate co-benefits of reducing black carbon and ground-level ozone …,
>
> …
>
> *Aware also* of the commitment that Parties have assumed under the United Nations Framework Convention on Climate Change.

The objective of the amended Protocol, as set out in article 2, paragraph 1, should also be noted:

> The objective of the present Protocol is to control and reduce emission of [chemical substances] that are caused by anthropogenic activities and are likely to cause adverse effects on human health and the environment, natural ecosystems, materials, crops and *the climate** in the short and long term, due to acidification, eutrophication, particulate matter or ground-level ozone as a result of long-range transboundary atmospheric transport, and to ensure, as far as possible, that in the long term and in a stepwise approach, taking into account advances in scientific knowledge, atmospheric depositions or concentrations do not exceed [critical levels as described in annex I, etc.].

Thus, there exists a significant treaty practice of addressing the linkage between transboundary air pollution and climate change. Against the backdrop of such growing recognition of this inherent linkage, application of the concept of "common concern" to the issues in the transboundary context should be considered appropriate to the extent that a relationship exists with atmospheric problems of a global dimension.

33. The endeavour, in the work on the present topic, is to establish a cooperative framework for atmospheric protection, without seeking either to establish common ownership or management or to mould a liability regime of atmospheric protection. This narrow application of the concept of "common concern" is in line with existing applications of the concept in international environmental law, as described above, and reflects the understanding that it is not a particular resource that is common, but rather that *threats* to that resource are of common concern, since States both jointly contribute to the problem and share in its effects. To the extent that transboundary air pollution is a global phenomenon, the concept of "common concern of humankind" would apply, since "transboundary or regional environmental issues which cannot be effectively managed by national or regional efforts can give rise to common concern".[86] Furthermore, the principle of *sic utere tuo ut alienum non laedas* has been imported into the concept of global atmospheric protection in a multiplicity of ways. That this principle is not now limited to the narrow context of bilateral transboundary harm has been confirmed in the jurisprudence of the International Court of Justice. Further, the principle was recognized in the eighth preambular paragraph of the United Nations Framework Convention on Climate Change, and in article 2, paragraph 2 (*b*), of the Vienna Convention for the Protection of the Ozone Layer. The importing of the *sic utere tuo* principle into the global issues of international environmental law attests to the juridical linkage between transboundary harm and global issues surrounding atmospheric protection. Thus, the expansion of the scope of application of this principle has been recognized by judicial precedents, in treaty practice and in the literature, as discussed further in chapter V, section B, below.

34. The work of the Commission on the codification and progressive development of international law requires the use of both inductive and deductive approaches. Even the codification exercise, which is supposed to entail the recitation of the rules of existing customary international law, to be identified by the usual inductive approaches, includes the work of "more precise formulation and systematization" (art. 15 of the statute of the Commission). During formulation and systematization, some elements of deduction inevitably enter into the process. This is even more the case with respect to the work of progressive development of international law in dealing with 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" (*ibid.*). While the concept of "common concern of humankind" appears to have received widespread acceptance in State practice, it still may be regarded in part as a developing notion, in which case a deductive approach may be justified to the extent that it conforms to the emergent principles and rules of customary international law.[87]

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[83] The Convention has 128 signatories and 10 parties as of 15 February 2015. (According to its article 31, the Convention shall enter into force on the 90th day after the date of deposit of the 50th instrument of ratification, acceptance, approval or accession.)

[84] French, "Common concern, common heritage and other global(-ising) concepts …", p. 348.

[85] See Economic Commission for Europe, document ECE/EB.AIR/114. The amendments to annex I to the Protocol became effective for all Parties to the Protocol on 5 June 2013, while the amendments to the text and annexes II to IX, and the addition of new annexes X and XI are not yet in force.

[86] Kiss, "The common concern of mankind", p. 246.

[87] During the Commission's debate at its sixty-sixth session, a few members made a critical comment that the Special Rapporteur was

35. As stated in the Special Rapporteur's first report,[88] according to the legal content of the concept of common concern, the matter in question does not fall solely within the domestic jurisdiction of States, owing to its global importance and consequences for all.[89] What is at stake in the protection of the atmosphere and the protection of the environment in general may not be in the immediate interest of a State or States, but, instead, may reflect a more remote, general concern: a benefit for (or the prevention of harm to) all humankind, which can be achieved only through the acceptance of basic and general obligations by all States and international cooperation, even if they reap no immediate gains or returns.[90]

36. It should be noted that the Convention on Biological Diversity, the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, and the United Nations Framework Convention on Climate Change do not identify climate and biological diversity *per se* as being of common concern. The emphasis in respect of common concern is placed on the necessity for international cooperation, not on the resources in and of themselves. It is therefore considered that the *raison d'être* of common concern is the collective responsibility to act.[91] In other words, common concern reflects a willingness by the international community to act collectively to protect the integrity of the biosphere and of the atmosphere by entitling—or even requiring—all States to cooperate at the international level to address the concern.[92] For all of the above-mentioned reasons, the Special Rapporteur finds that common concern forms the soundest basis for international cooperation to protect the atmosphere.

37. The concept of common concern may be interpreted broadly or narrowly. A broad interpretation would include a legal effect that gives all States a legal interest, or standing, in the enforcement of rules concerning protection of the atmosphere. However, as discussed in the next chapter below on the general obligation of States, since there are no appropriate procedures yet established in international law enabling *actio popularis*, this expansive interpretation cannot be sustained.[93] According to another possible interpretation, the concept of common concern creates rights for individuals and future generations. This interpretation, however, also lacks, as yet, a solid legal basis in contemporary international law on the protection of the atmosphere, which makes no reference to individual rights. The preamble to the United Nations Framework Convention on Climate Change does refer to the interests of future generations, but only as an object of concern; further, there are no institutions or procedures in place to enable future generations to be represented or given rights.[94] According to a third interpretation, common concern creates substantive obligations for the protection of the atmosphere.[95] Since the concept of common concern does not imply a specific rule of conduct for States,[96] it is difficult to conceive how the concept itself can lead to the creation of specific substantive obligations for States.[97] However, it can certainly serve as a supplement in the creation of two general obligations of States, namely, to protect the atmosphere (as discussed in chapter IV below) and to cooperate with each other for the protection of the atmosphere (as discussed in chapter V below).

38. One means of articulating the concept of common concern in relation to the atmosphere is to stipulate proactively that the *protection* of the atmosphere is a common concern. This approach was taken by the Special Rapporteur in his first report, and is similar in kind to that reflected in the third preambular paragraph of the Convention on Biological Diversity, which provides "that the *conservation** of biological diversity is a common concern of humankind". Another way of expressing common concern could be through the (more passive) recognition of deteriorating atmospheric conditions as being a matter of common concern, in line with the first preambular paragraph of the United Nations Framework Convention on Climate Change, which acknowledges "that *change in the Earth's climate and its adverse effects** are a common concern of humankind". Given the need for prudence in pursuing the present topic, the latter approach may be considered more readily acceptable as regards the present draft guideline. The wording of draft guideline 3 has therefore been changed accordingly.

39. The justification and scientific basis of other concepts employed in draft guideline 3 below, such as that of "the atmosphere as a natural resource", have already been fully discussed in the Special Rapporteur's first report[98]

"putting the cart before the horse" (see *Yearbook ... 2014*, vol. I, 3211th and 3213th meetings), to which he responded in his summation that, in this context, a better metaphor might be the relationship of children to their parents: the notion of the common concern of humankind might still be in its infancy, but it was the responsibility of the older generation to encourage its development for the future (*ibid.*, vol. I, 3214th meeting, para. 16).

[88] *Ibid.*, vol. II (Part One), document A/CN.4/667, para. 89.

[89] Kiss, "The common concern of mankind", p. 247.

[90] *Ibid.*, p. 245. 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. See also Cançado-Trindade and Attard, "The implication of the 'common concern of mankind' concept on global environmental issues".

[91] French, "Common concern, common heritage and other global(-ising) concepts …", p. 348.

[92] Brunnée, "Common areas, common heritage, and common concern", p. 566. See also Kreuter-Kirchhof, "Atmosphere, international protection", sect. D, The atmosphere as a "common concern of mankind".

[93] Boyle, "International law and the protection of the global atmosphere: concepts, categories and principles", pp. 11–12.

[94] *Ibid.*, pp. 12–13.

[95] *Ibid.*, p. 13.

[96] Brunnée, "Common areas, common heritage, and common concern", p. 566.

[97] "[C]ommon concern … is a general concept which does not connote specific rules and obligations, but establishes the general basis for the community concerned to act.", Kiss, "The common concern of mankind", p. 246.

[98] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667, paras. 64–90.

and are not repeated here. Pursuant to the above, draft guideline 3 reads as follows:

"*Draft guideline 3. Common concern of humankind*

"The atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, and hence the degradation of atmospheric conditions is a common concern of humankind."

40. As outlined above, application of the concept of the common concern of humankind has two important corollaries as regards the protection of the atmosphere (which are considered below): the general obligation of States to protect the atmosphere and international cooperation for the protection of the atmosphere.

Chapter IV

General obligation of States to protect the atmosphere

41. Article 192 of the United Nations Convention on the Law of the Sea sets out the general obligation of States "to protect and preserve the marine environment", which could also be characterized as an obligation *erga omnes*. The present report submits that the same general obligation is applicable to the protection of the atmosphere. In order that this may be substantiated, it is first necessary to discuss the meaning and function of the term "obligation *erga omnes*".

A. Obligation *erga omnes*

42. As is well known, it was in the famous *obiter dictum* of the judgment in the *Barcelona Traction* case that the International Court of Justice invoked the notion of obligations *erga omnes*, which referred to the "obligations of a State towards the international community as a whole", that is, obligations that "by their very nature … are the concern of all States".[99] The Court thus identified the notion of obligations existing towards the international community as a whole with that of obligations existing towards all States, which possess corresponding "rights", in contrast to the notion of the traditional type of "reciprocal obligations" owed by a State *vis-à-vis* another State within their bilateral relationship, in which only the latter State has the corresponding right. The Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".[100]

43. As a reflection of the changing structure of the international legal order, the importance of protecting community interests has been increasingly emphasized by authors.[101] The International Court of Justice has played a significant role in the development of this process. For instance, the Court considered that respect for self-determination is a right and obligation *erga omnes* in both the 1995 *East Timor (Portugal v. Australia)* case[102] and the 2004 *Legal Consequences of the Construction of a Wall* case.[103] In the latter case, the Court took the view that obligations erga omnes are by their nature "the concern of all States" and "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection".[104] It will also be recalled that the Court discussed the nature of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide in the cases of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro)[105] and *Armed Activities in the Congo*,[106] which discussion has also been reiterated in the recent 2015 judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*.[107]

44. Earlier, in its application in the *Nuclear Tests* cases, Australia asked the Court

> to adjudge and declare that … the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law and to order that the French Republic shall not carry out further such tests.[108]

While the Court had previously indicated provisional measures on 22 June 1973, it rendered a final judgment on 20 December 1974, holding 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 therefore that the Court was not called upon to give a decision on the claims put forward by the applicants.[109] It may be noted that Australia filed this

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[99] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

[100] *Ibid.*

[101] See Annacker, "The legal regime of *erga omnes* obligations in international law"; Simma, "From bilateralism to community interest in international law"; Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century".

[102] *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

[103] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 172, para. 88, and p. 199, para. 155.

[104] *Ibid.*, at p. 199, para. 155, citing *Barcelona Traction, Light and Power Company* (see footnote 99 above), p. 32, para. 33.

[105] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, at p. 616, para. 31.

[106] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at pp. 31–32, para. 64.

[107] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at pp. 46–48, paras. 87–88.

[108] Memorial by Australia, Pleadings, *I.C.J. Reports 1973*, pp. 338–343, paras. 462–485.

[109] *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 99; *Nuclear Tests (Australia v. France), 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; *Nuclear Tests (New Zealand v. France), 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*

case on the grounds of protecting not only its own legal interests, but also the interests of *other* States, since it considered the nuclear tests of France 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.[110]

On this point, the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, stated:

> 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.[111]

Thus, the joint dissenting opinion stopped short of determining the consequential impact of the obligation *erga omnes* in substantive law that it may have on the procedural law dimension. This apparent "disconnect" between substantive law and procedural law is the major difficulty inherent in the concept of obligations *erga omnes*.

45. The Institute of International Law confirmed this legal situation when it adopted in 2005 a resolution entitled "Obligations *erga omnes* in international law". Article 1 (*a*) defines an obligation *erga omnes* as "an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action". Article 1 (*b*) defines an obligation "*erga omnes partes*" (although the resolution does not employ this terminology but simply uses the same term, *erga omnes*, for both cases) as "an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action". With regard to the procedural requirements for giving effect to these obligations, the resolution states that there should be "a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed" in order for the latter State to have "standing to bring a claim to the International Court of Justice or other international judicial institutions in relation to a dispute concerning compliance with that obligation" (art. 3). For a State to participate in the proceedings before the Court or that institution relating to that obligation, "[s]pecific rules should govern this participation" (art. 4), without which no participation is possible.[112] Nonetheless, it is significant that the Institute has clearly confirmed the existence and function of the obligations *erga omnes* in international law as it stands at present.[113]

46. It will be recalled that the Commission dealt with the question of obligations *erga omnes* with regard to article 48 on "Invocation of responsibility by a State other than an injured State" of the 2001 articles on responsibility of States for internationally wrongful acts. Article 48, paragraph 1, provides that

> [a]ny State other than an injured State is entitled to invoke the responsibility of another State … if: (*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (*b*) the obligation breached is owed to the international community as a whole.[114]

Subparagraph (*a*) refers to obligations *erga omnes partes* owed to a group of States, while subparagraph (*b*) refers to obligations *erga omnes* owed to the international community as a whole.[115] With regard to the issue of standing of the non-injured State, the Commission seems to have been neutral in respect of the existence of a collective

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Tests cases"; McWhinney, "International law-making and the judicial process: the World Court and the *French Nuclear Tests* case"; Sur, "Les affaires des essais nucléaires devant la C.I.J."; MacDonald and Hough, "The *Nuclear Tests* case revisited".

The Court stated that "[t]he unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes*", implying that France became bound towards all States. *Nuclear Tests (Australia v. France), Judgment*, pp. 269 *et seq.*, paras. 50 *et seq.* However, this passage is only relevant as an explanation of the legal effect of unilateral declarations and not so much to the legal nature of the obligations in question.

[110] Memorial on Jurisdiction and Admissibility submitted by the Government of Australia, *I.C.J. Pleadings, Nuclear Tests Cases*, vol. 1, pp. 248–380, p. 337, para. 459.

[111] *Nuclear Tests (Australia v. France), Judgment* (see footnote 109 above), pp. 369–370, para. 117. It will be recalled that, in the 1966 judgment of the *South West Africa* case, the Court stated that "the argument [of the applicants, Ethiopia and Liberia] amounts to a plea that the Court should allow the equivalent of an '*actio popularis*' … it is not known to international law as it stands at present. *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 47, para. 88.

[112] Resolution by the Institute of International Law on "Obligations *erga omnes* in international law" adopted on 27 August 2005, Institute of International Law, *Yearbook*, vol. 71 (2005), *Session of Krakow (2005), Part II*, p. 287 (available from www.idi-iil.org, *Resolutions*), Mr. Giorgio Gaja as Rapporteur. See also the Rapporteur's first report (2002) in *ibid.*, Part I, pp. 119–151; second report (2004), *ibid.*, pp. 189–202; replies and observations of the members of the Commission to the first report, *ibid.*, pp. 153–187.

[113] Fitzmaurice, "The International Court of Justice and international environmental law", p. 358.

[114] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

[115] *Ibid.* See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 277, para. (6), and p. 278, para. (9). The commentary explains that "obligations protecting a collective interest of the group" under subparagraph (*a*), "have sometimes been referred to as 'obligations *erga omnes partes*'" (*Yearbook ... 2001*, vol. II (Part Two), p. 126, para. (6) of the commentary to article 48). As for subparagraph (*b*), "the articles avoid use of the term 'obligations *erga omnes*'", because that term "conveys less information than the Court's reference … and has sometimes been confused with obligations owed to all the parties to a treaty" (*ibid.*, p. 127, párr. (9) of the commentary). See also Crawford, "Responsibility for breaches of communitarian norms: an appraisal of article 48 of the ILA articles on responsibility of States for internationally wrongful acts".

interest of the group and of the legal nature of the obligation imposed by a multilateral treaty. The answer can be given only through the interpretation of the treaty in question.[116]

47. The question of applicants' standing before international courts based on community interests incorporated in multilateral treaties has been at issue for many years, dating back to the *S.S. "Wimbledon"* case of the Permanent Court of International Justice in 1923.[117] The Court found in this case that article 380 of the Treaty of Versailles on the free passage of the Kiel Canal was a provision with a general and peremptory character, and that the four applicants had a legal interest and therefore standing under the Treaty.[118] The 1966 *South West Africa* judgment of the International Court of Justice, by a narrow majority, rejected the claim of standing as "appertained to the merits"[119] of Ethiopia and Liberia, who had claimed, as members of the League of Nations, standing under the relevant mandate whose purpose was to ensure its proper administration as the "sacred trust" of the community interests shared by the League members. However, in the 1966 judgment, the Court took the view, distinguishing between the "conduct" and "special interests" provisions in the mandate, that the right to claim due performance of the mandate did not derive from the mere fact of membership of the League of Nations. Consequently, it concluded that the applicants did not, in their individual capacity as States, possess "any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, in order to require the due performance of the Mandate in discharge of the 'sacred trust'".[120] In contrast, the International Court of Justice has accepted a more liberal view in a recent case, *Obligation to Prosecute or Extradite (Belgium v. Senegal)*,[121] with regard to the standing of the applicant based on the obligations *erga omnes partes* that is provided for in a multilateral treaty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As to the standing of Belgium in the case, the Court admitted that all the States parties had a common interest in compliance with the obligations to prevent torture and to take measures for prosecution, and "[t]hat common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention". It therefore considered that "[a]ll the States parties 'have a legal interest' in the protection of the rights involved" and that "[t]hese obligations may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case".[122] The Court concluded that "any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end" and that for this purpose, "a special interest" was not required.[123] Thus, the jurisprudence of the Court confirms that the question of whether or not standing is recognized for obligations *erga omnes partes* depends upon the interpretation of the relevant multilateral treaty.[124] By contrast, in the absence of any procedural rules in general international law for obligations *erga omnes* owed to the international community as a whole, it is difficult to conceive of similar standing for any State to bring a claim before international courts and tribunals.[125]

48. As mentioned earlier, article 192 of the United Nations Convention on the Law of the Sea provides for a general obligation, which could be characterized also as an obligation *erga omnes*, that "States have the obligation to protect and preserve the marine environment". This provision is an essential component of the comprehensive approach taken in Part XII of the Convention to the protection and preservation of the marine environment.[126] While the basic structure of the United Nations Convention on the Law of the Sea is founded on the allocation of burden to protect the marine environment in accordance with area-based divisions of the sea (such as territorial waters, contiguous zones, exclusive economic zones and high seas), it is significant that the Convention nonetheless provides for this umbrella clause on the general obligation of States to protect the marine environment. It should be further noted that provisions for a general obligation to protect certain natural resources are found in the previous work of the Commission, including in article 20 of the Convention on the Law of the Non-navigational Uses of International Watercourses and article 10 of the articles on the law of transboundary aquifers.[127] These provisions were modelled on article 192

[116] Gaja, "States having an interest in compliance with the obligation breached", p. 959.

[117] *S.S. "Wimbledon" (France, Italy, Japan and U.K. v. Germany), Judgments, 1923, P.C.I.J. Series A, No. 1*, pp. 16–20.

[118] See Crawford, "Responsibility for breaches of communitarian norms …". See also Kawano, "Standing of a State in the contentious proceedings of the International Court of Justice …", pp. 221–223.

[119] The 1962 judgment of the International Court of Justice affirmed its jurisdiction over the case as well as the standing of the applicants on the basis of article 7, paragraph 2, of the Mandate of 17 December 1920 for German South West Africa (*South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 319, at pp. 335–342). The 1966 judgment, however, considered that their standing in that matter could not be recognized as a "matter that appertained to the merits" of the case (*South West Africa, Second Phase, Judgment* (see footnote 111 above), p. 18, para. 4).

[120] *South West Africa, Second Phase, Judgment* (see footnote 111 above), pp. 28–29, paras. 32–33. See Kawano, "Standing of a State in the contentious proceedings of the International Court of Justice", pp. 223–224.

[121] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 426, para. 1.

[122] *Ibid.*, p. 449, para. 68.

[123] *Ibid.*, p. 450, para. 69.

[124] In its application instituting proceedings against Japan in the *Whaling in the Antarctic* case (*Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226), Australia invoked an obligation *erga omnes partes* under the International Convention for the Regulation of Whaling (see Crawford, "Responsibility for breaches of communitarian norms", pp. 235–236). Japan did not challenge this assertion and, consequently, the Court did not touch on this point in its judgment. It may have been difficult to imagine that the Court would reverse its position on the obligation *erga omnes partes* after the *Obligation to Prosecute or Extradite (Belgium v. Senegal)* judgment of 2012. Nonetheless, an argument could have been made that the International Convention for the Regulation of Whaling, unless under an evolutionary interpretation (which the Court rejected), with an entirely different procedural setting as compared to the Convention against Torture, was hardly contemplated in 1946 to grant standing to a non-injured party.

[125] Thirlway, *The Sources of International Law*, pp. 143–153.

[126] Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary …*, p. 36.

[127] General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2008*, vol. II (Part Two), paras. 53–54.

of the United Nations Convention on the Law of the Sea.[128] The commentary to the draft articles on the law of the non-navigational uses of international watercourses states that "[i]n view of the general nature of the obligation contained in this article, the Commission was of the view that it should precede the other more specific articles".[129] Given these precedents in the work of the Commission, the Special Rapporteur submits that the same general obligation should be included in the present draft guidelines with regard to the protection of the atmosphere, on the basis of the following State practice and jurisprudence.

49. The Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water provides that the parties, "desiring to put an end to the contamination of man's environment by radioactive substances" (preamble), undertake "to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion … in the atmosphere" (art. 1). Although the number of the parties to the Treaty remains at 124 (as of February 2015), subsequent to the announcement of France indicating its intention to terminate atmospheric nuclear tests in 1974, it seems inconceivable that a State today would dare to challenge the partial prohibition of nuclear weapons tests achieved by the Treaty, thereby making the obligation applicable to all States on the basis of customary international law.[130]

50. In the advisory proceedings of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*,[131] it was examined whether the use of nuclear weapons would lead to damage to the environment, presumably including the global 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.[132]

The Court pronounced that

> [t]he 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.[133]

51. Needless to say, protection of the atmosphere relating to global issues such as ozone depletion and climate change is clearly under the general obligation of States.[134] With regard to the question whether transboundary air pollution of a bilateral or regional nature could also be regarded as falling under the general obligation to protect the atmosphere, it has already been pointed out in the first as well as the present report that there exist strong links between transboundary air pollution and the global issues of ozone depletion and climate change, and if the latter categories are to come under the general obligation, then the former should also be regarded as the object of the same obligation. This is reflected in the transformation of the *sic utere tuo ut alienum non laedas* principle: its application to the relationship between adjacent States has expanded in scope to encompass the broader context of the international community as a whole, as discussed in some detail directly below. The Special Rapporteur intends to refer to *sic utere tuo* in his third report in 2016 as one of the basic principles underpinning the protection of the atmosphere. The description below is intended to give a preliminary account of certain changes in the application of the principle with respect to the general obligations of States.

B. The *sic utere tuo ut alienum non laedas* principle

52. The *sic utere tuo ut alienum non laedas* principle ("use your own property so as not to injure that of another") was originally intended to apply to the relationship with an "adjacent State" sharing a common territorial border. The principle was a corollary to that of the territorial sovereignty and equality of States, according to which a State can exclusively exercise its jurisdiction or control over activities within it,[135] while acknowledging the dictum of Judge Huber in the *Island of Palmas* case stating that "the exclusive right" involved in territorial sovereignty "has as corollary a duty: the obligation to protect within the territory the rights of other States".[136] It was initially in the context of a traditional, bilateral type of transboundary air pollution that the principle was applied, for example, in the *Trail Smelter* case. The arbitral tribunal in *Trail Smelter* stated that "under the principles of international law … no State has the right to use … 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

[128] Para. (2) of the commentary to article 20 of the draft articles on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), para. 222, at p. 118; para. (1) of the commentary to article 10 of the draft articles on the law of transboundary aquifers, *Yearbook … 2008, vol. II (Part Two),* para. 54, at p. 33.

[129] Para. (1) of the commentary to article 20 of the draft articles on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), para. 222, at p. 118.

[130] Although the customary law status of the Treaty was not considered by the International Court of Justice in its judgment in *Nuclear Tests (Australia v. France)* (*Judgment, I.C.J. Reports 1974*, p. 253) due to its declaring the cases moot, it was nonetheless pointed out that the question should have been considered, joint dissenting opinion by Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, p. 368. See D'Amato, "Legal aspects of the French nuclear tests", pp. 66–67; Tiewul, "International law and nuclear test explosions on the high seas", p. 56.

[131] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 226, at p. 241. The General Assembly had requested the advisory opinion.

[132] *Ibid.*, pp. 241–242, para. 29.

[133] *Ibid.*

[134] The Vienna Convention on the Protection of the Ozone Layer provides in article 2 (General obligation), para. 1, that "[t]he Parties shall take appropriate measures … against adverse effects … which modify or are likely to modify the ozone layer"; the United Nations Framework Convention on Climate Change provides in article 3 (Principles), para. 1, that "[t]he Parties should protect the climate system for the benefit of present and future generations", a principle that is presumably applicable to both developed and developing countries. The quoted sentence is qualified by the phrase "in accordance with their common but differentiated responsibilities and respective capabilities". The words "common responsibilities" dictate that all States have the general obligation to protect the climate system, while the degree of "responsibilities" should be "differentiated" according to their "respective capabilities".

[135] Brunnée, "*Sic utere tuo ut alienum non laedas*", paras. 5–6.

[136] *Island of Palmas case between the Netherlands and the United States of America, Award of 4 April 1928*, Permanent Court of Arbitration, UNRIAA, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 829–872, p. 839.

and the injury is established by clear and convincing evidence".[137] Naturally, the *sic utere tuo principle* was invoked in that instance in regard to the relations between adjacent States.

53. It will be recalled that, in the *Corfu Channel* case, the International Court of Justice referred to "certain general and well-recognized principles", reaffirming "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[138] A series of orders and judgments in the *Nuclear Tests* cases served as the litmus test for the customary-law status of the *sic utere tuo* principle as applicable to transboundary atmospheric pollution not limited only to adjacent States. In indicating the provisional measures in the case, the Court stated in its order that "the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory [and the territory of New Zealand]",[139] covering a broad range of areas. Because the object of the provisional measures was to preserve the *rights* of the Parties, it is considered from the orders of the Court that the basis of the Court's decision was the *sic utere tuo* principle when it acknowledged the *rights* of the applicants.[140]

54. In its judgment of 20 December 1974 (*Nuclear Tests I*), the International Court of Justice reasoned that the declaration of France indicating its intention not to continue atmospheric nuclear tests rendered moot the claims of Australia and New Zealand. However, this did not mean that the Court did not consider the *sic utere tuo* principle. Rather, as Judge Petrén pointed out in his separate opinion:

> As there is no treaty link between Australia and France in the matter of nuclear tests, the Application presupposes the existence of a rule of customary international law whereby States are prohibited from causing, through atmospheric nuclear tests, the deposit of radio-active fall-out on the territory of other States. It is therefore the existence or non existence of such a customary rule which has to be determined.[141]

Judge de Castro answered this question affirmatively in his dissenting opinion, stating that "[t]he principle *sic utere tuo ut alienum non laedas* is a feature of law both ancient and modern" and that "[i]n international law, the duty of each State not to use its territory for acts contrary to the rights of other States might be mentioned".[142] The joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock also inferred the existence of the customary rule, stating that "we cannot fail to observe that … the Applicant also rests its case on long-established—indeed elemental—rights, the character of which as *lex lata* is beyond question".[143] In contrast, Judge Gros, in his separate opinion, observed that "[i]n the absence of any rule which can be opposed to the French Government for the purpose of obtaining from the Court a declaration prohibiting the French tests and those alone, the whole case must collapse".[144] Judge Petrén also observed that "one may ask what has been the attitude of the numerous States on whose territory radio-active fall-out from the atmospheric tests of the nuclear Powers has been deposited and continues to be deposited". Asking, "[h]ave they … protested to these Powers, pointing out that their tests were in breach of customary international law?", he concluded that he did "not observe that such has been the case".[145] Because of the conflicting opinions with regard to the existence of customary international law not to cause harm to other States, it can be stated that "[b]y the close of the 1974 proceedings it would be difficult to conclude that the status in international law of the rule … was widely accepted".[146]

55. Two decades later, however, the customary status of the principle was affirmatively recognized in the 1995 *Nuclear Tests II* case. Although the request in which New Zealand protested underground nuclear tests was dismissed, the Court observed that "the present Order is without prejudice to *the obligations of States to respect and protect the natural environment**, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment".[147] Although the Court did not clarify in full detail the extent of the obligations, Judge Weeramantry in his dissenting opinion stated that the principle that damage must not be caused to other nations is "a fundamental principle of modern environmental law…well entrenched in international law", and as "a deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law".[148] Judge Koroma also considered in his dissenting opinion, though cautiously, that: "Under contemporary international law, there is probably a duty not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances."[149] Furthermore, Judge Palmer cited the *Nuclear Tests I* case, the *Corfu Channel* case, the *Trail Smelter* case and the *Lac Lanoux* case[150] as "a quartet of cases that offer some protection for the environment through the

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[137] *Trail Smelter case between United States of America and Canada, Decision of 11 March 1941*, Permanent Court of Arbitration, UNRIAA, vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1938–1982, at p. 1965.

[138] *Corfu Channel Case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at p. 22.

[139] *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973* (see footnote 109 above), p. 106; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973* (see footnote 109 above), p. 142.

[140] The Applicant claimed potential damage not only to "Australian territory" but also to "elsewhere in the southern hemisphere". However, the Court indicated interim measures only "in respect of the deposit of radio-active fall-out *on her territory**", while it did not indicate measures "in respect of other rights". *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973* (see footnote 109 above), pp. 104–105, paras. 27–31.

[141] *Nuclear Tests (Australia v. France), Judgment* (see footnote 109 above), p. 304.

[142] *Ibid.*, p. 388, para. 4.

[143] *Ibid.*, p. 367, para. 113.

[144] *Ibid.*, p. 288, para. 21.

[145] *Ibid.*, p. 306.

[146] Sands, "Pleadings and the pursuit of international law: *Nuclear Tests II* (*New Zealand v. France*)", p. 615.

[147] *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* ("Nuclear Tests II"), *I.C.J. Reports 1995*, p. 288, at p. 306, para. 64.

[148] *Ibid.*, at pp. 346–347.

[149] *Ibid.*, at p. 378.

[150] *Affaire du lac Lanoux* (Spain, France), 16 November 1957, UNRIAA, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 281–317.

medium of customary international law", and concluded that "[t]he principles established by these cases have been included in" the *sic utere tuo* principle.[151] In the light of these opinions, it follows that "the obligations of States to respect and protect the natural environment" in the majority order include the *sic utere tuo* principle as customary international law.[152] In addition, the International Court of Justice, in the recent *Pulp Mills* case, also reiterated the key principle as stated in the *Corfu Channel* case, pointing out that "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory".[153] These cases confirmed the principle not to cause significant harm to the atmospheric environment of *other* States, not limited exclusively to adjacent States, as an established principle of customary international law.

56. While the traditional principle dealt only with transboundary harm to other States in a narrow sense, the development of the principle has resulted in an extension of its territorial scope to include addressing the subject of the global commons *per se*.[154] Principle 21 of the Declaration of the United Nations Conference on the Human Environment (hereinafter, "Stockholm Declaration"),[155] a reformulation of this principle provides that "States have…the responsibility [*devoir*] 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**". This part of the principle was reiterated in principle 2 of the Rio Declaration on Environment and Development.[156] The areas beyond the jurisdiction and sovereignty of any State, generally referred to as the "global commons", are assumed to include the high seas, outer space and the global atmosphere. Although the concept of the atmosphere, which is not area-based, does not conform to that of "areas beyond the limits of national jurisdiction", it is nonetheless clear that the atmosphere existing above those areas is now covered by principle 21 of the Stockholm Declaration.[157]

57. It is noteworthy that the *sic utere tuo* principle, when applied to global phenomena such as long-distance, transcontinental air pollution, ozone depletion and climate change, has been confronted with certain difficulties. In such cases, the chain of causation, i.e., the physical link between cause (activity) and effect (harm), is difficult to establish, because of the widespread, long-term and cumulative character of their effects. The adverse effects, because of their complex and synergetic nature, arise from multiple sources, and therefore such adverse effects are not attributable to any one activity. In the global setting, virtually all States are likely to be contributing States as well as victim States. Consequently, even where actual harm has occurred, it is difficult, if not impossible, to identify a single responsible State of origin.[158] The difficulty of establishing the causal link between the wrongful act and the harm suffered has already been acknowledged in the Convention on Long-range Transboundary Air Pollution. Article 1, paragraph (*b*), of that Convention defines long-range transboundary air pollution as pollution "at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources". That definition notwithstanding, the Convention does enshrine principle 21 of the Stockholm Declaration in its fifth preambular paragraph as expressing a "common conviction". The Vienna Convention for the Protection of the Ozone Layer and the United Nations Framework Convention on Climate Change recognize the above-mentioned difficulties as well. However, they also expressly incorporate the content of principle 21 of the Stockholm Declaration in their preambles and therefore bolster the case for considering it an integral component of international law.[159]

58. In fact, it was confirmed in the International Court of Justice advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* that the provisions of principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration are "now part of the corpus of international law relating to the environment".[160] In the *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* case, the Court reaffirmed that phrase, recognizing further that "it has recently had occasion to stress…the great significance that it attaches to respect for the environment, not only for States *but also for the whole of mankind**".[161] The Court also cited that phrase in the judgment in the *Pulp Mills* case.[162] In addition, in the *Iron Rhine Railway* case, the Tribunal stated: "Environmental law…require[s] that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate,

[151] *Nuclear Tests II* (see footnote 147 above), at p. 408.

[152] Sands, "Pleadings and the pursuit of international law", p. 616.

[153] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 55, para. 101.

[154] Xue, *Transboundary Damage in International Law*, p. 191.

[155] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (A/CONF.48/14/Rev.1; United Nations publication, Sales No. E.73.II.A.14), chap. I, p. 3.

[156] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, Volume I: Resolutions Adopted by the Conference* (A/CONF.151/26/Rev.1 and Corr.1; United Nations publication, Sales No. E.93.I.8), resolution 1, annex I, p. 3.

[157] Birnie, Boyle and Redgwell, *International Law and the Environment*, p. 339.

[158] In contrast, an "injured State" for the purpose of law on State responsibility may be identified even in that case. According to article 42, para. (*b*), subpara. (i), of the articles on responsibility of States for internationally wrongful acts, where the obligation breached is owed to the international community as a whole, a specially affected State is considered to be an injured State. According to the commentary thereto, "[e]ven in cases where the legal effects of an internationally wrongful act extend by implication … to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States", para. (12) of the commentary to article 42, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 119. An example given in the commentary is the pollution of the high seas, which constitutes a breach of the customary rule, where this pollution has a particular impact on the territorial sea of a certain State. In this case, "the breach exists in respect of all other States, but among these the coastal State which is particularly affected by the pollution is to be considered as 'specially' affected". Gaja, "The concept of an injured State", p. 947. The same can be applied, for example, to the acid rain resulting from the transboundary air pollution or the ozone hole.

[159] Yoshida, *The International Legal Régime for the Protection of the Stratospheric Ozone Layer*, pp. 62–67; Fitzmaurice, "Responsibility and climate change", pp. 117–118.

[160] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 131 above), pp. 241–242, para. 29.

[161] *Gabčikovo-Nagymaros Project* (see footnote 61 above), p. 41, para. 53.

[162] *Pulp Mills* (see footnote 153 above), p. 78, para. 193.

such harm … This duty … has now become a principle of general international law."[163]

[163] *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*, Permanent Court of Arbitration, UNRIAA, vol. XXVII (United Nations publication, Sales No. E/F.06.V.8), pp. 33–125, at pp. 66–67, para. 59.

It may have been premature to say that principle 21 was only a starting point and that the principle had not yet entered into customary international law at the time of the adoption of the Stockholm Declaration in 1972. However, subsequent developments of jurisprudence, such as the 1995 *Nuclear Tests II* case (see footnote 147 above), the 1996 *Nuclear Weapons* case (see footnote 131 above), the 1997 *Gabčikovo–Nagymaros Project* case (see footnote 61 above) and the 2010 *Pulp Mills* case (see footnote 153 above), confirm the customary status of the principle, consolidated by State practice and *opinio juris* as well; see Birnie, Boyle and Redgwell, *International Law and the Environment*, p. 339; Galizzi, "Air, atmosphere and climate change", p. 337.

59. The following draft guideline is therefore proposed:

"*Draft guideline 4. General obligation of States to protect the atmosphere*

"States have the obligation to protect the atmosphere."

Chapter V

International cooperation

A. Development of the principle of cooperation in international law

60. Modern international law is often characterized as being a "law of cooperation" as opposed to the "law of coexistence" (a law of reciprocity and/or law of coordination) of traditional international law.[164] This is in large part a reflection of structural change in the present-day world whereby the principle of cooperation has come to be recognized as a legal obligation rather than merely a moral duty. Many multilateral treaties today provide for international cooperation of varying content and legal character. The international cooperation provided under these treaties is often premised on specific obligations and designed to induce compliance therewith.[165] Indeed, the concept of international cooperation is now built to a large extent upon the notion of the "common interests" of the "international community as a whole", rather than on the "arithmetic aggregate" of bilateral collaborative relations in the traditional "international society".[166]

61. One of the main purposes of the United Nations, as provided in Article 1, paragraph 3, of the Charter of the United Nations is "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character". Further, Article 13, paragraph 1 (*b*), provides that the General Assembly "shall initiate studies and make recommendations for the purpose of … promoting international cooperation in the economic, social, cultural, educational, and health fields". Article 56 in Chapter IX of the Charter, entitled "International economic and social cooperation", provides that "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization". Important as it was that the Charter provide for the duty to cooperate, this entailed merely a "pledge" on the part of Member States, which was limited to "action in co-operation with the Organization". The nature of the duty was ambiguous: was it a legal or merely a moral duty? Moreover, this duty would be assumed only by States Members of the United Nations and not by all States. The focus was specifically on Member States "in cooperation with the Organization" rather than on other States in their reciprocal relations.[167] It was the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, approved by the General Assembly in 1970, that expanded the scope of cooperation to include all States and in their relations with one another, providing, under its fourth principle, that States have the duty "to co-operate with one another in accordance with the Charter".[168]

[164] Friedmann, *The Changing Structure of International Law*, pp. 60–71; Leben, "The changing structure of international law revisited: by way of introduction". See also Delbrück, "The international obligation to cooperate—an empty shell or a hard law principle of international law?—A critical look at a much debated paradigm of modern international law".

[165] Beyerlin, *et al.*, distinguish between two types of treaties in relation to multilateral environmental agreements: one being a category of "result-oriented treaties" and the second consisting of "action-oriented treaties". The former includes the Montreal Protocol on Substances that Deplete the Ozone Layer and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, while the latter includes the International Convention for the Regulation of Whaling, the Convention on International Trade of Endangered Species, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Convention on Biological Diversity and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. It is pointed out that the instruments of the latter category have only ambiguous provisions on the methods for achieving their objectives, often making it difficult to assess how far the stated objectives have been achieved (Beyerlin, Stoll and Wolfrum, *Ensuring Compliance with Multilateral Environmental Agreements …*, pp. 361–362). Regarding the duty to cooperate in article 100 of the United Nations Convention on the Law of the Sea, which provides for the obligation of conduct and not of result, see, e.g., Gottlieb, "Combating maritime piracy: inter-disciplinary cooperation and information sharing", p. 312.

[166] Okuwaki, "On compliance with the obligation to cooperate: new developments of 'International Law for Cooperation'", pp. 16–17 (in Japanese).

[167] Wolfrum, "Article 56", p. 942, para. 3, and p. 943, para. 7. The commentary emphasizes the shortcoming of "the limited bearing of Art. 56 as far as the obligation of [M]ember States is concerned". According to the commentary, "Article 56 not only requires co-operation among the [M]ember States but between the [M]ember States and the Organization". See also Stoll, "Article 56", p. 1604. para. 3, and p. 1605, para. 10. With regard to Article 55 of the Charter, see Stoll, "Article 55 (*a*) and (*b*)", pp. 1551–1554, paras. 63–74.

[168] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, preamble. See Babović, "The duty of States to cooperate with one another in accordance with the Charter"; Houben, "Principles of international law concerning friendly relations and cooperation among States", pp. 720–723; McWhinney, "The 'new' countries and the 'new' international law: the United Nations' Special Conference on Friendly Relations and Co-operation among States".

62. The Charter of the United Nations did not include any specific provisions on environmental protection, nor did the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States make any reference to cooperation on environmental protection.[169] However, Article 1, paragraph 3, of the Charter, as cited above, does provide the basis for the competence of the United Nations with respect to dealing with problems of environmental protection. It was in the late 1960s that the United Nations began addressing environmental issues, through interpretation of the purposes of the Organization enumerated in Article 1, paragraph 3, as including the promotion of international cooperation for protection of the environment.[170] Thus, "the absence of any explicit mention of the environment in the Declaration on Principles of Friendly Relations should not be seen as implying that the principles of … co-operation it sets out have no importance in an environmental context".[171]

63. By its resolution 2398 (XXIII) of 3 December 1968, the General Assembly decided to convene in 1972 the United Nations Conference on the Human Environment which proclaimed, on 16 June 1972, the Stockholm Declaration. Principle 24 of the Declaration declared:

> International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

Although principle 24 did not elaborate detailed rules on international cooperation, the General Assembly, in its resolution 2995 (XXVII) of 15 December 1972, entitled "Cooperation between States in the field of the environment", recognized that cooperation between States in the field of the environment would be effectively achieved if States exchanged information effectively.[172] Twenty years later, in June 1992, the Rio Declaration on Environment and Development was proclaimed by the United Nations Conference on Environment and Development. Principle 27 of the Rio Declaration stressed that "States and people [should] cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in [the] Declaration and in the further development of international law in the field of sustainable development". The principles of the Declaration have evolved into more detailed rules in subsequent treaties.

B. Treaties and other instruments

1. Global treaties

64. International cooperation is among the core provisions of global environmental treaties. The Vienna Convention for the Protection of the Ozone Layer provides in its preamble that the Parties to this Convention are "[*a*]*ware* that measures to protect the ozone layer from modifications due to human activities require international co-operation and action, and should be based on relevant scientific and technical considerations"; and in paragraph 1 of article 4, on cooperation in the legal, scientific and technical fields, the Convention provides that: "[t]he Parties shall facilitate and encourage the exchange of scientific, technical, socio-economic, commercial and legal information relevant to this Convention as further elaborated in annex II" and that "[s]uch information shall be supplied to bodies agreed upon by the Parties". Annex II of the Convention sets out a detailed list of the types of information to be exchanged, which should be useful for the present guidelines.[173] Paragraph 2 of article 4 provides

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[169] It was pointed out that "the declaration's emphasis on economic sovereignty and the promotion of economic growth suggests that environmental matters were not a priority concern of the drafters of this resolution". Boyle, "The principle of co-operation: the environment", p. 120.

[170] Sands and Peel, *Principles of International Environmental Law*, pp. 27, 56–57.

[171] Boyle, "The principle of co-operation", p. 121.

[172] Paragraph 2 of the resolution recognized that "co-operation between States in the field of the environment, including co-operation towards the implementation of principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment, will be effectively achieved if official and public knowledge is provided of the technical data relating to the work to be carried out by States within their national jurisdiction, with a view to avoiding significant harm that may occur in the environment of the adjacent area". Thus, the linkages among the duty to supply information, the duty of cooperation between the parties and the duty of prevention, recognized in the *Pulp Mills* case judgment (see *Pulp Mills* (footnote 153 above), p. 43, para. 58), had already been affirmed by the General Assembly in the 1970s.

[173] Annex II (Information Exchange) to the Vienna Convention for the Protection of the Ozone Layer provides as follows:

"1. The Parties to the Convention recognize that the collection and sharing of information is an important means of implementing the objectives of this Convention and of assuring that any actions that may be taken are appropriate and equitable. Therefore, Parties shall exchange scientific, technical, socio-economic, business, commercial and legal information.

"2. The Parties to the Convention, in deciding what information is to be collected and exchanged, should take into account the usefulness of the information and the costs of obtaining it. The Parties further recognize that co-operation under this annex has to be consistent with national laws, regulations and practices regarding patents, trade secrets, and protection of confidential and proprietary information.

"3. *Scientific information*

"This includes information on:

"(*a*) Planned and ongoing research, both governmental and private, to facilitate the co-ordination of research programmes so as to make the most effective use of available national and international resources;

"(*b*) The emission data needed for research;

"(*c*) Scientific results published in peer-reviewed literature on the understanding of the physics and chemistry of the Earth's atmosphere and of its susceptibility to change, in particular on the state of the ozone layer and effects on human health, environment and climate which would result from changes on all time-scales in either the total column content or the vertical distribution of ozone;

"(*d*) The assessment of research results and the recommendations for future research.

"4. *Technical information*

"This includes information on:

"(*a*) The availability and cost of chemical substitutes and of alternative technologies to reduce the emissions of ozone-modifying substances and related planned and ongoing research;

"(*b*) The limitations and any risks involved in using chemical or other substitutes and alternative technologies.

"5. *Socio-economic and commercial information on the substances referred to in annex I*

"This includes information on:

"(*a*) Production and production capacity;

"(*b*) Use and use patterns;

"(*c*) Imports/exports;

(*Continued on next page.*)

for cooperation in the technical fields, such as through the transfer of technology, taking into account the needs of developing countries.

65. The preamble to the United Nations Framework Convention on Climate Change acknowledges that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response" and reaffirms "the principle of sovereignty of States in international cooperation to address climate change". Article 4 (Commitments), paragraph 1, provides that all Parties should:

(*e*) Cooperate in preparing for adaptation to the impacts of climate change; …

…

(*g*) Promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies;

(*h*) Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies.[174]

2. Regional agreements

66. International cooperation is provided for in regional instruments in the field of transboundary air pollution, which include the following: (*a*) the Final Act of the Conference on Security and Cooperation in Europe,[175] which states that "[t]he participating States are resolved that co-operation in the field of the environment will be implemented in particular through … exchanges of scientific and technical information, documentation and research results"; and (*b*) the Convention on Long-range Transboundary Air Pollution, whose Parties, recalling in the preamble the Final Act of the Conference on Security and Cooperation in Europe, express their cognizance

of the references in the chapter on environment of the Final Act of the Conference on Security and Cooperation in Europe calling for co-operation to control air pollution and its effects, including long-range transport of air pollutants, and to the development through international co-operation of an extensive programme for the monitoring and evaluation of long-range transport of air pollutants … [and affirm] their willingness to reinforce active international co-operation to develop appropriate national policies and by means of exchange of information, consultation, research and monitoring, to co-ordinate national action for combating air pollution including long-range transboundary air pollution.

Article 4 of the Convention provides that

[t]he Contracting Parties shall exchange information on and review their policies, scientific activities and technical measures aimed at combating, as far as possible, the discharge of air pollutants which may have adverse effects, thereby contributing to the reduction of air pollution including long-range transboundary air pollution.[176]

67. The Eastern Africa Regional Framework Agreement on Air Pollution (Nairobi Agreement)[177] and the West and Central Africa Regional Framework Agreement on Air Pollution (Abidjan Agreement)[178] have identical provisions on international cooperation. They agree to the following actions as constituting forms of regional cooperation:

1.2 Consider the synergies and co-benefits of taking joint measures against the emission of air pollutants and greenhouse gases;

…

1.4 Promote the exchange of educational and research information on air quality management;

1.5 Promote regional cooperation to strengthen the regulatory institutions".

The Association of Southeast Asian Nations (ASEAN) Agreement on the Conservation of Nature and Natural Resources[179] provides in article 9 (Air) that "[t]he Contracting Parties shall, in view of the role of air in the functioning of natural ecosystems, endeavour to take all appropriate measures towards air quality management compatible with sustainable development". Its article 18 (Co-operative activities) provides that:

1. The Contracting Parties shall co-operate together and with the competent international organizations, with a view to co-ordinating their activities in the field of conservation of nature and management of natural resources and assisting each other in fulfilling their obligations under [the] Agreement.

2. To that effect, they shall endeavour:

…

(*b*) to the greatest extent possible, co-ordinate their research activities;

…

(*Footnote 173 continued.*)

"(*d*) The costs, risks and benefits of human activities which may indirectly modify the ozone layer and of the impacts of regulatory actions taken or being considered to control these activities.

"6. *Legal information*

"This includes information on:

"(*a*) National laws, administrative measures and legal research relevant to the protection of the ozone layer;

"(*b*) International agreements, including bilateral agreements, relevant to the protection of the ozone layer;

"(*c*) Methods and terms of licensing and availability of patents relevant to the protection of the ozone layer."

[174] Paragraph (*c*) also provides for cooperation on transfer of technology.

[175] Final Act of the Conference on Security and Cooperation in Europe, signed at Helsinki on 1 August 1975 (Lausanne, Imprimeries Réunies).

[176] See Flinterman, Kwiatkowska and Lammers, *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States.*

[177] Eleven countries—Burundi, Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, Sudan, Uganda, United Republic of Tanzania—agreed this framework agreement.

[178] This agreement documents the recommendations resulting from the West and Central Africa Subregional Workshop on Better Air Quality. Twenty-one countries—Angola, Benin, Burkina Faso, Cameroon, Cabo Verde, Chad, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo agreed to this recommendation.

[179] Not yet entered into force. The Agreement shall enter into force after the deposit of the sixth instrument of ratification. Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand signed the Agreement in 1985, and Myanmar acceded to it in 1997.

(*d*) to exchange appropriate scientific and technical data, information and experience, on a regular basis

…

3. In applying the principles of co-operation and co-ordination set forth above, the Contracting Parties shall forward to the Secretariat:

…

(*b*) Information, including reports and publications of a scientific, administrative or legal nature, and in particular information on:

– measures taken by the Parties in pursuance of the provisions of [the] Agreement

…

C. Previous work of the Commission

68. Provisions on international cooperation in the previous work of the Commission should also be noted. Article 8 (General obligation to cooperate) of the Convention on the Law of the Non-navigational Uses of International Watercourses, provides that: "[w]atercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse". Article 9 (Regular exchange of data and information) provides as follows:

1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature … as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

69. The articles on prevention of transboundary harm from hazardous activities provide in article 4 (Cooperation) that "States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof". It is stated in the commentary to this article that "[t]he principle of cooperation between States is essential in designing and implementing effective policies to prevent significant transboundary harm or at any event to minimize the risk thereof", and that "[p]rinciple 24 of the Stockholm Declaration and principle 7 of the Rio Declaration recognize cooperation as an essential element in any effective planning for the protection of the environment".[180]

70. The articles on the law of transboundary aquifers[181] provide in article 7 (General obligation to cooperate) that:

1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.

2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.

The second sentence of paragraph 4 of article 17 (Emergency situations) reads: "Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance."

71. The draft articles on the protection of persons in the event of disasters (provisionally adopted on first reading in 2014)[182] provide in draft article 8 (Duty to cooperate) that

in accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

With regard to the forms of cooperation, they provide in draft article 9 that "[f]or the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources". Further, draft article 10 (Cooperation for disaster risk reduction) provides that "[c]ooperation shall extend to the taking of measures intended to reduce the risk of disasters".

D. Judicial decisions

72. It may be appropriate here to briefly review how the International Court of Justice regarded the obligation of international cooperation in its recent cases. In the judgment in the 2010 *Pulp Mills* case, the Court emphasized linkages between the obligation to inform the Administrative Commission of the River Uruguay (CARU; an international organization), cooperation between the parties and the obligation of prevention. The Court noted that, "it is by co-operating that the States concerned can jointly manage the risks of damage to the environment…so as to prevent the damage in question".[183] When discussing the precise content of the parties' obligation to cooperate, the Court referred to the obligation to inform CARU which "allows for the initiation of cooperation between the

[180] Para. (1) of the commentary to draft article 4, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 98, at p. 155. The initial intention of Mr. Robert Q. Quentin-Baxter, the first Special Rapporteur, appointed in 1978, for the topic of international liability for the injurious consequences arising out of acts not prohibited by international law, was to establish a State "liability" regime in the realm of "lawfulness", in contrast to the regime of State "responsibility" in the realm of "wrongfulness". However, the focus of the project gradually shifted to "prevention" of transboundary harm and to "cooperation" for prevention as the Special Rapporteur was succeeded by Mr. Julio Barboza in 1985 and Mr. Pemmaraju Sreenivasa Rao in 1997. See O'Keefe, "Transboundary pollution and strict liability issue: the work of the International Law Commission on the topic of international liability for injurious consequences arising out of acts not prohibited by international law", pp. 178 *et seq.*; Barboza, "International liability for injurious consequences of acts not prohibited by international law and protection of the environment".

[181] General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

[182] *Yearbook … 2014*, vol. II (Part Two), paras. 55–56.

[183] *Pulp Mills* (see footnote 153 above), p. 49, para. 77.

Parties which is necessary in order to fulfil the obligation of prevention".[184] In addition, the Court stated that "[t]hese obligations [the procedural obligations of informing, notifying and negotiating] are all the more vital when a shared resource is at issue … which can only be protected through close and continuous co-operation between the riparian States".[185] According to the Court, "the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause".[186]

73. As compared with those of the *Pulp Mills* case, the problems surrounding the obligation to cooperate became more complicated in the 2014 *Whaling in the Antarctic* (*Australia v. Japan: New Zealand Intervening*) case.[187] It was concerned with the obligation of a State party (in this case, Japan) to cooperate with the International Whaling Commission. New Zealand suggested some grounds for the obligation of Japan to cooperate with International Whaling Commission and the Scientific Committee in its written observation, arguing that it could be derived either from article 65 of the United Nations Convention on the Law of the Sea,[188] from the interpretation of paragraph 30 of the Schedule under the International Convention for the Regulation of Whaling,[189] or from the advisory opinion of the International Court of Justice in the 1980 case of the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.[190] The Court referred to the "duty to co-operate with the [International Whaling Commission] and the Scientific Committee"[191] and the consequential "obligation to give due regard to recommendations [of the International Whaling Commission]",[192] but it did not elaborate on these points in its analyses of the relevant issues. It seems that the Court simply deduced the obligation to cooperate from the general duty of the States Parties to cooperate with treaty bodies.[193] To understand its position meaningfully, it could be considered that the Court based its holding, at least tacitly, on the same line of reasoning as that of the above-mentioned *Interpretation of the Agreement between the WHO and Egypt* advisory opinion, according to which a "special legal regime of mutual rights and obligations" has been created based on "the legal relationship between Egypt and the Organization … the very essence of which is a body of mutual obligations of co-operation and good faith".[194] This position of the Court may be regarded as consonant with the "trend" of the development of international law,[195] although whether the 1946 International Convention for the Regulation of Whaling could be construed as an evolutionary instrument that would justify such a holding is naturally quite a different matter.[196]

E. The principle of good faith

74. Before concluding the present chapter on the obligation of States to cooperate, it is necessary to ascertain the nature of the principle of "good faith" which lies at the heart of the international law of cooperation.[197] Today, good faith is no longer a merely abstract principle or one of a wholly ethical nature.[198] As is well-known, in the 1973 *Nuclear Tests* cases, the International Court of Justice affirmed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith" and that "[t]rust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential".[199] The Court reaffirmed this in the *Pulp Mills* case, stating that "the mechanism for co-operation between States is governed by the principle of good faith".[200] At the level of implementation of international rules, the Court specified that customary international law, as reflected in article 26 of the Vienna Convention on the Law of Treaties—i.e., the principle of *pacta sunt servanda*—"applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States".[201]

75. The concept of good faith has absorbed concrete legal content through the accumulation of relevant State

[184] *Ibid.*, p. 56, para. 102.

[185] *Ibid.*, p. 51, para. 81.

[186] *Ibid.*, p. 58, para. 113.

[187] *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)* (see footnote 124 above), p. 226.

[188] Written observations of New Zealand, paras. 94–97. It should be noted, however, that article 65 of the United Nations Convention on the Law of the Sea obliges States to cooperate with each other "through … international organizations" and not *with* them.

[189] Written observations of New Zealand, para. 95; See also *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)* (see footnote 124 above), p. 226, separate opinion of Judge *ad hoc* Charlesworth, at pp. 457–458, paras. 13–14.

[190] *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73.

[191] *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)* (see footnote 124 above), pp. 257 and 297, paras. 83 and 240.

[192] *Ibid.*, at pp. 257 and 269, paras. 83 and 137.

[193] *Ibid.*, at p. 257, para. 83.

[194] *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt* (see footnote 190 above), pp. 92–93, para. 43.

[195] Murase, "Legal aspects of international environmental regimes: ensuring compliance with treaty obligations".

[196] While the Court squarely rejected the idea of interpretation by subsequent agreement or subsequent practice (*Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)* (see footnote 124 above), p. 257, para. 83), not to mention "evolutionary interpretation" of the Convention, the Court nevertheless seems to have contradicted itself by introducing the idea of "evolutionary instrument" to which it gave, to use the words of Judge Hanqin Xue, a "creeping effect". (*ibid.*, separate opinion of Judge Hanqin Xue, p. 423, para. 11).

[197] It was noted by Hugo Grotius that "[f]or not only is every State sustained by good faith …. but also that greater society of States. Aristotle truly says that, if good faith has been taken away, 'all intercourse among men ceases to exist'". Grotius, *De jure belli ac pacis libri tres*, vol. 2, p. 860. See also O'Connor, *Good Faith in International Law*, pp. 56 *et seq.*, at pp. 81–106; Murase, "Function of the principle of good faith in international disputes …", pp. 569–595 (in Japanese); *ibid.* (translated by Yihe Qin), pp. 267–279 (in Chinese).

[198] See Verdross, *Völkerrecht*, pp. 131–132; Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, pp. 46–48.

[199] *Nuclear Tests (Australia v. France), Judgment* (see footnote 109 above), p. 268, para. 46, and *Nuclear Tests (New Zealand v. France), Judgment* (see footnote 109 above), p. 473, para. 49. See also *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 105, para. 94.

[200] *Pulp Mills* (see footnote 153 above), p. 67, para. 145.

[201] *Ibid.*

practice and the jurisprudence of international courts and tribunals, demonstrating its essential role at each stage of international law's life cycle:[202] first, in the creation of international rights and obligations,[203] second, on the level of interpretation and application of international rules,[204] and third, in implementation thereof by States.[205] Thus, the principle of good faith is expected to contribute to guaranteeing the "coherence and unity" of legal order in an international community composed of States with diverse values and conflicting interests.[206]

[202] See Murase, *International Law: An Integrative Perspective on Transboundary Issues*, pp. 68, 112–113.

[203] See *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 457, at p. 473, para. 49, and *Nuclear Tests (Australia v. France), Judgement* (see footnote 109 above), p. 268, para. 46, stating that "[j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."

[204] The function of good faith in interpretation and application is well known as is provided for in article 31, para. 1, of the Vienna Convention of the Law of Treaties. See, in detail, Rosenne, *Developments in the Law of Treaties 1945–1986*, pp. 137 *et seq.*; Sinclair, *The Vienna Convention of the Law of Treaties*, pp. 119–120; Gardiner, *Treaty Interpretation*, pp. 147–161.

[205] At the level of implementation, a typical example of a good faith provision is article 300 of the United Nations Convention on the Law of the Sea. There are three dimensions to be considered: (*a*) negotiation and consultation in good faith (e.g. *North Sea Continental Shelf* (see footnote 64 above) pp. 46–47, para. 85; *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, at p. 33, para. 78; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974,* p. 175, at p. 202, para. 70; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 46, at p. 299, para. 112); (*b*) exclusion of the abuse of rights (cf. *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); and (*c*) maintenance of a *régime* in good faith (e.g. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (see footnote 190 above), p. 96, para. 49).

[206] Kolb, *La bonne foi en droit international public …* , pp. 685–686. Schwarzenberger, in his *The Dynamics of International Law*, observed: "the rules on good faith fulfil a relativising function. They transform absolute legal rights into relative rights behind quasi-legal and quasi-logical façades, they temper the exercise of judicial discretion and contribute to an organic growth of the rules of international law. More clearly than any other rules, those on the interpretation of treaties and international responsibility bear witness to this dynamic function of good faith in the system of international law" (p. 71).

76. As the international community becomes increasingly integrated on a functional basis, to the extent of building an international regime for specific objectives, States parties to a treaty are required to fulfil their obligation to cooperate in good faith with other States parties and relevant international organizations. Specifically, the good faith obligation was present as a consideration as early as 1980, when the International Court of Justice rendered its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* that "the paramount consideration … in every case must be [the] clear obligation to co-operate in good faith to promote the objectives and purposes of [the regime]".[207] While it may still be premature in the field of the protection of the atmosphere to envisage a strong international regime in which a State party is required to fulfil such an obligation as an "agent" thereof, it appears that the international community is moving gradually in the direction of good faith in this and other fields.[208] Based on consideration of all of the above factors, the conclusion can be drawn that the principle of good faith is regarded as one of the basic principles of modern international law, and that it is essential for its intrinsic and underlying value as the basis for international cooperation.

77. On the basis of the foregoing, the following draft guideline is proposed:

"*Draft guideline 5. International cooperation*

"(*a*) States have the obligation to cooperate with each other and with relevant international organizations in good faith for the protection of the atmosphere.

"(*b*) States are encouraged to cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric degradation. Cooperation could include exchange of information and joint monitoring."

[207] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (see footnote 190 above), p. 96, para. 49.

[208] Murase, *International Lawmaking* (in Japanese), p. 575; *idem* (in Chinese), p. 272.

Chapter VI

Conclusion

78. In this second report, the Special Rapporteur has aimed at presenting the general draft guidelines on the definition and scope of the project, as well as three draft guidelines on the basic principles for the protection of the atmosphere (all three draft guidelines are reproduced in the annex hereto). These three basic principles—the common concern of humankind, the general obligation of States, and international cooperation—are fundamentally interconnected, forming a trinity for the protection of the atmosphere. Further, they are well established in State practice. As the Special Rapporteur stressed in his first report, and as members of the Commission have emphasized, the basic role of the Commission is to analyse the problems of special regimes such as international environmental law from the perspective of general international law.[209] In his third report in 2016, the Special Rapporteur will continue to use the same approach in proceeding with his study of the remaining basic principles, including *sic utere tuo ut alienum non laedas*, sustainable development and equity.

79. With regard to the future workplan, the Special Rapporteur initially indicated its content in his first report.[210] The members of the Commission wished to be presented with a more detailed plan of work extending beyond the current quinquennium. Set out directly below are the

[209] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667, paras. 17–18.

[210] *Ibid.*, para. 92.

details of the plan post-2016. It is hoped that the work on the topic will be completed by 2020.

THIRD REPORT (2016)

Part III. Basic principles (*continued*)

Draft guideline 6. Principle of *sic utere tuo ut alienum non laedas*

Draft guideline 7. Principle of sustainable development (utilization of the atmosphere and environmental impact assessment)

Draft guideline 8. Principle of equity

Draft guideline 9. Special circumstances and vulnerability

FOURTH REPORT (2017)

Part IV. Prevention and precaution

Draft guideline 10. Prevention

Draft guideline 11. Due diligence

Draft guideline 12. Precaution

FIFTH REPORT (2018)

Part V. Interrelationship with other relevant fields of international law

Draft guideline 13. Principles guiding interrelationship

Draft guideline 14. Law of the sea

Draft guideline 15. International trade law

Draft guideline 16. International human rights law

SIXTH REPORT (2019)

Part VI. Compliance and dispute settlement

Draft guideline 17. Compliance and implementation

Draft guideline 18. Dispute settlement

Draft preamble

Completion of the first reading of the draft guidelines

SEVENTH REPORT (2020)

Second reading of the draft guidelines

Annex

Draft guidelines

Part I. General guidelines

Draft guideline 1. Use of terms

For the purposes of the present draft guidelines,

(*a*) "atmosphere" means the envelope of gases surrounding the Earth, within which the transport and dispersion of degrading substances occurs;

(*b*) "air pollution" means the introduction by human activities, directly or indirectly, of substances or energy into the atmosphere resulting in deleterious effects on human life and health and the Earth's natural environment;

(*c*) "atmospheric degradation" includes air pollution, stratospheric ozone depletion, climate change and any other alterations of atmospheric conditions resulting in significant adverse effects to human life and health and the Earth's natural environment.

[Definition of other terms will be proposed at later stages.]

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 with other relevant fields of international law;

(*c*) Nothing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law.

Part II. Basic principles

Draft guideline 3. Common concern of humankind

The atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, and hence the degradation of atmospheric conditions is a common concern of humankind.

Draft guideline 4. General obligation of States to protect the atmosphere

States have the obligation to protect the atmosphere.

Draft guideline 5. International cooperation

(*a*) States have the obligation to cooperate with each other and with relevant international organizations in good faith for the protection of the atmosphere;

(*b*) States are encouraged to cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

CRIMES AGAINST HUMANITY

[Agenda item 10]

DOCUMENT A/CN.4/680*

First report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur**

[*Original: English*]
[*17 February 2015*]

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* Incorporating document A/CN.4/680/Corr.1.

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Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London, 8 August 1945); and Protocol Rectifying Discrepancy in Text of the Charter (Berlin, 6 October 1945)	United Nations *Treaty Series*, vol. 82, No. 251, p. 279. See also the text of the Berlin Protocol in *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 1 (1947), pp. 17–18.
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	Source
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Introduction

A. Inclusion of the topic in the Commission's programme of work

1. At its sixty-fifth session, in 2013, the International Law Commission decided to place the topic "Crimes against humanity" on its long-term programme of work.[1] After debate within the Sixth Committee in 2013,[2] the General Assembly took note of this development.[3] At its sixty-sixth session, in 2014, the Commission decided to move this topic onto its current programme of work and to appoint a Special Rapporteur. After debate within the Sixth Committee in 2014, the General Assembly took note of this step as well.[4]

B. Purpose and structure of the present report

2. The purpose of the present report is to address the potential benefits of developing draft articles that might serve as the basis of an international convention on crimes against humanity. Further, the report provides general background with respect to the emergence of the concept of crimes against humanity as an aspect of international law, its application by international courts and tribunals and its incorporation into the national laws of some States. Ultimately, the report proposes two draft articles: one on prevention and punishment of crimes against humanity and the other on the definition of such crimes.

3. Chapter I of the present report assesses the potential benefits resulting from a convention on crimes against humanity, which, if adhered to by States, include promoting the adoption of national laws that contain a widely accepted definition of such crimes and that allow for a broad ambit of jurisdiction when an offender is present in territory under the jurisdiction of the State party. Such a convention could also contain provisions obligating States parties to prevent crimes against humanity, to cooperate on mutual legal assistance for the investigation and prosecution of such crimes in national courts and to extradite or prosecute alleged offenders. The chapter notes the reactions of States in 2013 and 2014 to the Commission's selection of this topic, which were largely favourable, but which in some instances raised questions about the relationship of such a convention to other treaty regimes.

4. Consequently, chapter I also considers the relationship of such a convention to other treaty regimes, notably the Rome Statute of the International Criminal Court (hereinafter, "Rome Statute"). The International Criminal Court stands at the centre of efforts to address genocide, crimes against humanity and war crimes, and is one of the signature achievements in the field of international law. With 122 States parties as at January 2015, the Rome Statute provides a critical means for investigating and

[1] See *Yearbook ... 2013*, vol. II (Part Two), para. 170 and annex II.

[2] See topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666), para. 72; see also chap. I, sect. B, below.

[3] General Assembly resolution 68/112 of 16 December 2013, para. 8.

[4] See *Yearbook ... 2014*, vol. II (Part Two), para. 266; General Assembly resolution 69/118 of 10 December 2014, para. 7. For discussion of the debate in the Sixth Committee, see chap. I, sect. B, below.

prosecuting these crimes at the international level. A convention on crimes against humanity could help promote the investigation and prosecution of such crimes at the national level, thereby enhancing the complementarity system upon which the International Criminal Court is built, as well as promoting inter-State cooperation not addressed by the Rome Statute.

5. Chapter II of the present report provides general background with respect to the emergence of crimes against humanity as a concept of international law, including its progression from a crime associated with international armed conflict to a crime that can occur whenever there is a widespread or systematic attack directed against a civilian population by means of certain heinous acts. Further, chapter II notes the existence and application of crimes against humanity by contemporary international criminal tribunals, including the International Criminal Court. As noted above, the Court is built upon the principle of complementarity, whereby in the first instance the relevant crimes should be prosecuted in national courts, if national authorities are able and willing to investigate and prosecute the crime. With that in mind, chapter II also considers whether States have adopted national laws on crimes against humanity; whether those laws coincide with the definition of these crimes contained in article 7 of the Rome Statute; and whether those laws provide the State with the means to exercise jurisdiction over crimes occurring in its territory, crimes committed by its nationals, crimes that harm its nationals and/or crimes committed abroad by non-nationals against non-nationals in situations where the offender is present in the State's territory.

6. Chapter III notes that a wide range of existing multilateral conventions can serve as potential models for a convention on crimes against humanity, including those that promote prevention, criminalization and inter-State cooperation with respect to transnational crimes. Such conventions address offences such as genocide, war crimes, State-sponsored torture, enforced disappearance, transnational corruption and organized crime, crimes against internationally protected persons, and terrorism-related offences. Likewise, multilateral conventions on extradition, mutual legal assistance and statutes of limitation can provide important guidance with respect to those issues.

7. Chapter IV assesses the general obligation that exists in various treaty regimes for States to prevent and punish crimes. Since the obligation to punish is to be addressed in greater detail in subsequent draft articles, this part focuses on the obligation to prevent as it exists in numerous multilateral treaties, and considers the contours of such an obligation as discussed in the comments of treaty bodies, United Nations resolutions, case law and the writings of publicists. In the light of such information, chapter IV proposes an initial draft article that broadly addresses "prevention and punishment of crimes against humanity".

8. Chapter V turns to the definition of "crimes against humanity" for the purpose of the present draft articles. Article 7 of the Rome Statute marks the culmination of almost a century of development of the concept of crimes against humanity and expresses the core elements of the crime. In particular, the crime involves a "widespread or systematic attack"; an attack "directed against any civilian population", which means a course of conduct "pursuant to or in furtherance of a State or organizational policy to commit such attack"; a perpetrator who has "knowledge of the attack"; and an attack that occurs by means of the multiple commission of certain specified acts, such as murder, torture or rape. Contemporary case law of the International Criminal Court is refining and clarifying the meaning of such terms, relying to a degree on the jurisprudence of earlier tribunals. In recognition that the definition contained in article 7 of the Rome Statute is now widely accepted among States, and out of a desire to promote harmony between national and international efforts to address the crime, the proposed draft article uses the exact same definition of "crimes against humanity" as appears in article 7, except for three non-substantive changes that are necessary given the different context in which the definition is being used (such as replacing references to "Statute" with "present draft articles").

9. Finally, chapter VI briefly addresses the future programme of work on this topic.

Chapter I

Why a convention on crimes against humanity?

A. Objectives of a convention on crimes against humanity

10. As noted in the proposal for the topic adopted by the Commission at its sixty-fifth session in 2013,[5] in the field of international law three core crimes generally make up the jurisdiction of international criminal tribunals: war crimes; genocide; and crimes against humanity. Only two of these crimes (war crimes and genocide) are the subject of a global treaty that requires States to prevent and punish such conduct and to cooperate among themselves toward those ends. By contrast, there is no such treaty dedicated to preventing and punishing crimes against humanity.

11. Yet crimes against humanity may be more prevalent than either genocide or war crimes. Such crimes may occur in situations not involving armed conflict and do not require the special intent that is necessary for establishing genocide.[6] Moreover, treaties focused on prevention, punishment and inter-State cooperation exist for many far less egregious offences, such

[5] *Yearbook ... 2013*, vol. II (Part Two), annex II.

[6] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015,* p. 3, at p. 64, para. 139 ("The Court recalls that, in 2007, it held that the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution.") (citing to *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 pp. 121–122, paras. 187–188).

as corruption, bribery or organized crime. While some treaties address offences, such as State-sponsored torture or enforced disappearance of persons, which under certain conditions might also constitute crimes against humanity, those treaties do not address crimes against humanity as such.

12. Therefore, a global convention on prevention, punishment and inter-State cooperation with respect to crimes against humanity appears to be a key missing piece in the current framework of international law and, in particular, international humanitarian law, international criminal law and international human rights law. Such a convention could help to stigmatize such egregious conduct, could draw further attention to the need for its prevention and punishment and could help States to adopt and harmonize national laws relating to such conduct, thereby opening the door to more effective inter-State cooperation on prevention, investigation, prosecution and extradition for such crimes. In building a network of cooperation, as has been done with respect to other offences, sanctuary would be denied to offenders, which would thereby—it is hoped—both help to deter such conduct *ab initio* and to ensure accountability *ex post*.[7]

13. Hence, the overall objective for this topic will be to draft articles for what could become a convention on the prevention and punishment of crimes against humanity (hereinafter, "convention on crimes against humanity" or "convention"). Using the definition of crimes against humanity embodied in the Rome Statute, the convention could require all States parties to take effective measures to prevent crimes against humanity in any territory under their jurisdiction. One such measure would be for States parties to criminalize the offence in its entirety in their national law, a step that most States have not yet taken. Further, the convention could require each State party to exercise jurisdiction not just with respect to acts that occur on its territory or by its nationals, but also with respect to acts committed abroad by nonnationals who later are present in territory under the State party's jurisdiction.

14. Moreover, the convention could require robust inter-State cooperation by the parties for investigation, prosecution and punishment of the offence, including through the provision of mutual legal assistance and extradition. The convention could also impose an *aut dedere aut judicare* obligation when an alleged offender is present in territory under a State party's jurisdiction. The convention could also contain other relevant obligations, such as an obligation for compulsory dispute settlement between States parties whenever a dispute arises with respect to the interpretation or application of the convention.

15. The convention would not address other serious crimes, such as genocide or war crimes, which are already the subject of widely-adhered-to global treaties relating to their prevention and punishment. An argument can be made that existing global treaties on genocide and war crimes could be updated through a new instrument, and there is support among some States[8] and non-State actors[9] for an expanded initiative of that kind. Bearing in mind that several States have suggested that work on this topic should complement rather than overlap with existing legal regimes,[10] the present topic focuses on the most prominent gap in such regimes, where the need for a new instrument appears the greatest. The Commission, of course, remains open to the views of States and others as it proceeds with this topic, and ultimately it will be for States to decide whether the scope of the Commission's work is optimal.

B. Reactions by States

16. In the course of the debate within the Sixth Committee in 2013, several delegations supported adding the topic of crimes against humanity to the agenda of the Commission,[11] and noted the value of having such a convention. For example, the Nordic countries indicated that

> robust inter-State cooperation for the purpose of investigation, prosecution and punishment of such crimes was crucial, as was the obligation to extradite or prosecute alleged offenders, regardless of their nationality. Hence the need for the Commission to conduct a legal analysis of the obligation to extradite or prosecute and to identify clear principles in that regard. Additional clarity on the scope of application of that obligation would help ensure maximum effect and compliance with existing rules.[12]

17. At the same time, other delegations cautioned that the drafting of such a convention must be addressed in a prudent manner,[13] with a particular emphasis on avoiding any conflicts with existing international regimes,

[7] For calls within the academic community for such a convention, see Bassiouni, "'Crimes against humanity': the need for a specialized convention"; Bassiouni, "Crimes against humanity: the case for a specialized convention"; Sadat, *Forging a Convention for Crimes against Humanity*; Bergsmo and Song, *On the Proposed Crimes against Humanity Convention*.

[8] See "Towards a multilateral treaty for mutual legal assistance and extradition for domestic prosecution of the most serious international crimes", a non-paper informally circulated by Argentina, Belgium, the Netherlands and Slovenia at the Sixth Committee in November 2013. A resolution on this initiative was presented before the Commission on Crime Prevention and Criminal Justice, but was withdrawn after extensive debate in the Committee of the Whole, where several delegations raised "serious concerns" regarding the competence of that Commission in this matter. See Commission on Crime Prevention and Criminal Justice, Report on the twenty-second session, *Official Records of the Economic and Social Council, 2013, Supplement No. 10* (E/2013/30), paras. 64–66.

[9] See Zgonec-Rožej and J. Foakes, "*International criminals: extradite or prosecute?*", Chatham House Briefing Paper No. IL BP 2013/01 (July 2013), p. 16.

[10] See, e.g., A/CN.4/666 (footnote 2 above), para. 72.

[11] Austria, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee,* 17th meeting (A/C.6/68/SR.17), para. 74; Czech Republic, *ibid.*, 18th meeting (A/C.6/68/SR.18), para. 102; Italy, *ibid.*, 19th meeting (A/C.6/68/SR.19), para. 10; statement to the Sixth Committee by Japan (on file with the Codification Division (see also, generally, *ibid.*, 17th meeting, A/C.6/68/SR.17, paras. 79–85)); Mongolia, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee,* 19th meeting (A/C.6/68/SR.19), para. 79; Norway, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *ibid.*, 17th meeting, (A/C.6/68/SR.17) para. 36; Peru, *ibid.*, 18th meeting (A/C.6/68/SR.18), para. 28; United States of America, *ibid.*, 17th meeting (A/C.6/68/SR.17), para. 51.

[12] Statement to the Sixth Committee by Norway (on behalf of the Nordic countries), *ibid.*, 17th meeting (A/C.6/68/SR.17), para. 38.

[13] China, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee,* 19th meeting (A/C.6/68/SR.19), para. 61; *ibid.*, India, para. 21; Malaysia, *ibid.*, para. 33; Romania, *ibid.*, 18th meeting (A/C.6/68/SR.18), para. 116; Spain, *ibid.*, 17th meeting (A/C.6/68/SR.17), para. 133; United Kingdom of Great Britain and Northern Ireland, *ibid.*, 18th meeting (A/C.6/68/SR.18), para. 22.

including the International Criminal Court.[14] A few delegations expressed doubts about whether a convention on this topic was really needed,[15] while a few others supported the drafting of a new convention but with a scope wider than crimes against humanity.[16]

18. Most of the 23 States that addressed the issue before the Sixth Committee in 2014 welcomed the inclusion of this topic on the Commission's current programme of work.[17] Three States did not expressly support the topic, but acknowledged that a gap existed in current treaty regimes with respect to crimes against humanity, which could benefit from further study,[18] while yet another State maintained that the topic should be "treated with great caution".[19] Four States, however, expressed the view that there existed no lacuna in the existing international law framework in relation to crimes against humanity, given the existence of the Rome Statute.[20] Finally, two States favoured pursuing a new convention, but in an alternative forum and with an alternative approach that would emphasize a wider range of crimes, but for narrower purposes limited to extradition and mutual legal assistance.[21]

[14] See, e.g., Malaysia, *ibid.*, 19th meeting (A/C.6/68/SR.19), para. 33. Malaysia was of the view that the study "should not undermine the intended universality of the Rome Statute, nor should it overlap with existing regimes, but rather seek to complement them"); United Kingdom, *ibid.*, 18th meeting (A/C.6/68/SR.18), para. 22 (stressing "that any new conventions in this area must be consistent with and complementary to the [Rome] Statute"); Spain, *ibid.*, 17th meeting (A/C.6/68/SR.17), para. 133 (should this topic be undertaken, "[i]t would require a careful analysis of the specific elements of a definition to be included in a convention and its precise relationship with the Rome Statute and the International Criminal Court, without overstepping their provisions"); Norway (on behalf of the Nordic countries), *ibid.*, para. 39 ("recognition of a duty to prevent such crimes and an obligation of inter-State cooperation would be welcome, but must not be misconstrued so as to limit similar existing obligations *vis-à-vis* other crimes, or existing legal obligations in the field.").

[15] France, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 17th meeting (A/C.6/68/SR.17), para. 106; statement to the Sixth Committee by the Islamic Republic of Iran (on file with the Codification Division; see also *ibid.*, 19th meeting (A/C.6/68/SR.19), para. 79); Russian Federation, *Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee*, 19th meeting (A/C.6/68/SR.19), para. 56; South Africa, *ibid.*, 18th meeting (A/C.6/68/SR.18), paras. 51–58.

[16] Netherlands, *ibid.*, 18th meeting (A/C.6/68/SR.18), para. 37; Slovenia, *ibid.*, 21st meeting (A/C.6/68/SR.21), para. 56.

[17] Austria, *ibid.*, *Sixty-ninth Session*, *Sixth Committee*, 19th meeting (A/C.6/69/SR.19), para. 111; Croatia, *ibid.*, 20th meeting (A/C.6/69/SR.20), paras. 92–93; Czech Republic, *ibid.*, para. 10; El Salvador, *ibid.*, para. 91; Finland (on behalf of the Nordic countries), *ibid.*, 19th meeting (A/C.6/69/SR.19), para. 81; Israel, *ibid.*, 20th meeting (A/C.6/69/SR.20), para. 67; Jamaica, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 33; Japan, *ibid.*, 20th meeting (A/C.6/69/SR.20), para. 49; Republic of Korea, *ibid.*, 21st meeting (A/C.6/69/SR.21), para. 45; Mongolia, *ibid.*, 24th meeting (A/C.6/69/SR.24), para. 94; New Zealand, *ibid.*, 21st meeting (A/C.6/69/SR.21), para. 33; Poland, *ibid.*, 20th meeting (A/C.6/69/SR.20), para. 36; Spain, *ibid.*, 21st meeting (A/C.6/69/SR.21), para. 42; Trinidad and Tobago, *ibid.*, 26th meeting (A/C.6/69/SR.26), para. 118; United States, *ibid.*, 20th meeting (A/C.6/69/SR.20), para. 121.

[18] Chile, *ibid.*, 24th meeting (A/C.6/69/SR.24), para. 52; Italy, *ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 54; United Kingdom, *ibid.*, 19th meeting (A/C.6/69/SR.19), para. 160.

[19] Romania, *ibid.*, 19th meeting (A/C.6/69/SR.19), para. 147.

[20] France, *ibid.*, 22nd meeting (A/C.6/69/SR.22), para. 38; Malaysia, *ibid.*, 27th meeting (A/C.6/69/SR.27), para. 54; Netherlands, *ibid.*, 20th meeting (A/C.6/69/SR.20), paras. 15–16; South Africa, *ibid.*, para. 114.

[21] Netherlands, *ibid.*, 20th meeting (A/C.6/69/SR.20), paras. 15–17; Ireland, *ibid.*, 19th meeting (A/C.6/69/SR.19), para. 177.

19. In commenting favourably, States mentioned that work on the topic would help develop international criminal law[22] and would build upon the prior work of the Commission,[23] such as by considering how an extradite-or-prosecute regime might operate for crimes against humanity.[24] At the same time, several States expressed the view that work on the topic must avoid conflicts with existing legal instruments, notably the Rome Statute.[25] On balance, the views of Governments at present appear to be that there is value in developing a new convention, but that it must be pursued carefully, with particular attention to its relationship to existing international regimes, especially the Rome Statute.

C. Relationship of a convention on crimes against humanity to other treaties, including the Rome Statute

20. The relationship of a convention on crimes against humanity to other treaties is an extremely important issue that will guide the Commission in its work. Many of the acts that fall within the scope of crimes against humanity (when they are done as part of a widespread or systematic attack directed against a civilian population) are also acts addressed in existing treaty regimes, such as the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, "Genocide Convention") and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, "Convention against Torture"). A convention on crimes against humanity should build upon the text and techniques of relevant existing treaty regimes, but should also avoid any conflict with those regimes.

21. In particular, a convention on crimes against humanity should avoid any conflict with the Rome Statute. Certainly the drafting of a new convention should draw upon the language of the Rome Statute, as well as associated instruments and jurisprudence, whenever appropriate. But the new convention should avoid any conflict with the Rome Statute, given the large number of States that have adhered thereto. For example, in the event that a State party to the Rome Statute receives a request from the International Criminal Court for the surrender of a person to the Court and also receives a request from another State for extradition of the person pursuant to the proposed convention, article 90 of the Rome Statute provides a procedure to resolve the competing requests. The draft articles should be crafted to ensure that States parties to the Rome Statute can follow that procedure even after joining the convention on crimes against humanity. Moreover, in several ways, the adoption of a convention could promote desirable objectives not addressed in the Rome Statute, while simultaneously supporting the mandate of the International Criminal Court.

[22] Croatia, *ibid.*, 20th meeting (A/C.6/69/SR.20), para. 94; Japan, *ibid.*, para. 49.

[23] Croatia, *ibid.*, paras. 94–97; Czech Republic, *ibid.*, para. 10.

[24] Chile, *ibid.*, 24th meeting (A/C.6/69/SR.24), para. 52; Finland (on behalf of the Nordic countries), *ibid.*, 19th meeting (A/C.6/69/SR.19), para. 82; United Kingdom, *ibid.*, para. 159.

[25] Chile (A/C.6/69/SR.24, para. 52); Italy (A/C.6/69/SR.22, para. 54); Mongolia (A/C.6/69/SR.24, paras. 94–95); Romania (A/C.6/69/SR.19, para. 147); Trinidad and Tobago (A/C.6/69/SR.26, para. 118); United Kingdom (A/C.6/69/SR.19, para. 160).

22. First, the Rome Statute regulates relations between its States parties and the International Criminal Court, but does not regulate matters among the parties themselves (nor among parties and non-parties). In other words, the Rome Statute is focused on the "vertical" relationship of States to the International Criminal Court, but not the "horizontal" relationship of inter-State cooperation. Part IX of the Rome Statute on "International cooperation and judicial assistance" implicitly acknowledges that inter-State cooperation on crimes within the jurisdiction of the International Criminal Court should continue to operate outside the Rome Statute, but does not direct itself to the regulation of that cooperation. A convention on crimes against humanity could expressly address inter-State cooperation on the investigation, apprehension, prosecution and punishment in national legal systems of persons who commit crimes against humanity,[26] an objective fully consistent with the object and purpose of the Rome Statute.

23. Second, the International Criminal Court is focused upon punishment of persons for the crimes within its jurisdiction, not upon steps that should be taken by States to prevent such crimes. As discussed in greater detail in chapter IV below, a new convention on crimes against humanity could include obligations relating to prevention that draw upon comparable obligations in other treaties, such as the Genocide Convention and the Convention against Torture. As such, a convention on crimes against humanity could clarify a State's obligation to prevent crimes against humanity and provide a basis for holding States accountable in that regard.

24. Third, while the International Criminal Court is a key international institution for prosecution of high-level persons who commit these crimes, the Court was not designed (nor given the resources) to prosecute all persons responsible for crimes against humanity. Rather, the Court is predicated on the notion that, in the first instance, national jurisdictions are the proper place for prosecution in the event that appropriate national laws are in place (the principle of complementarity).[27] Further, in some circumstances, the Court may wish to transfer a suspect in its custody for prosecution in a national jurisdiction, but may be unable to do so if the national jurisdiction is not capable of charging the suspect with crimes against humanity.[28] Given that the Court does not have the capacity to prosecute all persons responsible for crimes against humanity, or to strengthen national legal systems in this regard, a new convention could help reinforce the Court by developing greater capacity at the national level for prevention and punishment of such crimes.[29]

25. Finally, and relatedly, a convention on crimes against humanity would require the enactment of national laws that criminalize crimes against humanity, something which, as discussed in the present chapter, many States have currently not done, including many States Parties to the Rome Statute. In particular, a convention could require States to exercise jurisdiction over an offender present in its territory even when the offender is a non-national and committed the crime abroad.[30] Upon joining the convention, States without such laws would be expressly obliged to enact them. States with such laws would be obliged to review them to determine whether they encompass the full range of heinous conduct covered by the convention, and allow for the exercise of jurisdiction over offenders.

26. As such, rather than conflict with other treaty regimes, a well-designed convention on crimes against humanity could help fill a gap[31] in existing treaty regimes and, in doing so, simultaneously reinforce those regimes.

[26] See Olson, "Re-enforcing enforcement in a specialized convention on crimes against humanity …".

[27] El Zeidy, *The Principle of Complementarity in International Criminal Law …*; Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*.

[28] Such circumstances arose, for example, before the International Tribunal for Rwanda in the *Bagaragaza* case. See *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, Appeals Chamber, International Tribunal for Rwanda, 30 August 2006, *Reports of Orders, Decisions and Judgements*, 2006, para. 471 ("the Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law").

[29] See statement to the Sixth Committee by Austria on 28 October 2013 ("The Rome Statute of the International Criminal Court certainly cannot be the last step in the endeavour to prosecute such crimes and to combat impunity. The Court is only able to deal with a few major perpetrators, but this does not take away the primary responsibility of states to prosecute crimes against humanity.").

[30] See Akhavan, "The universal repression of crimes against humanity before national jurisdictions … ", p. 31 (noting that "whatever implicit duty to prosecute may arguably exist [in the Rome Statute] does not extend to universal jurisdiction" and that, as of 2009, only 11 European Union and 8 African Union member States had enacted laws allowing for such jurisdiction with respect to crimes against humanity).

[31] See, e.g., statement to the Sixth Committee by Slovenia on 30 October 2013 ("This legal gap in the international law has been recognized for some time and is particularly evident in the field of State cooperation, including mutual legal assistance and extradition. We believe all efforts should be directed at filling this gap.").

Chapter II

Background to crimes against humanity

A. Concept of crimes against humanity

27. The concept of "crimes against humanity" is generally seen as having two broad features. First, the crime is so heinous that it is viewed as an attack on the very quality of being human.[32] Second, the crime is so heinous that it is an attack not just upon the immediate victims, but also against all humanity, and hence the entire community of humankind has an interest in its punishment. It has been noted that

> [w]hilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind

[32] Arendt characterized the Holocaust as a "new crime, the crime against humanity—in the sense of a crime 'against human status,' or against the very nature of mankind". Arendt, *Eichmann in Jerusalem …*, p. 268.

… Because of their heinousness and magnitude they constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.[33]

28. As discussed below, the concept of "crimes against humanity" has evolved over the past century, with watershed developments in the Charter of the International Military Tribunal (Nürnberg Charter) and the Charter of the International Military Tribunal for the Far East (Tokyo Charter),[34] and important refinements in the statutes and case law of contemporary international criminal tribunals, including the International Criminal Court.[35] Although the codification and application of the crime has led to some doctrinal divergences, the concept contains several basic elements that are common across all formulations of the crime. The crime is an international crime; it matters not whether the national law of the territory in which the act was committed has criminalized the conduct. The crime is directed against a civilian population and hence has a certain scale or systematic nature that generally extends beyond isolated incidents of violence or crimes committed for purely private purposes. The crime can be committed within the territory of a single State or can be committed across borders. Finally, the crime concerns the most heinous acts of violence and persecution known to humankind. A wide range of scholarship has analysed these various elements.[36]

B. Historical emergence of the prohibition of crimes against humanity

29. An important forerunner of the concept of "crimes against humanity" is the "Martens clause" of the Conventions II and IV respecting the Laws and Customs of War on Land (the 1899 and 1907 Hague Conventions), the latter of which made reference to the "laws of humanity, and the dictates of the public conscience" when crafting protections for persons in time of war.[37] That clause is typically understood as indicating that, until there exists a comprehensive codification of the laws of war, principles of "humanity" offer residual protection.[38]

30. The Hague Conventions addressed conduct occurring in inter-State armed conflicts, not violence by a Government directed against its own people. In the aftermath of the First World War, further thought was given to whether international law regulated atrocities inflicted domestically by a Government. In 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented a report to the post-First World War Paris Peace Conference which, after referencing the Martens clause, identified various crimes for which persons might be prosecuted with respect to

[33] *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment, Appeals Chamber, the International Tribunal for the Former Yugoslavia, 7 October 1997, *Judicial Reports 1997*, para. 21, joint separate opinion of Judges McDonald and Judge Vohrah; see Luban, "A theory of crimes against humanity", p. 85, para. 90 ("We are creatures whose nature compels us to live socially, but who cannot do so without artificial political organization that inevitably poses threats to our well-being, and, at the limit, to our very survival. Crimes against humanity represent the worst of those threats; they are the limiting case of politics gone cancerous"); see also Vernon, "What is crime against humanity?"; Macleod, "Towards a philosophical account of crimes against humanity".

[34] Charter of the International Military Tribunal for the Far East, 19 January 1946, reproduced in *Documents on American Foreign Relations*, vol. VIII, Princeton University Press, 1948, p. 355.

[35] See generally Ricci, *Crimes against Humanity: A Historical Perspective*; López Goldaracena, *Derecho internacional y crímenes contra la humanidad*; Parenti, *Los crímenes contra la humanidad y el genocidio en el derecho internacional*; Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*; Geras, *Crimes against Humanity: Birth of a Concept*.

[36] Schwelb, "Crimes against humanity", p. 181; Dautricourt, "Crime against humanity: European views on its conception and its future"; Graven, "Les crimes contre l'humanité"; Aronéanu, *Le crime contre l'humanité*; Ramella, *Crímenes contra la humanidad*; Ramella, *Crimes contra a humanidade*; Sturma, "K návrhu Kodexu zločinů proti míru a bezpečnosti lidstva"; Richard, *L'histoire inhumaine: massacres et génocides des origines à nos jours*; Delmas-Marty *et al.*, "Le crime contre l'humanité, les droits de l'homme et l'irréductible humain"; Becker, *Der Tatbestand des Verbrechens gegen die Menschlichkeit*; Dinstein, "Crimes against humanity"; Lippman, "Crimes against humanity"; Chalandon and Nivelle, *Crimes contre l'humanité—Barbie, Touvier, Bousquet, Papon*; Van Schaack, "The definition of crimes against humanity: resolving the incoherence"; Bassiouni, *Crimes against Humanity in International Law*; Bazelaire and Cretin, *La justice internationale, son évolution, son avenir, de Nuremberg à La Haye*; Gil Gil, "Die Tatbestände der Verbrechen gegen die Menschlichkeit und des Völkermordes im Römischen Statut des Internationalen Strafgerichtshofs"; Greppi, *I crimini di guerra e contro l'umanità nel diritto internazionale*; Kittichaisaree, *International Criminal Law*, p. 85; Jurovics, *Réflexions sur la spécificité du crime contre l'humanité*; Palombino, "The overlapping between war crimes and crimes against humanity in international criminal law"; Cassese, "Crimes against humanity", p. 375; Lattimer and Sands, *Justice for Crimes against Humanity*; Manske, *Verbrechen gegen die Menschlichkeit als Verbrechen an der Menschheit*; Romero Mendoza, *Crímenes de Lesa Humanidad: Un Enfoque Venezolano*; Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des Internationalen Strafgerichtshofes*; Ambos, *Estudios de Derecho Penal Internacional*, p. 303; Shelton, *Encyclopedia of Genocide and Crimes against Humanity*; May, *Crimes against Humanity: A Normative Account*; Capellà i Roig, *La Tipificación Internacional de los Crímenes contra la Humanidad*; Moir, "Crimes against humanity in historical perspective"; Ambos and Wirth, "El Derecho Actual sobre Crímenes en Contra de la Humanidad", p. 167 ; Slye, "Refugee jurisprudence, crimes against humanity, and customary international law"; Cassese, *International Criminal Law*, p. 98; Márquez Carrasco, *El Proceso de Codificación y Desarrollo Progresivo de los Crímenes Contra la Humanidad*; Eboe-Osuji, "Crimes against humanity: directing attacks against a civilian population"; Morlachetti, "Imprescriptibilidad de los crímenes de lesa humanidad"; Delmas-Marty *et al.*, *Le crime contre l'humanité*; Doria, "Whether crimes against humanity are backdoor war crimes"; Kirsch, *Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit*; Kirsch, "Two kinds of wrong: on the context element of crimes against humanity"; Kuschnik, *Der Gesamttatbestand des Verbrechens gegen die Menschlichkeit: Herleitungen, Ausprägungen, Entwicklungen*; Garibian, *Le crime contre l'humanité au regard des principes fondateurs de l'Etat moderne: Naissance et consécration d'un concept*; Amati, "I crimini contro l'umanità"; Van der Wolf, *Crimes against Humanity and International Law*; Van den Herik, "Using custom to reconceptualize crimes against humanity"; DeGuzman, "Crimes against humanity"; Acquaviva and Pocar, "Crimes against humanity"; Dondé Matute, *Tipos Penales en el Ámbito Internacional*, pp. 97 *et seq.*; Bettati, "Le crime contre l'humanité"; Bosly and Vandermeersch, *Génocide, crimes contre l'humanité et crimes de guerre face à la justice*; Dhena, *Droit d'ingérence humanitaire et normes internationales impératives*; Focarelli, *Diritto Internazionale*, vol. I, pp. 485 *et seq.*; Valencia Villa, "Los crímenes de lesa humanidad: su calificación en América Latina y algunos comentarios en el caso colombiano"; Sadat, "Crimes against humanity in the modern age".

[37] 1907 Hague Convention, preamble. The 1907 version of the clause provides:

"Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

[38] See Meron, "The Martens clause, principles of humanity, and dictates of public conscience".

conduct during the war.[39] The Commission advocated including atrocities by a Government against its own people within the scope of what would become the Treaty of Versailles, so that prosecutions before international and national tribunals would address crimes in violation of both "the established laws and customs of war" and "the elementary laws of humanity".[40] The Commission therefore called for the establishment of an international commission to prosecute senior leaders, with the applicable law being "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience".[41]

31. No "crimes against humanity", however, were ultimately included in articles 228 and 229 of the Treaty of Versailles; those provisions relate solely to war crimes. As such, no prosecutions for crimes against humanity occurred relating to the First World War,[42] but the seeds were sown for such prosecutions in the aftermath of the Second World War.[43] The Nürnberg Charter, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, as amended by the Berlin Protocol,[44] included "crimes against humanity" as a component of the jurisdiction of the Tribunal. The Nürnberg Charter defined such crimes in article 6 (*c*), as

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

32. This definition of crimes against humanity was linked to the existence of an international armed conflict; the acts only constituted crimes under international law if committed in execution of or in connection with "any crime within the jurisdiction of the Tribunal", meaning a crime against peace or a war crime. As such, the justification for intruding into matters that traditionally were within the national jurisdiction of a State was based on the crime's connection to inter-State conflict. That connection, in turn, suggested heinous crimes occurring on a large scale, perhaps as part of a pattern of conduct.[45] The International Military Tribunal, charged with trying the senior political and military leaders of the Third Reich, convicted several defendants for crimes against humanity committed during the war,[46] though in some instances the connection of those crimes with other crimes in the Tribunal's jurisdiction was tenuous.[47]

33. After the first trial of senior German leaders,[48] further individuals were convicted of crimes against humanity during the trials conducted by the occupation authorities pursuant to Control Council Law No. 10.[49] For example, crimes against humanity played a part in all 12 of the subsequent trials conducted by occupation authorities of the United States of America.[50] Control Council Law No. 10 did not expressly provide that crimes against humanity must be connected with a crime against peace or a war crime; while in some of the trials that connection was maintained, in others it was not.[51] The *Justice Case* did not maintain the connection, but did determine that crimes against humanity entail more than isolated cases of atrocity or persecution and require "proof of conscious participation in systematic government organized or approved procedures".[52] German national courts also applied Control Council Law No. 10 in hundreds of cases and in doing so did not require a connection with war crimes or crimes against peace.[53]

[39] Report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32 (1919), partially reprinted in AJIL, vol. 14 (1920), p. 95.

[40] *Ibid.*, p. 115.

[41] *Ibid.*, p. 122; see Bassiouni, "World War I: 'The war to end all wars' and the birth of a handicapped international criminal justice system".

[42] The various other post-war treaties, such as the 1919 Treaty of Saint-Germain-en-Laye, the 1919 Treaty of Neuilly-sur-Seine, the 1920 Treaty of Trianon and the 1923 Treaty of Lausanne, also contained no reference to crimes against humanity.

[43] See Clark, "History of efforts to codify crimes against humanity". On the role of Sir Hersch Lauterpacht in developing crimes against humanity as one of the headings for prosecutions at Nuremberg, see Lauterpacht, *The Life of Hersch Lauterpacht*, p. 272, and the review by S. Schwebel in BYBIL, vol. 83 (2013), p. 143.

[44] Protocol Rectifying Discrepancy in Text of Charter. The Berlin Protocol replaced a semi-colon after "during the war" with a comma, so as to harmonize the English and French texts with the Russian text. The effect of doing so was to link the first part of the provision to the latter part of the provision ("in connection with any crime within the jurisdiction of the Tribunal"), and hence to the existence of an international armed conflict.

[45] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 179 ("Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.").

[46] See Clark, "Crimes against humanity at Nuremberg"; Mansfield, "Crimes against humanity: reflections on the fiftieth anniversary of Nuremberg and a forgotten legacy".

[47] See, e.g., *Prosecutor v. Kupreškić and others*, Case No. IT-95-16-T, Judgment, Trial Chamber, the International Tribunal for the Former Yugoslavia, 14 January 2000, *Judicial Reports 2000*, para. 576 (noting the tenuous link between the crimes against humanity committed by Baldur von Schirach and the other crimes within the jurisdiction of the International Military Tribunal) (hereinafter, "*Kupreškić 2000*").

[48] Crimes against humanity were also within the jurisdiction of the International Military Tribunal for the Far East. See Tokyo Charter, art. 5 (*c*). No persons, however, were convicted of this crime by that Tribunal; rather, the convictions concerned war crimes against persons other than Japanese nationals that occurred outside Japan. See Boister and Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, pp. 32, 194 and 328–330.

[49] Control Council Law No. 10 regarding Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, in *Official Gazette of the Control Council for Germany*, No. 3 (1946), p. 50. Control Council Law No. 10 recognized crimes against humanity as: "Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." *Ibid.*, art. II, para. 1 (*c*).

[50] Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, pp. 69, 92 and 118–119; see Brand, "Crimes against humanity and the Nürnberg trials"; Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, p. 85.

[51] See, e.g., *United States of America v. Flick et al.*, *Law Reports of Trials of War Criminals* (London, HM Stationery Office, 1947), vol. III, pp. 1212–1214.

[52] See, e.g., *United States of America v. Altstoetter et al.* ("*Justice Case*"), *ibid.*, pp. 974 and 982.

[53] See Vultejus, "Verbrechen gegen die Menschlichkeit".

34. The principles of international law recognized in the Nürnberg Charter were noted and reaffirmed in 1945–1946 by the General Assembly,[54] which also directed the Commission to "formulate" those principles and to prepare a draft code of offences.[55] The Commission then studied and distilled the principles in 1950 as the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (hereinafter, "Nürnberg Principles"), which defined crimes against humanity in principle VI (*c*) as

[m]urder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.[56]

In its commentary to this principle, the Commission emphasized that the crime need not be committed during a war, but maintained that pre-war crimes must nevertheless be in connection with a crime against peace.[57] At the same time, the Commission maintained that "acts may be crimes against humanity even if they are committed by the perpetrator against his own population".[58]

35. Although the Commission's Nürnberg Principles continued to require a connection between crimes against humanity and war crimes or crimes against the peace, that connection was omitted in the Commission's draft code of offences against the peace and security of mankind of 1954. That draft code identified as one of the offences against the peace and security of mankind:

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.[59]

When explaining the final clause of that offence, the Commission said that

in order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State.[60]

36. There was hope that in the 1950s it would be possible to establish a permanent international criminal court, but the General Assembly deferred action on the Commission's 1954 draft code of offences, indicating that first the crime of aggression should be defined.[61] Some attention was then focused on developing national laws with respect to the crime. In that regard, the 1968 Convention on the NonApplicability of Statutory Limitations to War Crimes and Crimes against Humanity called upon States to criminalize nationally "crimes against humanity" and to set aside statutory limitations on prosecuting the crime.[62] As the first definition of crimes against humanity in a multilateral convention drafted and adhered to by several States, it bears noting that the definition contained in article 1 (*b*) of that Convention referred to

[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the [Nürnberg] Charter … and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations.

37. Consisting of just four substantive articles, the 1968 Convention is narrowly focused on statutory limitations; while it does call upon States parties to take steps "with a view to making possible" (art. III) extradition for the crime, the Convention does not expressly obligate a party to exercise jurisdiction over crimes against humanity. As at January 2015, the Convention has attracted adherence by 55 States.

38. In 1981, the General Assembly invited the Commission to resume its work on the draft code of offences.[63] In 1991, the Commission completed on first reading a draft code of crimes against the peace and security of mankind.[64] The General Assembly then invited the Commission, within the framework of the draft code, to consider further the question of establishing an international criminal jurisdiction to address such crimes, including proposals for a permanent international criminal court.[65] Completion of the project became especially pertinent after the establishment of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda (discussed below), and the emergence of greater support for a permanent international criminal court. In 1996, the Commission completed a second reading of the draft Code of Crimes.[66] The 1996 draft Code of Crimes against the Peace and Security of Mankind listed in article 18 a series of acts that constituted crimes against humanity "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group".[67] In explaining that opening clause, the Commission commented:

(3) The opening clause of this definition establishes the two general conditions which must be met for one of the prohibited acts to qualify as a crime against humanity covered by the Code. The first condition requires that the act was "committed in a systematic manner or on a large scale". This first condition consists of two alternative

[54] See General Assembly resolution 3 (I) of 13 February 1946 on extradition and punishment of war criminals; General Assembly resolution 95 (I) of 11 December 1946 on affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal.

[55] General Assembly resolution 177 (II) of 21 November 1947.

[56] *Yearbook …1950*, vol. II, document A/1316, paras. 95–127, pp. 374–378, at p. 377.

[57] *Ibid.*, para. 123.

[58] *Ibid.*, para. 124.

[59] *Yearbook … 1954, vol. II*, document A/2693, chap. III, art. 2, para. 11; see Johnson, "The draft code of offences against the peace and security of mankind".

[60] Commentary to article 2, para. 11, *Yearbook … 1954*, vol. II, at p. 150.

[61] General Assembly resolution 898 (IX) of 14 December 1954; General Assembly resolution 1187 (XII) 11 December 1957.

[62] See Miller, "The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity". For a regional convention of a similar nature, see European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes. As of January 2015, there are seven States Parties to this Convention.

[63] General Assembly resolution 36/106 of 10 December 1981.

[64] *Yearbook … 1991*, vol. II (Part Two), chap. IV, sect. D. The 1991 draft code contained 26 categories of crimes.

[65] General Assembly resolution 46/54 of 9 December 1991.

[66] *Yearbook … 1996*, vol. II (Part Two), para. 50. The 1996 draft Code contained five categories of crimes. See Vargas Carreño, "El proyecto de código de crímenes contra la paz y la seguridad de la humanidad de la Comisión de Derecho Internacional".

[67] *Yearbook … 1996*, vol. II (Part Two), para. 50, at p. 47.

requirements. The first alternative requires that the inhumane acts be "committed in a systematic manner" meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy. The Charter of the Nürnberg Tribunal did not include such a requirement. Nonetheless the Nürnberg Tribunal emphasized that the inhumane acts were committed as part of the policy of terror and were "in many cases … organized and systematic" in considering whether such acts constituted crimes against humanity.

(4) The second alternative requires that the inhumane acts be committed "on a large scale" meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim. The Charter of the Nürnberg Tribunal did not include this second requirement either. Nonetheless the Nürnberg Tribunal further emphasized that the policy of terror was "certainly carried out on a vast scale" in its consideration of inhumane acts as possible crimes against humanity. The term "mass scale" was used in the text of the draft code as adopted on first reading to indicate the requirement of a multiplicity of victims. This term was replaced by the term "large scale" which is sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude. The first condition is formulated in terms of the two alternative requirements. Consequently, an act could constitute a crime against humanity if either of these conditions is met.

(5) The second condition requires that the act was "instigated or directed by a Government or by any organization or group". The necessary instigation or direction may come from a Government or from an organization or a group. This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity. It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18. The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.

(6) The definition of crimes against humanity contained in article 18 does not include the requirement that an act was committed in time of war or in connection with crimes against peace or war crimes as in the Charter of the Nürnberg Tribunal. The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement. … The absence of any requirement of an international armed conflict as a prerequisite for crimes against humanity was also confirmed by the International Tribunal for the Former Yugoslavia: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."[68]

39. Since 1996, the Commission on occasion has addressed crimes against humanity. In 2001, the Commission indicated that the prohibition of crimes against humanity was "clearly accepted and recognized" as a peremptory norm of international law.[69] The International Court of Justice has also indicated that the prohibition of certain acts, such as State-sponsored torture, has the character of *jus cogens*,[70] which *a fortiori* suggests that a prohibition of the perpetration of that act on a widespread or systematic basis would also have the character of *jus cogens*.

C. Crimes against humanity before contemporary international and special courts and tribunals

40. By its resolution 827 (1993), the Security Council established 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 (the International Tribunal for the Former Yugoslavia) and adopted the statute of the Tribunal. Article 5 of the statute includes "crimes against humanity" as part of the jurisdiction of the International Tribunal for the Former Yugoslavia.[71] That article reads:

Article 5. Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(*a*) murder;

(*b*) extermination;

(*c*) enslavement;

(*d*) deportation;

(*e*) imprisonment;

(*f*) torture;

(*g*) rape;

(*h*) persecutions on political, racial and religious grounds;

(*i*) other inhumane acts.

Although the Secretary-General's report proposing this article indicated that crimes against humanity "refer to inhumane acts of a very serious nature … committed as part of a widespread or systematic attack against any

[68] Paras. (3)–(6) of the commentary to draft article 18, *ibid.*, para. 50, at pp. 47–48.

[69] Para. (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 85 (see also General Assembly resolution 56/83 of 12 December 2001, annex) (maintaining that those "peremptory norms that are clearly accepted and recognized include the prohibition[] of … crimes against humanity"); see also "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (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 be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)), para. 374 (identifying crimes against humanity as one of the "most frequently cited candidates for the status of *jus cogens*"); see also *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening), I.C.J. Reports 2012*, p. 99, at para. 95 (indicating that the crimes against humanity at issue in the *Arrest Warrant* case "undoubtedly possess the character of *jus cogens*"); *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006, Inter-American Court of Human Rights, Series C, No. 154, para. 96 (acknowledging the *jus cogens* status of crimes against humanity).

[70] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), I.C.J. Reports 2012*, p. 422, at para. 99; see also *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 10 December 1998, *Judicial Reports 1998*, para. 153; *Al-Adsani v. United Kingdom [GC]*, No. 35763/97, European Court of Human Rights, ECHR 2001-XI, para. 61.

[71] Statute of the International Tribunal for the Former Yugoslavia, originally published as an annex to document S/25704 and Add.1, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and amended on 13 May 1998 by resolution 1166 (1998) and on 30 November 2000 by resolution 1329 (2000), art. 5.

civilian population on national, political, ethnic, racial or religious grounds",[72] that particular language was not included in the text of article 5. The formulation used in article 5 retained a connection to armed conflict by criminalizing specified acts "when committed in armed conflict, whether international or internal in character, and directed against any civilian population". This formulation is best understood contextually, having been developed in 1993 with an understanding that armed conflict in fact existed in the former Yugoslavia (which had led to the exercise of the Security Council's Chapter VII enforcement powers), and as designed principally to dispel the notion that crimes against humanity had to be linked to an international armed conflict. To the extent that this formulation might be read to suggest that customary international law requires a nexus to armed conflict, the Appeals Chamber of the Tribunal later clarified that there was "no logical or legal basis" for retaining a connection to armed conflict, since "it has been abandoned" in State practice since Nuremberg. The Appeals Chamber also noted that the "obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict".[73] Indeed, the Appeals Chamber later maintained that such a connection in the statute of the Tribunal was simply circumscribing the subject-matter jurisdiction of the Tribunal, not codifying customary international law.[74] Through its jurisprudence, the Tribunal also developed important guidance as to what elements must be proven when prosecuting an individual for crimes against humanity.[75] Thereafter, a large number of defendants before the Tribunal were convicted of crimes against humanity.[76]

41. By its resolution 955 (1994), the Security Council established the International Tribunal for Rwanda and adopted the statute of the Tribunal. Article 3 of the statute includes "crimes against humanity" as part of the jurisdiction of the International Tribunal for Rwanda.[77] Although article 3 retained the same list of conduct (murder, extermination, etc.), the chapeau language did not retain the reference to armed conflict, and instead introduced the formulation from the 1993 report of the Secretary-General[78] of crimes when "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". As such, the statute expressly provided that a discriminatory motive was required in order to establish the crime. Like that of the International Tribunal for the Former Yugoslavia, the jurisprudence of the International Tribunal for Rwanda further developed the key elements that must be proven when prosecuting an individual for crimes against humanity.[79] Here, too, defendants before the Tribunal were regularly convicted of crimes against humanity.[80]

42. Also in 1994, the Commission completed a draft statute for a permanent international criminal court, which included in article 20 (*d*) crimes against humanity as part of the jurisdiction of the proposed court. In its commentary on that provision, the Commission noted:

> It is the understanding of the Commission that the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part. The hallmarks of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful act (murder, enslavement, deportation, torture, rape, imprisonment, etc.) are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part. This idea is sought to be reflected in the phrase "directed against any civilian population" in article 5 of the statute of the [International Tribunal for the Former Yugoslavia], but it is more explicitly brought out in article [18][81] of the draft Code. The term "directed against any civilian population" should be taken to refer to acts committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The particular acts referred to in the definition are acts deliberately committed as part of such an attack.[82]

43. Thereafter, the General Assembly decided to establish an *ad hoc* committee to review the major substantive and administrative issues arising out of the draft statute prepared by the Commission and to consider arrangements for the convening of an international conference of

[72] S/25704, para. 48.

[73] *Prosecutor v. Duško Tadić a/k/a "DULE"*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, International Tribunal for the Former Yugoslavia, 2 October 1995, *Judicial Reports 1994–1995*, para. 140 (hereinafter, "*Tadić 1995*").

[74] See, e.g., *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, Appeals Chamber, International Tribunal for the Former Yugoslavia, 15 July 1999, *Judicial Reports 1999*, paras. 249–251 (hereinafter, "*Tadić 1999*") ("The armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law"); see also *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 26 February 2001, para. 33 (hereinafter, "*Kordić 2001*").

[75] See, e.g., *Tadić 1999* (previous footnote), paras. 227–229.

[76] See, e.g., Roberge, "Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide"; Mettraux, "Crimes against humanity in the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda"; Meseke, "La contribution de la jurisprudence des tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda à la concrétisation de l'incrimination du crime contre l'humanité"; Sadat, "Crimes against humanity in the modern age", pp. 342–346.

[77] Statute of the International Tribunal for Rwanda, Security Council resolution 955, annex, at art. 3; see generally Van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*.

[78] S/25704, para. 48.

[79] See, e.g., *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, Trial Chamber, International Tribunal for Rwanda, 2 September 1998, *Reports of Orders, Decisions and Judgements 1998*, paras. 578–598; see also Van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, pp. 160–196; Kolb, "The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on international crimes", pp. 291–300; Kolb, "The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on international crimes (2000–2004)", pp. 310–326; Kolb, "The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on international crimes (2004–2013)", pp. 163–172.

[80] See, e.g., *Akayesu* (see previous footnote), para. 23; see also Van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, pp. 151–198 and 270–273; Cerone, "The jurisprudential contributions of the ICTR to the legal definition of crimes against humanity—The evolution of the nexus requirement"; Sadat, "Crimes against humanity in the modern age", pp. 346–349.

[81] At the time of this commentary, the relevant article in the draft code was article 21, as adopted at first reading, which was subsequently renumbered to be article 18 at second reading.

[82] Para. (14) of the commentary to draft article 20, *Yearbook ... 1994*, vol. II (Part Two), para. 91, at p. 40.

plenipotentiaries.[83] That led, in turn, to the establishment of a preparatory committee to discuss further the major issues arising out of the draft statute prepared by the Commission, with a view to preparing a widely acceptable consolidated text,[84] which was then considered and revised further at a diplomatic conference.[85] That conference led to the adoption on 17 July 1998 of the Rome Statute. As at January 2015, 122 States are parties to the Rome Statute.

44. Article 5, paragraph 1 (*b*), of the Rome Statute includes crimes against humanity within the jurisdiction of the International Criminal Court. Article 7, paragraph 1, defines the crime as a number of acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[86] Article 7, paragraph 2, further clarifies that such an attack "means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". Article 7, which is addressed in greater detail in chapter V below, does not retain the nexus to an armed conflict that characterized the statute of the International Tribunal for the Former Yugoslavia, nor the discriminatory motive requirement that characterized the statute of the International Tribunal for Rwanda (except with respect to acts of persecution).

45. In preparation for the entry into force of the Rome Statute, States developed the document entitled Elements of Crimes, which sets forth important guidance as to what must be proven when prosecuting an individual for crimes against humanity.[87] Since the entry into force of the Rome Statute in July 2002, several defendants have been indicted and some convicted by the International Criminal Court for crimes against humanity.[88] For example, in March 2014, the Court's Trial Chamber II issued its judgment that Germain Katanga had committed, through other persons, murder as a crime against humanity during an attack in February 2003 on the village of Bogoro in the Democratic Republic of the Congo.[89]

46. Crimes against humanity have also featured in the jurisdiction of "hybrid" tribunals that contain a mixture of international law and national law elements. The agreement between Sierra Leone and the United Nations, which established the Special Court for Sierra Leone in 2002, includes crimes against humanity as a part of the Special Court's jurisdiction.[90] Article 2 of the Court's statute provides that the "Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population", and then lists nine categories of acts. Several defendants have been indicted and some convicted by the Special Court for crimes against humanity, including the former President of Liberia, Charles Taylor.[91]

47. By contrast, the statute of the Special Tribunal for Lebanon does not include crimes against humanity within the scope of the jurisdiction of the Tribunal, which was established in 2007 by the Security Council and charged with applying Lebanese law rather than international law.[92] The Secretary-General considered that the pattern of terrorist attacks at issue for that tribunal "could meet the *prima facie* definition of the crime, as developed in the

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[83] General Assembly resolution 49/53 of 9 December 1994, para. 2.

[84] General Assembly resolution 50/46 of 11 December 1995, para. 2.

[85] General Assembly resolution 51/207 of 17 December 1996, para. 5.

[86] For discussion of the new phrase "with knowledge of the attack", see chapter V, section D, below. For general commentary on the adoption of article 7, see Hwang, "Defining crimes against humanity in the Rome Statute of the International Criminal Court", pp. 497–501; Robinson, "Defining 'crimes against humanity' at the Rome Conference"; Von Hebel, "Crimes against humanity under the Rome Statute"; Donat-Cattin, "A general definition of crimes against humanity under international law"; Von Hebel and Robinson, "Crimes within the jurisdiction of the Court"; Clark, "Crimes against humanity and the Rome Statute of the International Criminal Court"; Robinson, "The elements of crimes against humanity"; Gil Gil, "Los crímenes contra la humanidad y el genocidio en el Estatuto de la Corte Penal Internacional a la luz de 'los elementos de los crímenes'", pp. 68–94 and 104; McCormack, "Crimes against humanity"; Currat, *Les crimes contre l'humanité dans le Statut de la Cour pénale internationale*; Hall *et al.*, "Article 7: Crimes against humanity"; Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, pp. 137–187; Sadat, "Crimes against humanity in the modern age", pp. 350–355.

[87] See International Criminal Court, Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum, part II.B, and *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010* (International Criminal Court publication, RC/9/11), resolution RC/Res.5). Article 9, paragraph 1, of the Rome Statute provides that Elements of Crimes "shall assist the Court in the interpretation and application of [article 7]". See generally Chesterman, "An altogether different order: defining the elements of crimes against humanity"; Lee *et al.*, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*; Badar, "From the Nuremberg Charter to the Rome Statute: defining the elements of crimes against humanity". Consistent with article 7, the two elements that must exist to establish a crime against humanity, in conjunction with the various proscribed acts, are: (*a*) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (*b*) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. The elements of crimes have been amended to take account of further elements adopted at the 2010 ICC Review Conference. See Elements of Crimes, document ICC-PIDS-LT-03-002/11 (2011).

[88] *Prosecutor v. Thomas Lubanga Dyilo*, *Judgment pursuant to Article 74 of the Statute*, Case No. ICC-01/04-01/06-2842, Judgment, Trial Chamber I, 14 March 2012; *Prosecutor v. Germain Katanga, Judgment pursuant to Article 74 of the Statute*, Case No. ICC-01/04-01/07, Judgment, Trial Chamber II , 7 March 2014 (hereinafter, "*Katanga 2014*"); Sadat, "Crimes against humanity in the modern age", pp. 355–368.

[89] *Katanga 2014* (see previous footnote), para. 1691. Since all appeals have been discontinued, this judgment is final.

[90] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, at art. 2.

[91] See, e.g., *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Trial Chamber II, Judgment, 18 May 2012; *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-PT, Appeals Chamber, Judgment, 26 September 2013; see also *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgment, 28 May 2008; *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-A, Appeals Chamber, Judgment, 22 February 2008 (judgments of the Special Court are available from www.rscsl.org); see generally Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone*, p. 40; Jalloh and Meisenberg, *The Law Reports of the Special Court for Sierra Leone*; Van der Wolf, *The Case Against Charles Taylor*; Sadat, "Crimes against humanity in the modern age", pp. 349–350.

[92] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (Beirut, 22 January 2007, and New York, 6 February 2007), United Nations, *Treaty Series*, vol. 2461, No. 44232, p. 257, and annexed to Security Council resolution 1757 (2007) of 30 May 2007.

jurisprudence of international criminal tribunals".[93] However, there was insufficient support within the Security Council for including crimes against humanity in the Tribunal's jurisdiction.[94]

48. Special courts have been set up within a few national legal systems (at times with international judges participating) and some of these courts have exercised jurisdiction over crimes against humanity. The Special Panels for Serious Crimes, established in 2000, had jurisdiction over crimes against humanity committed between 1 January and 25 October 1999 in East Timor. The relevant language was an almost verbatim repetition of article 7 of the Rome Statute[95] and the Special Panels convicted several defendants.[96] Likewise, the Extraordinary Chambers in the Courts of Cambodia, established by Cambodia in 2001[97] and the subject of a Cambodia–United Nations agreement in 2003,[98] included within article 5 of their statute "the power to bring to trial all [s]uspects who committed crimes against humanity",[99] which the Court has done.[100] The Supreme Iraqi Criminal Tribunal, established in 2003 by the Iraqi Governing Council, also had within its jurisdiction crimes against humanity.[101] Again, unlike the Nürnberg Charter, the crime as formulated for these tribunals requires no link to armed conflict.[102]

49. The Extraordinary African Chambers within the Senegalese judicial system, established in 2012–2013 pursuant to agreements between Senegal and the African Union, are empowered to try persons "responsible for the crimes and serious violations of international law, international humanitarian law and custom, and international conventions ratified by Chad and Senegal, that were committed in Chad between 7 June 1982 and 1 December 1990".[103] Article 4 (*b*) of the statute of the Chambers provides that they have jurisdiction over crimes

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[93] Report of the Secretary-General on the establishment of a Special Tribunal for Lebanon, S/2006/893, para. 24.

[94] See *ibid.*, para. 25; statement by Mr. Nicholas Michel, Under-Secretary-General for Legal Affairs, the Legal Counsel, at the informal consultations held by the Security Council on 20 November 2006, S/2006/893/Add.1, p. 2 ("The text of the statute, the language of the report, the preparatory work and the background of the negotiations clearly demonstrate that the tribunal will not be competent to qualify the attacks as crimes against humanity.").

[95] See United Nations Transitional Administration in East Timor, Regulation 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15), sect. 5; see also Ambos and Wirth, "The current law of crimes against humanity: an analysis of UNTAET Regulation 15/2000", p. 2.

[96] East Timor Special Panel for the Trial of Serious Crimes: *Prosecutor v. Joni Marques et al.*, Case No. 9/2000, Judgment, 11 December 2001, *Annotated Leading Cases of International Criminal Tribunals* (ALC), vol. XIII, p. 257; *Deputy Prosecutor General v. Francisco Pedro*, Case No. 1/2001, Judgment, 14 April 2005, ALC, vol. XVI, p. 721; *Prosecutor v. Sabino Gouveia Leite*, Case No. 04b/2001, Judgment, 7 December 2002, ALC, vol. XIII, p. 637; *Prosecutor v. Jose Cardoso*, Case No. 04c/2001, Judgment, 5 April 2003; *Prosecutor v. Lino de Carvalho*, Case No. 10/2001, Judgment, 18 March 2004, ALC, vol. XVI, p. 467; *Prosecutor v. Anastacio Martins and Domingos Goncalves*, Case No. 11/2001, Judgment, 13 November 2003, ALC, vol. XVI, p. 339; *Prosecutor v. Armando Santos*, Case No. 16/2001, Judgment, 9 September 2002, ALC, vol. XIII, p. 541; *Prosecutor v. Benjamin Sarmento and Romeiro Tilman*, Case No. 18/2001, Judgment, 16 July 2003, ALC, vol. XVI, p. 269; *Prosecutor v. João Sarmento*, Case No. 18a/2001, Judgment, 12 August 2003, ALC, vol. XVI, p. 293; *Prosecutor v. Domingos Mendonça*, Case No. 18b/2001, Judgment, 13 October 2003, ALC, vol. XVI, p. 309; *Prosecutor v. Abilio Mendes Correia*, Case No. 19/2001, Judgment, 29 March 2004, ALC, vol. XVI, p. 457; *Prosecutor v. Florencio Tacaqui*, Case No. 20/2001, Judgment, 9 December 2004, ALC, vol. XVI, p. 643; *Prosecutor v. Marculino Soares*, Case No. 2b/2002, Judgment, 1 December 2004, ALC, vol. XVI, p. 545; *Prosecutor v. Umbertus Ena and Carlos Ena*, Case No. 5/2002, Judgment, 23 March 2004, ALC, vol. XVI, p. 477; *Prosecutor v. Salvador Soares*, Case No. 7a/2002, Judgment, 9 December 2003, ALC, vol. XVI, p. 365; *Prosecutor v. Inacio Olivera, Gilberto Fernandes and Jose da Costa*, Case No. 12/2002, Judgment, 23 February 2004, ALC, vol. XVI, p. 425; *Prosecutor v. Damiao Da Costa Nunes*, Case No. 1/2003, Judgment, 10 December 2003, ALC, vol. XVI, p. 403; *Prosecutor v. Agustinho Atolan alias Quelo Mauno*, Case No. 3/2003, Judgment, 9 June 2003, ALC, vol. XIII, p. 755; *Prosecutor v. Agostinho Cloe et al.*, Case No. 4/2003, Judgment, 16 November 2004, ALC, vol. XVI, p. 587; *Prosecutor v. Anton Lelan Sufa*, Case No. 4a/2003, Judgment, 25 November 2004, ALC, vol. XVI, p. 595; *Prosecutor v. Lino Beno*, Case No. 4b/2003, Judgment, 16 November 2004, ALC, vol. XVI, p. 579; *Prosecutor v. Domingos Metan*, Case No. 4c/2003, Judgment, 16 November 2004, ALC, vol. XVI, p. 573; *Prosecutor v. Gusmão*, Case No. 7/2003, Judgment, 28 February 2003; *Prosecutor v. Miguel Mau*, Case No. 8/2003, *ibid.*, Judgment, 23 February 2004; *Prosecutor v. Mateus Lao a.k.a. Ena Poto*, Case No. 10/2003, Judgment, 3 December 2004, ALC, vol. XVI, p. 605; *Prosecutor v. Marcelino Soares*, Case No. 11/2003, Judgment, 11 December 2003, ALC, vol. XVI, p. 415; *Prosecutor v. Beny Ludji and José Gusmão*, Case No. 16/2003, Judgment, 19 May 2004, ALC, vol. XVI, p. 505; *Prosecutor v. Aparicio Guterres a.k.a. Mau Buti*, Case No. 18a/2003, Judgment, 28 February 2005, ALC, vol. XVI, p. 683; *Prosecutor v. Januario da Costa and Mateus Punef*, Case No. 22/2003, Judgment, 25 April 2005, ALC, vol. XVI, p. 765; *Prosecutor v. Rusdin Maubere*, Case No. 23/2003, Judgment, 5 July 2004, ALC, vol. XVI, p. 523; *Prosecutor v. Júlio Fernandes*, Case No. 25/2003, Judgment, 19 April 2005, ALC, vol. XVI, p. 729; *Prosecutor v. Rudolfo Alves Correia aka "ADOLFO"*, Case No. 27/2003, Judgment, 25 April 2005, ALC, vol. XVI, p. 745; *Prosecutor v. Alarico Mesquita et al.*, Case No. 28/2003, Judgment, 6 December 2004, ALC, vol. XVI, p. 611; *Prosecutor v. Francisco Perreira*, Case No. 34/2003, Judgment, 27 April 2005, ALC, vol. XVI, p. 781; *Prosecutor v. Domingos de Deus*, Case No. 2a/2004, Judgment, 12 April 2005, ALC, vol. XVI, p. 709; see also *Report to the Secretary-General of the Commission of Experts to review the prosecution of serious violations of human rights in Timor-Leste (then East Timor) in 1999*, contained in document S/2005/458, annex II; Reiger and Wierda, "*The serious crimes process in Timor-Leste: in retrospect*".

[97] See General Assembly resolution 57/228 B of 13 May 2003.

[98] Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117.

[99] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 5, available from www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended.

[100] *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, Trial Chamber, Extraordinary Chambers in the Courts of Cambodia, 26 July 2010; *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Office of the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, Closing Order, 15 September 2010.

[101] Statute of the Iraqi Special Tribunal (10 December 2003), art. 10 (*b*), ILM, vol. 43 (2004), p. 231. The Iraqi Interim Government enacted a new statute in 2005, which built upon the earlier statute and changed the Tribunal's name to "Supreme Iraqi Criminal Tribunal". See Law of the Supreme Iraqi Criminal Tribunal, Law No. 10, *Official Gazette of the Republic of Iraq*, vol. 47, No. 4006 (18 October 2005); see also Scharf, "The Iraqi High Tribunal: a viable experiment in international justice?"; Kuschnik, "The legal findings of crimes against humanity in the *Al-Dujail* judgments of the Iraqi High Tribunal: a forerunner for the ICC?"; Van Heugten and Van Laar, *The Iraqi Special Tribunal for Crimes against Humanity: The Dujail Case*.

[102] See, e.g., *Duch* (footnote 100 above), para. 291 ("The notion of armed conflict also does not form part of the current-day customary definition of crimes against humanity.").

[103] Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between Senegal and the African Union of 22 August 2012, ILM, vol. 52 (2013), p. 1024.

against humanity, which are then defined in article 6 in terms that draw upon, but do not replicate, article 7 of the Rome Statute.[104]

50. Finally, crimes against humanity have also featured at times in the jurisprudence of regional human rights courts and tribunals,[105] such as before the Inter-American Court of Human Rights[106] and the European Court of Human Rights. The Grand Chamber of the European Court, for example, in 2008 analysed the meaning of "crimes against humanity" as the concept existed in 1956, finding that even by that point the nexus with armed conflict that initially formed part of the customary definition of crimes against humanity may have disappeared.[107]

51. In the light of such developments, it is now well settled that, under international law, criminal responsibility attaches to an individual for committing crimes against humanity. As the Trial Chamber in the *Tadić* case indicated, "since the Nürnberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned".[108]

D. Crimes against humanity in national law

52. In the annual report on its sixty-sixth session,[109] the Commission requested that States provide information on: (*a*) whether the State's national law at present expressly criminalizes "crimes against humanity" as such and, if so; (*b*) the text of the relevant criminal statute(s); (*c*) under what conditions the State is capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity (e.g., when the offence occurs within its territory or when the offence is by its national or resident); and (*d*) decisions of the State's national courts that have adjudicated crimes against humanity. As at early February 2015, the Commission had received responses from four States. The information contained in those responses is incorporated in the present report.

53. The national laws of several States address in some fashion crimes against humanity, thereby allowing national prosecutions falling within the scope of those laws.[110] For example, chapter 11 of the Criminal Code of Finland codifies crimes against humanity (as well as genocide and war crimes).[111] Section 3 of that chapter defines the crime, while section 4 indicates circumstances when the crime is to be regarded as aggravated. Generally, Finnish criminal law is only applied to crimes committed within the territory of Finland; crimes committed in another State's territory by a Finnish national or resident, or by a person who is apprehended in Finland and is a national or permanent resident of Denmark, Iceland, Norway or Sweden; and crimes committed in another State's territory that are directed against Finnish nationals and are punishable by more than six months in prison. There are, however, exceptions to this general rule. Thus, pursuant to chapter 1, section 7, paragraph 1, of the Criminal Code, "Finnish law applies to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (*international offence*)". Crimes against humanity are regarded as being such an offence.

54. Similarly, title 12 *bis* of the Penal Code of Switzerland[112] codifies genocide and crimes against humanity, with article 264 *a* defining crimes against humanity. Swiss law extends to crimes committed in Switzerland (art. 3) and to crimes committed outside Switzerland that are against the Swiss State (art. 4), that are against minors (art. 5), that Switzerland has undertaken to prosecute under an international agreement (art. 6) or that otherwise involve an act punishable in the State where it was committed if the perpetrator is in Switzerland and, under Swiss law, the act may result in extradition, but the author is not extradited (if the perpetrator is not a Swiss national, and the crime was not committed against a Swiss national, then prosecution may only proceed if the extradition request was rejected for a reason other than the nature of the act or the perpetrator committed a particularly serious crime proscribed by the international community) (art. 7).

55. By contrast, other States do not have any national law expressly criminalizing "crimes against humanity", although they may have statutes that allow for prosecution of conduct that, in some circumstances, amounts to crimes against humanity. For example, the United States has no national law on crimes against humanity as such. While it has statutes containing criminal prohibitions of torture, war

[104] Contained in the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between Senegal and the African Union of 30 January 2013, *ibid.*, p. 1028.

[105] See Huneeus, "International criminal law by other means: the quasi-criminal jurisdiction of the human rights bodies".

[106] See, e.g., Dondé Matute, "Los elementos contextuales de los crímenes de lesa humanidad y la Corte Interamericana de Derechos Humanos".

[107] *Korbely v. Hungary [GC]*, No. 9174/02, European Court of Human Rights, ECHR 2008, para. 82. International jurisprudence may also arise before the African Court of Justice and Human Rights. See draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 28 A (providing that the Court's International Criminal Law Section shall have power to try persons for crimes against humanity). As of January 2015, however, this Protocol and the amendments have not yet entered into force.

[108] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment, Trial Chamber, the International Tribunal for the Former Yugoslavia, 7 May 1997, *Judicial Reports 1997*, para. 623 (hereinafter, "*Tadić 1997*"); see also *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF Case)*, Case No. SCSL-04-15-T, Judgment, Trial Chamber I, Special Court for Sierre Leone, 2 March 2009, para. 58.

[109] See *Yearbook ... 2014*, vol. II (Part Two), para. 34.

[110] See generally Eser *et al.*, *National Prosecution of International Crimes*; Bergsmo, Harlem and Hayashi, *Importing Core International Crimes into National Law*; García Falconí, "The codification of crimes against humanity in the domestic legislation of Latin American States"; Van der Wolf, *Prosecution and Punishment of International Crimes by National Courts*. For country-specific studies, see, e.g., Ferstman, "Domestic trials for genocide and crimes against humanity: the example of Rwanda"; Van den Herik, "The Dutch engagement with the project of international criminal justice".

[111] Criminal Code of Finland, Law No. 39/1889, as amended in 2012, available from www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf (unofficial English translation).

[112] Penal Code of Switzerland, Law No. 311.0, as amended in 2015, available from www.admin.ch/opc/en/classified-compilation/19370083/index.html (unofficial English translation).

crimes and genocide,[113] these statutes do not criminalize all conduct that might amount to crimes against humanity, and some of the constituent acts of crimes against humanity as defined in certain international texts are not found in United States national law. At the same time, other statutes with extraterritorial application might apply depending on the circumstances, such as statutes addressing terrorism offences or violent crime. Cuba also does not criminalize "crimes against humanity" as such, but its law takes account of crimes against humanity as a basis for setting aside limitations under national law that might otherwise apply.[114]

56. In the decades following Nuremberg, various national prosecutions occurred, such as the *Eichmann* and *Demjanjuk* cases in Israel,[115] the *Menten* case in the Netherlands,[116] the *Barbie* and *Touvier* cases in France[117] and the *Finta*, *Mugesera* and *Munyaneza* cases in Canada.[118] Such cases can raise difficult issues concerning immunities, statutes of limitations and the effect of national amnesty laws. For example, in the *Rubens Paiva* case currently being prosecuted in Brazil, lower courts have allowed a prosecution to proceed against former military or police officers alleged to have committed crimes against humanity, notwithstanding the 1979 amnesty law of Brazil.[119] In some circumstances, the issue of crimes against humanity arose in the context of national proceedings other than prosecutions, such as extradition[120] or immigration[121] proceedings. Under the influence of the Rome Statute,[122] in recent years many States have adopted or amended national laws that criminalize crimes against humanity, as well as other crimes.[123]

57. Various studies have attempted not just to compile a list of the national laws on crimes against humanity, but to analyse the scope of those laws both in terms of the substantive crimes and the circumstances when jurisdiction may be exercised over such crimes.[124] Important elements to consider when assessing such laws are: (*a*) whether there exists a specific law on "crimes against humanity" (as opposed to ordinary criminal statutes on penalizing acts of violence or persecution); (*b*) if a specific law exists on "crimes against humanity", whether that law includes all the components encompassed in the most relevant contemporary definition of the crime, that is, article 7 of the Rome Statute; and (*c*) if a specific law exists on "crimes against humanity", whether that law is limited only to conduct that occurs within the State's territory, or whether it also extends to conduct by or against its nationals abroad, or even extends to acts committed abroad by non-nationals against non-nationals.[125]

58. A relevant study completed in July 2013 reached several conclusions. First, it found that earlier studies, when read collectively, indicate that at best 54 per cent of States Members of the United Nations (104 of 193) had some form of national law relating to crimes against humanity.[126] The remaining Member States (89 of 193) appeared to have no national laws relating to crimes

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[113] See United States Code, Title 18, sect. 2340A (2012) (prohibiting torture); *ibid.*, sect. 2441 (2012) (prohibiting war crimes); *ibid.*, sect. 1091 (2012) (prohibiting genocide).

[114] See Penal Code of Cuba, Law No. 62, art. 5, para. 3, and art. 18, para. 4, available from www.parlamentocubano.cu/index.php/documento/codigo-penal/ (in Spanish only).

[115] *Attorney General for the Government of Israel v. Eichmann*, ILR, vol. 36, p. 5 (District of Jerusalem), at p. 277, Supreme Court of Israel (1962); *Attorney General for the Government of Israel v. Demjanjuk,* Trial Judgment, 18 *April* 1988, Israel District Court; *Demjanjuk v. State of Israel,* Isr. S.C. 221 (1993), Supreme Court of Israel; see Baade, "The Eichmann trial: some legal aspects"; Fawcett, "The *Eichmann* case"; Schwarzenberger, "The *Eichmann* judgment".

[116] *Menten Case*, ILR, vol. 75 (1981), p. 331 (Dutch Supreme Court).

[117] *Barbie Case*, *ibid.*, vol. 78 (1985), p. 124; *ibid.*, vol. 100, p. 330 (1988) (French Court of Cassation); *Touvier Case*, *ibid.*, vol. 100 (1992), p. 337 (French Court of Cassation); see Sadat, "The interpretation of the Nuremberg Principles by the French Court of Cassation: from Touvier to Barbie and back again"; Chalandon and Nivelle, *Crimes contre l'humanité—Barbie, Touvier, Bousquet, Papon*.

[118] *Regina v. Finta*, [1994] 1 S.C.R. 701, [1997], ILR, vol. 104 (1997), p. 284 (Supreme Court of Canada); *Munyaneza v. R*, 2014 QCCA 906 (Quebec Court of Appeal).

[119] For the Federal Court of Appeals decision agreeing with the Court of First Instance in setting aside the amnesty law, see Brazil, Federal Regional Court of the 2nd Region. 2nd Specialized Chamber. *Habeas Corpus* No. 0104222-36.2014.4.02.0000. *Rodrigo Henrique Roca Pires and Another v. 4th Federal Criminal Court*, Judiciary Section of Rio de Janeiro, 26 August 2014. The Supreme Federal Court, however, has suspended proceedings pending determination of the applicability of the amnesty law. See Brazil, Federal Supreme Court. Rcl 18686 MC/RJ, Rapporteur: Min. Teori Zavascki, Decision of 29 September 2014, published electronically at the DJe-191 on 1 October 2014, available from www.stf.jus.br.

[120] See, e.g., *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

[121] See, e.g., *Mugesera v. Canada*, [2005] 2 SCR 100 (Supreme Court of Canada). For an analysis of the reliance of Canada on immigration proceedings for addressing crimes against humanity, finding the practice to be an incomplete remedy, see Yap, "*Aut deportare aut judicare*: current topics in international humanitarian law in Canada".

[122] For an analysis of how complementarity under the Rome Statute serves as an incentive to the adoption of national legislation, and reviewing the arguments for and against finding an obligation in the Rome Statute to adopt national legislation, see Kleffner, "The impact of complementarity on national implementation of substantive international criminal law", p. 91 ("The Statute is ambiguous on this issue, and States as well as academic writers differ on it").

[123] See, e.g., Alvarez, "The implementation of the ICC Statute in Argentina"; Canada, Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 ; Lafontaine, "Parties to offences under the Canadian *Crimes against Humanity and War Crimes Act*: an analysis of principal liability and complicity"; Currie and Rikhof, *International and Transnational Criminal Law* (surveying the treatment of international crimes under Canadian law); Germany, Code of Crimes against International Law, *Bundesgesetzblatt*, sect. 7, I, p. 2254 (2002), available from www.bmjv.de; Capus, "Die Unverjährbarkeit von Verbrechen gegen die Menschheit nach schweizerischem und nach internationalem Recht"; Werle and Jessberger, "International criminal justice is coming home: the new German Code of Crimes against International Law"; Roscini, "Great expectations—the implementation of the Rome Statute in Italy"; South Africa, Implementation of the Rome Statute of the International Criminal Court, Act No. 27 of 2002, *Government Gazette of the Republic of South Africa*, vol. 445, No. 23642, 18 July 2002; Fournet, *Genocide and Crimes against Humanity—Misconceptions and Confusion in French Law and Practice*; Du Plessis, "South Africa's implementation of the ICC Statute—an African example". On extraterritorial application of the statute of South Africa, see *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre* (485/2012) [2013], Supreme Court of Appeal of South Africa 168, 27 November 2013.

[124] See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2011); Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (especially chapter 9 on "A survey of national legislation and prosecutions for crimes against humanity"); ICRC, *International Humanitarian Law National Implementation Database* (updated periodically), available from www.icrc.org/ihl-nat.nsf; International Human Rights Law Clinic, George Washington University Law School, "Comparative law study and analysis of national legislation relating to crimes against humanity and extraterritorial jurisdiction" .

[125] For a general discussion of national jurisdiction in the context of international crimes, see generally Cassese and Delmas-Marty, *Juridictions nationales et crimes internationaux*.

[126] International Human Rights Law Clinic, "Comparative law study …", pp. 487–488.

against humanity. Further, the 2013 study found that earlier studies, again when read collectively, indicated that at best 66 per cent of parties to the Rome Statute (80 of 121) had some form of national law relating to crimes against humanity, leaving 34 per cent of parties to the Rome Statute (41 of 121) without any such law.[127]

59. Second, the 2013 study undertook an in-depth, qualitative review of the national laws of a sample of 83 States (States Members of the United Nations listed alphabetically from A to I). Since 12 of those States were thought by earlier studies to have no law relating to crimes against humanity, the qualitative review focused on assessing the laws of the other 71 States. That review concluded that, in fact, only 41 per cent of States in the sample actually possessed a national law specifically on "crimes against humanity" (34 of 83).[128] Of the 58 parties to the Rome Statute within the sample of 83 States, the review indicated that 48 per cent of them possessed a national law specifically on "crimes against humanity" (28 of 58).[129]

60. Third, for the 34 States that possessed a national law specifically on "crimes against humanity", the 2013 study analysed closely the provisions of those laws. Of those States, only 29 per cent adopted verbatim the text of article 7 of the Rome Statute when defining the crime (10 of 34).[130] As such, of the 83 States within the sample, only about 12 per cent had adopted the formulation of article 7 of the Rome Statute in its entirety (10 of 83). Instead, most of the 34 States that possessed a national law specifically on "crimes against humanity" deviated from the components of article 7, such as by omitting components of the *chapeau* language of article 7, paragraph 1, omitting some prohibited acts as set forth in article 7, paragraph 1 (*a*)–(*k*), or omitting the second or third paragraphs of article 7, including the component relating to furthering "a State or organizational policy". All told, of those 34 States that possessed a national law specifically on "crimes against humanity", 71 per cent of them (24 of 34) possessed national laws that lacked key elements of the article 7 definition, revealing a wide range of minor to major substantive differences.[131]

61. Finally, the 2013 study analysed whether the 34 States that possessed a national law specifically on "crimes against humanity" could exercise jurisdiction over a non-national offender who commits the crime abroad against non-nationals. The study concluded that nearly 62 per cent (21 of 34) could exercise such jurisdiction. However, this meant that only 25 per cent of the States within the sample were able to exercise such jurisdiction over "crimes against humanity" (21 of 83). Further, of the 58 parties to the Rome Statute within the sample, 33 per cent both possess a national law specifically on "crimes against humanity" and were able to exercise such jurisdiction (19 of 58).[132]

62. A number of States have established specialized prosecutorial authorities or procedures within their legal systems to investigate and prosecute crimes against humanity and other international crimes.[133] These authorities, in turn, have begun developing networks for cooperation, such as the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.[134] The International Criminal Police Organization (INTERPOL) has established a fugitive investigative support subdirectorate dedicated to facilitating the apprehension and extradition of individuals accused of such crimes.[135]

63. Separate and apart from statutes providing for the criminal prosecution of crimes against humanity, some States have also included the prohibition on crimes against humanity in their immigration rules.[136] Such provisions indicate that persons accused of the commission of crimes against humanity may be barred entry to the country in question, may be removed and/or deported and may be prosecuted for committing fraud upon entry.

64. The unevenness in the adoption of national laws relating to crimes against humanity has collateral consequences with respect to inter-State cooperation in seeking to sanction offences. Existing bilateral and multilateral agreements on mutual legal assistance and on extradition typically require that the offence at issue be criminalized in the jurisdictions of both the requesting and requested States (referred to as "double" or "dual" criminality); if their respective national laws are not comparable, then cooperation usually is not required. With a large number of States having no national law on crimes against humanity, and with significant discrepancies among the national laws of States that have criminalized the offence, there at present exist considerable impediments to inter-State cooperation. Further, the absence in most States of national laws that allow for the exercise of jurisdiction over non-nationals for crimes against humanity inflicted upon non-nationals abroad means that offenders often may seek sanctuary simply by moving to a State in which the acts were not committed. Even in circumstances in which States have adopted harmonious national laws on crimes against humanity, there may exist no obligation between the States to cooperate with respect to the offence, including by way of an obligation to extradite or prosecute the alleged offender.

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[127] *Ibid.*, p. 488.

[128] *Ibid.*, p. 493. By contrast, 20 per cent of States in the sample possessed laws that did not actually address "crimes against humanity", but that arguably contained some features in common with the crime, such as a prohibition of one or more of the prohibited acts listed in article 7, paragraph 1 (*a*)–(*k*), of the Rome Statute (17 of 83). Within this group are States possessing a law that is labelled "crimes against humanity", but which in fact only covers war crimes and genocide. *Ibid.*, pp. 490–491. The remaining 39 per cent of States in the sample had no discernible law relating to crimes against humanity (32 of 83). *Ibid.*, p. 490, footnote 19.

[129] *Ibid.*, p. 493.

[130] *Ibid.*, p. 492.

[131] *Ibid.*, pp. 483, 493–495 and 497–503.

[132] *Ibid.*, pp. 505–513.

[133] See, e.g., Canada, Crimes Against Humanity and War Crimes Program, available from www.justice.gc.ca/eng/cj-jp/wc-cdg/index.html.

[134] This network was set up pursuant to European Council decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (*Official Journal of the European Communities*, vol. 45, No. L 167, 26 June 2002 pp. 1–2) and reaffirmed with Council decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (*Official Journal of the European Union*, vol. 46, No. L 118, 14 May 2003, pp. 12–14).

[135] See INTERPOL War Crimes programme, www.interpol.int/Crimes/War-crimes.

[136] See, e.g., Canada, Immigration and Refugee Protection Act, S.C. 2001, C.27, as amended on 16 December 2014; United States Presidential Proclamation 8697 of 4 August 2011—Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses, Federal Register, vol. 76 (2011), p. 49277.

Chapter III

Existing multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to crimes

65. In pursuing the objectives identified in chapter I above, the Commission may be guided by numerous existing multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to transnational crimes. The Commission has previously helped draft a convention of this nature: the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[137] Of particular interest are the conventions relating to genocide and war crimes, as well as other treaties that seek to deal comprehensively with specific crimes, such as conventions relating to State-sponsored torture, enforced disappearance, transnational corruption and organized crime and terrorist-related offences. Likewise, multilateral conventions on extradition, mutual legal assistance and statutes of limitation can provide important guidance with respect to those issues. The following discussion briefly addresses some aspects of these treaties.

A. 1948 Genocide Convention

66. The Convention on the Prevention and Punishment of the Crime of Genocide[138] sets forth in article I that the Contracting Parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish". Article II then defines the crime in terms that were later adopted verbatim as article 6 of the Rome Statute. Article III identifies that the act itself shall be punishable, but so shall conspiracy, incitement and attempt to commit the act, as well as complicity in the act. Article IV provides that persons committing genocide or any of the other acts enumerated in article III (such as complicity in genocide) shall be punished "whether they are constitutionally responsible rulers, public officials or private individuals".

67. Article V provides:

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI provides that persons charged with genocide shall be tried by a competent national tribunal "in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction". Article VII addresses extradition, stating that the act of genocide shall not be considered as "political crimes" and that the parties "pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force". Article VIII recalls that any party may call upon competent United Nations organs to take action to prevent and suppress genocide, while article IX provides that disputes arising under the Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

68. As is the case for crimes against humanity, the crime of genocide has been included in the statutes of various international criminal tribunals and developed in their jurisprudence. Moreover, the Genocide Convention has featured in several decisions of the International Court of Justice relevant to interpretation of the Convention.[139]

B. 1949 Geneva Conventions and Additional Protocol I[140]

69. The four Geneva Conventions of 1949 contain in a common article[141] an identical mechanism for the prosecution of persons accused of having committed "grave breaches"[142] of the Conventions. Pursuant to the first

[137] Draft prepared by the Commission at its twenty-fourth session in 1972 (*Yearbook ... 1972*, vol. II, p. 201); the Convention was then negotiated and adopted by the General Assembly in 1973, entered into force in 1977, and as of January 2015 has 178 States Parties.

[138] See also Gil Gil, *El genocidio y otros crímenes internacionales*; Gaeta, *The UN Genocide Convention: A Commentary*; Tams, Berster and Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*.

[139] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 6 above); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 6 above).

[140] The analysis in this section is drawn from the Secretariat survey of multilateral conventions, which may be relevant to the work of the Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/630, paras. 44–48 and 59–60. The Geneva Conventions and Additional Protocol are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Geneva Convention for the Amelioration of the Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention VI), and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

[141] Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[142] Each Convention contains an article describing what acts constitute "grave breaches" of that particular convention. For Geneva Conventions I and II, this article is identical (arts. 50 and 51, respectively): "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

Article 130 of Geneva Convention III reads: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

paragraph of the common article, the parties "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" of the Conventions. In its second paragraph, the common article specifies that:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

70. This obligation to undertake measures against an alleged offender is not conditioned by any jurisdictional nexus of the offender to the State party in which the offender is present. The obligation is one of prosecution, with the possibility to transfer an accused person as an alternative. Further, the obligation to search for and prosecute an alleged offender exists irrespective of any request for transfer by another party.[143]

71. While the obligation described above is limited to grave breaches, the common article further provides, in its third paragraph, that the States parties shall take measures to suppress all acts contrary to the Conventions other than the grave breaches. Finally, under its fourth paragraph, the common article stipulates that the accused "shall benefit by safeguards of proper trial and defence" in all circumstances, and that those safeguards "shall not be less favourable than those provided by Article 105 and those following" of the Geneva Convention III. Other articles briefly address the responsibility of States parties for violations of the conventions and the possibility of a procedure for enquiry concerning any alleged violation of the Conventions.[144]

72. Protocol I builds upon the provision concerning the punishment of offenders contained in the common article to the 1949 Geneva Conventions. In essence, the common article is made applicable to Protocol I by *renvoi*; article 85, paragraph 1, of Protocol I specifies that "[t]he provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol".[145] Protocol I also builds upon the Geneva Conventions with a series of articles designed to help repress breaches: article 86 addresses a State's failure to act; article 87 addresses the duty of commanders; article 88 addresses mutual assistance in criminal matters;[146] article 89 addresses inter-State cooperation in situations of serious violations of the Geneva Conventions or Protocol I; article 90 addresses the establishment of an international fact-finding commission to investigate facts alleged to be a grave breach; and article 91 addresses the responsibility of States parties to pay compensation for violations of the Geneva Conventions or Protocol I.

C. Other potentially relevant conventions

73. Contemporary definitions of crimes against humanity include acts such as "torture", "enslavement" and "enforced disappearance of persons" as the types of acts that, if committed on a widespread or systematic basis against a civilian population, can constitute crimes against humanity. As such, when drafting a convention on crimes against humanity, account should be taken of conventions that address such acts.

74. For example, the Convention against Torture sets forth a series of articles that define the crime, call upon States parties to prevent the crime, criminalize the conduct, establish jurisdiction over the conduct and impose an obligation to extradite or prosecute an offender that turns up in the State party's territory. Numerous other provisions address other aspects of the State party's obligations, as well as inter-State cooperation and dispute resolution. As at January 2015, 156 States are party to this convention. The International Court of Justice recently addressed at some length the *aut dedere aut judicare* obligation contained within this Convention,[147] which was in turn the subject of a report by the Commission in 2014.[148]

75. The United Nations Convention against Transnational Organized Crime[149] has a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Protocol defines the crime of trafficking, requires States parties to incorporate the crime into their national laws, and requires them to adopt prevention measures. The provisions of the Convention, which apply *mutatis mutandis* to the Protocol, set forth various obligations relating to prosecution, jurisdiction, adjudication and sanctions, as well as extradition, mutual legal assistance and other matters. As of January 2015, 166 States are party to this protocol.

Article 147 of Geneva Convention IV reads: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

[143] See Pictet, *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV, p. 593.

[144] See, e.g., Geneva Convention III, arts. 131–132.

[145] "Grave breaches" of Protocol I are identified in articles 11 and 85, paragraphs 2 and 4, thereof.

[146] Article 88, paragraph 1, provides that the States Parties "shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol". Article 88, paragraph 2, specifies that the Parties to Protocol I shall, when the circumstances allow, cooperate in extradition matters, including giving due consideration to a request received from the State in whose territory the alleged offence has occurred. Article 88, paragraph 3, provides that the law of the requested party shall apply in all cases and that the paragraphs shall not "affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters".

[147] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 70 above).

[148] *Yearbook ... 2014*, vol. II (Part Two), para. 65.

[149] As of January 2015, there are 179 States Parties to this Convention.

76. Likewise, the International Convention for the Protection of All Persons from Enforced Disappearance[150] contains provisions regarding defining the crime, criminalization of the act in national law, *aut dedere aut judicare*, mutual legal assistance and extradition. Notably, article 5 of the Convention provides that: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law."[151] As at January 2015, 44 States are party to this Convention.

77. There are, of course, numerous other global treaties that address issues of prevention, criminalization in national law, *aut dedere aut judicare*, mutual legal assistance, extradition, dispute settlement and other issues potentially relevant to a convention on crimes against humanity. Moreover, there are also some relevant treaties operating at the regional or subregional levels, such as the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination.[152] All such treaties should be considered in the course of the Commission's work, bearing in mind that the value and effectiveness of particular provisions must be assessed in context.

[150] As of January 2015, there are 44 States Parties to this Convention.

[151] See Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, pp. 60–62.

[152] The Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination (signed at the International Conference on the Great Lakes Region on 29 November 2006 and which entered into force in 2008). The International Conference on the Great Lakes Region of Africa, which developed this Protocol, consists of Angola, Burundi, the Central African Republic, the Congo, the Democratic Republic of the Congo, Kenya, Rwanda, South Sudan, the Sudan, Uganda, the United Republic of Tanzania and Zambia. The instrument is a protocol to the Pact on Security, Stability and Development in the Great Lakes Region.

Chapter IV

Prevention and punishment of crimes against humanity

78. Treaties that address efforts to criminalize acts are largely focused on punishment of individuals for the crime once committed, but many also contain an obligation of some type that the States parties prevent the crime as well. Such an obligation may be set forth in a single article that speaks broadly to the issue of prevention or may be embedded in several articles that collectively seek the same end.

79. At the most general level, such an obligation simply requires the States parties to undertake to prevent (as well as punish) the acts in question. Thus, article I of the Genocide Convention provides: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Much of the remainder of the Convention is then focused on specific measures relating to punishment of individuals, although some provisions also relate to the issue of prevention.[153]

80. This general obligation to prevent manifests itself in two ways. First, it imposes upon States parties an obligation not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law".[154] Second, it imposes upon States parties an obligation "to employ the means at their disposal … to prevent persons or groups not directly under their authority from committing" such acts.[155] For the latter, the State party is only expected to use its best efforts (a due diligence standard) when it has a "capacity to influence effectively the action of persons likely to commit, or already committing, genocide", which in turn depends on the State party's geographic, political and other links to the persons or groups at issue. Further, the State party is only obligated to do what it legally can do under international law.[156]

81. A breach of this general obligation implicates the responsibility of the State if the conduct at issue (either the commission of the proscribed act or a failure to take necessary, appropriate and lawful measures to prevent the proscribed act by another) is attributable to the State pursuant to the rules on State responsibility. Indeed, in the context of disputes that may arise under the Genocide Convention, article IX refers, *inter alia*, to disputes "relating to the responsibility of a State for genocide". Although much of the focus of the Genocide Convention is upon prosecuting individuals for the crime of genocide, the International Court of Justice has stressed that the breach of the obligation to prevent is not a criminal violation by the State but, rather, concerns a breach of international law that engages traditional State

[153] Article V provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III." Article VIII provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

[154] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 6 above), para. 166.

[155] *Ibid.*, para. 166; see also Simma, "Genocide and the International Court of Justice", p. 262.

[156] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 6 above), para. 430 (finding that "it is clear that every State may only act within the limits permitted by international law"); see Tams, "Article I", p. 51 ("The duty to prevent may require State parties to make use of existing options but it does not create new rights of intervention—hence, to give just one example, the recognition of a duty to prevent adds very little to debates about the unilateral use of force to stop genocide in so-called 'humanitarian interventions'.").

responsibility.[157] The Court's approach is consistent with views previously expressed by the Commission,[158] including in commentary to the 2001 articles on responsibility of States for internationally wrongful acts: "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them."[159]

82. Many conventions also contain a different type of "prevention" obligation, which is an obligation to pursue specific measures designed to help prevent the offence from occurring, such as by obliging States parties to take effective legislative, executive, administrative, judicial or other measures to prevent the conduct from occurring in any territory under their jurisdiction. Depending on the particular crime at issue, and the context in which that State party is operating, such measures might be pursued in various ways. The State party might be expected to pursue initiatives that educate governmental officials as to the State's obligations under the relevant treaty regime. Training programmes for police, military, militia, and other personnel might be necessary to help prevent the proscribed act. National laws and policies will likely be necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission. Certainly once the proscribed act is committed, such an obligation reinforces other obligations within the treaty that require the State party to investigate and prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others. Here, too, international responsibility of the State arises if the State party has failed to use its best efforts to organize the governmental apparatus, as necessary and appropriate, to minimize the likelihood of the proscribed act being committed.

83. For egregious offences, such provisions are often accompanied by a further provision indicating that no exceptional circumstances (such as the existence of an armed conflict or a public emergency) may be invoked as a justification for the offence. Such a general statement, sometimes placed at the beginning of the treaty, stresses that the obligation not to commit the offence is non-derogable in nature.

84. The following discussion centres on the treatment of an "obligation to prevent" in a range of treaties relevant to crimes against humanity, in comments by treaty monitoring bodies that seek to interpret such an obligation, in General Assembly resolutions, in international case law and in the writings of publicists. The present chapter then concludes with a proposed draft article, consisting of three paragraphs, entitled "Prevention and punishment of crimes against humanity".

A. Obligation to prevent crimes against humanity

1. Treaties

85. As discussed above, and as indicated above in chapter III, section A, of the present report, the Genocide Convention contains within its full title (Convention on the Prevention and Punishment of the Crime of Genocide) the notion that States parties are obligated not just to punish persons who commit genocide, but also to take measures to prevent commission of the crime. As noted above in chapter III, section B, of the present report, the 1949 Geneva Conventions identify certain acts that are grave breaches of the Conventions and provide that: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."[160] The Conventions further provide that: "Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article."[161]

86. Such obligations to prevent and suppress crimes have been a feature of most multilateral treaties addressing transnational crimes since the 1960s. Examples include:

(*a*) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 10, para. 1: "Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1");

(*b*) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (art. 4, subpara. (*a*): "States Parties shall co-operate in the prevention of the crimes set forth in article 2, particularly by … taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories");

(*c*) International Convention on the Suppression and Punishment of the Crime of Apartheid (art. IV, subpara. (*a*): "The States Parties to the present Convention undertake … [t]o adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of *apartheid* and similar segregationist policies or their manifestations and to punish persons guilty of that crime");

(*d*) International Convention against the Taking of Hostages (art. 4, subpara. (*a*): "States Parties shall cooperate in the prevention of the offences set forth in article 1, particularly by … [t]aking all practicable measures to prevent preparations in their respective territories for the commission of … offences … including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate,

[157] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 6 above), para. 167 (finding that international responsibility is "quite different in nature from criminal responsibility").

[158] See *Yearbook … 1998*, vol. II (Part Two), para. 249 (finding that the Genocide Convention "did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility").

[159] Para. (3) of the commentary to article 58 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 142.

[160] Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[161] *Ibid.*

organize or engage in the perpetration of acts of taking of hostages");

(*e*) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 2, para. 1: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction");

(*f*) Inter-American Convention to Prevent and Punish Torture (art. I: "The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention."; art. 6: "The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction");

(*g*) Inter-American Convention on the Forced Disappearance of Persons (art. I (*c*) and (*d*): "The States Parties to this Convention undertake … [t]o cooperate with one another in helping to prevent, punish and eliminate the forced disappearance of persons; [t]o take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention");

(*h*) Convention on the Safety of United Nations and Associated Personnel (art. 11: "States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (*a*) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (*b*) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes");

(*i*) International Convention for the Suppression of Terrorist Bombings (art. 15 (*a*): "States Parties shall cooperate in the prevention of the offences set forth in article 2");

(*j*) United Nations Convention against Transnational Organized Crime (art. 9, para. 1: "In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials"; art. 9, para. 2: "Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions"; art. 29, para. 1: "Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention"; art. 31, para. 1: "States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime");

(*k*) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (art. 9, para. 1: "States Parties shall establish comprehensive policies, programmes and other measures: (*a*) To prevent and combat trafficking in persons; and (*b*) To protect victims of trafficking in persons, especially women and children, from revictimization");

(*l*) Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (preamble: "Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures"; art. 3: "Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment");

(*m*) International Convention for the Protection of All Persons from Enforced Disappearance (preamble: "Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance"; art. 23: "1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (*a*) Prevent the involvement of such officials in enforced disappearances; (*b*) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (*c*) Ensure that the urgent need to resolve cases of enforced disappearance is recognized. 2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished. 3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy");[162]

(*n*) Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination (art. 8, para. 1: "The Member States recognise that the crime of genocide, war crimes, and crimes against humanity are crimes under international law and are crimes against people's rights which they undertake to prevent and punish").

87. Some multilateral human rights treaties, even though not focused on the prevention and punishment of crimes as such, contain relevant obligations to prevent and suppress serious human rights violations. Examples include:

(*a*) International Convention on the Elimination of All Forms of Racial Discrimination (art. 3: "States Parties

[162] See Vermeulen, *Enforced Disappearance …*, pp. 66–76.

particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction");

(*b*) Convention on the Elimination of All Forms of Discrimination against Women (art. 2: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women"; art. 3: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men");

(*c*) Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (art. 4, para. 2: "Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the use of sanctions, where appropriate; abolishing laws and practices which discriminate against women").

Some treaties do not refer expressly to "prevention" or "elimination" of the act but, rather, focus on an obligation to take appropriate legislative, administrative and other measures to "give effect" to or to "implement" the treaty, which may be seen as encompassing necessary or appropriate measures to prevent the act.[163] Examples include:

(*a*) International Covenant on Civil and Political Rights (art. 2, para. 2: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant");

(*b*) Convention on the Rights of the Child (art. 4: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention").

88. As such, in treaties relating to crimes of the type enumerated in the definition of crimes against humanity (such as torture or apartheid), treaties relating to transnational crimes (such as transnational organized crime) and human rights treaties, an obligation to prevent the act at issue is commonly included. The obligation may be stated in a general fashion or may indicate, with a greater or lesser degree of specificity, that the State party shall take effective legislative, administrative, judicial or other measures to prevent the proscribed acts.

2. Comments by treaty bodies

89. In some instances, committees established by such treaties have addressed the meaning of the obligation to prevent as contained in the relevant treaty.[164] Thus, in its general comment No. 2, the Committee against Torture addressed a State party's obligation to prevent State-sponsored torture under article 2 of the Convention against Torture. The Committee stated in part:

> 2. Article 2, paragraph 1, obliges each State party to take actions that will reinforce the prohibition against torture through legislative, administrative, judicial, or other actions that must, in the end, be effective in preventing it. To ensure that measures are in fact taken that are known to prevent or punish any acts of torture, the Convention outlines in subsequent articles obligations for the State party to take measures specified therein.
>
> 3. The obligation to prevent torture in article 2 is wide-ranging. …
>
> 4. States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted. Likewise, the Committee's understanding of and recommendations in respect of effective measures are in a process of continual evolution, as, unfortunately, are the methods of torture and ill-treatment.[165]

90. The Committee on the Elimination of Racial Discrimination addressed a State party's obligation to prevent racial discrimination in its general recommendation No. 31. In that recommendation, the Committee provided guidance on strategies States could employ to uphold their obligation to prevent discrimination, such as implementing national strategies or "plans of action aimed at the elimination of structural racial discrimination",[166] eliminating laws that target specific segments of the population[167] and developing "through appropriate education programmes, training in respect for human rights, tolerance and friendship among racial or ethnic groups, as well as sensitization to intercultural relations, for law enforcement officials".[168]

91. Likewise, the Committee on the Elimination of Discrimination against Women addressed a State party's obligation to prevent violations of the Convention on the Elimination of All Forms of Discrimination against Women, principally in its general recommendations

[163] See, e.g., Kriebaum, "Prevention of human rights violations", p. 156 (viewing art. 2, para. 2, of the International Covenant on Civil and Political Rights as entailing "preventive measures to ensure the necessary conditions for unimpeded enjoyment of the rights enshrined in the Covenant").

[164] See Ramcharan, *The Fundamentals of International Human Rights Treaty Law*, pp. 100–104.

[165] See Committee against Torture, general comment No. 2 (2007) on implementation of article 2 by States parties, *Report of the Committee aginst Torture, Official Records of the General Assembly, Sixty-third Session, Supplement No. 44* (A/63/44), annex VI, paras. 2–4. For an assessment of the Committee's practice with respect to article 2, see Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, pp. 94–107.

[166] Committee on the Elimination of Racial Discrimination, *general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, *Report of the Committee on the Elimination of Racial Discrimination, Official Records of the General Assembly, Sixtieth Session, Supplement No. 18* (A/60/18), chap. IX, para. 5 (*i*).

[167] *Ibid*., para. 5 (*a*).

[168] *Ibid*., para. 5 (*b*).

Nos. 6, 15 and 19. In general recommendation No. 6, the Committee recommended that States parties "[e]stablish and/or strengthen effective national machinery, institutions and procedures, at a high level of Government, and with adequate resources, commitment and authority to … [m]onitor the situation of women comprehensively; … [h]elp formulate new policies and effectively carry out strategies and measures to eliminate discrimination" and also "[t]ake appropriate steps to ensure the dissemination of the Convention".[169] In general recommendation No. 15, the Committee recommended that States parties report on their efforts to prevent specific discrimination against women who have contracted AIDS.[170] In general recommendation No. 19, the Committee emphasized that

> under article 2 (*e*) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.[171]

92. The Inter-American Commission on Human Rights, in its report on citizen security and human rights, noted that one of the main obligations of the State in upholding human rights

> is linked to the judicial clarification of criminal conduct with the view to eliminating impunity and preventing the recurrence of violence … [u]ndoubtedly the adequate and effective administration of justice on the part of the judicial branch and to an appropriate extent, of disciplinary entities, has a fundamental role … in terms of the lessening of the risk and the scope of violence.[172]

93. With respect to treaties that focus on an obligation to take appropriate legislative, administrative and other measures to "give effect" to or to "implement" the treaty, the relevant treaty bodies have also issued comments. Thus, the Human Rights Committee, in its general comment No. 3, emphasized, in part,

> that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. To this end, the Covenant should be publicized in all official languages of the State and steps should be taken to familiarize the authorities concerned with its contents as part of their training.[173]

The Committee on the Rights of the Child, in its general comment No. 5, sought to clarify what was meant by "general measures of implementation" and determined that they

> are intended to promote the full enjoyment of all rights in the Convention … through legislation, the establishment of coordinating and monitoring bodies … comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes.[174]

In general comment No. 6, the Committee provided guidance on various measures for preventing mistreatment of unaccompanied and separated children located outside their country of origin, including prevention of trafficking and sexual exploitation, prevention of their military recruitment and prevention of their detention.[175]

3. United Nations resolutions

94. The General Assembly has periodically made reference to an obligation of States to prevent crimes against humanity. For example, in its 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, the General Assembly recognized a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity. Among other things, the General Assembly declared that "States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose".[176] In its 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the Assembly stated that the "obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to … [t]ake appropriate legislative and administrative and other appropriate measures to prevent violations".[177]

4. Case law

95. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice analysed the meaning of "undertake to prevent" as contained in article I of the Genocide Convention. At the provisional measures phase, the Court determined that the undertaking in article I imposes "a clear

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[169] Committee on the Elimination of Discrimination against Women, general recommendation No. 6 (1988) on effective national machinery and publicity, paras. 1–2, *Report of the Committee on the Elimination of Discrimination against Women, ibid., Forty-third Session, Supplement No. 38* (A/43/38), chap. V.

[170] Committee on the Elimination of Discrimination against Women, general recommendation No. 15 (1990) on avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS), para. (*d*), *Report of the Committee on the Elimination of Discrimination against Women, ibid., Forty-fifth Session, Supplement No. 38* (A/45/38), chap. IV.

[171] Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, para. 9, *Report of the Committee on the Elimination of Discrimination against Women, ibid., Forty-seventh Session, Supplement No. 38* (A/47/38), chap. I.

[172] Inter-American Commission on Human Rights, Report on citizen security and human rights, OEA/Ser.L/V/II, Doc. 57 (2009), para. 36.

[173] Human Rights Committee, general comment No. 3 (1981) on *implementation at the national level (art. 2)*, para. 2, *Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex VII.

[174] Committee on the Rights of the Child, general comment No. 5 (2003) on *general measures of implementation of the Convention on the Rights of the Child*, para. 9, *Report of the Committee on the Rights of the Child, ibid., Fifty-ninth Session, Supplement No. 41* (A/59/41), annex XI.

[175] Committee on the Rights of the Child, general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, paras. 50–63, *ibid., Sixty-first Session, Supplement No. 41* (A/61/41), annex II.

[176] General Assembly resolution 3074 (XXVIII) of 3 December 1973, para. 3.

[177] General Assembly resolution 60/147 of 16 December 2005, annex, para. 3 (*a*).

obligation" on the two parties "to do all in their power to prevent the commission of any such acts in the future".[178] At the merits phase, the Court described such an undertaking as "a formal promise … not merely hortatory or purposive … and … not to be read merely as an introduction to later express references to legislation, prosecution and extradition".[179]

96. The Court then indicated two types of obligations associated with article I, beginning with the obligation that a State itself not commit genocide:

Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[180]

97. The Court also decided that the substantive obligation reflected in article I was not, on its face, limited by territory but, rather, applied "to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligation[] in question".[181] Later in the judgment, the Court addressed in greater depth the obligation that a State party employ the means at its disposal to prevent persons or groups not under its authority from committing genocide. The Court said:

it is clear that the obligation in question is one of conduct and not one of result, in the sense that 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; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position *vis-à-vis* the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce.[182]

98. In this context, the Court continued,

a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. [183]

99. The Court stressed that breach of this type of obligation to prevent "results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words … violation of the obligation to prevent results from omission" and, as such, "the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur".[184] To incur responsibility, "it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed".[185] At the same time, the Court maintained that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed".[186]

100. The Court also addressed the distinction between prevention and punishment. While "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent",[187] the Court found that "the duty to prevent genocide and the duty to punish its perpetrators … are … two distinct yet connected obligations".[188] Indeed, the "obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty".[189]

101. The Court cautioned that the "content of the duty to prevent varies from one instrument to another, according

[178] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3, at p. 22.

[179] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 6 above), para. 162.

[180] *Ibid*., para. 166.

[181] *Ibid*., para. 183.

[182] *Ibid*., para. 430.

[183] *Ibid*., para. 431.

[184] *Ibid*., para. 432.

[185] *Ibid*.

[186] *Ibid*., para. 431; see article 14, para. 3, of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 22 (maintaining that "[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs"); Salmon, "Duration of the breach"; Economides, "Content of the obligation: obligations of means and obligations of result".

[187] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 6 above), para. 426.

[188] *Ibid*., para. 425.

[189] *Ibid*., para. 427.

to the wording of the relevant provisions, and depending on the nature of the acts to be prevented", and hence the Court's decision did not "purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts".[190]

102. The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) contains no express obligation to "prevent" violations of the Convention, but the European Court of Human Rights has construed individual articles to contain such an obligation. Thus, in *Kiliç v. Turkey*, the Court found that article 2, paragraph 1, of the Convention, on the right to life, obliged a State party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction.[191] Construing the same article in *Makaratzis v. Greece*, the Court determined that this "involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions".[192]

103. At the same time, the Court has recognized that the State party's obligation in this regard is limited. In *Mahmut Kaya v. Turkey*, the Court found:

> Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2, paragraph 1] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[193]

104. The American Convention on Human Rights also contains no express obligation to "prevent" violations of the Convention. Even so, when construing the obligation of the States parties to "ensure" the free and full exercise of the rights recognized by the Convention,[194] the Inter-American Court of Human Rights has found that this obligation implies a "duty to prevent", which in turn requires the State party to pursue certain steps. Specifically, the Court in *Velasquez Rodriguez v. Honduras* found:

> 166. … This obligation implies the duty of States parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation…
>
> 174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.
>
> 175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.[195]

105. Similar reasoning has animated the Court's approach to interpretation of article 6 of the Inter-American Convention to Prevent and Punish Torture. For example, in *Tibi v. Ecuador*, the Court found that Ecuador violated article 6 when it failed to initiate formal investigations after complaints of maltreatment of prisoners.[196]

5. Publicists

106. Publicists have also analysed these treaty obligations concerning prevention. With respect to the general obligation to prevent, a central focus of recent scholarship has been the 2007 judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.[197] Owing to the absence of an express statement in the Genocide Convention that States parties shall not commit genocide, some scholars have debated whether the Court was correct in maintaining that the obligation is implicit in the obligation to "prevent".[198] Reflecting on a judgment in which he participated, however, former Judge Bruno Simma has

[190] *Ibid.*, para. 429.

[191] *Kiliç v. Turkey*, No. 22492/93, European Court of Human Rights, ECHR 2000-III, para. 62.

[192] *Makaratzis v. Greece [GC]*, No. 50385/99, European Court of Human Rights, ECHR 2004-XI, para. 57.

[193] *Mahmut Kaya v. Turkey*, No. 22535/93, European Court of Human Rights, ECHR 2000-III, para. 86; see also *Osman v. the United Kingdom*, European Court of Human Rights, *Reports of Judgments and Decisions 1998-VIII*, 28 October 1998, para. 116; *Kerimova and others v. Russia*, Nos. 17170/04 and five others, European Court of Human Rights, 3 May 2011, para. 246.

[194] Article 1, paragraph 1, reads: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination."

[195] *Velasquez Rodriguez v. Honduras*, Judgment, Series C, No. 4, Inter-American Court of Human Rights, 29 July 1988, paras. 166 and 174–175; see also *Juan Humberto Sánchez v. Honduras*, Judgment, Series C, No. 99, Inter-American Court of Human Rights, 7 June 2003, paras. 137 and 142; and *Gómez-Paquiyauri Brothers v. Peru*, Series C, No. 110, Inter-American Court of Human Rights, 8 July 2004, para. 155 (finding that the State's failure to effectively investigate allegations of torture and leaving acts unpunished meant that it had failed to take effective measures to prevent such acts from occurring, in violation of its obligations under the provisions of article 6 of the Inter-American Convention against Torture).

[196] *Tibi v. Ecuador*, Judgment, Series C, No. 114, Inter-American Court of Human Rights, 7 September 2004, para. 159; see also *Gómez-Paquiyauri* (previous footnote), para. 155.

[197] See footnote 6 above. See, e.g., Piqué, "Beyond territory, jurisdiction, and control: towards a comprehensive obligation to prevent crimes against humanity"; Weber, "The obligation to prevent in the proposed convention examined in light of the obligation to prevent in the Genocide Convention".

[198] Compare Gaeta, "On what conditions can a State be held responsible for genocide?", with Tams, "Article I", pp. 56–60; Seibert-Fohr,

indicated: "One of the more interesting questions finally put to rest in the 2007 judgment concerned whether States parties to the Convention are themselves under an obligation not to commit genocide. The Court's answer is a clear 'yes'."[199]

107. With respect to the obligation to pursue specific measures of prevention, publicists tend to characterize the obligation as an obligation of conduct or means. Thus,

> in relation to an obligation of means, the State may be bound to take positive measures of prevention or protection in order to obtain a particular goal …. The expressions used vary from one treaty to another ("take all measures", "all appropriate measures to protect", "necessary measures", "effective measures", "appropriate measures", "do everything possible", "do everything in its power", "exercise due diligence"), but their common feature is their general formulation and their lack of precise stipulation of the means to achieve the specified result.[200]

108. Other publicists have focused on the obligation to prevent as it exists in particular treaties, such as article I of the Genocide Convention[201] or article 2, paragraph 1, of the Convention against Torture. For example, two participants in the drafting of article 2, paragraph 1, of the Convention against Torture have analysed it as follows:

> According to *paragraph 1* of the article, … each State party shall take *effective measures to prevent torture*. The character of these measures is left to the discretion of the State concerned. It is merely indicated that the measures may be legislative, administrative, judicial or of some other kind, but in any case they must be effective. The paragraph should also be compared with article 4 of the *Convention*, which specifically requires legislative measures in order to make all acts of torture criminal offences punishable by appropriate penalties which take into account their grave nature.
>
> The obligation under article 2 is not only to prohibit but to *prevent* acts of torture. This further emphasizes that the measures shall be effective: a formal prohibition is not sufficient, but the acts shall actually be prevented.
>
> This does not mean, of course, that a State can guarantee that no act of torture will ever be committed in its territory. It is sufficient that the State does what can reasonably be expected from it in order to prevent such acts from occurring. If nevertheless such acts occur, other obligations under the *Convention* become applicable, and the State may then be obliged under article 2, paragraph 1, to take further effective measures in order to prevent a repetition. Such measures may include changes of personnel in a certain unit, stricter supervision, the issue of new instructions, etc.[202]

109. Still other publicists have analysed the obligation to prevent as expressed in case law. For example, one analysis of the *Velasquez Rodriguez* case[203] finds:

> The duty to prevent … includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. The Court clarified, however, that while the State is obligated to prevent human rights abuses, the existence of a particular violation did not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practiced torture and assassination with impunity was itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person was not tortured or assassinated, or if those facts could not be proven in a concrete case.[204]

110. Publicists appear to recognize that the obligation to pursue specific measures to prevent does not actually dictate the specific steps that must be taken and instead accepts that such steps may vary according to the nature of the conduct being regulated and the context in which the State party is operating. Thus, one publicist has analysed the obligation to prevent as expressed by treaty-monitoring bodies, in case law, and in other sources so as to sketch out specific measures that should be undertaken by a State party to the International Convention for the Protection of All Persons from Enforced Disappearance. Those measures included: (*a*) protective measures to prevent the enforced disappearance of persons not in detention; (*b*) safeguards surrounding arrest and detention to prevent subsequent enforced disappearance; and (*c*) measures to prevent repetition of enforced disappearance of persons when it occurs.[205]

B. Obligation to prevent and punish crimes against humanity

111. In the light of the above, there appear to be three important elements that might be captured in an initial draft article for a convention on crimes against humanity. First, the draft article could contain an opening provision that speaks generally to the obligation of a State party both to prevent and punish crimes against humanity. Such a provision would signal at the outset the broad obligation being undertaken by States parties with respect to the particular offence of crimes against humanity. Second, the draft article could contain a further provision addressing the obligation of the State party to pursue specific measures of prevention in the form of appropriate legislative, administrative, judicial or other measures. Consistent with prior treaties, this provision would only address the issue of prevention, since most of the remainder of the convention on crimes against humanity will address in greater detail specific measures that must be taken by the State party to punish crimes against humanity, including the obligations to incorporate crimes against humanity into national law and to exercise national jurisdiction over alleged offenders. Finally, a third provision of the draft article could address the non-derogable nature of the prohibition on crimes against humanity, an important statement at the outset of the convention that would highlight the seriousness of this offence. Each of these elements is discussed below.

"The ICJ judgment in the 'Bosnian Genocide' case and beyond: a need to reconceptualise?".

[199] Simma, "Genocide and the International Court of Justice", p. 264.

[200] Economides, "Content of the obligation: obligations of means and obligations of result", p. 378.

[201] See, e.g., Schabas, *Genocide in International Law: The Crime of Crimes*, pp. 520–525; Tams, "Article I", pp. 45–54; Ben-Naftali, "The obligation to prevent and punish genocide", pp. 33–44.

[202] Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p. 123 (Burgers, a member of the Netherlands delegation to the Commission on Human Rights, served as chair of the working group charged with drawing up the initial draft of the Convention; Danelius, a member of the Swedish delegation, was a member of that working group and wrote the initial draft).

[203] *Velasquez Rodriguez v. Honduras* (see footnote 195 above).

[204] Ramcharan, *The Fundamentals of International Human Rights Treaty Law*, p. 99. For an analysis of the "reasonableness" standard articulated by both the European and Inter-American courts, see Vermeulen, *Enforced Disappearance …*, pp. 265–268.

[205] Vermeulen, *Enforced Disappearance …*, pp. 268–312.

1. General obligation to prevent and punish

112. Based on the prior treaty practice recounted above, there are various ways that a general obligation to prevent and punish might be expressed in a convention on crimes against humanity. The provisions contained in the Genocide Convention and the 1949 Geneva Conventions were early efforts at identifying such an obligation. Even so, the approach in article I of the Genocide Convention—"confirming" genocide to be a crime under international law and calling upon States parties to pursue steps to prevent and punish such conduct—remains a useful model for a general obligation in a convention to prevent crimes against humanity. Again, that formulation is: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Using such a formulation would "confirm" that crimes against humanity currently violate customary international law; would clearly confirm its historical development as a crime that arises whether committed in time of peace or war; and would generally presage what follows in subsequent provisions that call upon States parties to take specific steps, such as adopting any necessary national criminal legislation. Further, using such a formulation would help in harmonizing the draft articles with a widely adhered-to convention on another core crime of international law (as at January 2015, there are 146 States parties to the Genocide Convention).

113. The words "undertake to" remain appropriate, given the analysis of the International Court of Justice that "the ordinary meaning of the word 'undertake' is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation".[206] As discussed above, this obligation consists of two types of obligations: (*a*) an obligation for the State not to commit such acts through its own organs or persons over whom they have control such that their conduct is attributable to the State under international law; and (*b*) an obligation for the State to employ the reasonable means at its disposal, when necessary, appropriate and lawful, to prevent others not directly under its authority from committing such acts.[207] The formulation contained in article I of the Genocide Convention is not, by its terms, limited in geographic scope. As such, it prohibits a State party from committing genocide outside territory under its jurisdiction, and imposes an obligation to act with respect to other actors outside such territory, subject to the important parameters discussed above.

2. Specific measures for prevention

114. At the same time, as noted above, an obligation exists in numerous treaties that requires States parties to pursue specific types of measures to prevent the crime. One widely adhered-to formulation is found in article 2, paragraph 1, of the Convention against Torture (as at January 2015, 156 States have adhered to this Convention), which provides that: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[208]

115. During the drafting of the Convention against Torture, this language was understood to provide flexibility and discretion to each State party as to the character of the measures to be taken, so long as they promote the basic objectives of the treaty.[209] By referring to acts occurring "in any territory under its jurisdiction", the language is broader than a reference solely to conduct occurring in the State's "territory",[210] but narrower than language that could suggest an obligation upon the State to develop legislative, administrative, judicial or other measures to prevent any conduct worldwide. "Territory under its jurisdiction" includes sovereign territory, vessels and aircraft of the State's nationality and occupied and other territory under its jurisdiction.[211] Such a geographic formulation appears to be supported in many contemporary treaties in addition to the Convention against Torture;[212] by establishing an obligation upon States to take specific measures to prevent conduct "in territory under its jurisdiction", the language focuses the obligation on areas where the State has a day-to-day ability to act and avoids suggesting a more open-ended and therefore perhaps less clear obligation with respect to the adoption of specific measures.

116. As noted above, the specific measures that must be taken will depend in part on the context and risks at issue for any given State party. Nevertheless, such an obligation normally would oblige the State party to: (*a*) adopt national laws, establish institutions and adopt policies necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission; (*b*) continually to keep those laws and policies under review and as necessary improve them; (*c*) pursue initiatives that educate governmental officials as to the State's obligations under the convention; (*d*) develop training programmes for police, military, militia and other relevant personnel as necessary to help prevent the commission of crimes against humanity; and (*e*) once the proscribed act is committed, fulfil in good faith other obligations within the convention that require the State party to investigate and either prosecute or extradite offenders, since doing so

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[206] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 6 above), para. 162.

[207] *Ibid*., para. 166.

[208] Article 2, para. 3, provides: "An order from a superior officer or a public authority may not be invoked as a justification of torture." The issue raised by this provision will be addressed in a future report of the Special Rapporteur in the context of the State party's obligation to ensure that a crime against humanity constitutes an offence under its criminal law.

[209] See *ibid*.

[210] See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 4 (*a*) (obliging States to take "all practicable measures to prevent preparations in their respective territories for the commission of" offences); International Convention against the Taking of Hostages, art. 4 (*a*) (same); Convention on the Safety of United Nations and Associated Personnel, art. 11 (*a*) (same).

[211] Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, pp. 116–117.

[212] See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, art. 3 (obliging States to "undertake to prevent … all practices of this nature in territories under their jurisdiction"); Inter-American Convention to Prevent and Punish Torture, art. 6 (obliging States to "take effective measures to prevent … torture within their jurisdiction").

serves, in part, to deter future acts by others. Such measures, of course, may already be in place for most States, since the underlying wrongful acts associated with crimes against humanity (murder, torture, etc.) are already proscribed in most national legal systems.

117. The general and more specific obligations to prevent crimes against humanity on the basis of the above-quoted texts would build upon obligations that already exist to prevent the underlying wrongful acts from occurring even on an isolated basis. When combining them in a single draft article, the texts might be harmonized by referring to "Each State Party" (used in the Convention against Torture) rather than "The Contracting Parties" (used in the Genocide Convention).

3. Non-derogation provision

118. As previously noted, general and specific obligations on prevention are often accompanied by a further provision indicating that no exceptional circumstances (such as the existence of an armed conflict or a public emergency) may be invoked as a justification for the offence. Such a general statement is often placed at the outset of a treaty that addresses serious crimes, which has the advantage of stressing that the obligation not to commit the offence is non-derogable in nature.

119. For example, article 2, paragraph 2, of the Convention against Torture makes clear that no exceptional situation may be invoked to justify acts of torture; hence, the obligation set forth is non-derogable in nature.[213] Specifically, that paragraph provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[214] Comparable language may be found in other treaties addressing serious crimes at the global or regional level. For example, article 1, paragraph 2, of the International Convention for the Protection of All Persons from Enforced Disappearance contains the same language, while article 5 of the Inter-American Convention to Prevent and Punish Torture contains comparable language. One advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors.

[213] See Burgers and Danelius, *The United Nations Convention against Torture …*, p. 124; Nowak and McArthur, *The United Nations Convention against Torture: A Commentary*, pp. 116–117.

C. Draft article 1: Prevention and punishment of crimes against humanity

120. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

"*Draft article 1. Prevention and punishment of crimes against humanity*

"1. Each State Party confirms that crimes against humanity, whether committed in time of peace or in time of war, are crimes under international law which it undertakes to prevent and punish.

"2. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent crimes against humanity in any territory under its jurisdiction.

"3. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of crimes against humanity."

[214] Article 2, para. 3, of the Convention against Torture provides: "An order from a superior officer or a public authority may not be invoked as a justification of torture". The issue raised by this provision will be addressed in a future report of the Special Rapporteur in the context of the State party's obligation to ensure that a crime against humanity constitutes an offence under its criminal law.

Chapter V

Definition of crimes against humanity

121. As indicated in chapter II above, the definition of crimes against humanity has been the subject of different formulations over the past century. The most widely accepted formulation, however, is that of article 7 of the Rome Statute, which was built upon the formulations articulated in the Nürnberg and Tokyo Charters, the Nürnberg Principles, the 1954 draft code of offences against the peace and security of mankind, the statute of the International Tribunal for the Former Yugoslavia, the statute of the International Criminal Tribunal for Rwanda, the Commission's 1994 draft statute for an international criminal court,[215] and the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind. Article 7 of the Rome Statute reflects an agreement reached among the 122 States that were party to the Statute as at January 2015.

122. While from time to time the view is expressed that article 7 might be improved and, although disagreements may exist regarding whether it reflects customary international law[216] or what constitutes the best interpretation

[215] *Yearbook … 1994*, vol. II (Part Two), para. 91.

[216] See, e.g., Cassese, "Crimes against humanity", p. 375. For example, while a "policy" element appears in article 7, the Appeals Chamber of the International Tribunal for the Former Yugoslavia maintained in 2002 in the *Kunarac* case that there is "nothing" in customary international law that requires a policy element and, rather, an "overwhelming" case against it. *Prosecutor v. Kunarac*, Case No. IT-96-23, Judgment, Appeals Chamber, International Tribunal for the Former Yugoslavia, 12 June 2002, *Judicial Reports 2002* (hereinafter, "Kunarac 2002"), para. 98; see also Mettraux, "Crimes against humanity in the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda", pp. 270–282. Yet with the passage of time and the adherence of a large number of States to the Rome Statute, it seems likely that article 7 is having an effect in crystallizing customary international law. See generally Baxter, "Multilateral treaties as evidence of customary international law".

of some of its aspects,[217] there can be little doubt that article 7 has very broad support among States as a definition of crimes against humanity. Indeed, every State that addressed this issue before the Sixth Committee in 2014 maintained that the Commission should not adopt a definition of "crimes against humanity" for a new convention that differs from article 7 of the Rome Statute.[218] Moreover, any convention that seeks in part to promote the complementarity regime of the Rome Statute should use the article 7 definition so as to foster national laws that are in harmony with the Rome Statute. More generally, using the article 7 definition would help minimize undesirable fragmentation in the field of international criminal law.

123. Article 7 of the Rome Statute provides:

Article 7. Crimes against humanity

1. For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(*a*) Murder;

(*b*) Extermination;

(*c*) Enslavement;

(*d*) Deportation or forcible transfer of population;

(*e*) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(*f*) Torture;

(*g*) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(*h*) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(*i*) Enforced disappearance of persons;

(*j*) The crime of apartheid;

(*k*) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(*a*) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(*b*) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(*c*) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(*d*) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(*e*) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(*f*) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(*g*) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(*h*) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(*i*) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

124. As noted in chapter II above, early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed conflict, most likely in part to address concerns about whether the crime was well-settled in international law, and in part to distinguish international crimes from large-scale, violent national crimes.[219] While the statute of the International Tribunal for the Former Yugoslavia maintained the armed conflict connection because that statute was crafted in the context of such a conflict, since 1993 that connection has disappeared from the statutes of international criminal tribunals, including the Rome Statute.[220] In its place are the "chapeau" requirements that the crime be committed within the context of a widespread or systematic attack directed against a civilian population in furtherance of a State or organizational policy to commit such an attack.

A. "Widespread or systematic" attack

125. The requirement that there be a "widespread or systematic attack" first appeared in the statute of the

[217] See, e.g., Robinson, "The draft convention on crimes against humanity: what to do with the definition?", p. 105 (but concluding that "the arguments for crafting a new definition are widely seen to be outweighed by the benefits of using the established definition in article 7" of the Rome Statute).

[218] See Austria, *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 19th meeting (A/C.6/69/SR.19), para. 111; Croatia, *ibid*., 20th meeting (A/C.6/69/SR.20), para. 94; Finland (on behalf of the Nordic countries), *ibid*., 19th meeting (A/C.6/69/SR.19), para. 81; Italy, *ibid*., 22nd meeting (A/C.6/69/SR.22), para. 53; Poland, *ibid*., 20th meeting (A/C.6/69/SR.20), para. 36; New Zealand, *ibid*., 21st meeting (A/C.6/69/SR.21), para. 33; Republic of Korea, *ibid*., para. 45; and Mongolia, *ibid*., 24th meeting (A/C.6/69/SR.24), para. 94. Similar views were expressed in the interventions made in 2013 on this issue. See, e.g., Norway (on behalf of the Nordic countries), *ibid., Sixty-eighth Session, Sixth Committee,* 17th meeting (A/C.6/68/SR.17), para. 38 ("agreed language under the Rome Statute must not be opened for reconsideration; the definition of crimes against humanity in article 7 must be retained as the material basis for any further work on the topic.").

[219] Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, p. 21.

[220] Ambos and Wirth, "The current law of crimes against humanity …", pp. 3–13.

International Tribunal for Rwanda,[221] though some decisions of the International Tribunal for the Former Yugoslavia maintained that the requirement was implicit even in the that Court's statute, given the inclusion of such language in the report of the Secretary-General proposing the statute.[222] Jurisprudence of both courts maintained that the conditions of "widespread" and "systematic" were disjunctive rather than conjunctive requirements; either condition may be met to establish the existence of the crime.[223] For example, the Trial Chamber of the International Tribunal for Rwanda in the *Akayesu* case found: "The act can be part of a widespread or systematic attack and need not be a part of both."[224] This reading of the widespread/systematic requirement is also reflected in the Commission's commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, where it stated that "an act could constitute a crime against humanity if either of these conditions [of systematicity or scale] is met".[225]

126. When this standard was considered for the Rome Statute, some States expressed the view that the conditions of "widespread" and "systematic" should be conjunctive requirements—that they both should be present to establish the existence of the crime—because otherwise the standard would be overinclusive.[226] Indeed, if "widespread" commission of acts alone were sufficient, these States maintained that spontaneous waves of widespread, but unrelated, crimes would constitute crimes against humanity.[227] Owing to that concern, a compromise was developed that involved adding to article 7, paragraph 2 (*a*), a definition of "attack" which, as discussed below, contains a policy element.[228]

127. Case law of the International Criminal Court has affirmed that the conditions of "widespread" and "systematic" are disjunctive. For example, in its *Kenya Authorization Decision*, Pre-Trial Chamber II of the Court stated that "this contextual element [of widespread or systematic] applies disjunctively, such that the alleged acts must be *either* widespread *or* systematic to warrant classification as crimes against humanity".[229]

128. The first condition requires that the attack be "widespread". According to the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Kunarac*, "the adjective 'widespread' connotes the large-scale nature of the attack and the number of targeted persons".[230] As such, this requirement refers to a "multiplicity of victims"[231]

[221] See chapter II above. Unlike the English version, the French version of article 3 the statute of the International Tribunal for Rwanda used a conjunctive formulation ("*généralisée et systématique*" [widespread and systematic]). In the *Akayesu* case, the Trial Chamber indicated: "In the original French version of the Statute, these requirements were worded cumulatively …, thereby significantly increasing the threshold for application of this provision. Since customary international law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation." *Akayesu* (see footnote 79 above), para. 579, footnote 149.

[222] *Tadić 1997* (see footnote 108 above), para. 646; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, International Tribunal for the Former Yugoslavia, 3 March 2000, *Judicial Reports 2000*, para. 202; see Sluiter, "'Chapeau elements' of crimes against humanity in the jurisprudence of the UN ad hoc tribunals".

[223] See, e.g., *Akayesu* (see footnote 79 above), para. 579; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1, Judgment, Trial Chamber, International Tribunal for Rwanda, 21 May 1999, *Reports of Orders, Decisions and Judgements 1999*, para. 123 ("[t]he attack must contain one of the alternative conditions of being widespread or systematic"); *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 27 September 2007, para. 437 ("[T]he attack must be widespread or systematic, the requirement being disjunctive rather than cumulative"); *Tadić 1997* (see footnote 108 above), para. 648 ("[E]ither a finding of widespreadness … or systematicity … fulfils this requirement.").

[224] *Akayesu* (see footnote 79 above), para. 579.

[225] Para. (4) of the commentary to article 18 of the draft Code, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 47. See also *Report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court, Official Records of the General Assembly, Fiftieth Session, Supplement No. 22* (A/50/22), para. 78 ("elements that should be reflected in the definition of crimes against humanity included…[that] the crimes usually involved a widespread *or** systematic attack"); *Yearbook ... 1995*, vol. II (Part Two), para. 90 ("the concepts of 'systematic' and 'massive' violations were complementary elements of the crimes concerned"); para. (14) of the commentary to the draft article 20 of the draft statute for an international criminal court, *Yearbook ... 1994*, vol. II (Part Two), para. 91, at p. 40 ("the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread *or** systematic violations"); para. (3) of the commentary to draft article 21 of the draft code of crimes against the peace and security of mankind as adopted on first reading, *Yearbook ... 1991*, vol. II (Part Two), chap. IV, sect. D, at p. 103 ("[e]ither one of these aspects—systematic or mass scale—in any of the acts enumerated … is enough for the offence to have taken place").

[226] See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15* June*–17* July *1998, Official Records*, vol. II (A/CONF.183/13 (Vol. II)), summary record of the 3rd meeting, document A/CONF.183/C.1/SR.3, para. 45 (India), para. 90 (United Kingdom of Great Britain and Northern Ireland), para. 96 (France), para. 108 (Thailand), para. 120 (Egypt), para. 136 (Islamic Republic of Iran), para. 172 (Turkey); and summary record of the 4th meeting, document A/CONF.183/C.1/SR.4, para. 5 (Russian Federation), para. 17 (Japan); Van Schaack, "The definition of crimes against humanity …", p. 844.

[227] Robinson, "Defining 'crimes against humanity' at the Rome Conference", p. 47.

[228] Hwang, "Defining crimes against humanity in the Rome Statute of the International Criminal Court", p. 497; DeGuzman, "The Road from Rome: the developing law of crimes against humanity", p. 372 (citing the author's notes of debate, Committee of the Whole (17 June 1998), taken while the author was a legal advisor on the delegation of Senegal to the Rome Conference); Van Schaack, "The definition of crimes against humanity …", pp. 844–845.

[229] See *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, Case No. ICC-01/09, Pre-Trial Chamber, International Criminal Court, 31 March 2010, para. 94; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7) (*a*) and (*b*) of the Rome Statute on the Charges, Pre-Trial Chamber II, International Criminanl Court, 15 June 2009, para. 82.

[230] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 22 February 2001 para. 428 (hereinafter, "*Kunarac 2001*"); see *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, Pre-Trial Chamber, International Criminal Court, 30 September 2008, para. 394 (hereinafter, "*Katanga 2008*"); see also *Prosecutor v. Dario Kordić and Mario Ćerkez*, Case No. IT-95-14/2-A, Judgment, Appeals Chamber, International Tribunal for the Former Yugoslavia, 17 December 2004, para. 94 (hereinafter, "*Kordić 2004*"); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 17 January 2005, para. 545–546.

[231] *Bemba* (see footnote 229 above), para. 83; article 18 of the draft Code of Crimes against the Peace and Security of Mankind and commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 47 (using the phrase "on a large scale" instead of widespread); *Akayesu* (see footnote 79 above), para. 580; *Kayishema* (see footnote 223 above), para. 123; see also *Mrkšić* (footnote 223 above), para. 437 ("widespread refers to the large scale nature of the attack and the number of victims").

and excludes isolated acts of violence,[232] such as murder directed against individual victims by persons acting on their own volition rather than as part of a broader initiative. At the same time, a single act committed by an individual perpetrator can constitute a crime against humanity if it occurs within the context of a broader campaign.[233] There is no specific numerical threshold of victims that must be met for an attack to be "widespread"; rather, the determination is dependent on the size of the civilian population that was allegedly attacked.[234] For example, in *Kunarac*, the Appeals Chamber of the International Tribunal for the Former Yugoslavia identified the following test for determining whether an attack is widespread:

> A Trial Chamber must therefore "first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread …" The consequences of the attack upon the targeted population, the number of victims, the nature of the acts … could be taken into account to determine whether the attack satisfies either or both requirements of a "widespread" or "systematic" attack *vis-à-vis* this civilian population.[235]

129. "Widespread" can also have a geographical dimension, with the attack occurring in different locations.[236] Thus, in the *Bemba* case, Pre-Trial Chamber II of the International Criminal Court found that there was sufficient evidence to establish that an attack was "widespread" on the basis of reports of attacks in various locations over a large geographical area, including evidence of thousands of rapes, mass grave sites and a large number of victims.[237] Yet a large geographic area is not required; the International Tribunal for the Former Yugoslavia has found that the attack can be in a small geographic area against a large number of civilians.[238]

130. In its *Kenya Authorization Decision*, Pre-Trial Chamber II of the International Criminal Court indicated that "[t]he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts".[239] An attack may be widespread owing to the cumulative effect of multiple inhumane acts or the result of a single inhumane act of great magnitude.[240]

131. The second, alternative condition requires that the attack be "systematic". In its commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, the Commission stated that the requirement of "systematic" means that the inhumane acts are committed "pursuant to a preconceived plan or policy" and that the "implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts".[241] Like "widespread", the term "systematic" excludes isolated or unconnected acts of violence,[242] and jurisprudence from the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the International Criminal Court reflects a similar understanding of what is meant by the term. The International Tribunal for the Former Yugoslavia defined "systematic" as "the organised nature of the acts of violence and the improbability of their random occurrence"[243] and found that evidence of a pattern or methodical plan establishes that an attack was systematic.[244] Thus, the Appeals Chamber in *Kunarac* confirmed that "'patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis—are a common expression of such systematic occurrence'".[245] The Trial Chamber in *Kunarac* found that there was a systematic attack on the Muslim civilian population on the basis of evidence of a consistent pattern: once the Serb forces had control of a town or village, they would ransack or burn down Muslim apartments or houses; they would then round up or capture Muslim villagers, who were sometimes beaten or killed during the process; and the men and women would be separated and kept in various detention centres or prisons.[246] Likewise, the International Tribunal for Rwanda has defined "systematic" as organized conduct following a consistent pattern or pursuant to a policy or plan.[247]

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[232] See *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, International Criminal Court, 13 July 2012, para. 19; *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad al Abd-Al-Rahman ("Au Kushayb")*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58 (7) of the Statute, Pre-Trial Chamber I, International Criminal Court, 27 April 2007, para. 62; see also *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgment, Trial Chamber, International Tribunal for Rwanda, 6 December 1999, paras. 67–69; *Kayishema* (footnote 223 above), paras. 122–123; article 18 of the draft Code of Crimes against the Peace and Security of Mankind and commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 47; draft article 21 of the draft code of crimes against the peace and security of mankind as adopted on first reading and commentary thereto, *Yearbook ... 1991*, vol. II (Part Two), chap. IV, sect. D, at p. 103.

[233] *Kupreškić 2000* (see footnote 47 above), para. 550; *Tadić 1997* (see footnote 108 above), para. 649.

[234] See *Kunarac 2002* (footnote 216 above), para. 95.

[235] *Ibid.*

[236] See, e.g., *Ntaganda* (footnote 232 above), para. 30; *Prosecutor v. William Samoei Ruto, Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (*a*) and (*b*) of the Rome Statute, Pre-Trial Chamber II, International Criminal Court, 23 January 2012, para. 177.

[237] *Bemba* (see footnote 229 above), paras. 117–124.

[238] *Blaškić* (see footnote 222 above), para. 206; *Kordić 2004* (see footnote 230 above), para. 94.

[239] *Kenya Authorization Decision* (see footnote 229 above), para. 95.

[240] Para. (4) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 47; see also *Bemba* (see footnote 229 above), para. 83 (finding that widespread "entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians").

[241] Para. (3) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 47; see also para. (3) of the commentary to draft article 21 of the draft code of crimes against the peace and security of mankind as adopted on first reading, *Yearbook ... 1991*, vol. II (Part Two), chap. IV, sect. D, at p. 103 ("The systematic element relates to a constant practice or to a methodical plan to carry out such violations.").

[242] See article 18 of the draft Code of Crimes against the Peace and Security of Mankind and commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 47; draft article 21 of the draft code of crimes against the peace and security of mankind as adopted on first reading and the commentary thereto, *Yearbook ... 1991*, vol. II (Part Two), chap. IV, sect. D, at p. 103.

[243] *Mrkšić* (see footnote 223 above), para. 437; *Kunarac 2001* (see footnote 230 above), para. 429.

[244] See, e.g., *Tadić 1997* (footnote 108 above), para. 648.

[245] *Kunarac 2002* (see footnote 216 above), para. 94.

[246] *Kunarac 2001* (see footnote 230 above), paras. 573 and 578.

[247] *Akayesu* (see footnote 79 above), para. 580 ("'systematic' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy"); *Kayishema* (see footnote 223 above), para. 123 ("systematic attacks means an attack carried out pursuant to a preconceived policy or plan").

132. Consistent with jurisprudence of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, Pre-Trial Chamber I of the International Criminal Court found in *Harun* that "'systematic' refers to 'the organised nature of the acts of violence and the improbability of their random occurrence'".[248] Pre-Trial Chamber I found in *Katanga* that the term

has been understood as either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts, or as "patterns of crimes" such that the crimes constitute a "non-accidental repetition of similar criminal conduct on a regular basis".[249]

In applying the standard in *Ntaganda*, Pre-Trial Chamber II found an attack to be systematic since

the perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions, they attacked villages with heavy weapons, and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting.[250]

B. "Directed against any civilian population"

133. The second general requirement of article 7 of the Rome Statute is that the act must be committed as part of an attack "directed against any civilian population". Article 7, paragraph 2 (*a*), of the Rome Statute defines "attack directed against any civilian population" for the purpose of paragraph 1 as "a course of conduct involving the multiple commission of acts referred to in [] paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[251] Moreover, jurisprudence from the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the International Criminal Court has construed the meaning of each of those terms: "directed against", "any", "civilian" and "population".

134. The International Tribunal for the Former Yugoslavia has established that the phrase "directed against" requires that a civilian population be the intended primary target of the attack, rather than an incidental victim.[252] Pre-Trial Chamber II of the International Criminal Court subsequently adopted this interpretation in the *Bemba* case and the *Kenya Authorization Decision*.[253] In the *Bemba* case, the Chamber found that there was sufficient evidence showing the attack was "directed against" the civilian population of the Central African Republic.[254] The Chamber concluded that Movement for the Liberation of the Congo (MLC) soldiers were aware that their victims were civilians, based on direct evidence of civilians being attacked inside their houses or in their courtyards.[255] The Chamber further found that MLC soldiers targeted *primarily* the civilian population, demonstrated by an attack at one locality where the MLC soldiers did not find any rebel troops, whom they claimed to be chasing.[256] The term "directed" places its emphasis on the intention of the attack rather than the physical result of the attack.[257] It is the attack, not the acts of the individual perpetrator, which must be "directed against" the target population.[258]

135. The word "any" indicates that "civilian population" is to have a wide definition and should be interpreted broadly.[259] An attack can be committed against any civilian population, "regardless of their nationality, ethnicity or any other distinguishing feature",[260] and can be committed against either national or foreign populations.[261] Those targeted may "include a group defined by its (perceived) political affiliation".[262] In order to qualify as a civilian population during a time of armed conflict, the targeted population must be of a "predominantly" civilian nature;[263] the presence of certain combatants within the population does not change its character.[264] This approach is in accordance with other rules arising under international humanitarian law. For example, Additional Protocol I to the Geneva Conventions states: "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character" (art. 50, para. 3). During a time of peace, "civilian" shall include all persons except those individuals who have a duty to maintain public order and have legitimate

[248] *Harun* (see footnote 232 above), para. 62 (citing to *Kordić 2004* (see footnote 230 above), para. 94, which in turn cites to *Kunarac 2001* (see footnote 230 above), para. 429); see also *Kenya Authorization Decision* (footnote 229 above), para. 96; *Ruto* (footnote 236 above), para. 179; *Katanga 2008* (footnote 230 above), para. 394.

[249] *Katanga 2008* (see footnote 230 above), para. 397.

[250] *Ntaganda* (see footnote 232 above), para. 31; see also *Ruto* (footnote 236 above), para. 179.

[251] See also International Criminal Court, Elements of Crimes (footnote 87 above), p. 5.

[252] See, e.g., *Kunarac 2001* (footnote 230 above), para. 421 ("The expression 'directed against' specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.").

[253] *Bemba* (see footnote 229 above), para. 76; *Kenya Authorization Decision* (see footnote 229 above), para. 82.

[254] *Bemba* (see footnote 229 above), para. 94; see also *Ntaganda* (footnote 232 above), paras. 20–21.

[255] *Bemba* (see footnote 229 above), para. 94.

[256] *Ibid*., paras. 95–98. The Pre-Trial Chamber also relied on evidence that at the time of the arrival of the MLC soldiers in this locality, rebel troops had already withdrawn. *Ibid*., para. 98.

[257] See, e.g., *Blaškić* (footnote 222 above), footnote 401.

[258] *Kunarac 2002* (see footnote 216 above), para. 103.

[259] See, e.g., *Mrkšić* (footnote 223 above), para. 442; *Tadić 1997* (footnote 108 above), para. 643; *Kupreškić 2000* (footnote 47 above), para. 547 ("[A] wide definition of 'civilian' and 'population' is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity."); *Kayishema* (footnote 223 above), para. 127.

[260] *Katanga 2008* (see footnote 230 above), para. 399 (quoting *Tadić 1997* (see footnote 108 above), para. 635).

[261] See, e.g., *Kunarac 2001* (see footnote 230 above), para. 423.

[262] *Ruto* (see footnote 236 above), para. 164.

[263] See, e.g., *Mrkšić* (footnote 223 above), para. 442; *Tadić 1997* (footnote 108 above), para. 638; *Kunarac 2001* (footnote 230 above), para. 425; *Kordić 2001* (footnote 74 above), para. 180; *Kayishema* (footnote 223 above), para. 128.

[264] See, e.g., *Mrkšić* (footnote 223 above), para. 442; *Tadić 1997* (footnote 108 above), para. 638; *Kunarac 2001* (footnote 230 above), para. 425 ("the presence of certain non-civilians in its midst does not change the character of the population"); *Blaškić* (footnote 222 above), para. 214 ("the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population"); *Kupreškić 2000* (footnote 47 above), para. 549 ("the presence of those actively involved in the conflict should not prevent the characterization a population as civilian"); *Kordić 2001* (footnote 74 above), para. 180; *Akayesu* (footnote 79 above), para. 582 ("Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character."); *Kayishema* (footnote 223 above), para. 128.

means to exercise force to that end at the time they are being attacked.[265] The status of any given victim must be assessed at the time the offence is committed;[266] a person should be considered a civilian if there is a doubt as to his or her status.[267]

136. "Population" does not mean that the entire population of a given geographical location must be subject to the attack;[268] rather, the term implies the collective nature of the crime as an attack upon multiple victims.[269] Any particular victim must be targeted not because of his or her individual characteristics, but because of his or her membership of a targeted civilian population.[270] International Criminal Court decisions in the *Bemba* case and the *Kenya Authorization Decision* have adopted a similar approach, declaring that the Prosecutor must establish that the attack was directed against the population, rather than a limited group of individuals.[271]

137. Article 7, paragraph 2 (*a*), of the Rome Statute defines "attack directed against any civilian population" for the purpose of paragraph 1. The first part of this definition refers to "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population". Although no such language was contained in the statutory definition of crimes against humanity for the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, this language reflects jurisprudence from both these tribunals.[272] The Elements of Crimes of the International Criminal Court provides that the "acts" referred to in article 7, paragraph 2 (*a*), "need not constitute a military attack".[273]

138. The second part of this definition requires that the attack be "pursuant to or in furtherance of a State or organizational policy to commit such an attack". The requirement of a policy element did not appear as part of the definition of crimes against humanity in the statutes of international tribunals until the adoption of the Rome Statute.[274] The statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda contain no policy requirement in their definition of crimes against humanity,[275] although some early jurisprudence required it.[276] Later jurisprudence, however, downplayed the policy element, regarding it as sufficient simply to prove the existence of a widespread or systematic attack.[277]

139. Prior to the Rome Statute, the work of the Commission in its draft codes tended to require a policy element. The Commission's 1954 draft code of offences against the peace and security of mankind defined crimes against humanity as "[i]nhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities**".[278] The Commission decided to include the State instigation or tolerance requirement in order to exclude inhuman acts committed by private

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[265] *Kayishema* (see footnote 223 above), para. 127.

[266] *Blaškić* (see footnote 222 above), para. 214 ("[T]he specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian."); see also *Kordić 2001* (footnote 74 above), para. 180 ("[I]ndividuals who at one time performed acts of resistance may in certain circumstances be victims of a crime against humanity."); *Akayesu* (see footnote 79 above), para. 582 (finding that civilian population includes "members of the armed forces who laid down their arms and those persons placed *hors de combat*").

[267] *Kunarac 2001* (see footnote 230 above), para. 426.

[268] See *Kenya Authorization Decision* (footnote 229 above), para. 82; *Bemba* (footnote 229 above), para. 77; *Kunarac 2001* (footnote 230 above), para. 424; *Tadić 1997* (footnote 108 above), para. 644; see also para. (14) of the commentary to the draft article 20 of the draft statute for an international criminal court, *Yearbook ... 1994*, vol. II (Part Two), para. 91, at p. 40 (defining crimes against humanity as "inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population *in whole or in part**").

[269] See *Tadić 1997* (footnote 108 above), para. 644.

[270] *Ibid.*; see also *Kunarac 2001* (footnote 230 above), para. 90; *Prosecutor v. Ante Gotovina, Ivan Cermak and Mladen Markac*, Case No. IT-06-90-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 15 April 2011, para. 1704 (finding that the attack must be directed at a civilian population, "rather than against a limited and randomly selected number of individuals").

[271] *Bemba* (see footnote 229 above), para. 77; *Kenya Authorization Decision* (see footnote 229 above), para. 81.

[272] See, e.g., *Kunarac 2001* (footnote 230 above), para. 415 (defining attack as "a course of conduct involving the commission of acts of violence"); *Kayishema* (footnote 223 above), para. 122 (defining attack as the "event in which the enumerated crimes must form part"); *Akayesu* (footnote 79 above), para. 581 ("The concept of 'attack' may be defined as [an] unlawful act of the kind enumerated [in the Statute]. An attack may also be non-violent in nature, like imposing a system of apartheid … or exerting pressure on the population to act in a particular manner").

[273] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 5, para. 3 (*i*) of the introduction to article 7.

[274] Article 6 (*c*) of the Nürnberg Charter contains no explicit reference to a plan or policy. The Nuremberg Judgment, however, did use a "policy" descriptor when discussing article 6 (*c*) in the context of the concept of the "attack" as a whole. See Judgment of the International Military Tribunal of 1 October 1946, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nürnberg, Germany*, Part 22, p. 498 (27 August 1946–1 October 1946) ("The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out."). Article II, paragraph 1 (*c*), of Control Council Law No. 10 also contains no reference to a plan or policy in its definition of crimes against humanity. See generally Mettraux, "The definition of crimes against humanity and the question of a 'policy' element".

[275] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has determined that there is no policy element on crimes against humanity in customary international law, see *Kunarac 2002* (footnote 216 above), para. 98 ("[t]here was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes"), although that position that has been criticized in writings. See, e.g., Schabas, "State policy as an element of international crimes", p. 954.

[276] *Tadić 1997* (see footnote 108 above), para. 626, also paras. 644 and 653–655 ("'directed against a civilian population'" … requires that the acts be undertaken on a widespread or systematic basis *and** in furtherance of a policy").

[277] See, e.g., *Kordić 2001* (footnote 74 above), para. 182 (finding that "the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity"); *Kunarac 2002* (footnote 216 above), para. 98; *Akayesu* (footnote 79 above), para. 580; *Kayishema* (footnote 223 above), para. 124 ("For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan.").

[278] Article 2, para. 11, of the draft code, *Yearbook ... 1954*, vol. II, at p. 150.

persons on their own without any State involvement.[279] At the same time, the definition of crimes against humanity included in the 1954 draft code did not include any requirement of scale ("widespread") or systematicity.

140. The Commission's 1994 draft statute for an international criminal court did not contain a definition of crimes against humanity. Rather, the draft statute referenced the definitions in article 5 of the statute of the International Tribunal for the Former Yugoslavia and article 21 of the draft code of crimes against the peace and security of mankind as adopted at its first reading in 1991, neither of which contained a State policy requirement.[280] Even so, the Commission did mention the issue of policy when it stated: "The particular forms of unlawful act … are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part".[281] The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also recognized a policy requirement, defining crimes against humanity as "any of the following acts, when committed in a systematic manner or on a large scale and *instigated or directed by a Government or by an organization or group**".[282] The Commission included this requirement in order to exclude inhumane acts committed by an individual "acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization".[283] In other words, the policy element sought to exclude "ordinary" crimes of individuals acting on their own initiative and without any connection to a State or organization.[284]

141. Article 7, paragraph 2 (*a*), of the Rome Statute uses the "policy" element in its definition of an "attack directed against any civilian population". The International Criminal Court's Elements of Crimes further provides that "policy to commit such attack" requires that "the State or organization actively promote or encourage such an attack against a civilian population".[285] In a footnote, the Elements of Crimes provides that "a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack".[286] Other precedents also emphasize that deliberate failure to act can satisfy the policy element.[287]

142. This "policy" element has been addressed in several cases at the International Criminal Court.[288] For example, in its *Kenya Authorization Decision*, Pre-Trial Chamber II of the Court suggested that the meaning of "State" in article 7, paragraph 2 (*a*), is "self-explanatory".[289] The Chamber went on to note that a policy adopted by regional or local organs of the State could satisfy the requirement of State policy.[290] Judge Hans-Peter Kaul argued in his dissent that, while acts of regional or local organs could be imputed to the State, nevertheless "considerations of attribution do not answer the question of who can establish a State policy".[291] Even so, he found that, "considering the specific circumstances of the case, a policy may also be adopted by an organ which, albeit at the regional level, such as the highest official or regional government in a province, has the means to establish a policy within its sphere of action".[292]

143. In its 2014 decision in the *Katanga case*, Trial Chamber II of the International Criminal Court found that the policy need not be formally established or promulgated in advance of the attack, and can be deduced from the repetition of acts, from preparatory activities or from a collective mobilization.[293] Moreover, the policy need not be concrete or precise, and may evolve over time as circumstances unfold.[294] The Trial Chamber stressed that the policy requirement should not be seen as synonymous with "systematic", since doing so would contradict the disjunctive requirement in article 7 of a "widespread" or "systematic" attack.[295] Rather, while "systematic" refers to a repetitive scheme of acts with similar features, the "policy" requirement points more toward such acts being intended as a collective attack on the civilian population.[296]

144. In its decision confirming the indictment of Laurent Gbagbo, Pre-Trial Chamber I of the International Criminal Court found that

> the "policy", for the purposes of the Statute, must be understood as the active promotion or encouragement of an attack against a civilian population by a State or organisation. The Chamber observes that neither the Statute nor the Elements of Crimes include a certain

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[279] Commentary to article 2, para. 11, *ibid.*, at p. 150.

[280] Para. (14) of the commentary to article 20 of the draft statute for an international criminal court, *Yearbook ... 1994*, vol. II (Part Two), para. 91, at p. 40.

[281] *Ibid.*

[282] Article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 47.

[283] Para. (5) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind and commentary thereto, *ibid.* In explaining its inclusion of the policy requirement, the Commission notes "[i]t would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18".

[284] See Bassiouni, "Revisiting the architecture of crimes against humanity …", pp. 54–55.

[285] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 5.

[286] *Ibid.*

[287] *Kupreškić 2000* (see footnote 47 above), paras. 551–555 ("approved," "condoned," "explicit or implicit approval"); 1954 draft code ("toleration") (see footnote 278 above); final report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), S/1994/674, para. 85; Ambos and Wirth, "The current law of crimes against humanity …", pp. 31–34.

[288] See, e.g., *Ntaganda* (footnote 232 above), para. 24; *Katanga 2008* (footnote 230 above), para. 396; *Bemba* (footnote 229 above), para. 81.

[289] *Kenya Authorization Decision* (see footnote 229 above), para. 89.

[290] *Ibid.*

[291] *Kenya Authorization Decision* (see footnote 229 above), dissenting opinion of Judge Hans-Peter Kaul, para. 43.

[292] *Ibid.*

[293] *Katanga 2014* (see footnote 88 above), para. 1109; see also *Prosecutor v. Gbagbo, Decision on the Confirmation of Charges against Laurent Gbagbo*, Case No. ICC-02/11-01/11, Pre-Trial Chamber I, International Criminal Court, 12 June 2014, paras. 211–212 and 215.

[294] *Katanga 2014* (see footnote 88 above), para. 1110.

[295] *Ibid.*, para. 1112; see also *ibid.*, para. 1101; *Gbagbo* (footnote 293 above), para. 208.

[296] *Katanga 2014* (see footnote 88 above), para. 1113 ("To establish a "policy", it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population."); *Gbagbo* (see footnote 293 above), para. 216 ("evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7 (1) and (2) (*a*) of the Statute").

rationale or motivations of the policy as a requirement of the definition. Establishing the underlying motive may, however, be useful for the detection of common features and links between acts. Furthermore, in accordance with the Statute and the Elements of Crimes, it is only necessary to establish that the person had knowledge of the attack in general terms. Indeed, the Elements of Crimes clarify that the requirement of knowledge "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization".[297]

In the *Bemba* case, Pre-Trial Chamber II of the International Criminal Court found that the attack was pursuant to an organizational policy on the basis of evidence establishing that the MLC troops "carried out attacks following the same pattern".[298] Such decisions are being thoughtfully analysed in the scholarly literature.[299]

C. Non-State actors

145. The Commission, commenting in 1991 on the draft provision on crimes against humanity for what would become the 1996 draft Code of Crimes, stated that "the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone" and that it "does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code".[300] Even so, a debate existed within the Commission with respect to this issue. The 1995 report of the Commission discusses the debate, with some members taking the position that the Code should only apply to State actors and others favouring the inclusion of nonState perpetrators.[301] As discussed previously, the 1996 draft Code added the requirement that, to be crimes against humanity, the inhumane acts must be "instigated or directed by a Government or by any organization or group".[302] In its commentary to this requirement, the Commission noted:

The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.[303]

146. Jurisprudence of the International Tribunal for the Former Yugoslavia accepted the possibility of non-State actors being prosecuted for crimes against humanity. For example, the Trial Chamber in the *Tadić* case stated that "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory".[304] That finding was echoed in the *Limaj* case, where the Trial Chamber viewed the defendant members of the Kosovo Liberation Army (KLA) as prosecutable for crimes against humanity. Among other things, the Trial Chamber stated:

Although not a legal element of article 5 [of the statute of the International Tribunal for the Former Yugoslavia], evidence of a policy or plan is an important indication that the acts in question are not merely the workings of individuals acting pursuant to haphazard or individual design, but instead have a level of organisational coherence and support of a magnitude sufficient to elevate them into the realm of crimes against humanity. It stands to reason that an attack against a civilian population will most often evince the presence of policy when the acts in question are performed against the backdrop of significant State action and where formal channels of command can be discerned. … Special issues arise, however, in considering whether a sub-state unit or armed opposition group, whether insurrectionist or trans-boundary in nature, evinces a policy to direct an attack. One requirement such an organisational unit must demonstrate in order to have sufficient competence to formulate a policy is a level of *de facto* control over territory.[305]

Ultimately, the Trial Chamber found that while "the KLA evinced a policy to target those Kosovo Albanians suspected of collaboration with the Serbian authorities, … there was no attack directed against a civilian population, whether of Serbian or Albanian ethnicity".[306]

147. Since article 7, paragraph 2 (*a*), of the Rome Statute requires that the attack be "pursuant to or in furtherance of a State *or organizational policy** to commit such an attack", article 7 expressly contemplates crimes against humanity by non-State perpetrators. Jurisprudence from the International Criminal Court suggests that "organizational" includes any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack. For example, Pre-Trial Chamber I stated in *Katanga*: "Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population."[307]

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[297] *Gbagbo* (see footnote 293 above), para. 214.

[298] *Bemba* (see footnote 229 above), para. 115.

[299] See, e.g., Halling, "Push the envelope—watch it bend: removing the policy requirement and extending crimes against humanity"; Schabas, "Prosecuting Dr. Strangelove, Goldfinger, and the Joker at the International Criminal Court: closing the loopholes"; Kress, "On the outer limits of crimes against humanity: the concept of organization within the policy requirement: some reflections on the March 2010 ICC Kenya decision"; Mettraux, "The definition of crimes against humanity and the question of a 'policy' element"; Jalloh, "Case report: Situation in the Republic of Kenya"; Hansen, "The policy requirement in crimes against humanity: lessons from and for the case of Kenya"; Werle and Burghardt, "Do crimes against humanity require the participation of a State or a 'State-like' organization?"; Sadat, "Crimes against humanity in the modern age", pp. 335–336 and 368–374; Jalloh, "What makes a crime against humanity a crime against humanity"; Robinson, "The draft convention on crimes against humanity: what to do with the definition?"; Robinson, "Crimes against humanity: a better policy on 'policy'".

[300] Para. (5) of the commentary to draft article 21 of the draft code of crimes against the peace and security of mankind as adopted on first reading, *Yearbook ... 1991*, vol. II (Part Two), chap. IV, sect. D, at pp. 103–104.

[301] *Yearbook ... 1995*, vol. II (Part Two), p. 25 ("While some members held that the Code should only deal with crimes committed by agents or representatives of the State or by individuals acting with the authorization, the support or the acquiescence of the State, other members favoured encompassing the conduct of individuals even if they had no link with the State.").

[302] Article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 47.

[303] Para. (5) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *ibid.*

[304] *Tadić 1997* (see footnote 108 above), para. 654. For further discussion of non-State perpetrators, see *ibid.*, para. 655.

[305] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment, Trial Chamber II, International Tribunal for the Former Yugoslavia, 30 November 2005, paras. 212–213.

[306] *Ibid.*, para. 228.

[307] *Katanga 2008* (see footnote 230 above), para. 396 (citing to case law of that Tribunal and the International Tribunal for Rwanda, as well as the Commission's 1991 draft code as adopted on first reading); see also *Bemba* (footnote 229 above), para. 81.

148. In its *Kenya Authorization Decision*, Pre-Trial Chamber II of the International Criminal Court took a similar approach, stating:

the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn about whether a group has the capability to perform acts which infringe on basic human values.[308]

In 2012, the Pre-Trial Chamber stated that, when determining whether a particular group qualifies as an "organization" under article 7 of the Rome Statute,

the Chamber may take into account a number of factors, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[309]

149. In its 2010 decision, the majority expressly rejected the idea that "only State-like organizations may qualify" as organizations for the purpose of article 7, paragraph 2 (*a*).[310] In his dissent, Judge Kaul agreed that "it is permissive to conclude that an 'organization' may be a private entity (a non-state actor) which is not an organ of a State or acting on behalf of a State", but he argued that "those 'organizations' should partake of some characteristics of a State".[311]

150. In the *Ntaganda* case, charges were confirmed against a defendant associated with two paramilitary groups in the Democratic Republic of the Congo, the Union des Patriotes Congolais (UPC) and the Forces Patriotiques pour la Libération du Congo (FPLC). In that instance, the Prosecutor contended "that the UPC/FPLC was a sophisticated and structured political-military organisation, akin to the government of a country, through which Mr. Ntaganda was able to commit crimes against humanity".[312] Similarly, in *Callixte Mbarushimana*, the prosecutor pursued charges against a defendant associated with the Forces démocratiques de liberation du Rwanda (FDLR), described as an "armed group seeking to 'reconquérir et défendre la souveraineté nationale' [regain and defend the national sovereignty] of Rwanda".[313] While in that case the majority and the dissent disagreed on whether there existed a policy of FDLR to attack the civilian population, there appeared to be common ground that FDLR, as a group, could fall within the scope of article 7. In the case against Joseph Kony relating to the situation in Uganda, the defendant is allegedly associated with the Lord's Resistance Army, "an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army"[314] which is organized "in a military-type hierarchy and operates as an army".[315] With respect to the situation in Kenya, Pre-Trial Chamber II confirmed charges of crimes against humanity against defendants owing to their association in a "network" of perpetrators "comprised of eminent ODM [Orange Democratic Movement] political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders".[316] Likewise, charges were confirmed with respect to other defendants associated with "coordinated attacks that were perpetrated by the Mungiki and pro-Party of National Unity (PNU) youth in different parts of Nakuru and Naivasha" that "were targeted at perceived [ODM] supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language".[317]

D. "With knowledge of the attack"

151. The third general requirement is that the perpetrator must commit the act "with knowledge of the attack". Jurisprudence from the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda concluded that the perpetrator must have knowledge that there is an attack on the civilian population and, further, that his or her act is a part of that attack.[318] This two-part approach is reflected in the International Criminal Court's Elements of Crimes, which for each of the proscribed acts requires as that act's last element: "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population." Even so,

the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.[319]

It need not be proven that the perpetrator knew the specific details of the attack;[320] rather, the perpetrator's knowledge

[308] *Kenya Authorization Decision* (see footnote 229 above), para. 90.

[309] *Ruto* (see footnote 236 above), para. 185; see also *Kenya Authorization Decision* (see footnote 229 above), para. 93; Corrigendum to *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire*, No. ICC-02/11-14-Corr., 3 October 2011, paras. 45–46.

[310] *Kenya Authorization Decision* (see footnote 229 above), para. 90; see also Werle and Burghardt, "Do crimes against humanity require the participation of a State or a 'State-like' organization?".

[311] *Kenya Authorization Decision* (see footnote 229 above), dissenting opinion of Judge Hans-Peter Kaul, paras. 45 and 51. The characteristics identified by Judge Kaul were: (*a*) a collectivity of persons; (*b*) which was established and acts for a common purpose; (*c*) over a prolonged period of time; (*d*) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (*e*) with the capacity to impose the policy on its members and to sanction them; and (*f*) which has the capacity and means available to attack any civilian population on a large scale.

[312] *Ntaganda* (see footnote 232 above), para. 22.

[313] *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, Pre-Trial Chamber I, International Criminal Court, 16 December 2011, para. 2.

[314] Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, No. ICC-02/04-01/05, International Criminal Court, 27 September 2005, para. 5.

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

[316] *Ruto* (see footnote 236 above), para. 182.

[317] *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (*a*) and (*b*) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, para. 102.

[318] See, e.g., *Kunarac 2001* (footnote 230 above), para. 418; *Kayishema* (footnote 223 above), para. 133.

[319] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 5, para. 2 *in fine* of the introduction to article 7.

[320] *Kunarac 2001* (see footnote 230 above), para. 434 (finding that the knowledge requirement "does not entail knowledge of the details of the attack").

may be inferred from circumstantial evidence.[321] Thus, when finding in the *Bemba* case that the MLC troops acted with knowledge of the attack, Pre-Trial Chamber II of the International Criminal Court stated that the troops' knowledge could be "inferred from the methods of the attack they followed", which reflected a clear pattern.[322] In the *Katanga* case, the Court's Pre-Trial Chamber I found that

> knowledge of the attack and the perpetrator's awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.[323]

152. Further, the personal motive of the perpetrator for taking part in the attack is irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack.[324] According to the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Kunarac*, evidence that the perpetrator committed the prohibited acts for personal reasons could at most "be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack".[325] It is the perpetrator's knowledge or intent that his or her act is part of the attack that is relevant to satisfying this requirement. Additionally, this element will be satisfied where it can be proven that the underlying offence was committed by directly taking advantage of the broader attack, or where the commission of the underlying offence had the effect of perpetuating the broader attack.[326] For example, in the *Kunarac* case, the perpetrators were accused of various forms of sexual violence, acts of torture and enslavement against Muslim women and girls. The Trial Chamber of the Court found that the accused had the requisite knowledge because they not only knew of the attack against the Muslim civilian population, but also perpetuated the attack "by directly taking advantage of the situation created" and "fully embraced the ethnicity-based aggression".[327]

E. Types of prohibited acts

153. Article 7, paragraph 1, of the Rome Statute, in subparagraphs (*a*) to (*k*), lists the underlying prohibited acts for crimes against humanity. These prohibited acts also appear as part of the definition of crimes against humanity contained in article 18 of the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind, although the language differs slightly. Article 7, paragraph 2, in subparagraphs (*b*) to (*i*), provides further definitions of these prohibited acts. An individual who commits one of these acts can commit a crime against humanity; the individual need not have committed multiple acts, but the individual's act must be "a part of" a widespread or systematic attack directed against any civilian population.[328] The underlying offence does not need to be committed in the heat of the attack against the civilian population to satisfy this requirement; the underlying offence can be part of the attack if it can be sufficiently connected to the attack.[329]

154. *Murder*. Article 7, paragraph 1 (*a*), of the Rome Statute identifies murder as a prohibited act. According to the International Criminal Court's Elements of Crimes, the act of murder means that "the perpetrator killed one or more persons".[330] The term "killed" can be used interchangeably with "caused death".[331] Murder was included as an act falling within the scope of crimes against humanity in article 6 (*c*) of the Nürnberg Charter, Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and the 1954 draft code of offences against the peace and security of mankind and 1996 draft Code of Crimes against the Peace and Security of Mankind of the Commission.[332]

155. *Extermination*. Article 7, paragraph 1 (*b*), of the Rome Statute identifies extermination as a prohibited act. Article 7, paragraph 2 (*b*), provides that extermination "includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population". To commit the act of extermination, according to the International Criminal Court's Elements of Crimes, the perpetrator must have "killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population".[333] These conditions "could include the deprivation of access to food and medicine".[334] Killing, in the context of the act of extermination, can be either direct or indirect, and can take various forms.[335] The conduct must also have "constituted, or [taken] place as part of, a mass killing of members of a civilian population".[336] Although extermination, like genocide, involves an element of mass destruction, it differs from the crime of genocide in that it covers situations in which a group of individuals who do not have any shared characteristics are killed, as well as situations in which some members of a group are killed

[321] See *Tadić 1997* (footnote 108 above), para. 657 ("While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances."); see also *Kayishema* (footnote 223 above), para. 134 (finding that "actual or constructive knowledge of the broader context of the attack" is sufficient); *Blaškić* (footnote 222 above), para. 259 (finding that knowledge of the broader context of the attack may be surmised from a number of facts, including "the nature of the crimes committed and the degree to which they are common knowledge").

[322] *Bemba* (see footnote 229 above), para. 126.

[323] *Katanga 2008* (see footnote 230 above), para. 402.

[324] See, e.g., *Kunarac 2002* (footnote 216 above), para. 103; *Kupreškić 2000* (footnote 47 above), para. 558.

[325] *Kunarac 2002* (see footnote 216 above), para. 103.

[326] See, e.g., *Kunarac 2001* (footnote 230 above), para. 592.

[327] *Ibid.*

[328] See, e.g., *Tadić 1997* (footnote 108 above), para. 649; *Kunarac 2002* (footnote 216 above), para. 100.

[329] See, e.g., *Mrkšić* (footnote 223 above), para. 438; *Tadić 1999* (footnote 74 above), para. 248; *Prosecutor v. Mladen Naletillić, aka "TUTA" and Vinko Martinović, aka "ŠTELA",* Case No. IT-98-34-T Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 31 March 2003, para. 234.

[330] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 5, element 1.

[331] *Ibid.*, footnote 7.

[332] *See* article 18 of the draft Code of Crimes against the Peace and Security of Mankind and para. (7) of the commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at pp. 47–48.

[333] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 6, element 1.

[334] *Ibid.,* footnote 9.

[335] *Ibid.*, footnote 8.

[336] *Ibid.*, p. 6.

while others are not.[337] Extermination was included as an act falling within the scope of crimes against humanity in article 6 (*c*) of the Nürnberg Charter, Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and the draft codes of the Commission.[338]

156. *Enslavement*. Article 7, paragraph 1 (*c*), of the Rome Statute identifies enslavement as a prohibited act. Article 7, paragraph 2 (*c*), defines enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children". The International Criminal Court's Elements of Crimes provides that such an exercise of power includes "purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty".[339] Elements of Crimes also notes:

> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.[340]

Enslavement was included as an act falling within the scope of crimes against humanity in article 6 (*c*) of the Nürnberg Charter, Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and the draft codes of the Commission.[341] Article 3 (*a*) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, defines "trafficking in persons" as the

> recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

157. *Deportation or forcible transfer of population*. Article 7, paragraph 1 (*d*), of the Rome Statute identifies forcible transfer of population as a prohibited act. Article 7, paragraph 2 (*d*), defines deportation or forcible transfer of population as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law". The International Criminal Court's Elements of Crimes states that the term "forcibly" is not limited to physical force, and may include the threat of coercion or force, "such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment".[342] According to Elements of Crimes, the perpetrator must also be aware of the factual circumstances establishing that the persons are lawfully present in the area from which they were displaced.[343] Elements of Crimes also notes that "deported or forcibly transferred" can be used interchangeably with "forcibly displaced".[344] "Grounds permitted under international law" can include legitimate reasons for transfer such as public health or welfare.[345] Deportation was included as an act falling within the scope of crimes against humanity in article 6 (*c*) of the Nürnberg Charter, Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and the draft codes of the Commission.[346]

158. *Imprisonment or other severe deprivation of physical liberty*. Article 7, paragraph 1 (*e*), of the Rome Statute identifies as a prohibited act imprisonment or other severe deprivation of physical liberty. To commit this prohibited act under the Rome Statute, the perpetrator must have "imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty".[347] Additionally, the conduct must be "in violation of the fundamental rules of international law".[348] Arbitrary imprisonment is a violation of individual human rights recognized in article 9 of the Universal Declaration of Human Rights[349] and article 9 of the International Covenant on Civil and Political Rights.[350] Subparagraph (*e*) also includes large-scale or systematic cases of imprisonment, such as concentration camps.[351] According to the International Criminal Court's Elements of Crimes, the perpetrator must also be "aware of the factual circumstances that established the gravity of the conduct".[352] Imprisonment was included as an act falling within the scope of crimes against humanity in Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda; and the 1996 draft Code of the International Law Commission.[353]

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[337] Para. (8) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 48.

[338] Article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *ibid.*

[339] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 6, art. 7 (1) (*c*), element 1.

[340] *Ibid.*, footnote 11.

[341] Article 18 of the draft Code of Crimes against the Peace and Security of Mankind and para. (10) of the commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at pp. 47–48.

[342] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 6, footnote 12.

[343] *Ibid.*, p. 7.

[344] *Ibid.*, p. 6, footnote 13.

[345] Para. (13) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 49.

[346] Article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *ibid.*

[347] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 7, art. 7 (1) (*e*), element 1.

[348] *Ibid.*, element 2.

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

[350] Para. (14) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 49. The International Covenant, in article 9, provides 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."

[351] Para. (14) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 49.

[352] International Criminal Court, Elements of Crimes (see footnote 87 above), art. 7 (1) (*e*), element 3.

[353] Article 18 of the draft Code of Crimes against the Peace and Security of Mankind and para. (14) of the commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 49.

159. *Torture*. Article 7, paragraph 1 (*f*), of the Rome Statute identifies torture as a prohibited act. Article 7, paragraph 2 (*e*), defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions". The International Criminal Court's Elements of Crimes provides that "no specific purpose need be proved for this crime".[354] This definition of torture mirrors the definition found in article 1, paragraph 1, of the Convention against Torture, but removes the specific purposes requirement.[355] Torture was included as an act falling within the scope of crimes against humanity in Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the 1996 draft Code of the Commission.[356]

160. *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity*. Article 7, paragraph 1 (*g*), of the of the Rome Statute identifies as prohibited acts rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity. Each of these acts is addressed below.

161. *Rape*. Rape was included as an act falling within the scope of crimes against humanity in Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda and the 1996 draft Code of the International Law Commission.[357] Owing to the accounts of rape committed in a widespread or systematic manner in the former Yugoslavia, the General Assembly in 1995 unanimously reaffirmed that rape falls within the scope of crimes against humanity when the other elements of the offence are satisfied.[358]

162. The International Criminal Court's Elements of Crimes defines the act of rape as an act by which "the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body".[359] This invasion must be "committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent".[360] Elements of Crimes notes that a person may be incapable of giving genuine consent for reasons such as "natural, induced, or age-related incapacity".[361] Elements of Crimes also notes that the concept of the act of rape under crimes against humanity in the Rome Statute is intended to be gender-neutral.[362] These elements were interpreted in some depth for the first time by Trial Chamber II in the *Katanga* and *Ngudjolo Chui* cases.[363]

163. *Sexual slavery*. Sexual slavery is listed as a separate prohibited act in article 7, paragraph 1 (*g*), of the Rome Statute, rather than as a form of enslavement under article 7, paragraph 1 (*c*). The International Criminal Court's Elements of Crimes defines sexual slavery as an act by which the "perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty".[364] Such a deprivation of liberty could include "exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956".[365] Additionally, the perpetrator must have "caused such person or persons to engage in one or more acts of a sexual nature".[366] Elements of Crimes also notes that due to the "complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose".[367] These elements were also interpreted in some depth for the first time by the Trial Chamber II in the *Katanga* and *Ngudjolo Chui* cases.[368]

164. *Enforced prostitution*. It has been suggested that the crime of "enforced prostitution" was included in the Rome Statute "to capture those situations that lack slavery-like conditions".[369] The International Criminal

[354] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 7, footnote 14.

[355] Article 1, para. 1 of the Convention against Torture provides that: "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[356] Article 18 of the draft Code of Crimes against the Peace and Security of Mankind and para. (9) of the commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at pp. 47–48.

[357] See Weiss, "Vergewaltigung und erzwungene Mutterschaft als Verbrechen gegen die Menschlichkeit, Kriegsverbrechen und Genozid"; Adams, *Der Tatbestand der Vergewaltigung im Völkerstrafrecht*.

[358] General Assembly resolution 50/192 of 22 December 1995.

[359] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 8, element 1.

[360] *Ibid.*, element 2.

[361] *Ibid.*, footnote 16.

[362] *Ibid.*, footnote 15.

[363] *Katanga 2014* (see footnote 88 above), paras. 963–972. The Trial Chamber found that during an attack on the village of Bogoro in February 2003, Ngiti combatants from militia camps committed rape as war crimes and crimes against humanity. The two defendants before the Court, however, were acquitted as an accessory to such rape (and to sexual slavery thereafter). Among other things, the Trial Chamber found unproven that these particular crimes formed part of the common purpose of the attack. See also *Katanga 2008* (footnote 230 above).

[364] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 8, art. 7 (1) (*c*), element 1.

[365] *Ibid.*, footnote 18.

[366] *Ibid.*, p. 8, art. 7 (1) (*g*)-3, element 1.

[367] *Ibid.*, footnote 17.

[368] *Katanga 2014* (see footnote 88 above), paras. 975–984. See also *Katanga 2008* (footnote 230 above).

[369] Hall *et al.*, "Article 7: Crimes against humanity", pp. 212–213.

Court's Elements of Crimes defines enforced prostitution as an act by which

> [t]he perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.[370]

The Elements of Crimes also identifies an additional element: that "[t]he perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature".[371] Enforced prostitution was included as an act falling within the scope of crimes against humanity in the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind.[372]

165. *Forced pregnancy*. Article 7, paragraph 2 (*f*), of the Rome Statute defines forced pregnancy[373] as "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy".[374]

166. *Enforced sterilization*. Following the Second World War, several defendants were found guilty of war crimes and crimes against humanity for medical experiments, including sterilization, conducted in concentration camps.[375] Forced sterilization can also amount to genocide when committed with the requisite intent to destroy a particular group in whole or in part, as a form of "imposing measures intended to prevent births within the group" under article 6 (*d*) of the Rome Statute. The International Criminal Court's Elements of Crimes defines enforced sterilization as an act by which the "perpetrator deprived one or more persons of biological reproductive capacity".[376] Additionally, the Elements of Crimes establishes that the conduct must not have been "justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent".[377] The Elements of Crimes includes a footnote to the first element, stating: "The deprivation is not intended to include birth-control measures which have a nonpermanent effect in practice."[378]

167. *Any other form of sexual violence of comparable gravity*. In the *Akayesu* case at the International Tribunal for Rwanda, the defendant was prosecuted for sexual violence as crimes against humanity, on the basis that such violence fell within the scope of "other inhumane acts".[379] The Trial Chamber in *Akayesu*, in defining "sexual violence" in the context of crimes against humanity, said:

> The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.[380]

The Tribunal found that the act of forcing a woman to undress and perform gymnastics in front of a crowd constituted sexual violence amounting to inhumane acts.[381] The Tribunal also noted that in this context, evidence of physical force is not necessary to demonstrate coercive circumstances.[382] The 1996 draft Code of Crimes against the Peace and Security of Mankind also included "other forms of sexual abuse" as a prohibited act in its definition of crimes against humanity.[383] The International Criminal Court's Elements of Crimes defines this prohibited act as one in which the "perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent".[384] This element appears consistent with the Trial Chamber's approach in *Akayesu* and incorporates the same broad definition of coercion. Additionally, the conduct must be of comparable gravity to the other offences enumerated in article 7, paragraph 1 (*g*), of the Rome Statute.[385] Elements of Crimes also provides that the perpetrator must have been "aware of the factual circumstances that established the gravity of the conduct".[386]

168. *Persecution against any identifiable group or collectivity*. Article 7, paragraph 1 (*h*), of the Rome Statute identifies as a prohibited act "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in" paragraph 1 as a whole or in connection with acts of genocide or war crimes. Article 7, paragraph 2 (*g*), defines persecution

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[370] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 9, art. 7 (1) (*g*)-3, element 1.

[371] *Ibid.*

[372] Article 18 of the draft Code of Crimes against the Peace and Security of Mankind and para. (16) of the commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at pp. 47 and 50.

[373] See generally Weiss, "Vergewaltigung und erzwungene Mutterschaft als Verbrechen gegen die Menschlichkeit, Kriegsverbrechen und Genozid".

[374] Elements of Crimes does not elaborate any further on this definition.

[375] Hall *et al.*, "Article 7: Crimes against humanity", pp. 213–214, footnote 255.

[376] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 9, art. 7 (1) (*g*)-6, element 1.

[377] *Ibid.*, element 2.

[378] *Ibid.*, footnote 19.

[379] *Akayesu* (see footnote 79 above), para. 688.

[380] *Ibid.*

[381] *Ibid.*

[382] *Ibid.* ("Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal."); see also *Brima* (see footnote 91 above).

[383] Article 18 (*j*) of the draft Code of Crimes against the Peace and Security of Mankind and para. (16) of the commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at pp. 47 and 50.

[384] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 10, art. 7 (1) (*g*)-6, element 1.

[385] *Ibid.*

[386] *Ibid.*, element 3. For a recent statement on the approach of the Prosecutor of the International Criminal Court to such crimes, see International Criminal Court, Office of the Prosecutor, *Policy paper on sexual and gender-based crimes* (2014). Available from www.icc-cpi.int.

as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". The International Criminal Court's Elements of Crimes clarifies that the crime of persecution includes targeting individuals because of their membership in the group or collectivity, as well as targeting the group or collectivity as a whole.[387] Persecution may take many forms, with its central characteristic being the denial of fundamental human rights to which every individual is entitled without distinction.[388] The importance of this notion can be seen in Article 1, paragraph 3, of the Charter of the United Nations, which provides for "respect for human rights and for fundamental freedoms of all without distinction as to race, sex, language, or religion", as well as article 2 of the International Covenant on Civil and Political Rights.[389] Article 7, paragraph 1 (*h*), of the Rome Statute applies to acts of persecution that do not have the specific intent necessary to constitute the crime of genocide.[390] Persecution on political, racial or religious grounds was included as an act falling within the scope of crimes against humanity in article 6 (*c*) of the Nürnberg Charter, Control Council Law No. 10, the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and the draft codes of the Commission.[391]

169. Article 7, paragraph 1 (*h*), of the Rome Statute prohibits persecution against any identifiable group or collectivity on several grounds, including gender. The Rome Statute was the first international legal instrument to explicitly list gender persecution as a crime.[392] Article 7, paragraph 3, defines gender as "the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above". In United Nations usage, "the word 'sex' is used to refer to physical and biological characteristics of women and men, while gender is used to refer to the explanations for observed differences between women and men based on socially assigned roles".[393] The phrase "in the context of society" in paragraph 3 then can be interpreted to refer to these socially constructed roles and differences assigned to both sexes.[394] Hence, the use of "gender" as opposed to "sex" in the Statute is more inclusive.[395]

170. *Enforced disappearance of persons*. Article 7, paragraph 1 (*i*), of the Rome Statute identifies enforced disappearance of persons as a prohibited act. Article 7, paragraph 2 (*i*), defines enforced disappearance of persons as

> the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

In 1992, the General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance, stating that "enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that *the systematic practice of such acts is of the nature of a crime against humanity**".[396] The definition of enforced disappearance of persons in article 7, paragraph 2 (*i*), of the Rome Statute uses nearly the same language as appears in the Declaration.[397]

171. Forced disappearance was included as an act falling within the scope of crimes against humanity in the 1996 draft Code of Crimes against the Peace and Security of Mankind, whose commentary referred to the Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on the Forced Disappearance of Persons for definitions of the prohibited act.[398] The Commission stated in its commentary that forced disappearance was included as an act falling within the scope of crimes against humanity "because of its extreme cruelty and gravity".[399] As noted in paragraph 86 above, in 2006 the General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearance. Article 5 of the Convention provides: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law."[400]

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[387] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 10 ("1. The perpetrator severely deprived, contrary to international law, *one or more persons** of fundamental rights. 2. The perpetrator *targeted such person or persons** by reason of the identity of a group or collectivity or targeted the group or collectivity as such.").

[388] Para. (11) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at pp. 48–49.

[389] International Covenant on Civil and Political Rights, art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.").

[390] Para. (11) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 49.

[391] *Ibid.*; see also Alija Fernández, *La persecución como crimen contra la humanidad*.

[392] Oosterveld, "The making of a gender-sensitive International Criminal Court", p. 40; see Oosterveld, "Gender-based crimes against humanity".

[393] Implementation of the outcome of the Fourth World Conference on Women, Report of the Secretary General, A/51/322, para. 9.

[394] Hall *et al.*, "Article 7: Crimes against humanity", p. 273.

[395] Oosterveld, "The making of a gender-sensitive International Criminal Court", p. 40.

[396] General Assembly resolution 47/133 of 18 December 1992, fourth preambular paragraph.

[397] The Declaration defines enforced disappearance as situations in which "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law". *Ibid.*, third preambular paragraph.

[398] Para. (15) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 50.

[399] *Ibid.*

[400] See also Working Group on Enforced or Involuntary Disappearances, general comment on enforced disappearance as a crime against

172. The International Criminal Court's Elements of Crimes does not separately address the elements for perpetrators involved in the deprivation of liberty and the elements pertaining to perpetrators involved in the refusal or denial; rather, the two types of conduct are addressed together. According to the first element, the perpetrator must have either "arrested, detained, or abducted one or more persons" or "refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons".[401] Footnotes clarify that the term "detained" includes "a perpetrator who maintained an existing detention" and that "under certain circumstances an arrest or detention may have been lawful".[402] The second element requires that the arrest, detention or abduction be followed or accompanied by a refusal to acknowledge or to give information, or that the "refusal was preceded or accompanied by that deprivation of freedom".[403] The third element requires that the perpetrator be aware that either the "arrest, detention or abduction would be followed in the ordinary course of events by a refusal" or that the "refusal was preceded or accompanied by that deprivation of freedom".[404] The fourth element requires that the "arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization", while the fifth element requires that the refusal be with "authorization or support of, such State or political organization".[405] The sixth element requires that the "perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time".[406] A footnote indicates: "Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose."[407]

173. *Apartheid*. Article 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid provides: "The States parties to the present Convention declare that apartheid is a crime against humanity." The 1996 draft Code included what the Commission called "the crime of apartheid under a more general denomination"[408] by referring to institutionalized discrimination on racial, ethnic or religious grounds as crimes against humanity.

174. Article 7, paragraph 1 (*j*), of the Rome Statute expressly identifies the crime of apartheid as a prohibited act. Article 7, paragraph 2 (*h*), defines the crime of apartheid as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime".

175. *Other inhumane acts*. Article 7, paragraph 1 (*k*), of the Rome Statute identifies as prohibited acts other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. In the commentary to its 1996 draft Code, the Commission explained the inclusion of "other inhumane acts" by recognizing that "it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity".[409] The 1996 draft Code includes two examples of the types of acts that would qualify as "other inhumane acts" as crimes against humanity: mutilation and severe bodily harm.[410] Article 6 (*c*) of the Nürnberg Charter, Control Council Law No. 10 and the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda included "other inhumane acts" in their definitions of crimes against humanity.[411]

F. Draft article 2: Definition of crimes against humanity

176. The definition of crimes against humanity as set forth in article 7 of the Rome Statute represents a widely accepted definition of settled international law.[412] As such, for the present draft articles, it should be used verbatim except for three non-substantive changes, which are necessary given the different context in which the definition is being used. First, the opening phrase of paragraph 1 should read "For the purpose of the present draft articles" rather than "For the purpose of this Statute". Second, the same change is necessary in the opening phrase of paragraph 3. Third, article 7, paragraph 1 (*h*), of the Rome Statute criminalizes acts of persecution when undertaken "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". Again, to adapt to the different context, this phrase should instead read "in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes".[413]

177. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:

humanity, contained in Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/13/31, para. 39.

[401] International Criminal Court, Elements of Crimes (see footnote 87 above), p. 11, art. 7 (1) (*i*), element 2 (*b*)..

[402] *Ibid.*, footnotes 25–26.

[403] *Ibid.*, p. 11.

[404] *Ibid.*

[405] *Ibid.*

[406] *Ibid.*

[407] *Ibid.*, p. 11, footnote 23.

[408] Para. (12) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 49. Specifically, the 1996 draft Code made "institutionalized discrimination on racial, ethnic or religious grounds involving the violation of human rights and fundamental freedoms and resulting in seriously disadvantaging a part of the population" a crime against humanity. *Ibid.*

[409] Para. (17) of the commentary to article 18 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50, at p. 50.

[410] *Ibid.*

[411] *Ibid.*

[412] See, e.g., Report of the Commission of Inquiry on Human Rights in the Democratic Peoples' Republic of Korea, A/HRC/25/63, para. 21 ("Matters relating to crimes against humanity were assessed on the basis of definitions set out by customary international law and in the Rome Statute of the International Criminal Court").

[413] In due course, the crime of aggression may be added to the jurisdiction of the International Criminal Court, in which case this language may be revisited by the Commission. At a minimum, this issue might be flagged in the Commission's commentary for consideration by States when negotiating and adopting a convention on crimes against humanity.

"*Draft article 2. Definition of crimes against humanity*

"1. For the purpose of the present draft articles, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

"(*a*) murder;

"(*b*) extermination;

"(*c*) enslavement;

"(*d*) deportation or forcible transfer of population;

"(*e*) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

"(*f*) torture;

"(*g*) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

"(*h*) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes;

"(*i*) enforced disappearance of persons;

"(*j*) the crime of apartheid;

"(*k*) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

"2. For the purpose of paragraph 1:

"(*a*) 'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

"(*b*) 'extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

"(*c*) 'enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

"(*d*) 'deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

"(*e*) 'torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

"(*f*) 'forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

"(*g*) 'persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

"(*h*) 'the crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

"(*i*) 'enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

"3. For the purposes of the present draft articles, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

Chapter VI

Future programme of work

178. A tentative road map for the completion of work on the present topic is as follows.

179. A second report, to be submitted in 2016, will likely address the obligation of a State party to take any necessary measures to ensure that crimes against humanity constitute an offence under national law; the obligation to take any necessary measures to establish the State party's competence to exercise jurisdiction over the offence; the obligation of each State party to take an alleged offender

in any territory under its jurisdiction into custody and carry out an investigation of the alleged offence; the obligation to submit the case to its competent authorities for the purpose of prosecution, unless the person is extradited to another State or surrendered to an international court or tribunal; and the entitlement of the alleged offender to fair treatment, including a fair trial.

180. The subsequent programme of work on the topic will be for the members of the Commission elected for the quinquennium 2017–2021 to determine. A possible timetable would be for a third report to be submitted in 2017, which could address a State party's obligation to investigate an alleged offence in circumstances where the alleged offender is not present; rights and obligations applicable to the extradition of the alleged offender; and rights and obligations applicable to mutual legal assistance in connection with criminal proceedings brought in respect of an alleged offence of crimes against humanity.

181. A fourth report, to be submitted in 2018, could address all further matters, such as dispute settlement, as well as a preamble and concluding articles to the convention.

182. If such a timetable is maintained, it is anticipated that a first reading of the entire set of draft articles could be completed by 2018 and a second reading could be completed by 2020.

Annex

Proposed draft articles

Draft article 1. Prevention and punishment of crimes against humanity

1. Each State Party confirms that crimes against humanity, whether committed in time of peace or in time of war, are crimes under international law which it undertakes to prevent and punish.

2. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent crimes against humanity in any territory under its jurisdiction.

3. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of crimes against humanity.

Draft article 2. Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(*a*) murder;

(*b*) extermination;

(*c*) enslavement;

(*d*) deportation or forcible transfer of population;

(*e*) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(*f*) torture;

(*g*) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(*h*) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes;

(*i*) enforced disappearance of persons;

(*j*) the crime of apartheid;

(*k*) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(*a*) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(*b*) "extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(*c*) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(*d*) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(*e*) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(*f*) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(*g*) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(*h*) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(*i*) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purposes of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

CHECKLIST OF DOCUMENTS OF THE SIXTY-SEVENTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/676	Provisional application of treaties: Memorandum by the Secretariat	Reproduced in the present volume.
A/CN.4/677	Provisional agenda for the sixty-seventh session	Mimeographed. For agenda as adopted, see *Yearbook ... 2015*, vol. II (Part Two).
A/CN.4/678	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat	Mimeographed.
[A/CN.4/679 and Add.1]	Long-term programme of work: Review of the list of topics established in 1996 in the light of subsequent developments—Working paper prepared by the Secretariat	[To be reproduced in *Yearbook ... 2016*, vol. II (Part One).]
A/CN.4/680 [and Corr.1]	First report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur	Reproduced in the present volume.
A/CN.4/681	Second report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur	*Idem*.
A/CN.4/682	Third report on identification of customary international law, by Sir Michael Wood, Special Rapporteur	*Idem*.
A/CN.4/683	Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur	*Idem*.
A/CN.4/684 and Add.1	Filling of casual vacancies in the Commission: Note by the Secretariat	A/CN.4/684, reproduced in the present volume; A/CN.4/684/Add.1, mimeographed.
A/CN.4/685	Second report on the protection of the environment in relation to armed conflicts, by Ms. Marie G. Jacobsson, Special Rapporteur	Reproduced in the present volume.
A/CN.4/686	Fourth report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur	*Idem*.
A/CN.4/687	Third report on the provisional application of treaties, by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur	*Idem*.
A/CN.4/L.851	Protection of the atmosphere: Texts and titles of draft conclusions 1, 2 and 5, and preambular paragraphs provisionally adopted by the Drafting Committee on 13, 18, 19 and 20 May 2015	Mimeographed.
A/CN.4/L.852	Study Group on the most-favoured-nation clause—Final report	*Idem*.
A/CN.4/L.853	Crimes against humanity: Text of draft articles 1, 2, 3 and 4 provisionally adopted by the Drafting Committee on 28 and 29 May and on 1 and 2 June 2015	*Idem*.
A/CN.4/L.854	Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Text and title of draft conclusion 11 provisionally adopted by the Drafting Committee on 4 June 2015	*Idem*.
A/CN.4/L.855	Draft report of the International Law Commission on the work of its sixty-seventh session: chapter I (Introduction)	*Idem*. See adopted text in *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10). The final text appears in *Yearbook ... 2015*, vol. II (Part Two).
A/CN.4/L.856	*Idem*: chapter II (Summary of the work of the Commission at its sixty-seventh session)	*Idem*.
A/CN.4/L.857	*Idem*: chapter III (Specific issues on which comments would be of particular interest to the Commission)	*Idem*.
A/CN.4/L.858 and Add.1	*Idem*: chapter [V] (Protection of the atmosphere)	*Idem*.
A/CN.4/L.859	*Idem*: chapter [VI] (Identification of customary international law)	*Idem*.

Document	*Title*	*Observations and references*
A/CN.4/L.860 and Add.1	*Idem*: chapter [VII] (Crimes against humanity)	*Idem*.
A/CN.4/L.861 and Add.1	*Idem*: chapter [VIII] (Subsequent agreements and subsequent practice in relation to the interpretation of treaties)	*Idem*.
A/CN.4/L.862	*Idem*: chapter [IX] (Protection of the environment in relation to armed conflicts)	*Idem*.
A/CN.4/L.863 and Add.1	*Idem*: chapter [X] (Immunity of State officials from foreign criminal jurisdiction)	*Idem*.
A/CN.4/L.864	*Idem*: chapter [XI] (Provisional application of treaties)	*Idem*.
A/CN.4/L.865	Immunity of State officials from foreign criminal jurisdiction: Text of the draft articles provisionally adopted by the Drafting Committee at the sixty-seventh session	Mimeographed.
A/CN.4/L.866	Draft report of the International Law Commission on the work of its sixty-seventh session: chapter IV (The most-favoured-nation clause)	*Idem*. See adopted text in *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10). The final text appears in *Yearbook ... 2015*, vol. II (Part Two).
A/CN.4/L.867 and Add.1	*Idem*: chapter [XII] (Other decisions and conclusions of the Commission)	*Idem*.
A/CN.4/L.868	Report of the Planning Group	Mimeographed.
A/CN.4/L.869	Identification of customary international law: Text of the draft conclusions provisionally adopted by the Drafting Committee	*Idem*.
A/CN.4/L.870	Protection of the environment in relation to armed conflict: Text of the draft introductory provisions and draft principles provisionally adopted in 2015 by the Drafting Committee	*Idem*.
A/CN.4/SR.3244– A/CN.4/SR.3290	Provisional summary records of the 3244th to 3290th meetings	*Idem*. The final text appears in *Yearbook ... 2015*, vol. I

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