Annex I

TREATIES OVER TIME IN PARTICULAR: SUBSEQUENT AGREEMENT AND PRACTICE

(Mr. Georg Nolte)

A. Introduction

1. Treaties are not just dry parchments. They are instruments for providing stability to their parties and for fulfilling the purposes which they embody. They can therefore change over time, and must adapt to new situations, evolve according to the social needs of the international community and can, sometimes, fall into obsolescence.

2. The general question of "treaties over time" reflects the tension between the requirements of stability and change in the law of treaties. On the one hand, it is generally the purpose of a treaty and of the law of treaties to provide stability in the face of evolving circumstances. On the other hand, legal systems must also leave room for the consideration of subsequent developments in order to ensure meaningful respect for the agreement of the parties and the identification of its limits.

3. It is important in any legal system to determine how subsequent acts, events and developments affect existing law. In national law, the most important subsequent developments after the enactment of a law, or the conclusion of a contract, are amendments by the legislature or by the parties to the contract and evolving interpretations by courts. In international law, the situation is more complicated. Different sources, in particular treaty and customary law, are subject to different rules and mechanisms; moreover, they interact with each other.

4. In the case of customary law, a given rule is the result of a process combining certain acts, accompanying expressions of legal evaluation and reactions thereto (State practice and *opinio iuris*). This process, in principle, continues over time and makes the given rule an object of constant reaffirmation or pressure to change. Thus, in the case of customary law, subsequent acts, events and developments are in principle part of, and not different from, the process of formation of customary law itself.

5. In treaty law, on the other hand, the treaty and the process of its conclusion must be clearly distinguished from subsequent acts, events and developments which may affect the existence, content or meaning of the said treaty. A treaty is a formalized agreement between States and/or other subjects of international law which is designed to preserve the agreement in a legally binding form over time. Therefore, subsequent acts, events or developments can affect the existence, content or meaning of a treaty only under certain conditions. It is in the interest of the security of treaty relations that such conditions be well defined. The judgment of the ICJ in the *Gabčikovo–Nagymaros Project* case[1] provides a good example of how the law of treaties operates in relation to subsequent acts, events and developments which may affect the existence, content or meaning of a treaty.

6. It is suggested that the Commission revisit the law of treaties as far as the evolution of treaties over time is concerned. Problems arise frequently in this context. As certain important multilateral treaties reach a certain age, they are even more likely to arise in the future.

7. One aspect of the topic "treaties over time" should be the role which subsequent agreement and subsequent practice of States parties play in treaty interpretation, in particular in relation to a more or less dynamic treaty interpretation on the basis of the purpose of a treaty rule (see, more specifically, sections B and E below). The evolution of the legal context or the emergence in international society of new needs can be taken into account if the pertinent treaty is considered to be a "living instrument".

8. Another dimension of the topic "treaties over time" would be the effect which certain acts, events or developments have on the continued existence, in full or in part, of a treaty. The most obvious questions in this context concern the termination or withdrawal (arts. 54, 59 and 60 of the 1969 Vienna Convention), denunciation (art. 56) and suspension (arts. 57, 58 and 60) of treaties, and the related question of their intertemporal effects. The Vienna Convention considers a number of causes for termination or suspension of the effects of a treaty: some clearly relate to the passage of time, such as the question of termination of treaties which contain no provision regarding their termination and which do not provide for denunciation or withdrawal (art. 56) or the fundamental change of circumstances (art. 62). The formation of a customary rule derogating from the treaty, which may imply the desuetude of a treaty in whole or in part, is not addressed in the Vienna Convention as a ground for the termination of the treaty, although it is arguably one of such causes.

9. Still another dimension of the topic would be the effect which supervening treaties or customary law have on a particular treaty. This concerns the modification of a treaty by way of the conclusion of one or more later

[1] *Gabčikovo–Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

treaties (art. 41), but also the modification of a treaty by way of a supervening rule of customary international law. A specific issue in this context would be the emergence of a new peremptory norm of general international law (art. 64) and its intertemporal effects.

10. A fourth aspect of the effects of time on a treaty is the possible obsolescence of some of its provisions. This is particularly significant with regard to law-making treaties. The need to revise certain treaties has been met with clauses providing for review mechanisms, but in the case of most treaties, the issue of their possible future obsolescence has not been considered.

B. In particular: the topic of subsequent agreement and subsequent practice with respect to treaties

11. International law has a specific feature which is designed to ensure that evolving circumstances are taken into account in a way that is compatible with the agreement of the parties. This feature is referred to in articles 31, paragraph 3 (*a*) and (*b*) of the 1969 Vienna Convention. It consists of the recognition of the role that subsequent agreement and subsequent practice play in the interpretation of a treaty. Both means of interpretation are of considerable practical importance. International tribunals and other dispute settlement organs have referred to and applied articles 31, paragraph 3 (*a*) and (*b*) of the Convention in a large number of cases. This is true for the ICJ[2] as well as its predecessor, the Permanent Court of International Justice (PCIJ).[3] Subsequent practice has also played an important role in arbitral awards,[4] the jurisprudence of the Iran–United States Claims Tribunal,[5] the International Tribunal for the Law of the Sea,[6] the European Court of Human Rights,[7] the International Tribunal for the Former Yugoslavia[8] and in reports of the WTO panels and of its Appellate Body.[9] In addition, domestic courts repeatedly refer to subsequent practice as a means of determining the impact of a given treaty on the domestic legal order.[10]

12. The Commission addressed this topic between 1957 and 1966 as part of its work on the law of treaties.[11] Later, the Commission considered the topic briefly

[2] See, *inter alia*, *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6 at pp. 33–34; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151, at p. 160; and *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. The Court makes further references to its case law in *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1076, para. 50.

[3] See, *inter alia*, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion of 12 August 1922, P.C.I.J., Series B, No. 2*, pp. 38–40; *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne, Advisory Opinion of 21 November 1925, P.C.I.J., Series B, No. 12*, p. 24; *Jurisdiction of the European Commission of the Danube, Advisory Opinion of 8 December 1927, P.C.I.J., Series B, No. 14*, p. 27, at pp. 62–63; and *Jurisdiction of the Courts of Danzig, Advisory Opinion of 3 March 1928, P.C.I.J., Series B, No. 15*, p. 18.

[4] See, *inter alia*, *The Chamizal Case (Mexico* v. *United States), Award of 15 June 1911*, UNRIAA, vol. XI (Sales No. 1961.V.4), p. 309, at pp. 323–335; *Affaire de l'indemnité russe (Russia* v. *Turkey), Award of 11 November 1912, ibid.*, p. 421, at p. 433; *Interpretation of the air transport services agreement between the United States of America and France, Award of 22 December 1963, ibid.*, vol. XVI (Sales No. E/F.69.V.1), p. 5; *Interpretation of the air transport services agreement between the United States of America and Italy, Award of 17 July 1965, ibid.*, p. 75, at p. 100; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel, Award of 18 February 1977, ibid.*, vol. XXI (Sales No. E/F.95.V.2), p. 53; *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, decision of 30 June 1977, ibid.*, vol. XVIII (Sales No. E/F.80.V.7), p. 3; *Case concerning the location of boundary markers in Taba between Egypt and Israel* (footnote 225 above), pp. 56–57, paras. 209–211; *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, Award of 14 February 1985*, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), p. 149, at p. 175, para. 66; *Southern Bluefin Tuna Cases (New Zealand–Japan, Australia–Japan), Award on jurisdiction and admissibility, Decision of 4 August 2000*, *ibid.*, vol. XXIII (Sales No. E/F.04.V.15), p. 1, at pp. 45–46; and *Tax regime governing pensions paid to retired UNESCO officials residing in France (France* v. *UNESCO), Award of 14 January 2003, ibid.*, vol. XXV (Sales No. E/F.05.V.5), pp. 231–266, at p. 258, para. 70.

[5] *The United States of America*, et al. v. *The Islamic Republic of Iran*, et al., *Award of 25 January 1984, Iran–United States Claims Tribunal Reports*, vol. 5, p. 71; *Houston Contracting Company* v. *National Iranian Oil Company, et al., Award of 22 July 1988, ibid.*, vol. 20, p. 3, at pp. 56–57.

[6] *M/V "Saiga" case (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10.

[7] *Case of Soering* v. *the United Kingdom, Judgment of 7 July 1989, Application No. 14038/88*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161; *Loizidou* v. *Turkey, Judgment of 18 December 1996 (Merits and Just Satisfaction), Application No. 15318/89, ibid.*, vol. 1996-VI, p. 2216, at p. 2236; *Banković and Others* v. *Belgium* et al., *Grand Chamber decision of 12 December 2001 (Admissibility), Application No. 52207/99, ibid.*, vol. 2001-XII; and *Öcalan* v. *Turkey, Judgment of 12 May 2005, Application No. 46221/99*, *ibid.*, vol. 2005-IV.

[8] *Prosecutor* v. *Duško Tadić, Case No. IT-94-1-A, Judgement of 15 July 1999*, Appeals Chamber, International Tribunal for the Former Yugoslavia, *Judicial Supplement No. 6*, June/July 1999. See also ILM, vol. 38 (1999), p. 1518.

[9] See *Japan—Taxes on Alcoholic Beverages, AB-1996-2, Report of the WTO Appellate Body* (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), 1 November 1996; *European Communities—Customs Classification of Certain Computer Equipment, AB-1998-2, Report of the WTO Appellate Body* (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R), 22 June 1998, DSR 1998:III, 1851; *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), Report of the Panel* (WT/DS294/R), 9 May 2006, paras. 7.214–7.218; *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products, Report of the Panel* (WT/DS207/R), 23 October 2002, paras. 7.78–7.101; *European Communities—Customs Classification of Frozen Boneless Chicken Cuts, AB-2005-5, Report of the WTO Appellate Body* (WT/DS269/AB/R and Corr.1, WT/DS286/AB/R and Corr.1), 27 September 2005, paras. 253–260 and 271–273; and *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the WTO Appellate Body* (WT/DS285/AB/R), 20 April 2005, pp. 64–66, paras. 190–195.

[10] See, for example, *Medellín* v. *Texas*, Judgment of 25 March 2008, 552 U.S. 491(2008) (slip opinion at pp. 20–21); *Trans World Airlines, Inc.* v. *Franklin Mint Corp.* et al., 466 U.S. 243 (1984); *R.* v. *Secretary of State for the Environment on the Application of Channel Tunnel Group*, 23 July 2001, ILR, vol. 125 (2004), p. 580, at pp. 296–597, para. 48; *Morris* v. *KLM Royal Dutch Airlines* [2002] UKHL7, 2 AC 628; ILDC 242 (UK 2002); *Attorney-General* v. *Zaoui and Inspector-General of Intelligence and Security and Human Rights Commission*, [2005] NZSC 38, ILDC 81 (NZ 2005); *A.* v. *B.*, Swiss Federal Supreme Court, 1st Civil Law Chamber, 8 April 2004, BGE 130 III 430, ILDC 343 (CH 2004); and *Bouzari* v. *Iran* (2004), 243 DLR (4th) 406, ILDC 175 (CA 2004).

[11] Second report on the law of treaties by Gerald Fitzmaurice, Special Rapporteur, *Yearbook ... 1957*, vol. II, document A/CN.4/107, pp. 22, 25, 39, 44 and 68; first report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 69; second report, *Yearbook ... 1963*, vol. II, document A/CN.4/156 and Add.1–3, pp. 60, 64, 66, 69–71 and 80; third report, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3,

(*Continued on next page.*)

in connection with the draft articles on treaties concluded between States and international organizations or between two or more international organizations.[12] Finally, the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law briefly touched on the topic of subsequent agreement and subsequent practice with respect to treaties.[13]

C. Should the International Law Commission examine the topic of subsequent agreement and subsequent practice with respect to treaties?

13. Despite their great practical importance, the means of interpretation contained in articles 31, paragraph 3 (*a*) and (*b*) of the 1969 Vienna Convention have hardly been analysed by international tribunals beyond what the cases at hand required. In addition, these means of interpretation have rarely been the subject of extensive empirical, comparative or theoretical research. In fact, relevant subsequent agreement and subsequent practice of States is not always well documented and often only comes to light in legal proceedings.

14. As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties' provisions will be subject to efforts of reinterpretation, and possibly even of informal modification. This may concern technical rules as well as more general substantive rules. As their context evolves, treaties face the danger of either being "frozen" in a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreements and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.[14]

15. The interest in clarifying the legal significance and effect of subsequent agreement and subsequent practice is enhanced by the increasing tendency of international courts to interpret treaties in a purpose-oriented and objective manner. Before the adoption of the 1969 Vienna Convention, it was an open question whether a more objective or more subjective method of treaty interpretation should prevail.[15] While the Convention already puts a stronger emphasis on objective factors, the trend towards objective treaty interpretation is continuing. The arbitral tribunal in the 2005 *Iron Rhine* case has, for example, maintained that an evolutive interpretation would ensure an application of the treaty that would be effective in terms of its object and purpose. The tribunal emphasized that this would "be preferred to a strict application of the intertemporal rule".[16] At a time when international law is faced with a "proliferation of international courts and tribunals",[17] an evolutive interpretation of treaties is, on the one hand, a method to ensure a treaty's effectiveness. On the other hand, an evolutive interpretation can lead to a reinterpretation of the treaty beyond the actual consent of the parties. This makes reference to subsequent practice less predictable and more important at the same time: if the invocation of subsequent practice is not limited to elucidating the actual and continuing agreement of parties,[18] treaty interpretation can become less predictable but subsequent practice can become more important when it is used as evidence of a dynamic understanding of treaty instruments (e.g. when the European Court of Human Rights speaks about the Convention as a "living instrument, which … must be interpreted in the light of present-day conditions"[19]).

(*Footnote 11 continued.*)

pp. 39, 40, 52, 53, 55, 59, 60 and 62; fourth report, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 49; fifth report, *Yearbook ... 1966*, vol. II, document A/CN.4/183 and Add.1–4, p. 28; sixth report, *ibid.*, document A/CN.4/186 and Add.1–7, draft article 68 at pp. 87–91 and draft article 69 at pp. 91–99 and 101; fifteenth session of the Commission, plenary discussions, *Yearbook ... 1963*, vol. I, 687th meeting, p. 89; 689th meeting, p. 100; 690th meeting, p. 109; 691st meeting, pp. 116 and 121; 694th meeting, pp. 136 and 139; 706th meeting, p. 224; 707th meeting, p. 226; 712th meeting, p. 269; 720th meeting, p. 316; sixteenth session of the Commission, plenary discussions, *Yearbook ... 1964*, vol. I, 729th meeting, pp. 39–40; 752nd meeting, p. 190; 753rd meeting, pp. 192–193; 758th meeting, p. 230; 765th meeting, pp. 276 and 278–279; 766th meeting, pp. 282 and 284–286 and 288; 767th meeting, pp. 296–298; 769th meeting, pp. 308–311 and 313; 770th meeting, pp. 316 and 318; 773rd meeting, p. 332; and 774th meeting, p. 340; seventeenth session of the Commission, plenary discussions, *Yearbook ... 1965*, vol. I, 790th meeting, p. 105; 799th meeting, p. 165; and 802nd meeting, p. 191; and *Yearbook ... 1966*, vol. I (Part One), 830th meeting, pp. 55 and 57; and eighteenth session of the Commission, plenary discussions, *ibid.*, vol. I (Part Two), 857th meeting, p. 96; 859th meeting, pp. 113–114; 866th meeting, p. 166; 870th meeting, p. 186; 871st meeting, p. 197; 883rd meeting: draft article 68 was adopted as article 38, pp. 266–267; and 893rd meeting, draft article 69 was adopted as article 27, pp. 328–329.

[12] Third report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Paul Reuter, Special Rapporteur, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/279, p. 148; fourth report, *Yearbook ... 1975*, vol. II, document A/CN.4/285, p. 44; twenty-ninth session of the Commission, plenary discussions, *Yearbook ... 1977*, vol. I, 1438th meeting, pp. 123 *et seq*.; and 1458th meeting, pp. 234–235; thirty-first session of the Commission, plenary discussions, *Yearbook ... 1979*, vol. I, 1548th meeting, p. 77; thirty-third session of the Commission, plenary discussions, *Yearbook ... 1981*, vol. I, 1675th meeting, p. 169; and thirty-fourth session of the Commission, plenary discussions, *Yearbook ... 1982*, vol. I, 1702nd meeting, p. 22; and 1740th meeting: article 31 was adopted, pp. 251–252 and 260.

[13] "[R]elations between article 30 (subsequent agreements), 41 (*inter se* modification) and Article 103 of the [Charter of the United Nations] (priority of the Charter obligations)" (report of the Study Group, A/CN.4/L.663/Rev.1 of 28 July 2004, mimeographed; reproduced in *Yearbook ... 2004*, vol. II (Part Two), pp. 111–119, paras. 300–358, at para. 343); analytical study of the Study Group of the Commission on fragmentation of international law, A/CN.4/L.682 and Corr.1 and Add.1 of 13 April 2006, mimeographed [pp. 13, 60, 214, 233, 241 and 251–252] (see footnote 195 above).

[14] On the relation of change and the *clausula rebus sic stantibus*, see the *Gabčikovo–Nagymaros Project (Hungary/Slovakia)* case (footnote 1 above), para. 104.

[15] On the historical development, see R. Bernhardt, "Interpretation in international law", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2, Amsterdam, Elsevier, 1995, pp. 1416–1426, at pp. 1419 *et seq*.

[16] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, Decision of 24 May 2005*, UNRIAA, vol. XXVII (Sales No. E/F.06.V.8), p. 35, at p. 73, para. 80.

[17] See J. I. Charney, "The impact on the international legal system of the growth of international courts and tribunals", *New York University Journal of International Law and Politics*, vol. 31, No. 4 (1999), pp. 697 *et seq*.; see also B. Kingsbury, "Foreword: is the proliferation of international courts and tribunals a systemic problem?", *ibid.*, pp. 679 *et seq*.

[18] *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne* (see footnote 3 above), p. 24.

[19] *Tyrer* v. *the United Kingdom, Judgment of 25 April 1978, Application No. 5856/72*, European Court of Human Rights, *Series A:*

16. Subsequent agreement and subsequent practice also affect the so-called "fragmentation" and "diversification" of international law. The report of the Study Group,[20] however, merely took note of the issue of subsequent practice.[21] This may be the reason why it was suggested in the Sixth Committee in 2006 that the Commission consider the subject of adaptation of international treaties to changing circumstances, with a special emphasis on the field of subsequent agreements and subsequent practice.[22]

17. A final reason why subsequent agreement and subsequent practice as a means of interpretation of treaties should be studied results from their implications on the domestic level. In the United Kingdom, Lord Nicholls noted in a recent decision of the House of Lords that subsequent practice would not be the right way to modify a treaty, an end which should only be achieved through an amendment procedure.[23] In the United States, the Supreme Court recently interpreted a treaty by relying on the "postratification understanding" of the parties.[24] The question of the significance of subsequent practice as a means of treaty interpretation is regarded in the United States as being part of the larger question of which effects different sources of international law have on domestic law, and which source of international law favours a larger role of the United States Senate.[25] While the United States Supreme Court has been reluctant to consider recently developed customary law when interpreting international agreements,[26] it has more openly referred to subsequent practice in some cases.[27] This aspect of the question is important for other countries as well.[28] In Germany, for example, the Federal Constitutional Court has recently reviewed the question of whether certain informal agreements and certain practical steps taken by member States of the North Atlantic Treaty Organization are evidence of a legitimate reinterpretation of the North Atlantic Treaty, or whether such agreements and practical steps should be seen as modifications of the Treaty which would require renewed parliamentary approval. While the German court held that all steps taken so far have remained within the confines of legitimate treaty interpretation by way of subsequent agreement and subsequent practice,[29] such cases reflect a widespread concern on the side of political actors that domestic control mechanisms concerning the conclusion and application of treaties may be bypassed. A former judge of the European Court of Human Rights has described treaties as being "set on wheels" by the processes of subsequent agreement and subsequent practice.[30]

18. Subsequent agreement and subsequent practice are not only pertinent for ordinary inter-State treaties, but also for those treaties that are constituent instruments of an international organization (art. 5 of the 1969 Vienna Convention). By virtue of operating in and engaging with international organizations, member States display forms of subsequent agreement and subsequent practice that are relevant to the evolving interpretation of the constituent treaties of such organizations. However, the Commission has in the past sometimes kept projects on international organizations apart (in particular the projects on the law of treaties and on international responsibility). The question of the relevance of organizational practice, and the reactions of member States to this organizational practice, will indeed not always be judged according to the same standards as those which are applicable to ordinary inter-State treaties.[31] However, since these two areas are so closely interrelated, it would be artificial to distinguish between them. One caveat may, however, be in order: while some the best-known examples of relevant organizational practice concern the United Nations,[32] one might consider excluding the practice of the main bodies of the United Nations from the inquiry, should there be concerns about possible limitations to the development of the United Nations system as a whole. Other United Nations organs, organizations and treaty bodies, however, do not

Judgments and Decisions, vol. 26, para. 31; *Marckx* v. *Belgium, Judgment of 13 June 1979, Application No. 6833/74, ibid.*, vol. 31, para. 41; *Airey* v. *Ireland, Judgment of 9 October 1979, Application No. 6289/73, ibid.*, vol. 32, para. 26; and *Loizidou* v. *Turkey*, *Preliminary Objections* (see footnote 324 above), para. 71.

[20] Analytical study of the Study Group of the Commission on fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1), mimeographed (see footnote 195 above).

[21] *Ibid.*, paras. 12, 109, 224 (footnote 288), 354, 412, 464 and 476.

[22] Topical summary of the discussion held in the Sixth Committee of the General Assembly, during its sixty-first session, prepared by the Secretariat, A/CN.4/577/Add.17 Jan, para. 31.

[23] *King* v. *Bristow Helicopters Ltd*, United Kingdom House of Lords [2002] UKHL 7, [2002] 2 AC 628; ILDC 242 (UK 2002), para. 98.

[24] *Medellín* v. *Texas* (see footnote 10 above) with further references.

[25] For an overview, see J. N. Moore, "Treaty interpretation, the Constitution, and the rule of law", *Virginia Journal of International Law*, vol. 42 (2001–2002), pp. 163–263; and Ph. R. Trimble and A.W. Koff, "All fall down: the treaty power in the Clinton administration", *Berkeley Journal of International Law*, vol. 16 (1998), pp. 55 *et seq.*

[26] In *United States* v. *Alvarez-Machain*, 504 U.S. 655 (1992), note 15, Justice Rehnquist wrote: "The practice of nations under customary international law [is] of little aid in construing the terms of an extradition treaty, or the authority of a court to later try an individual who has been so abducted".

[27] See, in addition to *Medellín* v. *Texas* (footnote 10 above), for example, *Trans World Airlines, Inc.* v. *Franklin Mint Corp.* et al. (*ibid.*).

[28] See A. Aust, "Domestic consequences of non-treaty (non-conventional) law-making", in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making*, Berlin, Springer, 2005, pp. 487–496; and F. Orrego Vicuña, "In memory of Triepel and Anzilotti: the use and abuse of non-conventional lawmaking", *ibid*., pp. 497–506; for a view on United States jurisprudence, see D. J. Bederman, "Revivalist canons and treaty interpretation", *UCLA Law Review*, vol. 41, No. 4 (1994), pp. 953 *et seq.* and pp. 972 *et seq.*

[29] *Parliamentary Group of the Party of Democratic Socialism in the German Federal Parliament* v. *Federal Government*, 22 November 2001, 2 BvE 6/99, ILDC 134 (DE 2001); *Parliamentary Group of the PDS/Die Linke in the German Parliament* v. *Federal Government*, 3 July 2007, 2 BvE 2/07, ILDC 819 (DE 2007).

[30] G. Ress, "Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge", in W. Fürst *et al.* (eds.), *Festschrift für Wolfgang Zeidler*, vol. 2, Berlin, 1987, pp. 1775 *et seq.*, at p. 1779.

[31] Amerasinghe, *Principles of the Institutional Law…*, *op. cit*. (footnote 569 above), at pp. 49 *et seq.*, 290 *et seq.* and 460 *et seq.*

[32] *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of 3 March 1950, I.C.J. Reports 1950*, p. 4, at pp. 8 *et seq.*; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962* (see footnote 2 of this annex, above), pp. 160, 162, 165, 168 *et seq.*, and 177–179; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971* (*ibid.*), paras. 21–22; B. Simma, S. Brunner and H.-P. Kaul, "Article 27", in B. Simma (ed.), *The Charter of the United Nations: a Commentary*, 2nd ed., vol. I, Munich, Verlag C. H. Beck, 2002, pp. 493 *et seq.*, paras. 46 *et seq.*; M. Bothe, "Peacekeeping", *ibid.*, p. 685, paras. 86 and 91 *et seq.*; and *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion* (see footnote 553 above), p. 180.

raise similar concerns and should be reviewed. In addition, generally recognized rules and principles that were developed with the practice of the United Nations organs in mind should be reviewed as to their applicability to other treaties and actors.

D. The goal and the possible scope of consideration of the proposed topic

19. The goal of considering the topic of subsequent agreement and subsequent practice with respect to treaties would be twofold.

20. The first goal would be to establish a sufficiently representative repertory of practice. Such a repertory would serve an important practical purpose. So far, the actual practice of subsequent agreement and subsequent practice with respect to treaties has never been collected in more than a random fashion. Although the importance of these means of treaty interpretation is generally acknowledged, their actual significance has not been identified in a systematic fashion, but only in judicial proceedings or when the case arose. Collecting examples of relevant subsequent agreement and subsequent practice and systematically ordering them is not merely of value in itself, but could also form the basis for orientation in analogous cases. Although such a collection certainly could not aspire to completeness, it would nevertheless provide an exemplary overview. This would be helpful for practitioners who would then more easily be able to reason from analogy. A repertory should also provide courts and tribunals with illustrative guidance on the relevance of subsequent agreement and practice. Without such guidance, judicial bodies might too easily identify what they consider to be the object and purpose of a treaty, thereby possibly overlooking the continuing role of States in treaty interpretation.

21. The task of compiling a repertory is not simply a matter that can be done equally well by an academic research institute. Although States do not consider it to be a secret, some instances of subsequent agreement and practice are simply not available in the public realm. The Commission is the best possible forum to determine whether certain activities can indeed be classified as relevant practice. With the help of its members, it is also the best and most legitimate source for obtaining relevant instances of subsequent agreement and subsequent practice. Of course, the process of collecting material cannot be conducted in the style of a fishing expedition, but must instead be based on a carefully formulated questionnaire.

22. The second and more important goal of the consideration of the topic should be to derive some general conclusions or guidelines from the repertory of practice. Such conclusions or guidelines should not result in a draft convention, if only for the reason that guidelines to interpretation are hardly ever codified even in domestic legal systems. Such general conclusions or guidelines could, however, give those who interpret and apply treaties an orientation for the possibilities and limits of an increasingly important means of interpretation that is specific to international law. These conclusions, or guidelines, would neither provide a straitjacket for the interpreters, nor would they leave them in a void. They would provide a reference point for all those who interpret and apply treaties, and thereby contribute to a common background understanding, minimizing possible conflicts and making the interpretive process more efficient.

23. The following specific issues could be addressed within this general framework:

(*a*) delimitation of subsequent agreement and subsequent practice;

(*b*) types of subsequent agreements and subsequent practice;

(*c*) relevant actors or activities;

(*d*) constituent elements;

(*e*) substantive limits;

(*f*) treaty modification and informal means of cooperation;

(*g*) special types of treaties;

(*h*) customary international law and systemic integration.

(a) *Delimitation of subsequent agreement and subsequent practice*

24. The delimitation between the various means of interpretation provided for in article 31, paragraph 3 of the 1969 Vienna Convention is not clear. While the Commission has shed some light on the principle of systemic integration (art. 31, para. 3 (*c*) of the Convention),[33] the boundary between subsequent agreement and subsequent practice is rather fluid. It is accepted that subsequent agreement can take various forms. Subsequent agreement therefore may be present when there is simply a decision adopted by a meeting of the parties to a treaty, as was the case when member States of the European Union changed the denomination of the ECU to the Euro.[34] Since subsequent agreement presupposes the consent of all the parties, it seems to imply a higher degree of formality than subsequent practice.

25. Subsequent practice relies on the establishment of a subsequent agreement of the parties to a treaty. It is generally required to be concordant, common and consistent.[35] As Special Rapporteur Sir Humphrey Waldock put it, "[t]o amount to an authentic interpretation, the

[33] Analytical study of the Study Group of the Commission on fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1), mimeographed (see footnote 195 above), paras. 410–480.

[34] See Aust, *Modern Treaty Law and Practice*, *op. cit.* (footnote 115 above), p. 192.

[35] See *Kasikili/Sedudu Island (Botswana/Namibia)* (footnote 2 of this annex, above), paras. 49–50; *Air Service Agreement of 27 March 1946 between the United States of America and France), Decision of 9 December 1978*, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 415; *Japan—Taxes on Alcoholic Beverages, Report of the WTO Appellate Body* (see footnote 9 of this annex, above), p. 13; and G. Distefano, "La pratique subséquente des États parties à un traité", *Annuaire français de droit international*, vol. 40 (1994), pp. 41 *et seq.*, at pp. 46 *et seq.*

practice must be such as to indicate that the interpretation has received the tacit assent of the parties generally".[36] However, the problem lies in how to establish this tacit assent. In this context, the notions of acquiescence and estoppel are used to determine whether a party has given its implied consent to a practice by another party. The exact meaning of those principles is subject to considerable debate.[37] While it may not be possible to arrive at definite conclusions in this respect, an analysis of State and organizational practice would probably give some general orientation.

(b) *Types of subsequent agreements and subsequent practice*

26. A study would try to identify different types of subsequent agreements and subsequent practice, or certain distinctions which could aid to identify relevant analogous cases:

—the distinction between specific and general subsequent developments;

—the distinction between technical treaties and more general treaties, such as treaties concerning the ensuring of security and/or human rights;

—the distinction between treaties with or without a special judicial dispute resolution mechanism;

—the distinction between old and new treaties;

—the distinction between bilateral and multilateral treaties.

(c) *Relevant actors or activities*

27. The question as to which of its organs is entitled to represent the State on the international level is addressed in a variety of settings. Article 7 of the 1969 Vienna Convention is obviously too narrow when it comes to determining the range of State organs or other actors that are capable of contributing to relevant subsequent agreement or practice. On the other hand, the all-inclusive approach of the rules on State responsibility[38] is probably too broad for this purpose. The arbitral award in the case of the tax regime governing pensions paid to retired UNESCO officials residing in France was reluctant to consider the conduct of low-ranking State organs as evidence of subsequent practice to a treaty.[39] Other awards have, however, relied on such practice, albeit only when it occurred with the tacit consent of higher authorities.[40] A study could provide a systematic analysis of whose action can count for subsequent agreement or practice.

(d) *Constituent elements*

28. The view is still widely held that all parties to a treaty should contribute to the subsequent practice in question. However, subsequent practice is also sometimes considered to be structurally similar to the development of new customary rules. There, the principle according to which all States need to consent to customary rules has been subject to certain modifications.[41] However, one important difference between customary law and treaty law lies in the fact that treaty law more clearly rests on the consent of all parties.

29. It is, however, a matter of considerable debate how such consent should be established. Examples from international practice include a WTO Panel Report which determined that the practice of only one party could shed light on the meaning of a provision as long as it was the practice of the sole State concerned with the question at issue.[42] Although the panel was later overruled in this regard by the Appellate Body,[43] the Panel Report merits attention and has merely reiterated a problem that has arisen in other contexts as well.[44] The ICJ has recognized that the practice of one individual State may have special cogency when it is related to the performance of an obligation incumbent on that State.[45]

(e) *Substantive limits*

30. The study would also need to look into possible limits for the consideration of subsequent agreement and subsequent practice. Some treaties contain specific rules concerning their interpretation and which can affect the operation of general methods of interpretation (see subsection (*g*) (Special types of treaties) below). However, substantive limits could also flow from rules of *jus cogens*. Such rules could pose a limit to certain

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[36] Sixth report on the law of treaties, *Yearbook ... 1966*, vol. II, A/CN.4/186 and Add.1–7, pp. 98–99, para. 18; see also Distefano, *loc. cit.* (footnote above), p. 55.

[37] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 305, para. 130; *Temple of Preah Vihear* (footnote 224 above), separate opinion of Judge Alfaro, pp. 39–40; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 26, para. 30; I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford University Press, 2003, p. 616; see also Ph. C. W. Chan, "Acquiescence/estoppel in international boundaries: *Temple of Preah Vihear* revisited", *Chinese Journal of International Law*, vol. 3, No. 2 (2004), pp. 421–439, at p. 439; H. Das, "L'*estoppel* et l'acquiescement: assimilations pragmatiques et divergences conceptuelles", *Revue belge de droit international*, vol. 30 (1997), pp. 607–634, at p. 608; M. N. Shaw, *International Law*, 5th ed., Cambridge University Press, 2003, p. 439; and M. Koskenniemi, *From Apology to Utopia—the Structure of International Legal Argument*, re-ed., Cambridge University Press, 2005, pp. 356 *et seq.*

[38] See article 4 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42.

[39] *Tax regime governing pensions paid to retired UNESCO officials residing in France* (see footnote 4 of this annex, above), at p. 258, para. 70; on this award, see R. Kolb, "La modification d'un traité par la pratique subséquente des parties", *Revue suisse de droit international et de droit européen*, vol. 14, No. 1 (2004), pp. 9–32.

[40] *Air Service Agreement of 27 March 1946 between the United States of America and France* (see footnote 35 of this annex, above).

[41] See C. Tomuschat, "Obligations arising for States without or against their will", *Collected Courses of the Hague Academy of International Law, 1993-IV*, vol. 241, pp. 195–374, at p. 290.

[42] *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, *Report of the Panel* (WT/DS2369/R), 30 May 2005, para. 7.255.

[43] *Ibid., Report of the WTO Appellate Body* (see footnote 9 of this annex, above), para. 259.

[44] Amerasinghe, *Principles of the Institutional Law…*, *op. cit.* (footnote 569 above), at pp. 50 *et seq.*

[45] *International Status of South-West Africa* (see footnote 215 above), at pp. 135 *et seq.*; McNair, *op. cit.* (footnote 89 above), p. 427.

forms of evolutive treaty interpretation by the parties, but they may also themselves be specifically affected by subsequent developments (see article 64 of the 1969 Vienna Convention).

(f) *Treaty modification and informal cooperation*

31. While it may be exaggerated to pretend, as Georges Scelle has done, that "*l'application elle-même des traités n'est ... qu'une révision continue*" ("the application itself of treaties … is but a continuous revision"),[46] a study on subsequent agreement and subsequent practice must consider informal treaty application as forms of interpretation and possibly even of treaty modification.[47] A classic example for the case in which supposed interpretation may have turned into a modification of a treaty is the understanding of the ICJ of Article 27, paragraph 3, of the Charter of the United Nations with respect to the non-consideration of abstentions of permanent members of the Security Council.[48] Although the possibility of treaty modification was also acknowledged by arbitral awards,[49] the ICJ has recently adopted a more sceptical position in this regard and did not find a modification through subsequent practice in *Kasikili/Sedudu Island (Botswana/Namibia)*.[50]

32. The issue of modification is connected with a tendency of States to resort to informal means of international cooperation. One question concerns the value of memorandums of understanding in the context of subsequent practice.[51] Their legal force is contested. However, the uncertainty surrounding their status has not prevented arbitral tribunals from considering them as subsequent practice.[52]

(g) *Special types of treaties*

33. The study should also consider subsequent agreement and subsequent practice within special treaty regimes. While the report of the Study Group on fragmentation has rejected the notion of "self-contained regimes",[53] it is nevertheless necessary to study how the general rules are applied in special contexts. One example is provided by WTO law. The interpreter of WTO law is faced with a complex array of provisions that simultaneously provide for and limit recourse to the interpretation of WTO law through subsequent practice. It follows that the considerable amount of reports both by Panels and the Appellate Body, which explicitly deal with subsequent practice, must be read in light of this framework of rules.[54]

34. Certain other treaty regimes that establish judicial organs or provide for some form of institutionalized dispute settlement display a tendency to develop their own rules of interpretation which differ from the classical canons of general international law. One example is the European Community/European Union legal system, in which subsequent practice is regularly not included in the list of means of interpretation of the Court of Justice (of the European Union).[55] On the other hand, in the context of the Common Foreign and Security Policy under the Treaty on European Union, subsequent practice of the organization as a means to interpret the relevant provisions of the Treaty, such as article 24,[56] is still plausible.

35. The European Convention on Human Rights is another special case. Although references to subsequent developments are numerous in the jurisprudence of the European Court of Human Rights,[57] how the Court actually makes use of it merits attention. Apart from the classical practice of the member States themselves, the concept of the Convention as a "living instrument" could be considered as subsequent practice of civil society more than as subsequent practice of the States party to the Convention.[58]

(h) *Customary international law and systemic integration*

36. The means of interpretation provided for in article 31, paragraph 3, of the 1969 Vienna Convention invite closer inspection as to their relation to the development of new customary rules.[59] Subsequent practice may reflect the wish of States to see a treaty modified in order to adapt it to the changing normative environment. From this perspective, subsequent practice in the sense of article 31, paragraph 3 (*b*) is intimately connected to the principle of systemic integration as embodied in subsection (*c*) of the same paragraph.

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[46] G. Scelle, *Théorie juridique de la révision des traités*, Paris, Librairie du Recueil Sirey, 1936, p. 11.

[47] K. Wolfke, "Treaties and custom", in J. Klabbers (ed.), *Essays on the Law of Treaties: a Collection of Essays in Honour of Bert Vierdag*, The Hague, Martinus Nijhoff, 1998, pp. 31–39, at p. 34.

[48] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971* (see footnote 2 of this annex, above), pp. 16 and 21–22.

[49] See *Case concerning the location of boundary markers in Taba between Egypt and Israel* (footnote 225 above), at pp. 56–57, paras. 209–211; *Temple of Preah Vihear* (footnote 224 above); *Air Service Agreement of 27 March 1946 between the United States of America and France* (footnote 35 of this annex, above); *Decision regarding the delimitation of the border between Eritrea and Ethiopia* (footnote 223 above), pp. 110 *et seq.*; and Aust, *Modern Treaty Law and Practice, op. cit.* (footnote 115 above), p. 213.

[50] *Kasikili/Sedudu Island (Botswana/Namibia)* (see footnote 2 of this annex, above).

[51] Aust, *Modern Treaty Law and Practice*, *op. cit.* (footnote 115 above), pp. 26–45.

[52] *United States–United Kingdom Arbitration concerning Heathrow Airport User Charges, Decision of 30 November 1992*, UNRIAA, vol. XXIV (Sales No. E/F.04.V.18), pp. 1–359, at pp. 76 *et seq.*, and 130 *et seq.*

[53] Analytical study of the Study Group of the Commission on fragmentation of international law (A/CN.4/L.682 and Corr.1 and Add.1), mimeographed (see footnote 195 above), paras. 191 *et seq.*

[54] See the references in footnote 9 of this annex, above.

[55] See *United Kingdom of Great Britain and Northern Ireland* v. *Council of the European Communities, Judgement of 23 February 1988, Case 68/86 European Court Reports 1988*, p. 855 *et seq.*, at para. 24.

[56] See D. Thym, "Die völkerrechtlichen Verträge der Europäischen Union", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*Heidelberg Journal of International Law*), vol. 66 (2006), pp. 863 *et seq.*, at p. 870.

[57] See the references in footnote 7 of this annex, above.

[58] Bernhardt, "Interpretation in international law", *loc. cit.* (footnote 15 of this annex, above), pp. 1416–1426, at p. 1421.

[59] See M. Kamto, "La volonté de l'État en droit international", *Collected Courses of the Hague Academy of International Law,* vol. 310 (2004), pp. 133 *et seq.*

E. How to approach the topic of subsequent agreement and practice

37. The object of the proposal is to develop guidelines for the interpretation of treaties in time on the basis of a repertory of practice. The goal is to deal with the topic within one quinquennium.

38. The nature of the topic as a cross-cutting issue requires an approach that is different from the one to be adopted if the goal would be to codify a specific area of international law. It would not make sense, for example, to start with general principles and then move to more specific guidelines or exceptions. This is because the material from which the guidelines would be extracted is substantially less pre-formed than are subject areas which lend themselves to codification. It is therefore necessary to develop the repertory and the ensuing guidelines inductively from certain manageable categories of material. These categories should fulfil two requirements: first, it should be possible to delineate them rather clearly from each other and, secondly, it should be possible to deal with them in a sequence that avoids duplication of work as far as possible.

39. The following categories of material should fulfil these requirements if analysed one after the other:

(*a*) jurisprudence of international courts and tribunals of general and *ad hoc* jurisdiction (e.g. ICJ, arbitral tribunals);

(*b*) pronouncements of courts or other independent bodies under special regimes (e.g. WTO, the Understanding on Rules and Procedures Governing the Settlement of Disputes, the European Court of Human Rights);

(*c*) subsequent agreement and practice of States outside judicial or quasi-judicial proceedings;

(*d*) subsequent agreement and practice with respect to and by international organizations (the United Nations, specialized and regional organizations);

(*e*) jurisprudence of national courts;

(*f*) conclusions.

40. From a purely theoretical point of view the point of departure should, in principle, be the practice of States outside judicial or quasi-judicial proceedings. Practical considerations, however, militate in favour of the suggested sequence. The collection of the practice of States outside judicial or quasi-judicial proceedings is the most difficult part of the project and, more than any other category of material, it requires help from States and other sources. There should be time for the preparation of this aspect of the topic by the Commission, and in particular for States to respond to a questionnaire. Since the legal significance of subsequent agreement and practice is usually described by way of examples from the jurisprudence of international courts, it is probably better to start the analysis of the topic by reviewing the jurisprudence of international courts of general jurisdiction (in particular the ICJ) and of *ad hoc* jurisdiction (various arbitral tribunals). These judicial bodies have developed the main reference points from which an analysis can proceed. The analysis of the pronouncements of courts or of other independent bodies under special regimes would follow and supplement the previous analysis by either confirming the approach of the international courts or tribunals of general or *ad hoc* jurisdiction, or by suggesting that certain exceptions exist in special regimes.

41. After reviewing the international judicial or quasi-judicial bodies' reflection of subsequent agreement and practice of States, pertinent examples of such agreement and practice of States outside judicial or quasi-judicial proceedings should be addressed. In this context, the question must again be asked whether such practice of States generally confirms the jurisprudence of international judicial or quasi-judicial bodies, and whether it adds any considerations.

42. The analysis of the international pronouncements on the topic would be completed by looking at subsequent agreement and practice with respect to and by international organizations. It is expected that certain specific understandings and practices will emerge in this context which could then become the basis for corresponding guidelines. A review of the available jurisprudence of national courts will help confirm or call into question previous insights.

43. Ultimately, a final report should synthesize the different layers of analysis and conclude with the envisaged guidelines to interpretation.

44. The suggested way of how to proceed with this cross-cutting issue inevitably raises questions of delimitation which must be resolved as the work on the topic proceeds. Another question is how to integrate the views of authors. It is suggested that they be considered based on how specifically they relate to the subcategory of material under consideration. This means that general views of authors on the issue of treaty interpretation in time would be considered mainly at the beginning and near the end of the work on the topic.

F. Conclusion

45. There are many examples of subsequent agreement and subsequent practice to international treaties. In a statement to the Sixth Committee in October 2007, one State confirmed and substantiated the practical interest of States in improving their knowledge of how subsequent agreements and practice may influence interpretation of their treaty obligations.[60] It is true that the topic relates to many subject areas, as another State remarked in its statement to the Sixth Committee,[61] but this does not mean that the topic is not sufficiently concrete and suitable for progressive development. As a cross-cutting issue, the topic proceeds from a firm basis in practical cases to which it gives added value by way of comparative analysis. The "real-world issues"[62] which suggest that the Commission take on this

[60] Statement by Germany on 30 October 2007, *Official Records of the General Assembly, Sixty-second Session, Sixth Committee*, 19th meeting (A/C.6/62/SR.19), paras. 28–29.

[61] Statement by the United States on 31 October 2007, *ibid.*, 20th meeting (A/C.6/62/SR.20), para. 24.

[62] Statement by the United States on 31 October 2007, *ibid.*

topic at this time are arising more and more frequently, as demonstrated by the recent *Medellín* v. *Texas* decision of the United States Supreme Court and its analysis of the "post-ratification understanding" of the Vienna Convention on Consular Relations.[63]

[63] *Medellín* v. *Texas* (see footnote 10 of this annex, above).

46. It is therefore suggested that the Commission shed light on the necessary balance between stability and change in the law of treaties through the codification and progressive development of international law on the matter. The topic lends itself both to the traditional method of being elaborated on the basis of reports by a special rapporteur, as well as to the method of being treated by a study group.

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