

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

[Agenda item 6]

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

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Multilateral instruments cited in the present report

	<i>Source</i>
Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Geneva, 22 August 1864)	ICRC/League of Red Cross Societies, <i>International Red Cross Handbook</i> , 12th ed., Geneva, July 1983, p. 19.
General Act of Algeciras (Algeciras, 7 April 1906)	Spain, <i>Gaceta de Madrid</i> , 2 January 1907, vol. I, p. 25.
Covenant of the League of Nations (Versailles, 28 April 1919)	League of Nations, <i>Official Journal</i> , No. 1, February 1920, p. 3.
Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, No. 102, p. 295.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973, pp. 31 <i>et seq.</i>
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I)	<i>Ibid.</i> , 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)	<i>Ibid.</i> , No. 971, p. 85.
Geneva Convention relative to the Treatment of Prisoners of War (Convention III)	<i>Ibid.</i> , No. 972, p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV)	<i>Ibid.</i> , 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)	<i>Ibid.</i> , 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)	<i>Ibid.</i> , No. 17513, p. 609.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	<i>Ibid.</i> , vol. 606, No. 8791, p. 267.
Treaty establishing the European Economic Community (Rome, 25 March 1957)	<i>Ibid.</i> , vol. 298, No. 4300, p. 3. See also the consolidated version of the Treaty establishing the European Community, <i>Official Journal of the European Communities</i> , No. C 340, 10 November 1997, p. 173.
Convention establishing the European Free Trade Association (Stockholm, 4 January 1960)	<i>Ibid.</i> , vol. 370, No. 5266, p. 3.
Convention on the settlement of investment disputes between States and nationals of other States (Washington, D.C., 18 March 1965)	<i>Ibid.</i> , vol. 575, No. 8359, p. 159.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, p. 123.
Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (London, Moscow and Washington, D.C., 10 April 1972)	<i>Ibid.</i> , vol. 1015, No. 14860, p. 163.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , 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.
North American Free Trade Agreement (Mexico City, Ottawa and Washington, D.C., 17 December 1992)	Washington, D.C., United States Government Printing Office, 1993.
Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (Paris, 13 January 1993)	United Nations, <i>Treaty Series</i> , vol. 1974, No. 33757, p. 45.
Convention for the Conservation of Southern Bluefin Tuna (Canberra, 10 May 1993)	United Nations, <i>Treaty Series</i> , vol. 1819, No. 31155, p. 359.
Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994)	<i>Ibid.</i> , vols. 1867–1869, No. 31874, p. 3.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997)	<i>Ibid.</i> , vol. 2056, No. 35597, p. 211.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	<i>Ibid.</i> , vol. 2187, No. 38544, p. 3.
Convention on Cluster Munitions (Dublin, 30 May 2008)	<i>Ibid.</i> , vol. 2688, No. 47713, p. 39.

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Introduction and previous work of the Commission*

1. During its sixty-fourth session, in 2012, the International Law Commission decided to change the format of work on the topic “Treaties over time” and to appoint Georg Nolte as Special Rapporteur¹ for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”.² The present report builds upon and continues the previous work of the Commission on “Treaties over time”.

2. The topic “Treaties over time” was included in the Commission’s programme of work at its sixtieth session,

in 2008.³ At its sixty-first session, in 2009, the Commission established a Study Group on Treaties over time, chaired by Mr. Nolte.⁴ At the sixty-second session, in 2010, the Study Group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chair on the relevant jurisprudence of ICJ and arbitral tribunals of *ad hoc* jurisdiction.⁵ At the sixty-third session, in 2011, the Study Group began its consideration of the second report by the Chair on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice,

* The Special Rapporteur gratefully acknowledges the research assistance in the preparation of the present report provided by Katharina Berner, Stefan Raffener and Alejandro Rodiles Bretón, as well as the technical assistance of Prisca Feihle and Moritz von Rochow (all of Humboldt University, Berlin).

¹ *Yearbook ... 2012*, vol. I, 3136th meeting.

² *Ibid.*, vol. II (Part Two), para. 269.

³ *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 353. For the syllabus of the topic, see *ibid.*, annex I. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

⁴ *Yearbook ... 2009*, vol. II (Part Two), pp. 148–149, paras. 220–226.

⁵ *Yearbook ... 2010*, vol. II (Part Two), pp. 194–195, paras. 344–354. The introductory, second and third reports, originally informal working papers, will be included in Nolte, *Treaties and Subsequent Practice*.

focusing on 12 of the general conclusions proposed therein.⁶ In the light of the discussions in the Study Group, the Chair reformulated the text of his proposed conclusions to what became nine preliminary conclusions.⁷

3. At the sixty-fourth session, in 2012, the Study Group completed its consideration of the second report by its Chair.⁸ In so doing, the Study Group examined six additional general conclusions proposed in the second report.

⁶ *Yearbook ... 2011*, vol. II (Part Two), pp. 168–169, paras. 336–341.

⁷ For the text of the nine preliminary conclusions by the Chair of the Study Group, see *ibid.*, pp. 169–171, para. 344.

⁸ *Yearbook ... 2012*, vol. II (Part Two), pp. 77–79, paras. 225–239.

In the light of the discussions in the Study Group, the Chair reformulated the text of what became six additional preliminary conclusions.⁹ The Study Group agreed that the preliminary conclusions by its Chair would be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur.¹⁰ In addition to considering the remainder of the second report, the Study Group also considered parts of the third report prepared by its Chair on subsequent agreements and subsequent practice of States outside of judicial and quasi-judicial proceedings.¹¹

⁹ *Ibid.*, pp. 79–80, para. 240.

¹⁰ *Ibid.*, pp. 77–78, para. 231.

¹¹ *Ibid.*, p. 78, paras. 232–234.

CHAPTER I

Scope, aim and possible outcome of the work

4. The original purpose for the Commission to pursue work on the topic “Treaties over time” within the format of a Study Group had been to give the members the opportunity to consider whether the topic should be approached with a broad focus, which would have also involved, *inter alia*, an in-depth treatment of the termination and the formal amendment of treaties, or whether the topic should be limited to a narrower focus on the aspect of subsequent agreements and subsequent practice. The discussions within the Study Group have led to the agreement, in accordance with the view originally expressed by the Chair, that it would be preferable to limit the topic to the narrower aspect of the legal significance of subsequent agreements and practice. The Study Group ultimately agreed that the main focus of the future work would be on the legal significance of subsequent agreements and subsequent practice for interpretation (Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”), art. 31) and related aspects,¹² as explained in the original proposal for the topic.¹³ According to the original proposal, these means of interpretation are important because of their function with regard to the interpretation of treaties over time:

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

5. The present report, in accordance with the discussions in the Study Group on treaties over time at the Commission’s sixty-fourth session, in 2012, synthesizes elements of the three reports of the Study Group¹⁵ and

¹² *Ibid.*, p. 79, para. 238.

¹³ *Yearbook ... 2008*, vol. II (Part Two), annex I, pp. 153 *et seq.*, para. 11 *et seq.*

¹⁴ *Ibid.*, p. 154, para. 14.

¹⁵ See footnotes 5, 6 and 11 above.

takes into account the discussions within that Group. It contains four proposed draft conclusions, explained by commentaries, which cover some basic aspects of the topic. Due to certain constraints, in particular space constraints, it has not been possible to synthesize the entirety of the three reports for the Study Group into the present report. However, the Special Rapporteur is confident that it will be possible to synthesize the remainder of those reports in a further report which will cover other and more specific aspects of the topic. He envisages that the work on the topic will be finalized, as foreseen, within the current quinquennium (see the future programme of work in chapter VI below).

6. The aim of the discussion on the present topic is to examine the role which subsequent agreements and subsequent practice play in the interpretation of treaties, and to give, thereby, some orientation to those who interpret or apply treaties. This group includes judges (at the international and the national levels), officials of States and international organizations, academics and other private actors. The materials and analyses that are contained in the present report and in the future reports, as well as the conclusions of the Commission, should provide a common reference and thereby contribute, as far as possible and reasonable, to a common and uniform approach to the interpretation and application of a particular treaty. The present report is based primarily on the jurisprudence of, it is hoped, a representative group of international courts, tribunals and other adjudicative bodies,¹⁶ as well as on documented instances of State practice. Together, this collection is an element, necessarily incomplete, of a repertory of practice. As it is formulated in the original proposal for the topic of Treaties over time:

¹⁶ The term “jurisprudence” is used in the sense of legal assessments in individual cases by competent adjudicatory bodies which are composed of independent members. Such legal assessments are not limited to binding judgments by international courts or tribunals, but also include “views” by the Human Rights Committee under the International Covenant on Civil and Political Rights and reports by the Panels and the Appellate Body under the World Trade Organization (WTO) Dispute Settlement Body. The report covers only pronouncements by adjudicatory bodies that concentrate on legal (not factual) assessments, that are sufficiently accessible and that have already generated a significant number of decisions.

The ... goal of the consideration of the topic should be to derive some general conclusions or guidelines from the repertory of practice. Such conclusions or guidelines should not result in a draft convention, if only for the reason that guidelines to interpretation are hardly ever codified even in domestic legal systems. Such general conclusions or guidelines could, however, give those who interpret and apply treaties an orientation for the possibilities and limits of an increasingly important means of interpretation that is specific to international law. These conclusions, or guidelines, would neither provide a straightjacket for the interpreters, nor would they leave them in a void. They would provide a reference point for all those who interpret and apply treaties, and thereby contribute to a common background understanding, minimizing possible conflicts and making the interpretive process more efficient.¹⁷

7. The delineation of the present topic from other topics is reasonably clear. One topic which might raise questions in this respect is “Formation and evidence of customary

¹⁷ *Yearbook ... 2008*, vol. II (Part Two), annex I, p. 156, para. 22.

international law”. In this respect, the Special Rapporteur is in agreement with the opinion of Sir Michael Wood, Special Rapporteur on the topic of “Formation and evidence of customary international law”, that, while the effect of treaties on the formation of customary international law is part of that topic, the role of customary international law in the interpretation of treaties is part of the present topic. Needless to say, the topic does not concern the determination of the content of particular treaty rules, but is rather focused on the elucidation of the role and possible effects of subsequent agreements and subsequent practice in relation to treaty interpretation. Another topic which could have points of contact is “Provisional application of treaties”. The focus of this topic does not, however, seem to be on the effect of provisional application on the interpretation of a treaty.¹⁸

¹⁸ *Yearbook ... 2012*, vol. II (Part Two), p. 67–68, paras. 144–155.

CHAPTER II

General rule and means of treaty interpretation

8. The legal significance of subsequent agreements and subsequent practice for the interpretation of treaties depends, as a point of departure, on the general rule regarding treaty interpretation. This general rule, consisting of different subrules or elements, is codified in article 31 of the 1969 Vienna Convention, which entered into force on 27 January 1980. ICJ has recognized that this general rule on treaty interpretation reflects customary international law.¹⁹ Together with article 32, article 31 of the Convention lists a number of relevant “means of interpretation”²⁰ (among them “subsequent agreement” and “subsequent practice” as “authentic means of interpretation”²¹) which shall be taken into account in the process of interpretation.

9. It is generally recognized that article 31 of the 1969 Vienna Convention must not “be taken as laying down a hierarchical order” of the different means of interpretation contained therein, but that these are to be applied by way of “a single combined operation”.²² Thus, the application of the general rule on treaty interpretation to different treaties, or treaty provisions, in a specific case may result in a different emphasis on the various means of interpretation contained therein, in particular in more or less emphasis on the text of the treaty or on its object and purpose. This is confirmed by the jurisprudence of various representative international adjudicatory bodies.

A. International Court of Justice

10. After an initial period of hesitation,²³ ICJ began to refer to articles 31 and 32 of the 1969 Vienna Convention

¹⁹ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 237, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 109, para. 160.

²⁰ Article 32. See also *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 218–223, paragraphs (2), (5), (8), (10), (15), (18) and (19) of the commentary to section 3: Interpretation of treaties.

²¹ *Ibid.*, p. 222, para. (15); see also paragraphs 30 and 64 (draft conclusion 2) below.

²² *Ibid.*, p. 219, para. (8).

²³ On the different periods of reception of the Vienna rules by ICJ, see Torres Bernárdez, “Interpretation of treaties by the International

in the 1990s.²⁴ Since then, the Court has routinely based its treaty interpretation on the general rule and the other means of interpretation according to articles 31 and 32 of the 1969 Vienna Convention.²⁵ The Court also typically reaffirms their customary nature, allowing the Court to apply the rules contained therein in cases where one or more parties to the dispute are not parties to the 1969 Vienna Convention, as well as in relation to treaties concluded before its entry into force in 1980.²⁶

B. Adjudicative bodies under international economic regimes

11. The WTO Appellate Body bases its practice of treaty interpretation on articles 31 and 32 of the 1969 Vienna

Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties”, p. 721; see also Gardiner, *Treaty Interpretation*, pp. 12 *et seq.*

²⁴ *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 69, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 582, para. 373 and p. 584, para. 376.

²⁵ For a recent case, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, I.C.J. Reports 2011, p. 673, para. 91.

²⁶ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (footnote 19 above); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (footnote 19 above); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 48, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 645, para. 37; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 501, para. 99; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 46, para. 65 (Vienna Convention, art. 31); *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1059, para. 18 (Vienna Convention, art. 31); *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 21, para. 41, without expressly mentioning art. 32, but referring to the supplementary means of interpretation.

Convention.²⁷ Panels and the Appellate Body typically concentrate on the text of the respective agreement.²⁸ So far, the Appellate Body has not put a particular emphasis on the object and purpose as a means of interpretation.²⁹ It has only occasionally resorted to an evolutive interpretation³⁰ or applied the principle of effectiveness in order to avoid “reducing whole clauses or paragraphs of a treaty to redundancy or inutility”.³¹

12. The Iran–United States Claims Tribunal has also recognized the rules of interpretation as they are enunciated in articles 31 and 32 of the 1969 Vienna Convention.³² In its jurisprudence it has primarily relied on the ordinary meaning of the terms in question and on their object and purpose.³³ Thus, the Tribunal is following a rather balanced interpretative approach, which does not put particular emphasis on one particular means of interpretation.³⁴

13. Tribunals established by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the settlement of investment disputes between States and nationals of other States have also recognized that they must apply articles 31 and 32 of the 1969 Vienna Convention either as treaty law or as customary law.³⁵ They regularly invoke jurisprudence of ICJ, PCIJ and arbitral tribunals, and they thereby place their reasoning within the context of general international law.³⁶ Although their jurisprudence is far from following a uniform approach, the ICSID tribunals have, so far, neither put a conspicuous emphasis on the object and purpose as a means of interpretation nor on the presumed intentions of the parties to the Convention when they concluded it.³⁷

14. The general approach to interpretation by Panels under the North American Free Trade Agreement (NAFTA) can be described as proceeding from the 1969 Vienna

Convention rules on interpretation, with an emphasis on trade liberalization as the main object and purpose of the Agreement.³⁸

C. Human rights courts and the Human Rights Committee

15. The European Court of Human Rights, in the early case of *Golder v. the United Kingdom*,³⁹ has considered “that it should be guided by Articles 31 to 33 of the Vienna Convention”⁴⁰ and has reiterated the explanation given by ILC for the process of interpretation under the Convention:

In the way in which it is presented in the “general rule” in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.⁴¹

16. Since then, the European Court of Human Rights has regularly reconfirmed its attachment, in principle, to articles 31 to 33 of the 1969 Vienna Convention as the basis for interpreting the European Convention on Human Rights.⁴² The Court, however, distinguishes the European Convention from “international treaties of the classic kind”.⁴³ According to the Court:

The Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement.”⁴⁴

17. The interpretation of the Convention would therefore have to take into account the “effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)”.⁴⁵ The identification of these characteristics of the Convention has contributed to the recognition by the European Court of Human Rights “that

²⁷ *Abi-Saab*, “The appellate body and treaty interpretation”, pp. 99–109.

²⁸ WTO, *Brazil: Export Financing Programme for Aircraft*, recourse by Canada to article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Report of the Appellate Body (21 July 2000), WT/DS46/AB/RW, para. 45.

²⁹ *McRae*, “Approaches to the interpretation of treaties: The European Court of Human Rights and the WTO Appellate Body”.

³⁰ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (12 October 1998), WT/DS58/AB/R, para. 130.

³¹ WTO, *Japan: Alcoholic Beverages II*, Report of the Appellate Body (4 October 1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, sect. D.

³² *Aldrich*, *The Jurisprudence of the Iran–United States Claims Tribunal*, pp. 361–362, citing Decision No. DEC 12-A1-FT (1982), *Iran–United States Claims Tribunal Reports* (hereinafter “Iran-USCTR”) (Cambridge, Grotius, 1983), vol. 1, p. 189, paras. 190–192.

³³ *Ibid.*, pp. 362–365.

³⁴ *Böckstiegel*, “Zur Auslegung völkerrechtlicher Verträge durch das Iran–United States Claims Tribunal”, pp. 119–131; *Aldrich* (see footnote 32 above), pp. 360 *et seq.*; *Brower and Brueschke*, *The Iran–United States Claims Tribunal*, p. 263 *et seq.*

³⁵ *Schreuer*, “Diversity and harmonization of treaty interpretation in investment arbitration”, pp. 129 *et seq.*; *Fauchald*, “The legal reasoning of ICSID Tribunals—An empirical analysis”, p. 314; *Weeramantry*, *Treaty Interpretation in Investment Arbitration*.

³⁶ *Fauchald* (see preceding footnote), pp. 311, 313 and 341.

³⁷ *Ibid.*, pp. 315–319.

³⁸ *Tariffs Applied by Canada to Certain US–Origin Agricultural Products* (Final Report of the Panel) Arbitral Panel Established Pursuant to article 2008, Secretariat File No. CDA-95-2008-01 (2 December 1996), paras. 118 and 119; for Chapter 11 Panels, see also *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (Award on Jurisdiction), UNCITRAL Arbitration under the North American Free Trade Agreement, chapter 11 (28 January 2008), paras. 45–48 and 122.

³⁹ 21 February 1975, Series A, No. 18.

⁴⁰ *Ibid.*, para. 29.

⁴¹ *Ibid.*, para. 30; for the wording of ILC, see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 219–220, para. (8) of the commentary to section 3: Interpretation of treaties.

⁴² *Mamatkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, paras. 111 and 123, ECHR 2005-I; *Banković and Others v. Belgium and Others* (dec.) [GC], No. 52207/99, paras. 55–58, ECHR 2001-XII; *Al-Adsani v. the United Kingdom* [GC], No. 35763/97, para. 55, ECHR 2001-XI; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, para. 73, Series A, No. 310; *Cruz Varas and Others v. Sweden*, 20 March 1991, para. 100, Series A, No. 201; *Johnston and Others v. Ireland*, 18 December 1986, para. 51, Series A, No. 112; *Al-Saadoon and Mufdhi v. the United Kingdom*, No. 61498/08, para. 126, ECHR 2010; *Rantsev v. Cyprus and Russia*, No. 25965/04, paras. 273–274, ECHR 2010; *Demir and Baykara v. Turkey* [GC], No. 34503/97, ECHR 2008, para. 65.

⁴³ *Ireland v. the United Kingdom*, 18 January 1978, para. 239, Series A, No. 25; *Al-Saadoon and Mufdhi* (see previous footnote), para. 127; *Soering v. the United Kingdom*, 7 July 1989, para. 87, Series A, No. 161.

⁴⁴ *Ireland* (see previous footnote), para. 239.

⁴⁵ *Loizidou* (footnote 42 above), para. 75.

the Convention is a living instrument which ... must be interpreted in the light of present-day conditions".⁴⁶ This "living instrument" approach is not, however, an exception to the general method of interpretation on the basis of articles 31 to 33 of the 1969 Vienna Convention. Indeed, the Court has regularly reiterated "that the Convention must be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties" and that it "must determine the responsibility of the States in accordance with the principles of international law governing this sphere, while taking into account the special nature of the Convention as an instrument of human rights protection".⁴⁷

18. In a similar vein, the Inter-American Court of Human Rights acknowledges that, according to the 1969 Vienna Convention, "the process of interpretation should be taken as a whole".⁴⁸

19. Although the Inter-American Court of Human Rights usually begins its reasoning by looking at the text,⁴⁹ it has, in general, not relied on a primarily textual approach but rather resorted to other means of interpretation.⁵⁰ The Court's reluctance to assign a more prominent role to a provision's ordinary meaning is ultimately the consequence of the Court's emphasis on object and purpose.⁵¹ Thus, the Court stressed that "the 'ordinary meaning' of terms cannot of itself become the sole rule, for it must always be considered within its context and, in particular, in the light of the object and purpose of the treaty".⁵²

20. In the jurisprudence of the Inter-American Court of Human Rights, the "object and purpose" appears to play the most important role among the different means of interpretation. A characteristic feature of this Court's object and purpose-based approach is its emphasis on the overriding aim of the Convention as a whole to effectively protect human rights. According to the Court, "when interpreting [the] Convention the Court must do it in such a

way that the system for the protection of human rights has all its appropriate effects (*effet utile*)".⁵³

21. The Human Rights Committee has recognized the 1969 Vienna Convention rules on interpretation⁵⁴ but applies them mostly by implication. In its jurisprudence, the "object and purpose" of the International Covenant on Civil and Political Rights has played the most important role among the various means of interpretation that are referred to in articles 31 and 32 of the Vienna Convention.⁵⁵ One important aspect of the Human Rights Committee's interpretative approach is its evolutive understanding of the rights of the Covenant. For example, in the case of *Yoon and Choi v. the Republic of Korea*, the Committee stressed that any right contained in the Covenant evolved over time,⁵⁶ and by this reasoning justified a certain departure from its own prior jurisprudence.⁵⁷ However, in the case of *Atasoy and Sarkut v. Turkey*, the Committee has emphasized that evolutive interpretation "cannot go beyond the letter and spirit of the treaty or what the States parties initially and explicitly so intended".⁵⁸

D. Other international adjudicative bodies

22. Other international adjudicative bodies have also recognized that the 1969 Vienna Convention articulates the basic rules on the interpretation of treaties.

23. The Seabed Disputes Chamber has outlined the importance of the 1969 Vienna Convention for ITLOS in its Advisory Opinion on the *Responsibilities and obligations of States with respect to activities in the Area*:

Among the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role. The applicable rules are set out in Part III, Section 3, entitled "Interpretation of Treaties" and comprising articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties... These rules are to be considered as reflecting customary international law. Although the Tribunal has never stated this view explicitly, it has done so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation (see the Tribunal's Judgment of 23 December 2002 in the "Volga" Case ...).⁵⁹

⁴⁶ *Tyrer v. the United Kingdom*, 25 April 1978, para. 31, Series A, No. 26; *Al-Saadon and Mufdhi* (footnote 42 above), para. 119, quoting *Öcalan v. Turkey* [GC], No. 46221/99, para. 163, ECHR 2005-IV; *Selmouni v. France* [GC], No. 25803/94, para. 101, ECHR 1999-V.

⁴⁷ *Mamatkulov and Askarov* (footnote 42 above), para. 111; see also *Al-Saadon and Mufdhi* (footnote 42 above), para. 119; *Al-Adsani* (footnote 42 above), para. 55; *Loizidou* (footnote 42 above), para. 73; and *Bayatyan v. Armenia* [GC], No. 23459/03, paras. 98–108, ECHR 2011.

⁴⁸ "White Van" (*Paniagua-Morales and others v. Guatemala*) (Preliminary objections), judgment, 25 January 1996, Inter-American Court of Human Rights, Series C, No. 23, para. 40.

⁴⁹ *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Inter-American Court of Human Rights, Series A, No. 2, para. 19; *Enforceability of the Right to Reply or Correction (Articles 14(1) I(1) and 2, American Convention on Human Rights)*, Advisory Opinion OC-7/85, 29 August 1986, Inter-American Court of Human Rights, Series A, No. 7.

⁵⁰ *The Effect of Reservations* (see footnote 49 above), para. 19; *González and others ("Cotton Field") v. Mexico* (Preliminary objection, Merits, Reparations and Costs), Judgment, 16 November 2009, Inter-American Court of Human Rights, Series C, No. 205, para. 29.

⁵¹ Lixinski, "Treaty interpretation by the Inter-American Court of Human Rights", pp. 587–588.

⁵² *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984, Inter-American Court of Human Rights, Series A, No. 4, para. 23; *Article 55 of the American Convention on Human Rights*, Advisory Opinion OC-20/09, 29 September 2009, Inter-American Court of Human Rights, Series A, No. 20, para. 26.

⁵³ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, Inter-American Court of Human Rights, Series A, No. 16 para. 58.

⁵⁴ Communication No. 118/1982, *J.B. et al. v. Canada*, Views adopted on 18 July 1986, *Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40)*, annex IX, p. 151, para. 6.3.

⁵⁵ Communication No. 63/1979[R.14/63], *Setelich v. Uruguay*, Views adopted on 28 October 1981, *Official Records of the General Assembly, Thirty-Seventh Session, Supplement No. 40 (A/37/40)*, annex VIII, p. 114, paras. 11, 14 and 18.

⁵⁶ Communication Nos. 1321/2004 and 1322/2004, *Yoon and Choi v. the Republic of Korea*, Views adopted on 3 November 2006, *Official Records of the General Assembly, Sixty-Second Session, Supplement No. 40 (A/62/40)*, vol. II, annex VII, p. 195, para. 8.2.

⁵⁷ Communication No. 185/1984, *L.T.K. v. Finland*, Views adopted on 9 July 1985, *Official Records of the General Assembly, Fortieth Session, Supplement No. 40 (A/40/40)*, annex XXI, p. 240, para. 5.2.

⁵⁸ Communication Nos. 1853/2008 and 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, *Official Records of the General Assembly, Sixty-Seventh Session, Supplement No. 40 (A/67/40)*, vol. II, annex IX, p. 248, para. 7.13.

⁵⁹ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, para. 57. See also para. 58.

24. On occasion, ITLOS has shown its readiness to employ a dynamic and evolutive approach to interpretation. Thus, the Seabed Disputes Chamber has characterized certain “obligations to ensure”⁶⁰ as “due diligence” obligations⁶¹ which were “variable concepts” and which “may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge”.⁶² Thus, where appropriate, the Tribunal seems to be prepared to interpret the United Nations Convention on the Law of the Sea in an evolutive and dynamic manner on the basis of the 1969 Vienna Convention, presumably as a feature of the object and purpose of the provision.

25. The International Criminal Court has repeatedly pronounced that, in interpreting its Statute and other applicable treaties, it follows the rules of the 1969 Vienna Convention.⁶³ The International Tribunal for the Former Yugoslavia has also stated on several occasions that the Vienna Convention rules are applicable to the interpretation of treaties.⁶⁴

26. The European Court of Justice treats the rules of the founding treaties (“primary Union law”) as constituting an “autonomous legal order” and accordingly does not refer to the 1969 Vienna Convention when interpreting those treaties. In contrast, when the European Court of Justice interprets agreements of the European Union with third States, it considers itself bound by the rules of customary international law as they are reflected in the rules on interpretation of the Vienna Convention.⁶⁵ In *Brita GmbH v. Hauptzollamt Hamburg-Hafen*,⁶⁶ the European Court of Justice remarked:

Even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as

such, are binding upon the Community institutions and form part of the Community legal order.⁶⁷

The Court concluded:

The rules laid down in the Vienna Convention apply to an agreement concluded between a State and an international organisation, such as the [European Community]–Israel Association Agreement, in so far as the rules are an expression of general international customary law.⁶⁸

27. Quoting article 31 of the 1969 Vienna Convention, the European Court of Justice then noted that treaties must not only be interpreted according to their textual meaning, but also in the light of their object and purpose. For example, in a case concerning the draft agreement relating to the creation of the European Economic Area between the Community and the countries of the European Free Trade Association,⁶⁹ the Court stressed that “the fact that the provisions of the agreement and the corresponding Community provision are identically worded does not mean that they must be interpreted identically.”⁷⁰ The Court determined that the meaning of identically worded provisions in the agreement and the Treaty establishing the European Economic Community differed.⁷¹

E. Conclusion: draft conclusion 1

28. Taken together, these sources suggest the following draft conclusion:⁷²

“Draft conclusion 1. *General rule and means of treaty interpretation*

“Article 31 of the Vienna Convention on the Law of Treaties, as treaty obligation and as reflection of customary international law, sets forth the general rule on the interpretation of treaties.

“The interpretation of a treaty in a specific case may result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Vienna Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned.”

⁶⁰ United Nations Convention on the Law of the Sea, art. 153, para. 4 and art. 4, para. 4 of annex III.

⁶¹ *Responsibilities and obligations of States* (footnote 59 above), para. 110.

⁶² *Ibid.*, para. 117; see also para. 211.

⁶³ *Thomas Lubanga Dyilo* (Decision on the Final System of Disclosure and the Establishment of a Timetable) ICC (Pre-Trial Chamber) (15 May 2006), annex I, para. 1; *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal), International Criminal Court (Appeals Chamber) (13 July 2006), paras. 6 and 33; *Thomas Lubanga Dyilo* (Decision on the Practices of Witness Familiarisation and Witness Proofing), ICC (Pre-Trial Chamber) (8 November 2006), para. 8.

⁶⁴ See *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, 14 December 1999, *Judicial Supplement*, No. 10, para. 61; *Prosecutor v. Delalić et al.* (“Čelebići”), Case No. IT-96-21-A, Judgment, 20 February 2001, *Judicial Supplement*, No. 23, paras. 67 *et seq.*; *Krstić*, IT-98-33-T, Judgment, 2 August 2001, *Judicial Supplement*, No. 27, para. 541; *Stakić*, IT-97-24-T, Judgment, 31 July 2003, *Judicial Supplement*, No. 43, para. 501; *Galić*, IT-98-29-T, Judgment and Opinion, 5 December 2003, *Judicial Supplement*, No. 46, para. 91.

⁶⁵ See Kuijper, “The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969”; Case C-344/04, *The Queen on the application of: International Air Transport Association and European Low Fares Airline Association v. Department for Transport* (Preliminary Ruling) (2006), *European Court Reports 2006*, p. I-403, para. 40.

⁶⁶ Case C-386/08, *European Court Reports 2010*, p. I-01289.

⁶⁷ *Ibid.*, para. 42.

⁶⁸ *Ibid.*, para. 41; see also Case C-6/60, *Jean-E. Humblet v. Belgian State* (1960), *European Court Reports 1960*, p. 559, at p. 574.

⁶⁹ European Court of Justice, Opinion 1/91 (1991), *European Court Reports 1991*, p. I-6079.

⁷⁰ *Ibid.*, para. 14.

⁷¹ *Ibid.*, para. 35.

⁷² See *Yearbook ... 2011*, vol. II (Part Two), para. 344, preliminary conclusions 1 to 3 of the Chair of the Study Group on treaties over time, in particular preliminary conclusion (1) and (2) (first paragraph):

“(1) *General rule on treaty interpretation*

“The provisions contained in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), either as an applicable treaty provision or as a reflection of customary international law, are recognized by the different adjudicatory bodies reviewed as reflecting the general rule on the interpretation of treaties which they apply.

“(2) *Approaches to interpretation*

“Regardless of their recognition of the general rule set forth in Article 31 VCLT as the basis for the interpretation of treaties, different adjudicatory bodies have in different contexts put more or less emphasis on different means of interpretation contained therein.”

CHAPTER III

Subsequent agreements and subsequent practice as means of interpretation

29. The general rule on the interpretation of treaties recognizes subsequent agreements and subsequent practice of the parties under certain conditions to be among the different means of interpretation (1969 Vienna Convention, art. 31, para. (3) (a) and (b)). The Commission, in its commentary on the draft articles on the Law of Treaties, underlined:

The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.⁷³

30. By considering subsequent agreement and subsequent practice according to article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention to be “objective evidence of the understanding of the parties”, the Commission conceived them as “authentic”⁷⁴ means of interpretation. This understanding as an authentic means of interpretation suggests that such subsequent agreements and subsequent practice of the parties are often, but not necessarily always,⁷⁵ particularly important factors for the interpretation of treaties.⁷⁶

A. Recognition by international adjudicatory bodies

31. Subsequent agreements and subsequent practice of the parties have been recognized and applied as means of interpretation by international adjudicatory bodies, albeit with somewhat different emphasis.

1. INTERNATIONAL COURT OF JUSTICE

32. ICJ “has itself frequently examined the subsequent practice of the parties in the application of [a] treaty”.⁷⁷ Its jurisprudence provides a general orientation and significant examples of the possible legal effects of subsequent agreements and subsequent practice as means of interpretation as well as their interplay with other means of interpretation (see more detailed discussion in paras. 58–63 below).

2. ADJUDICATORY BODIES UNDER ECONOMIC TREATY REGIMES

33. International adjudicatory bodies under economic treaty regimes have frequently addressed subsequent

agreements and subsequent practice as means of interpretation. Thus, the WTO Appellate Body has recognized subsequent practice as a means of interpretation and has applied it on several occasions⁷⁸ and has also taken a subsequent agreement into account.⁷⁹ The same is true for the Iran–United States Claims Tribunal,⁸⁰ which has held:

Hence, far from playing a secondary role in the interpretation of treaties, the subsequent practice of the Parties constitutes an important element in the exercise of interpretation. In interpreting treaty provisions, international tribunals have often examined the subsequent practice of the parties. The Tribunal has also recognized the importance of the subsequent practice of the parties and has referred to it in several cases.⁸¹

34. ICSID tribunals have frequently recognized subsequent agreements and subsequent practice as means of interpretation.⁸² In some decisions, tribunals have even emphasized that subsequent practice is a particularly important means of interpretation for such provisions which the parties to the treaty intended to evolve in the light of subsequent treaty practice. In the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, for example, the Tribunal held:

⁷⁸ WTO, *Japan: Alcoholic Beverages II* (see footnote 31 above), Report of the Appellate Body (4 October 1996), WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, at sect. E; Report of the Panel (11 July 1996), WT/DS8/R, WT/DS10/R and WT/DS11/R; *European Communities: Chicken Cuts*, Report of the Appellate Body (12 September 2005), WT/DS269/AB/R and WT/DS286/AB/R, para. 259, and Report of the Panel (30 May 2005), WT/DS269/R and WT/DS286/R; *European Communities: Computer Equipment*, Report of the Appellate Body (5 June 1998), WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, paras. 92 and 93, and Report of the Panel (5 February 1998), WT/DS62/R, WT/DS67/R and WT/DS68/R; *United States: Upland Cotton*, Report of the Appellate Body (3 March 2005), WT/DS267/AB/R; Report of the Panel (8 September 2004), WT/DS267/R; see also *European Communities and its Member States: Information Technology Products*, Report of the Panel (16 August 2010), WT/DS375/R, WT/DS376/R and WT/DS377/R, para. 7.558.

⁷⁹ WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (“Tuna II (Mexico)”)*, Report of the Appellate Body (16 May 2012), WT/DS381/AB/R, para. 372.

⁸⁰ *The United States of America (and others) v. The Islamic Republic of Iran (and others)*, Award No. 108-A-16/582/591-FT (1984), 5 Iran-USCTR 57; *International Schools Services, Inc. v. National Iranian Copper Industries Company*, Interlocutory Award No. ITL 37-111-FT (1984), 5 Iran-USCTR 338; *United States–Iran*, Case No. A17, Decision No. DEC 37-A17-FT (1985), 8 Iran-USCTR 189; *Burton Marks (and others) v. The Islamic Republic of Iran*, Interlocutory Award No. ITL 53-458-3 (1985), 8 Iran-USCTR 290; *The Islamic Republic of Iran v. The United States of America*, Interlocutory Award No. ITL 63-A15-FT (1986), 12 Iran-USCTR 40; *The Islamic Republic of Iran v. The United States of America*, Award No. 382-B1-FT (1988), 19 Iran-USCTR 273.

⁸¹ *The Islamic Republic of Iran v. The United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (9 September 2004), 38 Iran-USCTR 77, p. 117, para. 111.

⁸² See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (7 October 2008), para. 70; *Siemens AG v. Argentine Republic* (Germany/Argentina bilateral investment treaty) (Decision on Jurisdiction), ICSID Case No. ARB/02/8 (3 August 2004), para. 105; *National Grid PLC v. The Argentine Republic* (United Kingdom/Argentina bilateral investment treaty) (Decision on Jurisdiction) UNCITRAL Arbitral Tribunal (20 June 2006), paras. 84–85.

⁷³ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (15) of the commentary to article 27 in section 3: Interpretation of treaties.

⁷⁴ *Ibid.*

⁷⁵ It has been asserted that the interpretation of treaties which establish rights for other States or actors is less susceptible to “authentic” interpretation by their parties, for example in the context of investment treaties: *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (28 September 2007), para. 386; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (22 May 2007), para. 337.

⁷⁶ See Jennings and Watts, *Oppenheim’s International Law*, p. 1268, para. 630; G. Fitzmaurice, “The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and certain other treaty points”, pp. 223–225; WTO, *United States: Large Civil Aircraft (2nd complaint)*, Report of the Panel (31 March 2011) (WT/DS353/R, para. 7.953).

⁷⁷ *Kasikili/Sedudu Island (Botswana/Namibia)* (see footnote 26 above), p. 1076, para. 50; see also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)* (footnote 25 above), p. 675, para. 99.

Neither party asserted that the ICSID Convention contains any precise *a priori* definition of “investment”. Rather, the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.⁸³

35. NAFTA panels have on several occasions recognized subsequent agreements and subsequent practice as means of interpretation.⁸⁴ While NAFTA Panels do not seem to have discussed subsequent practice very often,⁸⁵ they have intensely argued about the legal effects of a document held to be a subsequent agreement.⁸⁶

3. HUMAN RIGHTS COURTS AND THE HUMAN RIGHTS COMMITTEE

36. Human rights courts and treaty bodies have followed a somewhat different approach with regard to subsequent agreements and subsequent practice than adjudicative bodies under international economic treaty regimes. Thus, human rights courts and treaty bodies do not seem to have considered subsequent agreements by the parties in their interpretation of substantive human rights provisions. The situation is different, however, for subsequent practice by the parties.

37. The European Court of Human Rights has from time to time invoked article 31, paragraph 3 (b), of the 1969 Vienna Convention, mostly in cases which concerned the relationship of the Court with the member States, and in cases which raised questions of general international law.⁸⁷ More often, however, the Court has referred to the legislative practice of member States without explicitly mentioning article 31, paragraph 3 (b), of the Vienna Convention.⁸⁸ In such cases the Court has confirmed that uniform, or largely uniform national legislation, and even domestic administrative practice, can in principle constitute relevant subsequent practice⁸⁹ and may have effects which can go beyond even that of being merely a means of interpretation according to article 31, paragraph 3 (b), of the Vienna Convention.⁹⁰ Thus, judgments in which the Court

has relied on subsequent State practice without explicitly quoting article 31, paragraph 3 (b), are more characteristic than those in which it has. Since *Tyrer v. the United Kingdom*, the Court has typically relied on subsequent State (and other) practice as orientation for its “dynamic” or “evolutive” interpretation. The Court determines the character and the extent of its evolutive interpretation by looking at the more or less specific “present-day conditions”⁹¹ and “developments in international law” which the Court recognizes on the basis of

a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States [which] reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.⁹²

38. Indeed, whenever the Court has recognized that it is engaging in “evolutive interpretation”, it has typically referred to State, social or international legal practice as orientation.⁹³

39. It appears that the Inter-American Court of Human Rights, in contrast to the European Court of Human Rights, has so far not referred to article 31, paragraph 3 (a) or (b), of the 1969 Vienna Convention, and the number of decisions in which the Court has referred to subsequent practice is rather limited.⁹⁴ However, despite its rare mentioning of subsequent practice *stricto sensu*, the Inter-American Court makes abundant references to international developments in a broader sense, which are located somewhere between subsequent practice, in the sense of article 31, paragraph 3 (b), and other “relevant rules” related to article 31, paragraph 3 (c), of the Vienna Convention.⁹⁵ The Human Rights Committee, for its part, has occasionally considered subsequent State practice more closely.⁹⁶ The reason why the Inter-American Court of Human Rights and the Human Rights Committee refer

⁹¹ *Tyrer* (footnote 46 above), para. 31.

⁹² *Demir and Baykara* (footnote 42 above), para. 76.

⁹³ See, for example, *Öcalan* (footnote 46 above), paras. 163 and 191; *Vo v. France* [GC], No. 53924/00, ECHR 2004-VIII; *Johnston* (footnote 42 above), para. 53; *Bayatyan* (footnote 47 above), para. 63; *Soering* (footnote 43 above), para. 103; *Al-Saadoon and Mufdhi* (footnote 42 above), para. 119.

⁹⁴ Inter-American Court of Human Rights, *Gelman v. Uruguay*, Merits and Reparations, Judgment of 24 February 2011, Series C, No. 221, paras. 215–224; and the Concurring Opinion of Judge Vio Grossi in *López Mendoza v. Venezuela* (Merits, Reparations and Costs), Judgment, 1 September 2011, Inter-American Court of Human Rights, Series C, No. 233, para. 3; see also *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago* (Merits, Reparations and Costs, Judgment, 21 June 2002, Inter-American Court of Human Rights, Series C, No. 94, para. 12; see also “*White Van*” (*Paniagua-Morales and others v. Guatemala*) (footnote 48 above).

⁹⁵ See, for example, *Velásquez-Rodríguez v. Honduras* (Merits), Judgment, 29 July 1988, Inter-American Court of Human Rights, Series C, No. 4, para. 151; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (footnote 53 above), paras. 130–133 and 137.

⁹⁶ Communication No. 470/1991, *Kindler v. Canada*, views adopted on 30 July 1993, (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40)*) (Part II), annex XII, para. 14.2; Communication No. 829/1998, *Judge v. Canada*, views adopted on 5 August 2002 (*ibid.*, *Fifty-eighth Session, Supplement No. 40 (A/58/40)*), vol. II, annex V, para. 10.3; Communications No. 270/1988 and 271/1988, *Barrett and Sutcliffe v. Jamaica*, views adopted on 30 March 1992 (*ibid.*, *Forty-seventh Session, Supplement No. 40 (A/47/40)*), annex IX, para. 8.4; Communication No. 541/1993, *Simms v. Jamaica*, views adopted on 3 April 1995, (*ibid.*, *Fiftieth Session, Supplement No. 40 (A/50/40)*), vol. II, annex XI, para. 6.5.

⁸³ *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (United States/Sri Lanka bilateral investment treaty) (Award and Concurring Opinion), ICSID Case No. ARB/00/2 (15 March 2002) [2004], *ICSID Reports*, vol. 6, p. 310, at para. 33; similarly *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela* (Decision on Jurisdiction), ICSID Case No. ARB/00/5 (27 September 2001) [2004], *ICSID Reports*, vol. 6, p. 419, at para. 97.

⁸⁴ *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (footnote 38 above), paras. 181–183.

⁸⁵ *In the Matter of Cross-Border Trucking Services* (Final Report of the Panel), Arbitral Panel Established Pursuant to article 2008, Secretariat File No. USA-MEX-98-2008-01 (6 February 2001), paras. 220, 221 and 235; *Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (footnote 38 above), paras. 119, 141 and 142.

⁸⁶ See paragraphs 88–90 below.

⁸⁷ *Cruz Varas*, para. 100; *Loizidou*, para. 73; *Banković*, para. 56 (see footnote 42 above).

⁸⁸ See, for example, *Laursi and Others v. Italy* [GC], No. 30814/06, judgment of 18 March 2011 (extracts), para. 61, ECHR 2011-III; and *Herrmann v. Germany* [GC], No. 9300/07, para. 78, judgment of 26 June 2012.

⁸⁹ See, for example, *Mamatkulov and Askarov*, paras. 111 and 123; *Johnston*, para. 51; *Al-Saadoon and Mufdhi*, para. 126; *Rantsev*, paras. 273 and 274; *Demir and Baykara* (see footnote 42 above), para. 65.

⁹⁰ *Soering* (footnote 43 above), para. 103; *Al-Saadoon and Mufdhi* (see footnote 42 above), para. 119, quoting *Öcalan* (footnote 46 above), para. 163.

less to subsequent practice than the European Court of Human Rights may, *inter alia*, have to do with a lack of resources to reliably verify a sufficiently representative part of the relevant practice.

4. OTHER INTERNATIONAL ADJUDICATIVE BODIES

40. ITLOS has, on some occasions, considered the subsequent practice of the parties as means of interpretation.⁹⁷ The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda have recognized that the interpretation of substantive international criminal law, including treaties, must take into account the subsequent interpretative practice of national courts.⁹⁸ Neither tribunal has limited itself to considering the subsequent jurisprudence of domestic courts, but each also refers to subsequent executive or military State practice.⁹⁹ The International Tribunal for the Former Yugoslavia has even taken more general forms of State practice into account, including trends in the legislation of member States which, in turn, can give rise to a changed interpretation of the scope of crimes or their elements. In *Furundžija*, for example, the Chamber of the International Tribunal for the Former Yugoslavia, in search of a definition for the crime of rape as prohibited by article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), article 76, paragraph 1, of the first additional Protocol, and article 4, paragraph 2 (e), of the second additional Protocol,¹⁰⁰ examined the principles of criminal law common to the major legal systems of the world and held

that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault: the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.¹⁰¹

41. The European Court of Justice, in contrast to other international adjudicatory bodies, has refrained from taking subsequent practice of the member States into account when interpreting the founding treaties of the European Union (primary Union law). This is in keeping with its general approach to treat the founding treaties as constituting an “autonomous legal order” and thus not to refer to and apply the 1969 Vienna Convention when interpreting those treaties.¹⁰² However, the Court does take subsequent practice into account when it interprets agreements which the

Union has concluded with third States, and it has recognized the relevance of “settled practice of the parties to the Agreement” for the purpose of their interpretation.¹⁰³

B. Subsequent agreements and subsequent practice among the different means of interpretation

42. The recognition of subsequent agreements and subsequent practice as means of interpretation by international adjudicatory bodies has led to their application in a wide variety of situations. For the present purpose, it is sufficient to point to a few cases in the jurisprudence of ICJ which exemplify the role which subsequent agreements and subsequent practice can play in relation to other means of interpretation. The most important of such other means of interpretation are the “ordinary meaning” of the terms of a treaty, their “context”, and the “object and purpose” of the treaty (article 31, para. 1, of the 1969 Vienna Convention).

1. ORDINARY MEANING

43. As far as the “ordinary meaning” of treaty terms is concerned, the Court has, for example,¹⁰⁴ determined in the *Nuclear Weapons* advisory opinion that “poison or poisonous weapons”

have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.¹⁰⁵

44. In the *Case concerning rights of nationals of the United States of America in Morocco*, ICJ stated:

The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs... have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner. In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute.¹⁰⁶

45. And in the case of *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ held:

In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials... In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.¹⁰⁷

⁹⁷ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, *ITLOS Reports 1999*, p. 10, at paras. 155–156; see also *M/V “SAIGA” (No. 1) (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, Judgment, 4 December 1997, *ITLOS Reports 1997*, p. 16, at para. 57.

⁹⁸ *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, *Judicial Supplement*, No. 11, para. 541; see also *Akayesu* (Judgment), ICTR-96-4-T, T Ch I (2 September 1998), paras. 503 and 542 *et seq.*

⁹⁹ *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, *Judicial Reports 1999*, para. 94; *Jelisić* (see footnote 64 above), para. 61 (footnotes omitted).

¹⁰⁰ *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, *Judicial Reports 1998*, vol. I, paras. 165 *et seq.*

¹⁰¹ *Ibid.*, para. 179; similarly, International Tribunal for Rwanda, *Musema* (Judgment), ICTR-96-13-A, Trial Chamber I (27 January 2000), paras. 220 *et seq.*, in particular para. 228.

¹⁰² See paragraphs 26–27 above.

¹⁰³ See Case C-52/77, *Leonce Cayrol v. Giovanni Rivoira & Figli* [1977], *European Court Reports 1977*, p. 2261, para. 18, at p. 2277; see also Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd. and others* [1994], *European Court Reports 1994*, p. I-3087, paras. 43 and 50.

¹⁰⁴ See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, *I.C.J. Reports 1998*, p. 306, para. 67; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, *I.C.J. Reports 1996*, p. 815, para. 30; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, *I.C.J. Reports 1950*, p. 9.

¹⁰⁵ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 248, para. 55.

¹⁰⁶ *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952, *I.C.J. Reports 1952*, p. 211.

¹⁰⁷ Advisory Opinion, *I.C.J. Reports 1989*, p. 177, at p. 194, para. 48.

46. In most cases, ICJ considered the determination of the “ordinary meaning” of a treaty term, as it was specified by the subsequent practice of the parties, to be determinative, regardless of whether this practice suggested a broader or a more restrictive interpretation of the “ordinary meaning”.¹⁰⁸ One well-known example is the interpretation by ICJ in the *Certain expenses* advisory opinion of the terms “expenses” (broad interpretation) and “action” (restrictive interpretation) in the light of the subsequent practice of the Organization.¹⁰⁹

47. Subsequent practice of the parties thus often exerts a pull towards a narrowing of different possible textual meanings. It is also possible, however, that subsequent practice indicates openness for different shades of meaning or suggests a broad interpretation of the terms of a treaty.¹¹⁰

2. CONTEXT

48. The interpretation of a treaty is not confined to the interpretation of the text of its specific terms but also encompasses the “terms of the treaty in their context” (art. 31, para. 1, of the 1969 Vienna Convention) as a whole. Subsequent agreements and subsequent practice may also influence the interpretation of a particular rule when the practice relates to the treaty as a whole or to other relevant treaty rules.¹¹¹ Accordingly, ICJ held in *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*:

This reliance upon registered tonnage in giving effect to different provisions of the Convention... persuade[s] the Court to the view that it is unlikely that when the latter Article [28 (a)] was drafted and incorporated into the Convention it was contemplated that any criterion other than registered tonnage should determine which were the largest ship-owning nations.¹¹²

49. While subsequent agreements and subsequent practice are mostly used to elucidate ambiguous or general terms,¹¹³ it would go too far to assume that the meaning of apparently clear terms is largely immune from being called into question by subsequent agreements or subsequent practice of the parties.¹¹⁴ ICJ has indeed, on occasion, found

¹⁰⁸ See, for an exception, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)* (see footnote 24 above), p. 586, para. 380.

¹⁰⁹ *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *I.C.J. Reports 1962*, p. 151, at pp. 158 *et seq.* (“expenses”) and pp. 164 *et seq.* (“action”).

¹¹⁰ The European Court of Human Rights, in particular, accepts that diverse or non-uniform practice may indicate that the contracting parties enjoy a wide margin of appreciation in complying with their obligations under the European Convention on Human Rights; see, for example, *Lautsi* (footnote 88 above), para. 61; and *Van der Heijden v. the Netherlands* [GC], No. 42857/05, 3 April 2012, paras. 31 and 61.

¹¹¹ See, for example, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1988*, p. 87, para. 40.

¹¹² *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, *I.C.J. Reports 1960*, p. 169; and, in the same sense, *Proceedings pursuant to the OSPAR Convention (Ireland–United Kingdom)* (2003), UNRIAA, vol. XXIII (Part II), p. 99, para. 141.

¹¹³ *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, Judgment of 18 November 1960, *I.C.J. Reports 1960*, pp. 208 *et seq.*; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19 above), Declaration of Judge *ad hoc* Guillaume, p. 290.

¹¹⁴ *Certain expenses of the United Nations*, Advisory Opinion (see footnote 109 above), Separate Opinion of Judge Spender, p. 189.

subsequent practice to render an apparently clear treaty provision more open-ended. One example is the *Wall* advisory opinion, in which ICJ held “that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter”.¹¹⁵

50. Article 12 of the Charter of the United Nations is a provision whose text does not clearly reflect what the subsequent practice of the General Assembly was suggesting.

3. OBJECT AND PURPOSE

51. Article 31, paragraph 1, of the 1969 Vienna Convention provides that a treaty shall also be interpreted “in the light of its object and purpose”. Subsequent agreements and subsequent practice, on the one hand, and the object and purpose of a treaty, on the other, can be closely interrelated. Thus, subsequent conduct of the parties is sometimes used for specifying the object and purpose of the treaty in the first place.¹¹⁶ In *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, for example, ICJ clarified the object and purpose of a bilateral agreement on the delimitation of the continental shelf by referring to subsequent practice as well as to the implementation by the parties.¹¹⁷ In *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, ICJ held:

From the treaty texts and the practice analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not, however, have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.¹¹⁸

52. It has been suggested that the character of an instrument (for example, multilateral/bilateral/unilateral; law-making/contractual) and the nature of the subject matter (for example, technical/value-oriented; economic/human rights) as elements of the object and purpose of a treaty would contribute to determining how much room is available for subsequent agreements and subsequent practice as a means of interpretation.¹¹⁹ Such assumptions cannot, however, be clearly confirmed by the jurisprudence of ICJ. Subsequent agreements and subsequent practice have been used as important means of interpretation of the Charter of the United Nations,¹²⁰ as well as for bilateral

¹¹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (see footnote 26 above), *I.C.J. Reports 2004*, p. 150, para. 28.

¹¹⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, separate opinion of Judge De Castro at p. 179; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (see footnote 26 above), p. 179, para. 109; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment (see footnote 104 above), p. 815, para. 30; Higgins, “Some observations on the inter-temporal rule in international law”, p. 180; Distefano, “La pratique subséquente des États Parties à un traité”, pp. 52–54.

¹¹⁷ Judgment, *I.C.J. Reports 1993*, p. 50, para. 27.

¹¹⁸ Preliminary Objections (see footnote 104 above), p. 306, para. 67.

¹¹⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) ...* (footnote 116 above), Separate Opinion of Judge Dillard, p. 154, footnote 1.

¹²⁰ See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ...* (footnote 26 above), p. 149, para. 27.

boundary treaties¹²¹ and for unilateral submissions to the jurisdiction of a court or tribunal.¹²² And there seems to be no conspicuous difference with respect to the relative importance of subsequent agreements or subsequent practice between “law-making” and “contractual” treaties, if such a distinction can be drawn at all. The same is true for the difference between more technical and more value-oriented treaties or provisions.

53. This observation from the jurisprudence of ICJ cannot, however, be taken to apply generally. Adjudicative bodies under international economic, human rights and other treaties sometimes put more emphasis on the “object and purpose” of a treaty, or on the “ordinary meaning” of a term of a treaty, depending on the regime in question.¹²³ It would therefore be premature to conclude from the jurisprudence of ICJ that the character of the instrument and the nature of the subject matter, as elements of the object and purpose of a treaty, do not influence the relative importance of subsequent agreements or subsequent practice for the interpretation of a treaty. It is possible that the comparatively low number of cases and the lack of specialization of ICJ have so far prevented a more differentiated picture to emerge from its jurisprudence. It may, therefore, be appropriate to review this question more closely at a later stage of the work.

C. Contemporaneous and evolutive interpretation

54. The possible legal significance of subsequent agreements and subsequent practice as means of interpretation also depends on the so-called intertemporal law.¹²⁴ This concerns the question of whether a treaty must be interpreted in the light of the circumstances at the time of its conclusion (“contemporaneous interpretation”), or rather in the light of the circumstances at the time of its application (“evolutive interpretation”).¹²⁵ Originally, Max Huber’s dictum in the *Island of Palmas* case according to which “a judicial fact must be appreciated in the light of the law contemporary with it”¹²⁶ had led many to generally favour “contemporaneous interpretation”.¹²⁷

1. THE COMMISSION’S PREVIOUS WORK

55. The Commission has dealt with the question of intertemporal law primarily in its work on the law of treaties and on the fragmentation of international law. During its work on the draft articles on the law of treaties, the

¹²¹ See, for example, *Kasikili/Sedudu Island (Botswana/Namibia)* (footnote 26 above), p. 1087, para. 63.

¹²² See, for example, *Anglo-Iranian Oil Co. case (jurisdiction)*, Preliminary Objection, Judgment of 22 July 1952, *I.C.J. Reports 1952*, p. 106.

¹²³ See paragraphs 11–27 above.

¹²⁴ M. Fitzmaurice, “Dynamic (Evolutive) Interpretation of Treaties” pp. 101 *et seq.*; Elias, “The doctrine of intertemporal law” pp. 285 *et seq.*; Greig, *Intertemporality and the Law of Treaties*; Kotzur, “Intertemporal Law”; Linderfalk, “Doing the right thing for the right reason: why dynamic or static approaches should be taken in the interpretation of treaties”; Verdross and Simma, *Universelles Völkerrecht*, pp. 496 *et seq.*, paras. 782 *et seq.*

¹²⁵ M. Fitzmaurice, “Dynamic (Evolutive) Interpretation of Treaties”, p. 102.

¹²⁶ *Island of Palmas case (Netherlands v. USA)* (1928), UNRIAA, vol. II, p. 845.

¹²⁷ Higgins, “Some observations on the inter-temporal rule in international law”, p. 174.

Commission discussed the question of treaty interpretation “over time” in the context of what would later become article 31, paragraph (3) (c), of the 1969 Vienna Convention. At the time, the Commission found that “to attempt to formulate a rule covering comprehensively the temporal element would present difficulties” and it, therefore, “concluded that it should omit the temporal element”.¹²⁸

56. The matter was addressed again within the Study Group on the fragmentation of international law.¹²⁹ The debates within that Study Group led to the conclusion that it is difficult to formulate and to agree on a general rule which would give preference either to a principle of contemporaneous interpretation or to one of evolutive interpretation. In his final report, the Chair of the Study Group, Mr. Martti Koskenniemi, therefore, concluded that it would be “best... to merely single out some considerations” to be taken into account when interpreting a particular treaty:

The starting-point must be... the fact that deciding this issue is a matter of interpreting the treaty itself. Does the language used give any indication? The starting-point of the argument might plausibly be the “principle of contemporaneity” – with regard to the normative environment as it existed at the moment when the obligation entered into force for a relevant party. When might the treaty language itself, in its context, provide for the taking account of future developments? Examples of when this might be a reasonable assumption include at least:

(a) Use of a term in the treaty which is “not static but evolutionary” [...]

(b) The description of obligations in very general terms, thus operating a kind of *renvoi* to the state of the law at the time of its application.¹³⁰

57. Thus, the previous work of the Commission leaves open the possibility that subsequent agreements and subsequent practice play a role in the determination of whether a more contemporaneous or a more evolutive interpretation is appropriate in a particular case.

2. THE RELATIONSHIP BETWEEN EVOLUTIVE INTERPRETATION AND INTERPRETATION IN THE LIGHT OF SUBSEQUENT PRACTICE

58. ICJ addressed the relationship between evolutive interpretation and subsequent practice of the parties in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*.¹³¹ This case concerned a treaty between Costa Rica and Nicaragua of 1858, which granted Costa Rica freedom of navigation on the San Juan River for the “*objetos de comercio*” (“purposes of commerce”). Nicaragua asserted that, at the time when the treaty was concluded and for a long time thereafter, the term “*comercio*” was understood by the States parties to be limited to goods and did not cover services, and in particular not the transport of persons for the purpose of tourism. The Court, however, did not consider this argument to be conclusive:

On the one hand, the subsequent practice of the parties, within the meaning of article 31, paragraph 3 (b) of the Vienna Convention, can

¹²⁸ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 222, para. (16) of the commentary to article 27; Higgins, “Some observations on the inter-temporal rule in international law”, p. 178.

¹²⁹ Document A/CN.4/L.682 and Add.1 (available from the Commission’s website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)), para. 475.

¹³⁰ *Ibid.*, para. 478.

¹³¹ Judgment, *I.C.J. Reports 2009*, p. 213.

result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was... to give the terms used... a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.¹³²

59. ICJ then held that the term “*comercio*” was a “generic term” of which “the parties necessarily” had “been aware that the meaning... was likely to evolve over time” and that “the treaty has been entered into for a very long period”, and concluded that “the parties must be presumed... to have intended” this term to “have an evolving meaning”.¹³³ And since the term “commerce” would today generally be understood to cover both goods and services, the Court concluded that Costa Rica had the right, under the treaty, to transport not only goods but also persons on the San Juan River.¹³⁴ Judge Skotnikov, while considering that an evolutive treaty interpretation was not appropriate, arrived at the same result by accepting that a subsequent practice of Costa Rican-operated tourism on the San Juan River “for at least a decade” against which Nicaragua “never protested” but rather “engaged in consistent practice of allowing tourist navigation” had led to a different understanding of the treaty, which would result in such services being included in the term “*objetos de comercio*”.¹³⁵ Judge *ad hoc* Guillaume also found “that the practice accords with this, as shown by the Memorandum of Understanding of 5 June 1994 between the two States' Ministers of Tourism and by the growth of tourist cruise traffic on the San Juan in recent years”.¹³⁶

60. The *Dispute regarding Navigational and Related Rights* judgment demonstrates that subsequent agreements and subsequent practice of the parties can have both a supportive and a restrictive effect on the possibility of an evolutive interpretation. The supportive effect consists in confirming that an evolved understanding of a treaty can be based on subsequent practice as an authentic means of interpretation. The restrictive effect of subsequent practice¹³⁷ emerges when it is contrasted with an evolutive interpretation which is based on other grounds, in particular on the object and purpose of the treaty. Thus, the judges who emphasized the need for stability of treaty relations (Skotnikov and Guillaume) favoured the recognition of informally developed interpretation by way of subsequent practice, whereas the opinion of the Court adopts a more dynamic approach by engaging in a more abstract form of evolutive interpretation. In any case, all judges in the case *Dispute regarding Navigational and Related Rights* supported the conclusion that an evolutive interpretation is possible if it is accompanied by a common subsequent practice of the parties.

61. The nuanced approach, which is reflected in the report of the Study Group on fragmentation of international law and in the *Dispute regarding Navigational and Related Rights* judgment, is well-grounded in the jurisprudence of ICJ. This does not, however, prevent the alternative between a more contemporaneous or a more evolutive interpretation

from re-emerging in specific cases. Judge *ad hoc* Guillaume, in particular, has suggested that two different strands of jurisprudence existed, one tending towards a more contemporaneous and the other towards a more evolutive interpretation.¹³⁸ It is noteworthy, however, that the cases which, according to him, favour a more contemporaneous approach mostly concern rather specific terms in boundary treaties (“watershed”,¹³⁹ “main channel/Thalweg”,¹⁴⁰ names of places,¹⁴¹ “mouth” of a river¹⁴²). In such cases, it is plausible that changes in the meaning of a (general or specific) terminology normally do not affect the substance of the specific arrangement, which is designed to be as stable and as divulged from contextual elements as possible. On the other hand, those cases which would support the legitimacy of an evolutive interpretation turn around terms whose meaning is inherently more context dependent. This is true, in particular, for the terms “the strenuous conditions of the modern world” or “the well-being and development of such peoples” in article 22 of the Covenant of the League of Nations, which ICJ, in its opinion in the case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, has given a progressive interpretation by referring to the evolution of the right of peoples to self-determination after the Second World War.¹⁴³ Other recognized grounds for the possibility of an evolutive interpretation are the “generic” character of a particular term in a treaty¹⁴⁴ and the fact that the treaty is designed to be “of continuing duration”.¹⁴⁵ There may even be more specific reasons which can justify an evolutive interpretation. In the *Iron Rhine* case, for example, the continued viability and effectiveness of the arrangement, as such, was an important reason for the Permanent Court of Arbitration to accept that even rather technical rules may have to be given an evolutive interpretation.¹⁴⁶

¹³⁸ *Dispute regarding Navigational and Related Rights* (footnote 19 above), Declaration of Judge *ad hoc* Guillaume, pp. 294 *et seq.*, paras. 9 *et seq.*; see also *Yearbook ... 2005*, vol. II (Part Two), pp. 86 and 89, paras. 467 and 479; Report of the International Law Commission Study Group on fragmentation of international law, finalized by Martti Koskenniemi (document A/CN.4/L.682 and Add.1 (footnote 129 above), para. 478); resolution of the Institute of International Law, “The intertemporal problem in public international law”.

¹³⁹ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports 1962*, p. 15.

¹⁴⁰ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment (footnote 26 above), pp. 1060–1061, para. 21.

¹⁴¹ *Decision regarding delimitation of the border between Eritrea and Ethiopia (Eritrea v. Ethiopia)* (2002) UNRIIAA, vol. XXV, p. 110, para. 3.5.

¹⁴² *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, pp. 338–339, para. 48.

¹⁴³ Advisory Opinion (footnote 116 above), pp. 30–31, para. 51.

¹⁴⁴ *Aegean Sea Continental Shelf*, Judgment, *I.C.J. Reports 1978*, p. 32, para. 77.

¹⁴⁵ *Dispute regarding Navigational and Related Rights* (footnote 19 above), p. 243, para. 66.

¹⁴⁶ *Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway (Belgium v. the Netherlands)*, Permanent Court of Arbitration (award of 24 May 2005), UNRIIAA, vol. XXVII (Sales No. E/F.06.V.8), para. 80 (“In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway”); see also *Aegean Sea Continental Shelf*, Judgment (footnote 144 above), p. 32, para. 77; see *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (Award of 31 July 1989), UNRIIAA, vol. XX (Sales No. E/F.93.V.3), p. 151, para. 85.

¹³² *Ibid.*, p. 242, para. 64.

¹³³ *Ibid.*, p. 243, para. 66.

¹³⁴ *Ibid.*, p. 244, para. 71.

¹³⁵ *Ibid.*, p. 285, para. 9, separate opinion of Judge Skotnikov.

¹³⁶ *Ibid.*, Declaration of Judge *ad hoc* Guillaume, p. 299, para. 16.

¹³⁷ See, for example, Boyle and Chinkin, *The Making of International Law*, p. 246.

62. In any case, the decisions in which ICJ has undertaken an evolutive interpretation have not strayed far from the text and from the determinable intention of the parties to the treaty, as they had also been expressed in their subsequent agreements and subsequent practice.¹⁴⁷ Thus, evolutive interpretation does not seem to be a separate method of interpretation but rather the result of a proper application of the usual means of interpretation.¹⁴⁸ It is therefore appropriate that subsequent agreements and subsequent practice have played an important role in leading cases in which international courts and tribunals have recognized and practised evolutive interpretation. In the case of *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, for example, ICJ referred to the practice of United Nations organs and of States in order to specify the conclusions which it derived from the inherently evolutive nature of the right to self-determination. In the *Aegean Sea Continental Shelf* case, the Court found it “significant” that what it had identified as the “ordinary, generic sense” of the term “territorial dispute” was confirmed by the administrative practice of the United Nations and by the behaviour of the party which invoked the restrictive interpretation in a different context.¹⁴⁹

63. On balance, the jurisprudence of ICJ and arbitral tribunals does not seem to contradict the “general support among the leading writers today for evolutive interpretation of treaties”, as the Tribunal in the *Iron Rhine* case has noted.¹⁵⁰ Other international adjudicatory bodies have displayed different degrees of openness towards evolutive

¹⁴⁷ See also *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (previous footnote), p. 151, para. 85.

¹⁴⁸ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (footnote 19 above), Declaration of Judge *ad hoc* Guillaume, p. 294, para. 9; Verdross and Simma, *Universelles Völkerrecht*, p. 498.

¹⁴⁹ *Aegean Sea Continental Shelf*, Judgment (footnote 144 above), p. 31, para. 74.

¹⁵⁰ *Iron Rhine (“Ijzeren Rijn”)* (footnote 146 above), para. 81; see, for example, Sorel, “Article 31”, p. 834, para. 55.

interpretation. While the Appellate Body of WTO has only exceptionally recognized and performed an evolutive interpretation, an evolutive approach to interpretation has become a characteristic feature of the jurisprudence of the European Court of Human Rights (European Convention on Human Rights as a “living instrument”).¹⁵¹ Thus, even if it would be still appropriate to proceed from a presumption that a treaty should be given a contemporaneous interpretation, this is not a strong presumption and it stands in the face of an open list of exceptions.

D. Conclusion: draft conclusion 2

64. Taken together, the preceding considerations suggest the following draft conclusion.¹⁵²

“Draft conclusion 2. *Subsequent agreements and subsequent practice as authentic means of interpretation*

“Subsequent agreements and subsequent practice between the parties to a treaty are authentic means of interpretation which shall be taken into account in the interpretation of treaties.

“Subsequent agreements and subsequent practice by the parties may guide an evolutive interpretation of a treaty.”

¹⁵¹ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (footnote 30 above), para. 130; European Court of Human Rights, *Tyrer* (footnote 46 above), para. 31; *Al-Saadoon and Mufdhi* (footnote 42 above), para. 119, quoting *Öcalan* (footnote 46 above), para. 163; *Selmouni* (footnote 46 above), para. 101.

¹⁵² See preliminary conclusions 4 and 7 of the Chair of the Study Group on Treaties over time (*Yearbook ... 2011*, vol. II (Part Two), p. 170, para. 344):

“(4) *Recognition in principle of subsequent agreements and subsequent practice as means of interpretation*

“All adjudicatory bodies reviewed recognize that subsequent agreements and subsequent practice in the sense of article 31 (3) (a) and (b) of the 1969 Vienna Convention are a means of interpretation which they should take into account when they interpret and apply treaties.

...

“(7) *Evolutionary interpretation and subsequent practice*

“Evolutionary interpretation is a form of purpose-oriented interpretation. Evolutionary interpretation may be guided by subsequent practice in a narrow and in a broad sense.”

CHAPTER IV

Definition of subsequent agreement and subsequent practice as means of treaty interpretation

65. Article 31, paragraph 3 (a), of the 1969 Vienna Convention recognizes “any subsequent agreement” and article 31, paragraph 3 (b), admits “subsequent practice” under certain conditions as means of treaty interpretation. Subsequent practice by one or more parties to a treaty may also be a means of interpretation under article 32 of the Convention even if not all conditions of article 31, paragraph 3 (b), are fulfilled. The concepts of “subsequent agreement” and “subsequent practice” thus need to be defined.

A. Subsequent agreement

66. The concept “subsequent agreement” raises questions as to: (a) its form and distinction from “subsequent

practice... which, establishes the agreement of the parties”; (b) its relational character; (c) the required number of parties; and (d) its subsequent character.

1. FORM OF “ANY SUBSEQUENT AGREEMENT” AND DISTINCTION FROM “SUBSEQUENT PRACTICE... WHICH ESTABLISHES THE AGREEMENT OF THE PARTIES”

67. Article 31, paragraph 3 (a), of the 1969 Vienna Convention uses the term “subsequent agreement” and not the term “subsequent treaty”. This does not mean, however, that a “subsequent agreement” is necessarily less formal than a “treaty”. Whereas a “treaty” within the meaning of the Convention must be in written form (art. 2, para. 1 (a)),

general international law knows no such requirement.¹⁵³ The term “agreement” in the Convention¹⁵⁴ and in general international law equally does not imply any particular degree of formality. Article 39 of the Convention, which lays down the general rule according to which “[a] treaty may be amended by agreement between the parties”, has been explained by the Commission to mean that “[a]n amending agreement may take whatever form the parties to the original treaty may choose”.¹⁵⁵ The drafters of the Vienna Convention have also not envisaged any particular formal requirements for agreements in the sense of article 31, paragraph 3 (a) and (b), of the Convention.¹⁵⁶

68. While every treaty is an agreement, not every agreement is a treaty. It is precisely the purpose of a “subsequent agreement” within the meaning of article 31, paragraph 3 (a), of the 1969 Vienna Convention that it “shall [only] be taken into account” in the interpretation of a treaty, but not necessarily be binding.¹⁵⁷ The question of the delimitation of when a subsequent agreement between the parties is binding and under which circumstances it is merely a means of interpretation among several others will be addressed in a later report.

69. It is, however, necessary to distinguish a “subsequent agreement” in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention from “any subsequent practice... which establishes the agreement of the parties regarding its interpretation” in the sense of article 31, paragraph 3 (b). Otherwise, all agreements which are established by subsequent practice would simultaneously also be “subsequent agreements regarding the interpretation of the treaty” in the sense of article 31, paragraph 3 (a).

70. It should be noted at the outset that by distinguishing between “any subsequent agreement” (art. 31, para. 3 (a)

of the Convention), and “subsequent practice... which establishes the agreement of the parties” (art. 31, para. 3 (b)), the Commission did not intend to denote a difference concerning their possible legal effect. The Commentary describes a “subsequent agreement” as representing “an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation”,¹⁵⁸ and states that “subsequent practice” “similarly” “constitutes objective evidence of the understanding of the parties as to the meaning of the treaty”.¹⁵⁹ This explanation suggests that the difference between the two concepts lies in the fact that a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a “subsequent practice” only has this effect if it “shows the common understanding of the parties as to the meaning of the terms”.¹⁶⁰ This suggests that a “subsequent agreement between the parties” is typically easier to prove than a “subsequent practice... which establishes the agreement of the parties”.¹⁶¹

71. The jurisprudence of international courts and other adjudicative bodies shows a certain reluctance to clearly distinguish between subsequent agreements and subsequent practice. In *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ used the expression “subsequent attitudes” both to denote what it later described as “subsequent agreements” as well as subsequent unilateral “attitudes”.¹⁶² In the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ left the question open whether the use of a particular map could constitute a subsequent agreement or subsequent practice.¹⁶³ In the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case, the Court spoke of “subsequent positions” in order to establish that “[t]he explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable”.¹⁶⁴ In the *CME* award, an UNCITRAL tribunal recalled the term “common position” between the State of the investor and the respondent State in order to confirm its interpretation of the investment treaty without identifying this as a case of article 31, paragraph 3 (a) or (b), of the 1969 Vienna Convention.¹⁶⁵ Similarly, the Panels and the Appellate Body of WTO also do not always distinguish clearly between subsequent agreement and subsequent practice.¹⁶⁶

¹⁵³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112; see Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 81; Gautier, “Article 2”, pp. 38 *et seq.*; Klabbers, *The Concept of Treaty in International Law*, pp. 49 *et seq.*; see also Aust, “The theory and practice of informal international instruments”, pp. 787 and 794 *et seq.*

¹⁵⁴ See articles 2, para. 1 (a); 3; 24, para. 2; 39–41, 58 and 60 of the 1969 Vienna Convention.

¹⁵⁵ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 232, para. (4) of the commentary to article 35; see also Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, art. 39, p. 513, para. 7; Sands, “Article 39”, pp. 971–972, paras. 31–34.

¹⁵⁶ ILC draft art. 27, para. 3 (b), which later became art. 31, para. 3 (b) of the 1969 Vienna Convention, contained the word “understanding”, which was changed to “agreement” by the United Nations Conference on the Law of Treaties. As Australia pointed out, this change was “merely a drafting matter”. See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7)*, vol. I, p. 169, para. 59; Fox, “Articles 31 (3) (a) and (b) of the Vienna Convention and the *Kasikili/Sedudu Island* case”, p. 63; see also the case of *Kasikili/Sedudu Island* (footnote 26 above), p. 1045, Dissenting Opinion of Vice-President Weeramantry, p. 1061 *et seq.*, paras. 23 *et seq.*

¹⁵⁷ But see Ronald Bettauer, Deputy Legal Adviser, United States Department of State, remarks at the meeting, held on 10 October 2006, of the Lawyers’ Committee on Nuclear Policy, New York City Bar, on the topic “Is the United States in compliance with international law on nuclear weapons?”, excerpts reprinted in Cummins, *Digest of United States Practice in International Law 2006*, pp. 1260 and 1261.

¹⁵⁸ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 p. 221, para. (14) of the commentary to article 27.

¹⁵⁹ *Ibid.*, para. 15.

¹⁶⁰ *Ibid.*; Wolfram, *Vertrag und spätere Praxis im Völkerrecht*, p. 294.

¹⁶¹ *Kasikili/Sedudu Island* (see footnote 26 above), p. 1087, para. 63.

¹⁶² *Territorial Dispute* (footnote 26 above), p. 34, paras. 66 *et seq.*

¹⁶³ *Sovereignty over Pulau Ligitan and Pulau Sipadan* (footnote 26 above), p. 656, para. 61.

¹⁶⁴ Judgment, *I.C.J. Reports 1997*, p. 77, para. 138; see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 153 above), p. 122, para. 28 (“subsequent conduct”).

¹⁶⁵ *CME Czech Republic B.V. (The Netherlands) v. the Czech Republic* (Final Award), UNCITRAL Arbitration (14 March 2003), para. 437.

¹⁶⁶ See “Scheduling guidelines” in *Mexico: Telecoms—Report of the Panel* (2 April 2004), WT/DS204/R, and in *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, Report of the Appellate Body (7 April 2005), WT/DS285/AB/R and Corr.1; to qualify “1981 Understanding” see *United States—Tax*

72. The NAFTA Panel in *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America*¹⁶⁷ addressed the question of the distinction between a subsequent agreement in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention and subsequent practice in the sense of article 31, paragraph 3 (b), of the Convention more explicitly. In this case, the United States asserted that a number of unilateral actions by each of the three parties to NAFTA would, taken together, constitute a subsequent agreement.¹⁶⁸ In a first step, the Panel did not find that the evidence was sufficient to establish a subsequent agreement:

The Respondent maintains that there is such a “subsequent agreement”, and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico’s Article 1128 submission in this arbitration; and to Canada’s statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the *Myers* case.

All of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a “subsequent agreement” by the NAFTA Parties... The Tribunal concludes that there is no “subsequent agreement” on this issue within the meaning of Article 31, paragraph 3 (a) of the Vienna Convention.¹⁶⁹

73. In a second step, however, the Panel concluded that the very same evidence constituted a relevant subsequent practice:

The question remains: is there “subsequent practice” that establishes the agreement of the NAFTA Parties on this issue within the meaning of Article 31, paragraph 3 (b)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,” the available evidence cited by the Respondent demonstrates to us that there is nevertheless a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications”.¹⁷⁰

74. This jurisprudence suggests that the distinction between a “subsequent agreement” and “subsequent practice... which establishes the agreement of the parties” in the sense of article 31, paragraph 3, of the 1969 Vienna Convention points to a different evidentiary standard for the determination of the “authentic” expression of the will of the parties. Subsequent agreements and subsequent

practice are distinguished according to whether a common position can be identified *as such*, in a common expression, or whether it is necessary to indirectly identify an agreement through particular conduct or circumstances. In this sense, a “subsequent agreement” in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention must be manifested as such, though not necessarily in written form,¹⁷¹ whereas “subsequent practice” encompasses all (other) forms of relevant subsequent conduct by one or more parties to a treaty which contributes to the manifestation of an agreement of the parties regarding the interpretation of the treaty.

75. Thus, while “subsequent practice” can contribute to identifying an agreement between the parties, such practice is not the agreement itself. It is, however, not excluded that “practice” and “agreement” coincide and cannot be distinguished by external evidence. This explains why the term “subsequent practice” is often used in the sense of a broader general category which encompasses both means of interpretation that are referred to in article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention.¹⁷² Such a broad understanding of “subsequent practice”, while perfectly possible in theory, would, however, level the distinction which is contained in the Convention and which serves the purpose of alerting States and other law applicers to different types of relevant subsequent interpretative conduct of the parties.

2. RELATIONAL CHARACTER

76. A “subsequent agreement” in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention must be made “regarding the interpretation of the treaty or the application of its provisions”, and thus be relational. By such an agreement, the parties must purport, possibly among other aims, to clarify the meaning of a treaty or to indicate how the treaty is to be applied.¹⁷³

77. A reference “regarding the... treaty” can often be identified by some indication of subordination of the “subsequent agreement” under the treaty to which it refers. Such reference may also be comprised in a later treaty which contains an agreement regarding the meaning of a previous treaty between the same parties. In the case of *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, for example, ICJ considered whether a “subsequent treaty” between the parties “in the same field” could be used for the purpose of the interpretation of the previous treaty, but rejected this possibility because the later treaty did not in any way “refer” to the previous treaty.¹⁷⁴ In the case of *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judge *ad hoc* Guillaume

(Footnote 166 continued.)

Treatment for Foreign Sales Corporations, Report of the Panel, unopposed (8 October 1999), WT/DS108/R. See “SCM Code” in *Brazil: Measures affecting desiccated coconut*, Report of the Panel, unopposed (17 October 1996), WT/DS22/R, and a “waiver” in *European Communities: Bananas III, second recourse to article 21.5, Appellate Body Report* (26 November 2008), WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA.

¹⁶⁷ *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (see footnote 38 above); *Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic* (Decision on the challenge to the President of the Committee) ICSID Case No. ARB/97/3 (3 October 2001) [2004], *ICSID Reports*, vol. 6, p. 330, para. 12; see M. Fitzmaurice and Merkouris, “Canons of treaty interpretation: selected case studies from the World Trade Organization and the North American Free Trade Agreement”, pp. 217–233.

¹⁶⁸ *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (see footnote 38 above), paras. 174–177.

¹⁶⁹ *Ibid.*, paras. 186–187.

¹⁷⁰ *Ibid.*, para. 188; in a similar sense, *Aguas del Tunari SA v. Republic of Bolivia* (Netherlands/Bolivia bilateral investment treaty), Decision on Respondent’s Objections to Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005, *ICSID Review–Foreign Investment Law Journal*, vol. 20, no. 2 (2005), p. 450, para. 251; *Proceedings pursuant to the OSPAR Convention (Ireland–United Kingdom)* (2003) (see footnote 112 above), p. 110, para. 180.

¹⁷¹ Sorel, “Article 31”, pp. 1320–1321, para. 43; Gardiner, *Treaty Interpretation*, p. 209.

¹⁷² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment (Provisional Measures, Order of 13 July 2006) [2006], *I.C.J. Reports 2006*, p. 113, para. 53 (in this case, even an explicit subsequent verbal agreement has been characterized by one of the parties as “subsequent practice”).

¹⁷³ WTO, *United States: Tuna II (Mexico)* (see footnote 79 above), paras. 366–378, in particular para. 372; Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, pp. 164 *et seq.*

¹⁷⁴ Judgment, *I.C.J. Reports 1993*, p. 51, para. 28.

referred to the actual practice of tourism on the San Juan River in conformity with a memorandum of understanding between the two States.¹⁷⁵ The question is, however, whether this particular memorandum of understanding was meant by the parties to serve as an interpretation of the boundary treaty under examination. Thus, even an explicit agreement between the parties is not necessarily a “subsequent agreement” in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention if it does not sufficiently relate to the treaty under review.

78. For the present definitional purpose, it is not necessary to develop the relational character of a “subsequent agreement” more specifically. This will be done at a later stage of the work.

3. NUMBER OF PARTIES

79. A “subsequent agreement” in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention is one between “the parties”, that is, between all the parties to the treaty (art. 2, para. 1 (g), of the Convention). This does not necessarily mean, however, that the term “subsequent agreement”, in itself and independently of article 31, paragraph 3 (a), of the Convention, is limited, for the purpose of the interpretation of treaties, to agreements between all the parties to a treaty. There are indeed also examples of agreements between a limited number of parties to a treaty regarding its interpretation.

80. Treaties with a broader membership are sometimes implemented by subsequent bilateral or regional agreements. Such agreements usually imply assertions concerning the permissible interpretation of the underlying treaty itself (“serial bilateralism”).¹⁷⁶ The Convention on International Civil Aviation is an example of such a form of subsequent implementation through bilateral agreements within a multilateral treaty framework. Between 3,000 and 4,000 mostly bilateral air service agreements or air transport agreements¹⁷⁷ have been concluded since the entry into force of the Convention. This bilateral system has been described as a “complex web ... of interlocking air service agreements”,¹⁷⁸ which “evolved through subsequent State practice”.¹⁷⁹ Such bilateral treaties are not, as such, subsequent agreements in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention, since they are only concluded between a limited number of the parties to the multilateral treaty. However, if taken together and sufficiently consistent and widespread, they may establish an agreement between all the parties regarding the meaning and scope of a respective multilateral treaty provision.

¹⁷⁵ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, Declaration of Judge *ad hoc* Guillaume, pp. 298–299, para. 16.

¹⁷⁶ The expression is borrowed from Benvenisti and Downs, “The empire’s new clothes: Political economy and the fragmentation of international law”, pp. 610–611.

¹⁷⁷ See Bowen, “The Chicago International Civil Aviation Conference (1944–1945)”, pp. 308 and 309 *et seq.*

¹⁷⁸ Department of Infrastructure, Regional Development and Cities, Australia, “The Bilateral System—how international air services work”, available from www.infrastructure.gov.au/aviation/international/bilateral_system.aspx.

¹⁷⁹ Havel, *Beyond Open Skies: A New Regime for International Aviation*, p. 10.

81. Should such agreements between a limited number of parties to a treaty regarding its interpretation be considered a “subsequent agreement” (in a broader sense) or should the use of the term “subsequent agreement” be limited to such agreements which are “between [all] the parties” of a treaty, as provided for in article 31, paragraph 3 (a), of the 1969 Vienna Convention? This is ultimately a question of terminological convenience since its response does not imply a conclusion regarding the value of a “subsequent agreement” between a limited number of States parties for the purpose of interpretation of the treaty. It is therefore theoretically possible to distinguish between a (subsequent) agreement between a limited number of parties regarding the interpretation of a treaty, on the one hand, and (subsequent) agreements regarding the interpretation of a treaty between all parties to the treaty. Such a distinction would not contradict article 31, paragraph 3 (a), since this provision only speaks of the latter without excluding that the former might be a supplementary means of interpretation under article 32 of the Vienna Convention or otherwise.

82. Ultimately, however, it is more convenient for the purpose of the present project to limit the use of the term “subsequent agreement” to such agreements between all the parties to a treaty which are manifested in one individual agreement (or in one act with regard to which all parties agree in whatever form).¹⁸⁰ The example of bilateral air service agreements demonstrates that a group of different agreements between a limited number of parties of a multilateral treaty can just as well be conceived as a set of different factual elements—a “subsequent practice”—which together “establish the agreement of [all] the parties regarding” the interpretation of the treaty in the sense of article 31, paragraph 3 (b), of the 1969 Vienna Convention.

83. A group of different agreements between a limited number of parties is not one individual agreement, as the term “any subsequent agreement” in article 31, paragraph 3 (a), of the 1969 Vienna Convention suggests. The concept “subsequent agreement” should, for the sake of terminological clarity, be limited to individual agreements between all the parties, as indicated in article 31, paragraph 3 (a). Subsequent agreements (in a broader sense) between a limited number of parties may have interpretative value as a supplementary means of interpretation within the meaning of article 32 of the Convention, but in this case they are a form of “subsequent practice” (in a broader sense) which does not (yet) establish the agreement of all the parties (see paras. 92–110 below).

4. “SUBSEQUENT”

84. The Commission has explained that “subsequent agreements” in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention are only those which are reached “after the conclusion of the treaty”.¹⁸¹ This point

¹⁸⁰ WTO, *United States: Tuna II (Mexico)* (see footnote 79 above), para. 371; Review Conference of the Rome Statute (Kampala, 31 May–11 June 2010), RC/Res. 6, annex III, adopted at the 13th plenary meeting, on 11 June 2010; and, generally, Barriga and Groover, “A historic breakthrough on the crime of aggression”, pp. 517 and 533. This aspect will be addressed in more detail in a later report.

¹⁸¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. (14) of the commentary to article 27.

in time is not necessarily the moment in which the treaty has entered into force (art. 24). Articles 18 and 25 of the Convention show that a treaty can already be regarded as being “concluded” for certain purposes before its actual entry into force. In such cases the relevant point in time is when the text of the treaty has been established as definite.¹⁸²

85. This point in time is also appropriate for the determination of the moment from which an agreement can be regarded as “subsequent” in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention. It would be difficult to identify a reason why an agreement by the parties which occurs between the moment when the text of a treaty has been established as definite and the entry into force of the treaty should not be as relevant for the purpose of interpretation as an agreement which occurs after the entry into force. This is in line with the reservations regime under articles 19 to 23 of the Convention and with the rules on interpretative declarations which are *lex specialis*.¹⁸³

86. The question from which point an agreement is “subsequent” must be distinguished from the question from which point the agreement is operative between the parties as a means of interpretation of the treaty. This depends on the moment when the States which have arrived at the agreement actually become a “party” to the treaty, that is, “a State which has consented to be bound by the treaty and for which the treaty is in force” (art. 2, para. 1 (g), of the 1969 Vienna Convention).

87. “Agreements” and “instruments”¹⁸⁴ which “are made in connection with the conclusion of the treaty” (art. 31, para. 2, of the 1969 Vienna Convention) can be made either before or after the moment when the text of the treaty was established as definite.¹⁸⁵ If they are made after this moment, such “agreements” and agreed “instruments” are special forms of “subsequent agreements”.

5. INTERPRETATIVE AGREEMENTS PURSUANT TO A SPECIFIC TREATY PROVISION

88. Certain treaty provisions, such as article IX, paragraph 2, of the Marrakesh Agreement establishing the World Trade Organization, provide that the parties may, under certain conditions, adopt more or less binding interpretations with respect to certain or all provisions of the treaty. The legal effects of decisions by the parties pursuant to such provisions are governed, in the first place, by the respective special treaty provisions. This does not exclude, however, that such decisions may, at the same time, constitute a “subsequent agreement” in the sense of

¹⁸² *Yearbook ... 1951*, vol. II, document A/CN.4/43, pp. 70 *et seq.*; *Yearbook ... 1956*, vol. II, p. 112; Rosenne, “Treaties, conclusion and entry into force”, pp. 464–467: “Strictly speaking it is the negotiation that is concluded through a treaty”; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, pp. 78–79, paras. 9–13.

¹⁸³ See Guide to Practice on Reservations to Treaties, *Yearbook ... 2011*, vol. II (Part Three).

¹⁸⁴ This may include unilateral declarations if the other party did not object; see Federal Constitutional Court of Germany, *BVerfGE*, vol. 40, p. 176; see generally Gardiner, *Treaty Interpretation*, pp. 215 and 216.

¹⁸⁵ Jennings and Watts, *Oppenheim’s International Law*, p. 1271, para. 632.

article 31, paragraph 3 (a), of the 1969 Vienna Convention. This has been recognized, for example, by a Panel under NAFTA in the *Methanex* case. This case concerned a provision (art. 1105 of NAFTA) with respect to which the parties to NAFTA had adopted an “interpretative note” (“Free Trade Commission Note”) pursuant to article 1131, paragraph 2, of NAFTA, according to which “the (inter-governmental) Free Trade Commission may adopt an interpretation of a provision of NAFTA which shall be binding on a Tribunal established under Chapter 11”:

Leaving to one side the impact of Article 1131 (2) NAFTA, the FTC’s interpretation must also be considered in the light of Article 31, paragraph 3 (a) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA.¹⁸⁶

89. Although the Federal Trade Commission Note has received a mixed reaction from some Chapter Eleven panels,¹⁸⁷ panels have generally not disputed that a decision pursuant to article 1131, paragraph 2, of NAFTA can, in principle, simultaneously be a subsequent agreement within the meaning of article 31, paragraph 3 (a), of the 1969 Vienna Convention. In a similar vein, the WTO Appellate Body has held in *European Communities: Bananas III*:

We consider that a multilateral interpretation pursuant to Article IX:2 of the WTO Agreement can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31 (3) (a) of the Vienna Convention, as far as the interpretation of the WTO agreements is concerned.

...

We further observe that, in its commentary on the Draft Articles on the Law of Treaties, the International Law Commission (the “ILC”) describes a subsequent agreement within the meaning of Article 31 (3) (a) of the Vienna Convention “as a further *authentic element of interpretation* to be taken into account together with the context”. In our view, by referring to “authentic interpretation”, the ILC reads Article 31 (3) (a) as referring to agreements bearing specifically upon the interpretation of a treaty. In the WTO context, multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement are most akin to subsequent agreements within the meaning of Article 31 (3) (a) of the Vienna Convention.¹⁸⁸

90. This does not mean, however, that any decision or agreement of the parties pursuant to a specific treaty provision with implications for interpretation is necessarily also a subsequent agreement in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention. For the present definitional purpose, however, it is sufficient to note that a subsequent agreement within the meaning of article 31, paragraph 3 (a), must not necessarily be self-standing, but may also be provided for in the treaty itself.

¹⁸⁶ *Methanex Corporation v. United States of America* (Final Award of the Tribunal on Jurisdiction and Merits) UNCITRAL Arbitration under NAFTA, Chapter Eleven (3 August 2005), Part II, chap. H, para. 23.

¹⁸⁷ *Pope and Talbot Inc. (Claimant) v. Government of Canada (Respondent)* (Award on the Merits of Phase 2), UNCITRAL Arbitration under NAFTA Chapter Eleven (10 April 2001), para. 46 *et seq.*; *ADF Group Inc. v. United States of America* (Award), ICSID Arbitration under NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/1 (9 January 2003), para. 177; Brower, “Why the FTC notes of interpretation constitute a partial amendment of NAFTA article 1105”, pp. 349–350 with further citations; Roberts, “Power and persuasion in investment treaty interpretation”, pp. 179–225.

¹⁸⁸ *European Communities: Bananas III* (see footnote 166 above), paras. 383 and 390.

B. Subsequent practice

91. Like “subsequent agreement”, the concept of “subsequent practice” raises a number of definitional questions. The most important are: (a) whether the term should be understood narrowly or broadly; (b) the “relational” character of subsequent practice; (c) the meaning of “subsequent”; and (d) who are the relevant actors.

1. NARROW OR BROAD DEFINITION?

92. In *Japan: Alcoholic Beverages II*,¹⁸⁹ the WTO Appellate Body has formulated a narrow definition of subsequent practice for the purpose of treaty interpretation:

Subsequent practice in interpreting a treaty has been recognized as a “concordant, common and consistent” sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.¹⁹⁰

93. This definition is not limited to defining “subsequent practice” by parties in the application of the treaty *as such*, but it adds other elements which are contained in article 31, paragraph 3 (b), of the 1969 Vienna Convention, in particular “the agreement of the parties regarding its interpretation”. The definition suggests that only such “subsequent practice in the application of the treaty” “which establishes the agreement of the parties regarding its interpretation” can at all be relevant for the purpose of treaty interpretation, and not any other form of subsequent practice by one or more parties. This suggestion, however, is misleading. The jurisprudence of ICJ and other international courts and tribunals, and even the jurisprudence of WTO itself, demonstrate that subsequent practice which fulfils all the conditions of article 31, paragraph 3 (b), of the Vienna Convention is not the only form of subsequent practice by parties in the application of a treaty which is relevant for the purpose of treaty interpretation. This leads to the conclusion that “subsequent practice” in the application of a treaty by one or more parties as such should be distinguished from the question whether any such “subsequent practice” “establishes the agreement between the parties regarding its interpretation”.

(a) *Jurisprudence of ICJ and other international courts and tribunals*

94. International courts and tribunals have distinguished between agreed “subsequent practice” in the sense of article 31, paragraph 3 (b), of the 1969 Vienna Convention, on the one hand, and subsequent practice in a broader sense by one or more parties to the treaty which may also be relevant for the purpose of interpretation.

95. In the case of *Kasikili/Sedudu Island (Botswana/Namibia)*, for example, ICJ held that a report by a technical expert which had been commissioned by one of the parties and which had “remained at all times an internal document”,¹⁹¹ while not representing “subsequent

practice which establishes the agreement of the parties within the meaning of” article 31, paragraph 3 (b), of the 1969 Vienna Convention, could “nevertheless support the conclusions” which the Court had reached by other means of interpretation.¹⁹² The same was true with respect to “factual findings that the parties concerned arrived at separately” and “which were expressed in concurrent terms in a joint report”.¹⁹³ Of course, such unilateral or parallel subsequent interpretative practice does not carry the same weight as subsequent practice which establishes the agreement of all the parties and thus cannot embody an “authentic” interpretation of a treaty by its parties.

96. ICSID Tribunals have also used subsequent State practice as means of interpretation in a broad sense.¹⁹⁴ For example, when addressing the question of whether minority shareholders can acquire rights from investment protection treaties and have standing in ICSID procedures, the tribunal in *CMS Gas Transmission Company v. Argentine Republic* held:

State practice further supports the meaning of this changing scenario... Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements... among other examples, evidence increasing flexibility in the handling of international claims.¹⁹⁵

97. The European Court of Human Rights has in some cases referred to article 31, paragraph 3 (b), of the 1969 Vienna Convention without identifying an agreement between the parties in the respective subsequent practice. Thus, the Court asserted in *Loizidou v. Turkey*¹⁹⁶ that its interpretation was “confirmed by the subsequent practice of the Contracting parties”; that is, “the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46... of the Convention do not permit territorial or substantive restrictions”.¹⁹⁷

98. More often, the European Court of Human Rights has relied on not necessarily uniform, subsequent State practice by referring to national legislation, and even domestic administrative practice, as means of interpretation: Since *Tyrer v. the United Kingdom*, the Court has typically given its “dynamic” or “evolutive” interpretations direction by describing and relying on subsequent State (and other) practice.¹⁹⁸ Depending on the outcome of its analysis—consensus, no consensus, or a sufficiently qualified majority or tendency—the Court proceeds with a dynamic interpretation or not. In the case of *Demir and Baykara*, for example, the Court held that “as to the practice of European States, it

¹⁹² *Ibid.*, p. 1096, para. 80.

¹⁹³ *Ibid.*

¹⁹⁴ Fauchald, “The legal reasoning of ICSID Tribunals—An empirical analysis”, p. 345.

¹⁹⁵ *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina bilateral investment treaty) (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB/01/8 (17 July 2003), *ICSID Reports*, vol. 7, p. 492 (2003), para. 47.

¹⁹⁶ See footnote 42 above, para. 79.

¹⁹⁷ *Ibid.*, paras. 79–80; it is noteworthy that the Court described “such a State practice” as being “uniform and consistent” (*ibid.*, para. 82), despite the fact that it had recognized that two States possibly constituted exceptions (Cyprus and the United Kingdom; “whatever its meaning”).

¹⁹⁸ See footnote 46 above.

¹⁸⁹ WTO, *Japan: Alcoholic Beverages II* (see footnote 31 above), and *Report of the Panel* (11 July 1996), WT/DS8/R, WT/DS10/R and WT/DS11/R.

¹⁹⁰ WTO, *Japan: Alcoholic Beverages II* (see footnote 31 above), sect. E.

¹⁹¹ *Kasikili/Sedudu Island (Botswana/Namibia)*, *Judgment*, *I.C.J. Reports* 1999, p. 1078, para. 55.

can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the authorities has been recognized¹⁹⁹ and that “the remaining exceptions can be justified only by particular circumstances”.²⁰⁰ In *Koch*, on the other hand, the Court remarked that the contracting parties were “far from reaching a consensus” in respect of allowing assistance to suicide and thus refused to limit their margin of appreciation by adopting an evolutive interpretation.²⁰¹ Finally, in *SH and Others*, the Court noted that an “emerging consensus” alone was not sufficient to restrict the member States’ margin of appreciation for allowing or not allowing gamete donation for the purpose of *in vitro* fertilization.²⁰²

99. Even in those rare cases in which the Inter-American Court of Human Rights and the Human Rights Committee have taken subsequent practice of the parties into account,²⁰³ they have not limited its use to cases in which the practice established the agreement of the parties. Thus, in the case of *Hilaire*, the Inter-American Court held that the mandatory imposition of the death penalty for every form of conduct which resulted in the death of another person was incompatible with article 4, paragraph 2, of the American Convention on Human Rights (imposition of the death penalty only for the most serious crimes). In order to support this interpretation, the Court held that it was “useful to consider some examples in this respect, taken from the legislation of those American countries that maintain the death penalty” and observed that “in these countries the gradation according to gravity of each theory of deprivation of life is well recognized: from homicide to parricide. In all these countries, there exists a diversity of penalties corresponding to the diversity in gravity.”²⁰⁴

100. Like the European Court of Human Rights, the Human Rights Committee is open to arguments based on subsequent practice when it comes to the justification of interference with the rights set forth in the Covenant. Interpreting the rather general terms contained in article 19, paragraph 3, of the International Covenant on Civil and Political Rights (permissible restrictions of the freedom of expression), the Committee looked at relevant State practice. Based on the observation that “similar restrictions can be found in many jurisdictions”,²⁰⁵ the Committee concluded that the aim pursued by the contested law did not, as such, fall outside the legitimate aims of article 19, paragraph 3, of the International Covenant on

Civil and Political Rights.²⁰⁶ The Committee, however, when it takes account of subsequent practice typically does so by way of a summary assessment and does not give specific references.²⁰⁷

101. ITLOS has on some occasions referred to the subsequent practice of the parties without verifying whether such practice actually established an agreement between the parties regarding the interpretation of the treaty. In “*SAIGA*” (No. 2), for example, the Tribunal reviewed State practice with regard to the right of self-defence under Article 51 of the Charter of the United Nations. Relying on the “normal practice used to stop a ship”, the Tribunal did not specify the respective State practice, but rather assumed a certain general standard to exist.²⁰⁸ In the *Southern Bluefin Tuna Cases*, the Tribunal held that the practice by parties under the Convention for the Conservation of Southern Bluefin Tuna was relevant to evaluate the extent to which States have complied with their obligations under the United Nations Convention on the Law of the Sea.²⁰⁹ Thus, by taking into account the practice under another treaty with different parties, the Tribunal has used the (subsequent) practice under a different treaty which does not encompass all parties to the Law of the Sea Convention.²¹⁰

102. The *Jelisić* Judgment describes the overall methodological approach of the International Criminal Tribunals. Referring to the Convention on the Prevention and Punishment of the Crime of Genocide and the practice performed under it,

the Trial Chamber... interprets the Convention’s terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties... The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgements rendered by the Tribunal for Rwanda... The practice of States, notably through their national courts, and the work of international authorities in this field have also been taken into account.²¹¹

103. The International Tribunal for the Former Yugoslavia has taken even more general forms of State practice into account, including trends in the legislation of member States which in turn can give rise to a changed interpretation of the scope of crimes or their elements.²¹²

(b) *Jurisprudence by WTO adjudicatory bodies*

104. Even the WTO adjudicatory organs occasionally distinguish between “subsequent practice” that satisfies all the conditions of article 31, paragraph 3 (b), of

¹⁹⁹ *Demir and Baykara* (see footnote 42 above), para. 52.

²⁰⁰ *Ibid.*, para. 151; similarly *Jorgic v. Germany*, No. 74613/01, para. 69, ECHR 2007-III; *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, para. 35, Series A, No. 264; *A. v. the United Kingdom*, No. 35373/97, paras. 80 and 83, ECHR 2002-X.

²⁰¹ *Koch v. Germany*, application No. 497/09, para. 70, 19 July 2012.

²⁰² *S.H. and Others v. Austria* [GC], application No. 57813/00, para. 96, ECHR 2011; see also *Stummer v. Austria* [GC], application No. 37452/02, ECHR 2011, paras. 105–109 and 129–132, where the Court also merely observed an “evolving trend” and, failing to identify a “European consensus”, refused to proceed with a dynamic interpretation.

²⁰³ See para. 39 above.

²⁰⁴ *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago* (see footnote 94 above), para. 12 (separate concurring opinion of Judge Sergio García Ramírez).

²⁰⁵ Communication No. 968/2001, *Kim Jong-Cheol v. the Republic of Korea*, Views adopted on 27 July 2005, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 40 (A/60/40)*, vol. II, para. 8.3.

²⁰⁶ *Ibid.*

²⁰⁷ For a similar case, see *Yoon and Choi v. The Republic of Korea* (footnote 56 above), para. 8.4; in this case, Committee Member Wedgwood criticized the approach of the Committee as displaying a selective perspective.

²⁰⁸ *M/V “SAIGA” (No. 2)* (see footnote 97 above), para. 156; see also “*Tomimaru*” (*Japan v. Russian Federation*), *Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, para. 72.

²⁰⁹ *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, *ITLOS Reports 1999*, p. 280, at para. 50.

²¹⁰ *Ibid.*, p. 293, para. 45.

²¹¹ *Jelisić* (see footnote 64 above), para. 61; similarly, *Krstić* (see footnote 64 above) para. 541.

²¹² *Furundžija* (see footnote 100 above), paras. 165 *et seq.* and 179.

the 1969 Vienna Convention and other forms of subsequent practice in the application of the treaty, which they also recognize as being relevant for the purpose of treaty interpretation. In *United States—Section 110 (5) Copyright Act*²¹³ (not appealed), for example, the Panel had to determine whether a “minor exceptions doctrine” concerning royalty payments applied.²¹⁴ The Panel found evidence in support of the existence of such a doctrine in several member States’ national legislation and noted:

We recall that Article 31 (3) of the Vienna Convention provides that together with the context (a) any subsequent agreement, (b) subsequent practice, or (c) any relevant rules of international law applicable between the parties, shall be taken into account for the purposes of interpretation. We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine. In our view, State practice as reflected in the national copyright laws of Berne Union members before and after 1948, 1967 and 1971, as well as of WTO members before and after the date that the TRIPS Agreement became applicable to them, confirms our conclusion about the minor exceptions doctrine.²¹⁵

And the Panel added the following cautionary footnote:

By enunciating these examples of State practice we do not wish to express a view on whether these are sufficient to constitute “subsequent practice” within the meaning of article 31 (3) (b) of the Vienna Convention.²¹⁶

105. Another example of a use of subsequent practice in the broad sense is in the case of *European Communities: Computer Equipment*, where the Appellate Body criticized the Panel for not having considered decisions by the Harmonized System Committee of the World Customs Organization (WCO) as a relevant subsequent practice:

A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions... However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant.²¹⁷

106. Thus, on closer inspection, the jurisprudence of the WTO adjudicatory bodies distinguishes between a narrow definition which sets out the conditions under which “subsequent practice” is fully relevant in the sense of article 31, paragraph 3 (b), of the 1969 Vienna Convention and a broader concept of subsequent practice which does not presuppose an agreement between all the parties of the treaty.²¹⁸ Such subsequent practice in a broader sense may then be relevant as a supplementary means of treaty interpretation within the meaning of article 32 of the Vienna Convention.

²¹³ *United States—Section 110(5) Copyright Act*, Report of the Panel (15 June 2000), WT/DS160/R.

²¹⁴ See Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 9, para. 1.

²¹⁵ *United States—Section 110(5) Copyright Act*, Report of the Panel (see footnote 213 above), para. 6.55.

²¹⁶ *Ibid.*, footnote 68.

²¹⁷ *European Communities: Computer Equipment* (see footnote 78 above), para. 90; see also Van Damme, *Treaty Interpretation by the WTO Appellate Body*, p. 342.

²¹⁸ See also WTO, *United States: COOL—Report of the Appellate Body* (29 June 2012), WT/DS384/AB/R and WT/DS386/AB/R, para. 452.

(c) Conclusion

107. The jurisprudence of international courts and tribunals, including the Dispute Settlement Body of WTO, recognizes that not only “subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation” may be relevant for the purpose of interpretation, but possibly also other subsequent practice which does not reflect an agreement on interpretation by all the parties. The concept of “subsequent practice” should therefore be defined broadly. A narrow definition such as the one by the WTO Appellate Body in the *Japan: Alcoholic Beverages II* case²¹⁹ may be helpful in identifying a fully agreed and authentic interpretation of a treaty in the sense of article 31, paragraph 3 (b), of the 1969 Vienna Convention. The taking into account of other treaty practice by States for the purpose of interpretation should not be excluded at the outset, since it may in some situations serve as a supplementary means of interpretation in the sense of article 32 of the Convention. Such use of subsequent practice (in a broad sense) must, however, always remain within the limit of the rule that treaty interpretation is not self-judging and that “the view of one State does not make international law”.²²⁰ The distinction between agreed subsequent practice in the narrow sense of article 31, paragraph 3 (b), of the Convention and all other subsequent practice (in a broad sense) then serves to indicate a greater interpretative value which is to be attributed to the former.

108. The distinction between (agreed) subsequent practice in the narrow sense of article 31, paragraph 3 (b), of the 1969 Vienna Convention and subsequent practice in a broad sense of any particular instance of treaty interpretation or application by a party also helps to answer the question whether “subsequent practice” requires repeated action with some frequency²²¹ or whether a one-time application of the treaty may be enough.²²² Within the WTO framework, the Appellate Body has found that “[a]n isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.”²²³

109. If, however, the concept of subsequent practice is divulged from a possible agreement between the parties, as it is recognized by international adjudicatory bodies, frequency is not a necessary element of the definition of the concept of “subsequent practice”.²²⁴

²¹⁹ See para. 92 and footnote 31 above; the Appellate Body has taken the formula from a publication by Sinclair (*The Vienna Convention on the Law of Treaties*, p. 137), who drew on a similar formulation in French by Yasseen (“L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”, pp. 48–49). Yasseen, a former member of ILC, had relied on elements from the work of the Commission, but this definition has never been adopted by ILC or ICJ.

²²⁰ *Sempra Energy International v. Argentine Republic* (see footnote 75 above), para. 385; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (see footnote 75 above), para. 337; WTO, *United States: Large Civil Aircraft (2nd complaint)* (see footnote 76 above), para. 7.953, footnote 2420.

²²¹ Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 431.

²²² Linderfalk, *On the Interpretation of Treaties*, p. 166.

²²³ WTO, *Japan: Alcoholic Beverages II* (see footnote 31 above) sect. E.

²²⁴ Kolb, *Interprétation et création du droit international: Esquisses d’une herméneutique juridique moderne pour le droit international public*, pp. 506 et seq.

110. Thus, “subsequent practice” in the broad sense covers any application of the treaty by one or more parties. It can take various forms.²²⁵ Practice may either consist of a direct application of the respective treaty or be a statement regarding the interpretation or application of the treaty. Such practice may include official statements concerning the treaty’s meaning, protests against non-performance, or tacit consent to statements or acts by other parties.²²⁶

2. RELATIONAL CHARACTER

111. Like a subsequent agreement under article 31, paragraph 3 (a), of the 1969 Vienna Convention, subsequent practice must be “in the application of the treaty”. This is true not only for agreed subsequent practice within the meaning of article 31, paragraph 3 (b), of the Vienna Convention, but also for subsequent practice generally. Thus, action or relevant silence²²⁷ must be taken in application of the treaty, including the invocation of provisions of the treaty; the same is true for pronouncements regarding the treaty in the course of a legal dispute or at a diplomatic conference, official communications for which the treaty gives cause, or the enactment of domestic legislation or conclusion of new international agreements for the purpose of implementing a treaty.

112. It should be mentioned, however, that a NAFTA Panel has denied that domestic legislation can be used as an interpretative aid:

Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to Article 27 of the Vienna Convention, which states that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework.²²⁸

113. While the rule contained in article 27 of the 1969 Vienna Convention is certainly valid and important, it does not follow from it that national law may not be taken into account as a possible interpretative aid in the form of subsequent State practice in the implementation of the treaty. Other international adjudicatory bodies, in particular in the context of WTO and the European Court of Human Rights, have recognized and regularly distinguish between national legislation (and other implementing measures at the national level) which violates treaty obligations, and national legislation and measures which can serve as a means to interpret the treaty.²²⁹

²²⁵ Aust, *Modern Treaty Law and Practice*, p. 239.

²²⁶ Wolfram, *Vertrag und spätere Praxis im Völkerrecht*, p. 114.

²²⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 221–222, para. (15) of the commentary to article 27; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (see footnote 139 above), p. 23; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction and Admissibility), *I.C.J. Reports 1984*, p. 410, para. 39; *Dispute between Argentina and Chile concerning the Beagle Channel* (1977), UNRIIAA, vol. XXI, part II, paras. 168 and 169; the role of silence will be elaborated upon in greater detail in the next report on the topic.

²²⁸ *In the Matter of Cross-Border Trucking Services* (see footnote 85 above), para. 224.

²²⁹ See, for example, *United States—Section 110 (5) Copyright Act*, Report of the Panel (footnote 213 above), para. 6.55; WTO, *United States: Continued Zeroing Methodology*, Report of the Panel (1 October 2008), WT/DS350/R, para. 7.217; WTO, *United States: Anti-Dumping and Countervailing Duties (China)*, Report of the

114. Subsequent practice for the purpose of treaty interpretation should, on the other hand, be distinguished from other, less immediate subsequent developments which may or may not have an influence on treaty interpretation. This is because subsequent agreements and subsequent practice of parties “regarding the interpretation of a treaty” contribute at least potentially to an “authentic” element to treaty interpretation. While there may ultimately be no clear dividing line between subsequent practice by the parties which specifically relate to a treaty and practice which bears some meaningful relationship with that treaty, it nevertheless makes sense to distinguish between both categories. Only such conduct which the parties undertake “regarding the interpretation of the treaty” should benefit from being treated as an “authentic” contribution to interpretation.

115. It is also not always easy to distinguish subsequent agreements and subsequent practice from subsequent “other relevant rules of international law applicable in the relations between the parties” (art. 31, para. 3 (c)). It appears that the most important distinguishing factor is whether an agreement is made “regarding the interpretation” of a treaty.

3. “SUBSEQUENT”

116. As with regard to subsequent agreements, relevant interpretative practice is “subsequent” if it has taken place “after the conclusion of the treaty”,²³⁰ that is, after the text of the treaty has been established as definite.²³¹

4. ACTORS

117. An important question relates to the actors who may perform relevant subsequent practice. Article 31, paragraph 3 (b), of the 1969 Vienna Convention does not explicitly require that it must be the practice of the parties to the treaty themselves, but the provision seems to imply this requirement. It is certainly the parties themselves, acting through their organs,²³² who are competent to engage in interpretative treaty practice and to apply or to comment upon a treaty. However, it is also not excluded that private (natural and legal) persons “apply” a treaty in certain cases. Such non-State practice, however, needs to be attributable to a particular State party in order to be relevant for the purpose of establishing an authentic element of interpretation.²³³ This point is developed below in chapter V (draft conclusion 4).

C. Conclusion: draft conclusion 3

118. Taken together, these sources and considerations suggest the following draft conclusion 3:²³⁴

Appellate Body (11 March 2011), WT/DS379/AB/R, paras. 335 and 336; *CMS Gas Transmission Company v. Argentine Republic* (footnote 195 above), para. 47; *V. v. the United Kingdom* [GC], No. 24888/94, para. 73, ECHR 1999-IX; *Kart v. Turkey* [GC], No. 8917/05, para. 54, ECHR 2009 (extracts); *Sigurjónsson v. Iceland* (footnote 200 above), para. 35; *A. v. the United Kingdom* (footnote 200 above), para. 80.

²³⁰ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 221, para. 14.

²³¹ See paragraphs 84–87 above.

²³² Wolfram, *Vertrag und spätere Praxis im Völkerrecht*, p. 115 *et seq.*

²³³ See paragraphs 119–144 below.

²³⁴ See preliminary conclusions 5 and 8 of the Chair of the Study Group on Treaties over time (*Yearbook ... 2011*, vol. II (Part Two), pp. 169–171, para. 344), in particular, preliminary conclusion 5 (at p. 170):

“Draft conclusion 3. Definition of subsequent agreement and subsequent practice as means of treaty interpretation

“For the purpose of treaty interpretation, a “subsequent agreement” is a manifested agreement between the parties after the conclusion of a treaty regarding its interpretation or the application of its provisions.

“(5) *Concept of subsequent practice as a means of interpretation*

“Most adjudicatory bodies reviewed have not defined the concept of subsequent practice. The definition given by the WTO Appellate Body (‘a “concordant, common and consistent” sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties [to the treaty] regarding its interpretation’) combines the element of ‘practice’ (‘sequence of acts or pronouncements’) with the requirement of agreement (‘concordant, common’) as provided for in article 31 (3) (b) of the 1969 Vienna Convention (subsequent practice in a narrow sense). Other adjudicatory

“For the purpose of treaty interpretation, “subsequent practice” consists of conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application.

“Subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation is a means of interpretation according to article 31, paragraph 3 (b), of the Vienna Convention. Other subsequent practice may under certain circumstances be used as a supplementary means of interpretation according to article 32 of the Vienna Convention.”

bodies reviewed have, however, also used the concept of ‘practice’ as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense).”

CHAPTER V

Attribution of treaty-related practice to a State

119. Whereas article 31, paragraph 3 (a), of the 1969 Vienna Convention speaks of any subsequent agreement “between the parties”, article 31, paragraph 3 (b), merely speaks of “subsequent practice in the application of the treaty”. This raises the question under which circumstances practice “in the application of the treaty” can be attributed to a State and thus be relevant interpretative State practice. Related questions are whether social developments and practice by other actors than States can also be relevant for the interpretation of a treaty and, in particular, whether they “can establish the agreement of the parties regarding its interpretation”.

A. Scope of relevant State practice

120. Whether a certain conduct amounts to a relevant subsequent treaty practice by a State depends, *inter alia*, on the applicable rules of attribution. In its draft articles on State responsibility for internationally wrongful acts, the Commission has adopted rules on the attribution of conduct to a State.²³⁵ The determination of State responsibility, however, serves a different purpose than the attribution of practice for the purpose of identifying relevant interpretative practice. The range of possible wrongful acts by a State is necessarily much wider than those which are “in application of” a treaty. It is, for example, difficult to conceive of a relevant treaty practice by way of the “conduct of an organ of a State” which “exceeds its authority” (art. 7, draft articles on State responsibility for internationally wrongful acts), or by way of the “conduct of an insurrectional movement” (art. 10, draft articles on State responsibility for internationally wrongful acts).

121. The pertinent rules of attribution for the present purpose of treaty interpretation must therefore be derived from the specific character of the interpretation and the application of treaties by their parties. This suggests that only such conduct which is undertaken or deemed to be

accepted by those organs of a State party which are internationally regarded as being responsible for the application of the treaty (as a whole, or of a particular provision of a treaty) may be attributed to a State. Subsequent practice of States may certainly be performed by high-ranking government officials in the sense of article 7 of the 1969 Vienna Convention. Yet, since many treaties are typically not applied by high government officials, international courts and tribunals have recognized that the conduct of minor authorities, or even other actors, can also be relevant subsequent conduct for the interpretation of a treaty. Thus, ICJ has recognized in the *Case concerning the rights of nationals of the United States of America in Morocco* that article 95 of the General Act of Algeciras had to be interpreted flexibly in the light of the inconsistent practice of local customs authorities.²³⁶ In the case of *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ even considered that the regular use of an island on the border between Namibia (former South West Africa) and Botswana (former Bechuanaland) by members of a local tribe, the Masubia, could be regarded as subsequent practice in the sense of article 31, paragraph 3 (b), of the 1969 Vienna Convention if it “was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the Southern Channel of the Chobe, and second, that the Bechuanaland authorities were fully aware and accepted this as a confirmation of the treaty boundary”.²³⁷

122. The *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, however, illustrates that situations may arise in which the conduct of minor officials and local practice cannot be attributed to the State. Trying to defend a boundary, Thailand argued that certain maps, delivered by France and apparently deviating from the line which had originally been agreed on, had only been

²³⁶ *I.C.J. Reports 1952*, p. 211.

²³⁷ *Kasikili/Sedudu Island (Botswana/Namibia)*, *I.C.J. Reports 1999*, p. 1094, para. 74.

²³⁵ *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76.

“seen” by Siamese officials of lower rank who were not in a position to agree on behalf of Siam with the boundary line as it was drawn on the maps. The Court held:

If the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk, and the claim by Thailand could not, on the international plane, derive any assistance from that fact.²³⁸

The Court thus seems to have implied that if the higher authorities had no knowledge of the map, the knowledge or conduct of minor officials alone would not have been attributed to Thailand.

123. The jurisprudence of arbitral tribunals confirms that relevant subsequent practice can emanate from lower government officials if they can be internationally expected as being responsible for the application of the treaty. In the *Case concerning the question whether the re-valuation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex IA of the 1953 Agreement on German External Debts*, the Arbitral Tribunal considered a letter of the Bank of England to the German Federal Debt Administration as relevant subsequent practice.²³⁹ And in the case concerning the *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice, but ultimately considered a few official pronouncements by a higher authority, the Government of France, to be decisive.²⁴⁰

124. It follows that the practice of lower and local authorities in the application of a treaty can be considered to be relevant subsequent practice for the purpose of treaty interpretation when the higher authorities can be expected to be aware of this practice and to accept it as an element of treaty interpretation or application.²⁴¹

B. Attribution to States of subsequent conduct by private actors and social developments

125. “Subsequent practice in the application of a treaty” will normally be brought about by those who are called by the treaty to apply it, which are the States parties themselves. It is nevertheless also conceivable that “the agreement of the parties regarding its interpretation” is “established” indirectly by way of the practice of other actors. So far, however, such practice by other actors has only to a very limited extent been judicially recognized as being attributable to a State party for the purpose of treaty interpretation.

126. The Iran–United States Claims Tribunal, being concerned with matters which involve a close cooperation between State organs and private entities, has been

confronted with the question of whether certain conduct by private entities could be attributed to one of the two States for the purpose of determining relevant subsequent State practice:

It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty. Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be attributed as such to the United States as the other party to the Algiers Declarations.²⁴²

127. This approach was criticized by Judge Ansari, who in his dissenting opinion held that the role of supervisory State organs should have been taken into account by the majority:

Iran has further argued that the subsequent practice of the parties during their settlement negotiations shall be given due consideration with respect to the interpretation of the “Undertakings”. In support of this argument Iran has furnished the Tribunal with settlement agreements reached in pursuance of the “Undertakings” and as a result of which Iran was paid fresh money directly by the U.S. banks. The said agreements by their very terms could not become operative without the approval of the United States Treasury and the Federal Reserve Bank of New York (The “Fed”) acting as the fiscal agent of the United States. Such subsequent practice of the parties is decisive and provides additional evidence in support of Iran’s argument.²⁴³

128. While the dissenting opinion raises an important consideration, it seems that the State involvement “by supervision” was not meant, in this particular context, to make a pronouncement regarding interpretation towards the other State and was therefore not sufficient to attribute the conduct of the private entities to the State for the purpose of treaty interpretation.

129. The European Court of Human Rights seems to be the only²⁴⁴ international judicial body to have occasionally considered “increased social acceptance”²⁴⁵ (of certain behaviour or personal characteristics) and “major social changes”²⁴⁶ to be relevant, for the purpose of treaty inter-

²⁴² *The United States of America (and others) v. The Islamic Republic of Iran, (and others)*, Award No. 108-A-16/582/591-FT (1984), 5 Iran-USCTR 57, p. 71; similarly, *The Islamic Republic of Iran v. the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (9 September 2004) (Iran-USCTR), paras. 127–128; see also Dissenting Opinion of President Lagergren in *International Schools Services, Inc. v. National Iranian Copper Industries Company*, 5 Iran-USCTR 338, at pp. 348 and 353: “the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case”.

²⁴³ Dissenting Opinion of Parviz Ansari in *The United States of America v. The Islamic Republic of Iran*, Award No. 108-A-16/582/591-FT (1985), 9 Iran-USCTR 97, at p. 99.

²⁴⁴ See, however, WTO, *United States: Certain Country of Origin*, Report of the Appellate Body (29 June 2012), WT/DS384/AB/R and WT/DS386/AB/R, para. 448.

²⁴⁵ *Christine Goodwin v. the United Kingdom* [GC], No. 28957/95, para. 85, ECHR 2002-VI.

²⁴⁶ *Ibid.*, para. 100.

²³⁸ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (see footnote 139 above), p. 25.

²³⁹ Award of 16 May 1980, UNRIAA, vol. XIX, part III, p. 103, para. 31.

²⁴⁰ Award of 14 January 2003, UNRIAA, vol. XXV, part IV, p. 257, para. 66 and p. 259, para. 74.

²⁴¹ See also Kamto, “La volonté de l’État en droit international”, pp. 141–144.

pretation, without clearly linking such developments in society to specific decisions of State organs. The two most important²⁴⁷ cases are *Dudgeon*²⁴⁸ and *Goodwin*.²⁴⁹

130. The *Dudgeon* case concerned the right of mutually consenting adult homosexuals not to be criminalized for their sexual intercourse. The European Court of Human Rights held with respect to the Northern Irish legislation at the time that “as compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour”.²⁵⁰ The Court based this assertion on the fact

that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.²⁵¹

131. The *Goodwin* case concerned the right of transsexuals to marry in their assigned gender. In this case, the European Court of Human Rights stated that it “must have regard to the changing conditions within the respondent State and within Contracting States generally”²⁵² and admonished the respondent State that it “had not yet taken any steps to... [keep the need for appropriate legal measures under review] despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted”.²⁵³

132. A close analysis of the case law of the European Court of Human Rights, however, reveals that the invocation by the Court, for the purpose of treaty interpretation, of “social changes” or “social acceptance” ultimately remained linked to State practice. In the *Dudgeon* case, the Court demonstrated the “increased tolerance of homosexual behaviour” by pointing to the fact “that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied” and that it could therefore not “overlook the marked changes which have occurred in this regard in the domestic law of the member States”.²⁵⁴ The Court further pointed to the fact that “in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law”.²⁵⁵ Even in the *Goodwin* case, the

Court attached importance “to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals”.²⁵⁶

133. Invocation of “social acceptance” by the European Court of Human Rights is rare and has been limited to cases which concerned marginal groups whose situations had not been fully considered within the political and legal system of the State concerned.²⁵⁷ In contrast, the Court does not rely on politically contested social developments. In the case of *Johnston*, for example, which concerned the claim that the right to marry implied the right to have a divorce in order to be able to remarry, “the applicants set considerable store on the social developments that have occurred since the [European Convention on Human Rights] was drafted, notably an alleged substantial increase in marriage breakdown”.²⁵⁸ The Court, however, while recognizing “that the Convention and its Protocols must be interpreted in the light of present-day conditions”, refused to take a closer look at those “social developments” and concluded that it could not “by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset”.²⁵⁹ In the same vein, the Court held in *Schalk and Kopf*:

Although, as it noted in *Christine Goodwin*, the institution of marriage has undergone major social changes since the adoption of the Convention, the Court note[s] that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage.²⁶⁰

134. Thus, the European Court of Human Rights typically determines, explicitly or implicitly, whether social developments are actually reflected in State practice and it takes this reflection in legislative or administrative practice as being the most relevant indicator.²⁶¹ This was true, for example, in cases concerning the status of children born out of wedlock²⁶² and in cases which concerned the alleged right of Gypsy people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.²⁶³ The European Court of Human Rights has only exceptionally implied that the

²⁴⁷ See also European Court of Human Rights, *I. v. the United Kingdom* [GC], No. 25680/94, para. 65, 11 July 2002; *Burden and Burden v. the United Kingdom*, No. 13378/05, para. 57, 12 December 2006; *Shackell v. the United Kingdom* (dec.) No. 45851/99, para. 1, 27 April 2000; *Schalk and Kopf v. Austria*, No. 30141/04, para. 58, ECHR 2010, citing *Goodwin* (see footnote 245 above), para. 100.

²⁴⁸ *Dudgeon v. the United Kingdom*, 22 October 1981, Series A, No. 45.

²⁴⁹ See footnote 245 above.

²⁵⁰ *Dudgeon* (see footnote 248 above), para. 60.

²⁵¹ *Ibid.*

²⁵² *Goodwin* (see footnote 245 above), para. 74.

²⁵³ *Ibid.*, para. 92.

²⁵⁴ *Dudgeon* case (see footnote 248 above), para. 60.

²⁵⁵ *Ibid.*

²⁵⁶ *Goodwin* case (see footnote 245 above), para. 85; see also para. 90.

²⁵⁷ See Brauch, “The margin of appreciation and the jurisprudence of the European Court of Human Rights”, p. 145.

²⁵⁸ *Johnston and Others v. Ireland*, (see footnote 42 above), para. 53.

²⁵⁹ *Ibid.*

²⁶⁰ *Schalk and Kopf v. Austria* (see footnote 247 above), para. 58.

²⁶¹ But see Letsas, “Strasbourg’s interpretative ethic: lessons for the international lawyer”, p. 530.

²⁶² *Mazurek v. France*, No. 34406/97, para. 52, ECHR 2000-II (“The Court notes at the outset that the institution of the family is not fixed, be it historically, sociologically or even legally”); see also European Court of Human Rights, *Marckx v. Belgium*, 13 June 1979, para. 41, Series A, No. 31; *Inze v. Austria*, 28 October 1987, para. 44, Series A, No. 126; and *Brauer v. Germany*, No. 3545/04, para. 40, 28 May 2009.

²⁶³ *Chapman v. the United Kingdom* [GC], No. 27238/95, paras. 70 and 93, ECHR 2001-I; see also European Court of Human Rights, *Lee v. the United Kingdom* [GC], No. 25289/94, paras. 95–96, 18 January 2001; *Beard v. the United Kingdom* [GC], No. 24882/94, paras. 104–105, 18 January 2001; *Coster v. the United Kingdom* [GC], No. 24876/94, paras. 107–108; and *Jane Smith v. the United Kingdom* [GC], No. 25154/94, paras. 100 and 101, 18 January 2001.

existence of contrary legislation in the respondent State was due to administrative or legislative inertia and did not any more reflect the considered view of the responsible State bodies.²⁶⁴ It can therefore be concluded that mere (subsequent) social practice, as such, is not sufficient to constitute relevant subsequent treaty practice but that it must be supported by some form of accompanying State practice.

C. Practice of other actors as evidence of State practice

135. Subsequent practice of the parties to a treaty can be reflected in, or be initiated by, the pronouncements or conduct of other actors, such as international organizations or non-State actors. Such initiation of subsequent practice of the parties by international organizations or by non-governmental organizations should not, however, be confounded with the practice by the parties to the treaty themselves. Activities of other bodies may rather constitute evidence of a subsequent agreement or practice of the parties in question.

1. INTERNATIONAL ORGANIZATIONS

136. Decisions, resolutions and other practice by international organizations can possess relevance for the interpretation of treaties in their own right. This is recognized, for example, in article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which mentions the “established practice of the organization” as one form of the “rules of the organization”. This aspect of subsequent practice to a treaty will be the subject of a later report. In the present report, the focus is limited to whether the practice of international organizations may be indicative of, or evidence for, relevant State treaty practice.

137. In this sense, collections and other reports by international organizations on subsequent State practice can possess, more or less, evidentiary weight. Reports by organizations at the universal level which are prepared on the basis of a specific mandate to provide accounts on the State practice in a particular field enjoy considerable authority without necessarily being authoritative in all cases. For example, State officials who are responsible for interpreting and applying the Convention relating to the Status of Refugees resort to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* as a reference work for State practice.²⁶⁵ Although the UNHCR Handbook is sometimes loosely referred to as if it would itself express State practice, this view has correctly been rejected by the Federal Court of Australia in *Semunigus*.²⁶⁶ Another example is

²⁶⁴ *Goodwin* case (see footnote 245 above), para. 92.

²⁶⁵ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (January 1992) foreword at para. VII; see also Gardiner, *Treaty Interpretation*, p. 239.

²⁶⁶ Federal Court of Australia, *Semunigus v. the Minister for Immigration and Multicultural Affairs* [1999] FCA 422 (14 April 1999)

the work of the United Nations Committee of the Security Council established pursuant to resolution 1540 (2004),²⁶⁷ which has proved to be of relevance for the interpretation of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction. As part of its work on the implementation of Security Council resolution 1540 (2004), the Committee entertains a systematic compilation of implementation measures taken by Member States, the so-called 1540 matrix.²⁶⁸ As far as the matrix relates to the implementation of the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, as well as to the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, it is a source of evidence of subsequent State practice with regard to the said treaties.²⁶⁹

2. NON-GOVERNMENTAL ORGANIZATIONS

138. Non-governmental organizations can play an important role in collecting subsequent practice, in particular through the monitoring of the implementation practice of a specific treaty.

139. This is the case, for example, for the Landmine and Cluster Munition Monitor, which is a joint initiative of the International Campaign to Ban Landmines and the Cluster Munition Coalition. The Monitor is described as the “*de facto* monitoring regime”²⁷⁰ for the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction and the Convention on Cluster Munitions. Apart from providing country profiles for States parties, signatories, States not parties and “Other Areas”,²⁷¹ the Cluster Munition Monitor 2011 identifies different interpretative issues concerning the Convention on Cluster Munitions, and lists pertinent statements and practice by States parties and signatories. These concern the prohibition on assistance and interoperability, foreign stockpiling and transit, and the issue of disinvestment.²⁷²

paras. 5–13; this does not exclude that the Handbook possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based not only on its quality as a professional collection, but also on art. 35, para. 1 of the Convention relating to the Status of Refugees, according to which “the Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention”.

²⁶⁷ Security Council resolution 1540 (2004), para. 8 (c).

²⁶⁸ According to the 1540 Committee’s webpage, “the 1540 Matrix has functioned as the primary method used by the 1540 Committee to organize information about implementation of United Nations Security Council resolution 1540 by Member States... The 1540 Committee uses the matrices as a reference tool to examine the status of implementation of Security Council resolution 1540 (2004)” (available from www.un.org/en/sc/1540/national-implementation/1540-matrices.shtml).

²⁶⁹ See Gardiner, *Treaty Interpretation*, p. 239.

²⁷⁰ See www.the-monitor.org, Introduction.

²⁷¹ *Cluster Munition Monitor 2011*, pp. 59–344.

²⁷² *Ibid.*, pp. 24–31; the same interpretative issues have already been assessed in the 2009 and 2010 reports.

140. The example of the Landmine and Cluster Munition Monitor shows that non-governmental organizations can provide a source of evidence for subsequent practice of State parties and even solicit its coming into being. In fact, by urging States to provide their views on certain issues, the amount of evidence for practice available to interpreters can be increased considerably. The example also demonstrates that non-governmental organizations can try to shape subsequent practice by providing their reading of disputed provisions. Indeed, such organizations can pursue their own agenda, which may be different from that of States. This may result in a certain bias in their research, which needs to be critically reviewed. This does not exclude the fact that State practice gathered by non-governmental organizations is often a valuable source of evidence for the subsequent practice of all the parties and that it enhances transparency, which in turn tends to increase compliance.

3. THE SPECIAL ROLE OF ICRC

141. The role which ICRC assumes with regard to the Geneva Conventions for the protection of war victims and their Additional Protocols is a case apart. ICRC, formally a private, non-profit association incorporated under Swiss domestic law,²⁷³ has been a catalyst in the development of international humanitarian law treaties since the original Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.²⁷⁴ ICRC has the legal personality in international law as the entity responsible for carrying out the mandate conferred on it by the international community through the Geneva Conventions for the protection of war victims and by the statutes of the International Red Cross and Red Crescent Movement.²⁷⁵ In addition, ICRC occasionally provides interpretative guidance on the Geneva Conventions for the protection of war victims and their Additional Protocols, a mandate it derives from the statutes of the Movement, adopted at the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006.²⁷⁶ Article 5, paragraph 2 (g), of the statutes provides:

The role of the International Committee, in accordance with its Statutes, is in particular:

...

(g) to work for the *understanding** and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.

142. In 2009, ICRC published, on the basis of its mandate,²⁷⁷ a handbook on interpretative guidance on the notion of direct participation in hostilities under

²⁷³ Gasser, "International Committee of the Red Cross (ICRC)", para. 20.

²⁷⁴ *Ibid.*, para. 14.

²⁷⁵ *Ibid.*, para. 25.

²⁷⁶ ICRC/IFRC, *Handbook of the International Red Cross and Red Crescent Movement*, 14th ed., Geneva, 2008.

²⁷⁷ "The responsibility for the interpretive guidance is assumed by ICRC as a neutral and independent humanitarian organization mandated by the international community of States to promote and work for a better understanding of international humanitarian law," citing art. 5, para. 2 (c) and (g) of the statutes of the Movement.

international humanitarian law.²⁷⁸ The guidance is the outcome of an "expert process" conducted from 2003 to 2008 drawing from academic, military, governmental and non-governmental circles, all participating in their private capacity, but ostensibly basing their analysis on State treaty and customary practice. The interpretative guidance consists of 10 recommendations with accompanying commentary and "reflect[s] the ICRC's institutional position as to how existing international humanitarian law should be interpreted".²⁷⁹ It is too early for a general assessment of the significance of the Guidance, but its impact on the subsequent practice of States will be of interest.

143. In this context, States have reaffirmed their role in the development of international humanitarian law. While resolution 1 of the 31st International Red Cross and Red Crescent Conference of 2011 recalls that "one of the important roles of the ICRC... is in particular 'to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof'", it also emphasizes "the primary role of States in the development of international humanitarian law".²⁸⁰ It should be noted that ICRC purports to interpret international humanitarian law as such, and not only the Geneva Conventions and the Additional Protocols.²⁸¹ The distinction between subsequent practice of States parties pursuant to treaties and pursuant to general customary practice may thus be blurred.

D. Conclusion: draft conclusion 4

144. Taken together, these sources and considerations suggest the following draft conclusion:²⁸²

"Draft conclusion 4. Possible authors and attribution of subsequent practice

"Subsequent practice can consist of conduct of all State organs which can be attributed to a State for the purpose of treaty interpretation.

"Subsequent practice by non-State actors, including social practice, may be taken into account for the purpose of treaty interpretation as far as it is reflected in or adopted by subsequent State practice, or as evidence of such State practice."

²⁷⁸ ICRC, *Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law; for the expert process*, Geneva, 2009.

²⁷⁹ *Ibid.*, p. 9.

²⁸⁰ Resolution 1—Strengthening legal protection for victims of armed conflicts (31st International Conference of the Red Cross and Red Crescent, Geneva Switzerland, 28 November–1 December 2011).

²⁸¹ See ICRC, *Interpretive guidance ...* (see footnote 278 above), p. 9.

²⁸² See preliminary conclusion (9) of the Chair of the Study Group on Treaties over time, *Yearbook ... 2011*, vol. II (Part Two), p. 171, para. 344:

"(9) *Possible authors of relevant subsequent practice*

"Relevant subsequent practice can consist of acts of all State organs (executive, legislative and judicial) which can be attributed to a State for the purpose of treaty interpretation. Such practice may under certain circumstances even include 'social practice' as far as it is reflected in State practice."

CHAPTER VI

Future programme of work

145. The Special Rapporteur proposes to submit, for the session in 2014, his second report on further aspects of the topic, most of which have been addressed in his three reports for the Study Group on Treaties over time²⁸³ and which the Study Group has, in part, discussed in 2011 and 2012.²⁸⁴ In 2015, he envisages submitting the third

report, in which he will discuss the practice of international organizations and on the jurisprudence of national courts.²⁸⁵ In 2016, the Special Rapporteur will submit a final report, with revised conclusions and commentaries, in particular taking into account the discussions in the Commission and the debates in the Sixth Committee.

²⁸³ See footnotes 4, 5 and 10 above.

²⁸⁴ *Yearbook ... 2011*, vol. II (Part Two), pp. 168–169, paras. 336–341; and *Yearbook ... 2012*, vol. II (Part Two), pp. 77–80, paras. 229–240.

²⁸⁵ As it was envisaged in the original proposal, see *Yearbook ... 2008*, vol. II (Part Two), annex I, pp. 155 *et seq.*, paras. 17, 18, 39 and 42.