Annex I

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

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A. A topical issue

1. The question of the immunity of State officials from foreign criminal jurisdiction has begun to attract greater attention in recent years. This is connected to a large extent with the growth of the concept of protection of human rights, a decline in willingness to tolerate gross violations of human rights, and efforts to combat terrorism, transnational crime, corruption and money laundering. Society no longer wishes to condone impunity on the part of those who commit these crimes, whatever their official position in the State. At the same time it can hardly be doubted that immunity of State officials is indispensable to keep stable inter-State relations.

2. Academic and public discussion as well as State practice, including domestic case law, in this area was given a substantial boost following consideration of the case of former Chilean dictator General Augusto Pinochet in the United Kingdom.[1] Between 1998 and 2001, more than 20 attempts were made to institute criminal proceedings in domestic courts against senior incumbent and former officials of foreign States.[2] Specifically, there were attempts to prosecute President Laurent-Désiré Kabila of the Democratic Republic of the Congo in Belgium and France in 1998; Israeli Prime Minister Ariel Sharon in Belgium in 2001–2002; President Muamar Al-Qadhafi of Libya, President Denis Sassou Nguesso of the Republic of the Congo and Cuban leader Fidel Castro in 2000–2001 in France; and former President of Chad Hissène Habré in Senegal in 2001.[3]

3. In 2002, the ICJ rendered a judgment in the case concerning the *Arrest Warrant of 11 April 2000*.[4] This judgment contains a valuable assessment of the state of international law in this field.

4. Currently before the ICJ is a case concerning *Certain Criminal Proceedings in France (Republic of the Congo* v. *France),* the focus of which is also the immunity of senior State officials from foreign criminal jurisdiction. In 2003, the Court issued an order on the question of provisional measures which is of interest in the context of the matter under discussion.[5]

5. Following the above-mentioned judgment of the ICJ, a number of rulings were issued by national courts which are also of significance for the consideration of this issue. For example, in 2004 appeal courts in the United States rendered final decisions in cases involving President Robert Mugabe of Zimbabwe and former Chinese leader Jiang Zemin.[6] Although both of these judgements concerned immunity from civil jurisdiction, they are also of interest when considering the issue of immunity from foreign criminal jurisdiction.

6. It should be pointed out that the position of various State organs, including those representing the executive branch, on the issue under consideration from the viewpoint of international law was expressed on several occasions recently, both during consideration of the above-mentioned court cases and independently of judicial procedures.[7]

7. The issue of the immunity of State officials from foreign criminal jurisdiction most often provokes a significant public response when it is intended to indict such persons for gross violations of human rights (such as torture or genocide) and international humanitarian law. In relation

[1] See United Kingdom High Court of Justice, Queen's Bench Division (Divisional Court): *In Re Augusto Pinochet Ugarte*, ILM, vol. 38 (1999), pp. 68 *et seq.*, at pp. 68–90; United Kingdom House of Lords: *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others–Ex Parte Pinochet*, *ibid.,* vol. 37 (1998), pp. 1302 *et seq.*, at pp. 1302–1339; and United Kingdom House of Lords: *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others–Ex Parte Pinochet, ibid.*, vol. 38 (1999), pp. 581 *et seq.*, at pp. 581–663.

[2] See, for example, A. Borghi, *L'immunité des dirigeants politiques en droit international*, Basel, Helbing & Lichtenhahn, 2003, pp. 361–369.

[3] "Several cases that hit the headlines in the late 1990s raised the question of the limits of the immunity available to the heads of State or former heads of State" (P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 7th ed., Paris, Librairie générale de droit et de jurisprudence, 2002, p. 453).

[4] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium), Judgment, I.C.J. Reports 2002* , p. 3. The text of the judgment is also available at www.icj-cij.org.

[5] *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003*, p. 102. The text of the order can also be found at www.icj-cij.org.

[6] *Tachiona* v. *United States*, 386 F.3d 205, 2004 U.S. App. LEXIS 20879 (2d Cir., 6 October 2004) (Tachiona II); *Wei Ye* v. *Jiang Zemin*, 383 F.3d 620, 2004 U.S. App. LEXIS 18944 (7th Cir., 8 September 2004). For commentaries on these cases, see, for example, S. Andrews, "U.S. courts rule on absolute immunity and inviolability of foreign Heads of State: the cases against Robert Mugabe and Jiang Zemin", The American Society of International Law, *Insights (November 2004)*, www.asil.org/insights_2004.cfm.

[7] For example, in 2005, in connection with a planned visit to the Russian Federation by Prime Minister Yulia Timoshenko of Ukraine, against whom criminal proceedings had been instituted in the Russian Federation long before her appointment to the post, the official position on the question of her immunity from criminal jurisdiction in the Russian Federation was publicly formulated by the Prosecutor-General of the Russian Federation. In particular, he pointed out that Prime Minister Yulia Timoshenko of Ukraine would have no problem if she wished to visit the Russian Federation, since senior State leaders—including Heads of Government—enjoy immunity. At the same time he added that the criminal proceedings against Ms. Timoshenko would be extended. It was only on 26 December 2006 that the Main Military Prosecution of the Russian Federation announced the closing of the criminal case against the former Prime Minister of Ukraine because of the expiration of the statute of limitations (http://genproc.gov.ru).

to such crimes, some States have recently been trying to exercise universal jurisdiction. However, this issue arises not only in connection with the exercise of universal jurisdiction in respect of international crimes (or crimes under international law), but also in the exercise of other types of jurisdiction. This happens, for example, when a State tries to prosecute under its own criminal law officials or former officials of another State who are suspected of crimes which are not connected with massive and gross violations of human rights but are nevertheless directed against the State exercising jurisdiction, or its nationals.

8. Originally, long before the issue of human rights became topical, the problem of the immunity of a State, its representatives or property arose from the conflict between, on the one hand, the rights of such a State stemming from the principle of the sovereign equality of States, and on the other hand, the rights of the State on whose territory these representatives or property were located, stemming from the principle of the full territorial jurisdiction of the latter. It seems that this conflict of rights and principle remains significant today. Indeed, it is obviously possible to say that it now displays new shades of meaning related to the development of universal and other types of domestic criminal jurisdiction, including extraterritorial jurisdiction, in the context of efforts to combat gross human rights violations, terrorism, transnational crime, money laundering, etc., against a background of globalization.

9. Nevertheless, despite the interrelation, issues of immunity and jurisdiction have an independent nature, and are regulated by different legal norms. As the ICJ pointed out in the above-mentioned judgment,

> rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law.[8]

In one of the recent publications on the topic it was also rightly noted that "a court faced with the violation of international law must first distinguish between jurisdictional immunities and the rules governing criminal jurisdictions of municipal courts".[9] Immunity is an obstacle to jurisdiction[10] and as such deserves a separate analysis.

10. The issue of the immunity of senior State officials from foreign criminal jurisdiction was examined by the Institute of International Law at the end of the last century. It adopted a resolution containing 16 articles[11] which, together with the corresponding *travaux préparatoires*, constitutes an important doctrinal source for the establishment of the content of international law in this field.

11. In 2004, by its resolution 59/38 of 2 December 2004, the United Nations General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property. Under article 2, paragraph 1 (*b*) (i) and (iv), of the Convention, the term "State" includes "various organs of government" and also "representatives of the State acting in that capacity". At the same time, article 3, paragraph 2, of the Convention states that it is "without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae"*. It is not entirely clear what this means for the immunity *ratione personae* of other officials and, in particular, such senior officials as Heads of Government and Ministers for Foreign Affairs.[12] However, in any case, paragraph 2 of the above-mentioned resolution states that the General Assembly agrees with the general understanding reached in the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property that the United Nations Convention on Jurisdictional Immunities of States and Their Property does not cover criminal proceedings.[13] The Chairperson of the Ad Hoc Committee, when presenting its report at the fifty-ninth session of the General Assembly, pointed out that the Convention did not apply where there was a special immunity regime, including immunities *ratione personae* (*lex specialis*).[14]

12. The charters and statutes of *ad hoc* international criminal tribunals (Nuremberg, Tokyo, the former Yugoslavia, Rwanda) and the Statute of the International Criminal Court contain provisions which deprive State officials, including senior State officials, of immunity from the jurisdiction of these international organs.[15] However, here it is a question of international criminal jurisdiction.[16]

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[8] *Arrest Warrant of 11 April 2000* (see footnote 4 above), pp. 24–25, para. 59.

[9] E. K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts*, Berlin, Springer, 2005, p. 296.

[10] It was stated in the draft article 2 of the Draft Declaration on Rights and Duties of States: "Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law" (*Yearbook ... 1949*, p. 287, and annex to General Assembly resolution 375 (IV) of 6 December 1949; see also *The Work of the International Law Commission,* 6th ed., vol. I (United Nations publication, Sales No. E.04.V.6), Annex IV, p. 262).

[11] *Yearbook of the Institute of International Law*, Session of Vancouver, 2000–2001, vol. 69 (2001), Paris, Pedone, 2001, pp. 442–709.

[12] The Commission's commentary to article 3 of the draft articles adopted by the Commission in 1991 states the following: "Paragraph 2 is designed to include an express reference to the immunities extended under existing international law to foreign sovereigns or other heads of State in their private capacities, *ratione personae*. Jurisdictional immunities of States in respect of sovereigns or other heads of State acting as State organs or State representatives are dealt with under article 2. Article 2, paragraph 1 (*b*) (i) and (v) [subparagraph (iv) in the Convention] covers the various organs of the Government of a State and State representatives, including heads of State … The reservation of article 3, paragraph 2, therefore refers exclusively to the private acts or personal immunities and privileges recognized and accorded in the practice of States, without any suggestion that their status should in any way be affected by the present articles. The existing customary law is left untouched" (*Yearbook ... 1991*, vol. II (Part Two), p. 22).

[13] The recommendation on this subject appears in paragraph 14 of the Ad Hoc Committee's report, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 22* (A/59/22).

[14] *Ibid., Sixth Committee, 13th meeting* (A/C.6/59/SR.13), para. 37.

[15] Article 7 of the Charter of the International Military Tribunal (see United Nations, *Treaty Series*, vol. 82, No. 251, p. 288); article 6 of the Charter of the International Military Tribunal for the Far East (see *Documents on American Foreign Relations*, vol. VIII, Princeton University Press, 1948, p. 354); article 7, paragraph 2, of the Statute of the International Tribunal for the Former Yugoslavia (see S/25704, Annex); article 6, paragraph 2, of the Statute of the International Tribunal for Rwanda (see Security Council resolution 955 (1994) of 8 November 1994, Annex); and article 27 of the Rome Statute of the International Criminal Court.

[16] In the *Arrest Warrant* case, the ICJ, it seems, drew a clear distinction between the situation as regards the immunity of senior State

13. As regards the immunity of State officials from foreign national criminal jurisdiction, the corresponding provisions on this subject of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on special missions, the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character are well known. However, these instruments concern only some specific aspects of the issue under consideration. The principal source of international law in relation to the immunity of State officials from foreign criminal jurisdiction is international custom.

B. The topic of immunity of State officials in the work of the International Law Commission

14. The Commission has addressed this topic more than once in one form or another. This took place during work on: the Draft Declaration on Rights and Duties of States;[17] the draft Principles of International Law Recognized in the Charter of the Nürnberg Tribunal;[18] the draft code of offences against the peace and security of mankind of 1954;[19] the draft Code of Crimes against the Peace and Security of Mankind of 1996;[20] the draft articles on diplomatic[21] and consular[22] relations and immunities; the draft articles on special missions;[23] the draft articles on the representation of States in their relations with international organizations;[24] the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons;[25] and, as already mentioned, draft articles on jurisdictional immunities of States and their property.[26]

15. However, the Commission has never examined the issue of the immunity of State officials from foreign criminal jurisdiction in a separate and focused manner.[27]

officials from international criminal jurisdiction, on the one hand, and from domestic criminal jurisdiction on the other (see *Arrest Warrant of 11 April 2000* (footnote 4 above), paras. 56–58).

[17] See in particular draft article 2 and the commentary thereto (footnote 10 above).

[18] See in particular draft principle III and the commentary thereto, *Yearbook ... 1950*, vol. II, p. 192.

[19] See in particular draft article 3 and the commentary thereto, *Yearbook ...1954*, vol. II, pp. 119–120.

[20] See in particular draft article 7 and the commentary thereto, *Yearbook ... 1996*, vol. II (Part Two), pp. 26–27.

[21] *Yearbook ... 1958*, vol. II, pp. 89–105.

[22] *Yearbook ... 1961*, vol. II, pp. 89–128.

[23] See in particular draft article 21 and the commentary thereto, *Yearbook ... 1967*, vol. II, p. 359.

[24] *Yearbook ...1971*, vol. I, pp. 287 *et seq.*; *Yearbook ... 1971*, vol. II (Part Two), pp. 101–110.

[25] *Yearbook ... 1972*, vol. II, pp. 309–323.

[26] See footnote 12 above.

[27] At a certain stage it was proposed to include in the draft articles on jurisdictional immunities of States and their property a provision on the immunity of sovereigns or Heads of State from criminal jurisdiction. See in particular draft article 25 in the seventh report of the Special Rapporteur on this topic, Mr. Sompong Sucharitkul, *Yearbook ... 1985*, vol. II (Part One), pp. 44–45.

C. Should the International Law Commission examine the issue of the immunity of State officials from foreign criminal jurisdiction?

16. It seems that State practice as well as the rulings of domestic courts, the above-mentioned conventions, the judgment of the ICJ in the *Arrest Warrant of 11 April 2000* case and the work of the Commission hitherto bear witness to the fact that customary international law in this field exists. Although there is a variety of views on the subject, this conclusion, in our opinion, is also confirmed by international legal doctrine.[28]

17. It is undoubtedly important that State officials, and first and foremost senior State officials, who have committed crimes, especially massive and gross violations of human rights or international humanitarian law, should bear responsibility, including criminal responsibility. It is important that, where the rights of its nationals have been violated by criminal acts, a State should be able to exercise its criminal jurisdiction in respect of the suspected perpetrators. However, it is also crucially important that inter-State relations based on generally recognized principles of international law, and in particular the principle of the sovereign equality of States, should be stable and predictable, and, correspondingly, that officials acting on behalf of their States should be independent *vis-à-vis* other States.

18. The Commission could make a contribution to ensuring a proper balance between these concepts through the codification and progressive development of international law, if it examined the issue of the immunity of State officials from foreign criminal jurisdiction and formulated its vision of the content of international law in this area.

D. Possible scope of consideration of the proposed topic

19. When analysing this topic in the Commission, it would be appropriate to examine the following issues in particular.

(1) The discussion should cover only immunity from domestic jurisdiction. The legal regime of this institution, as noted above, is distinct from the legal regime of immunity from international jurisdiction.

It is suggested that the analysis should be limited to issues of immunity from criminal jurisdiction. (At the same time, one might think about adding issues of immunity *ratione personae* from foreign civil and administrative jurisdiction to issues of immunity from foreign criminal jurisdiction, as, for example, in the above-mentioned draft articles of the Institute of International Law.[29])

Of course, the focus should be immunity from foreign jurisdiction (it is well known that domestic legal systems provide for the immunity of certain State officials from the jurisdiction of the same State) and immunity under international and not domestic law.

[28] A short list of publications on this topic is attached.

[29] See footnote 11 above.

(2) It will perhaps be necessary first to examine the concept of immunity (including the issue of immunity *ratione materiae* and immunity *ratione personae*) and the concept of criminal jurisdiction (including the issue of the principles on which it is based) for the purposes of this topic, and the relationship between them. There is a view that consideration of the issue of jurisdiction must precede consideration of the issue of immunity, since, in particular, the issue of immunity from jurisdiction arises only when the State has the requisite jurisdiction.[30]

It is worth defining the Commission's position concerning the nature of immunity—whether it is procedural or material in nature—and also, perhaps, concerning the question of whether it is peremptory in nature. The study of this latter question may be useful in the context of examination of the relations between immunity of State officials from foreign criminal jurisdiction and rules prohibiting torture, genocide, etc., which have the status of *jus cogens*.[31]

Here it would be worth examining the question of the relations between jurisdictional immunity and other legal doctrines which have similar consequences, such as the doctrine of the "act of State" and the doctrine of "non-justiciability".[32]

It is also desirable to look at the relations between immunity of State officials and immunity of the State itself and diplomatic immunity.

It is also necessary to analyse the relations between the concepts of "jurisdictional immunity", "inviolability", "immunity from procedural enforcement" and "immunity from execution".

It would be important to include in the final product of the Commission's work on the topic (whatever form it might take) provisions relating to the differences between the institution of immunity of officials from jurisdiction, on the one hand, and the institution of criminal responsibility, on the other. Immunity does not mean impunity.[33]

(3) At the beginning of the study it is important to examine the question of the foundation, the rational root of the immunity of State officials from foreign criminal jurisdiction. For example, does immunity derive only from a functional necessity, i.e. is it linked exclusively to the functions performed by State officials? Or is it not only the functional component which is significant but also, for example, the fact that the official is acting on behalf of a sovereign State, which participates on an equal footing with other States in international relations, in ensuring the stability in which all States have an interest? Is the immunity of the officials of a State a manifestation of the rights of that State, stemming from its sovereignty? Or is the immunity of State officials from foreign criminal jurisdiction the result of the consent of a State possessing such jurisdiction not to exercise it in view of the acknowledged practical need to respect international courtesy?[34] Can the foundation of the immunity of State officials be the same as the foundation of the immunity of the State itself?[35] The logic governing consideration of this topic will depend to a large extent on the concept that is behind the immunity of State officials from foreign criminal jurisdiction.

(4) It is necessary to define which State officials enjoy this immunity. The judgment of the ICJ in *Arrest Warrant of 11 April 2000* refers to the immunity of Ministers for Foreign Affairs and Heads of State and Government, and these persons are cited as examples of senior State officials who enjoy immunity from foreign jurisdiction.[36] The draft articles of the Institute of International Law speak only of Heads of State and Government.

The Commission may try to examine the issues of immunity of senior State officials, including Heads of State and Government and Ministers for Foreign Affairs (in such cases, however, it must bear in mind the difficulties which will obviously arise in defining precisely which officials fall in the category of senior State officials). The other option is to examine the question of the immunity not only of senior but also of any other State officials.

However, it would seem to be better for the Commission to confine itself at first to Heads of State and Government and Ministers for Foreign Affairs. At least in respect of this group of officials a sufficient body of State (including judicial) practice and doctrine exists.

The issue of immunity must be examined in respect of both present officials and former officials.

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[30] See in particular *Arrest Warrant of 11 April 2000* (footnote 4 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 3–5.

[31] On the question of these relations, see, for example the judgement on the merits delivered by the Grand Chamber in *Al-Adsani* v. *The United Kingdom, Application no. 35763/97, Judgement of 21 November 2001*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2001-XI*, paras. 57–67; and especially the Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić.

[32] "It is, however, important to bear in mind that state immunity may appear as a doctrine of inadmissibility or non-justiciability rather than an immunity in a strict sense" (I. Brownlie*, Principles of Public International Law*, 5th ed., Oxford University Press, 1998, p. 326). See also, for example, A. Bianchi, "*Immunity versus human rights: the Pinochet case*", *European Journal of International Law*, vol. 10, No. 2 (1999), pp. 266–270.

[33] See on this subject *Arrest Warrant of 11 April 2000* (footnote 4 above), para. 60.

[34] Caplan, for example, considers the foundation of State immunity to be the manifestation of "practical courtesy" on the part of the State possessing territorial jurisdiction (see L. M. Caplan, "State immunity, human rights and *jus cogens*: a critique of the normative hierarchy theory", AJIL, vol. 97, No. 4 (2003), pp. 741 *et seq.*, at pp. 745–757).

[35] Concerning the foundations of immunity, including the immunity of officials, in the practice of the ICJ, see for example V. S. Vereshchetin and C. J. Le Mon, "Immunities of individuals under international law in the jurisprudence of the International Court of Justice", *The Global Community: Yearbook of International Law and Jurisprudence, 2004*, vol. I, pp. 77–89.

[36] "[I]n international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal" (*Arrest Warrant of 11 April 2000* (footnote 4 above), para. 51).

In addition, it would also be worth examining the issue of the immunity of members of the families of those officials whose immunity will be the subject of consideration by the Commission.

(5) It seems appropriate to analyse the relevance in the context of this topic of the issue of recognition of foreign States and Governments and their Heads. For example, in the case of *M. A. Noriega*, the Court of Appeals pointed out that "[t]he district court rejected Noriega's head-of-state immunity claim because the United States government never recognized Noriega as Panama's legitimate, constitutional ruler".[37]

(6) The central issue in this topic is the scope or limits of immunity of State officials from foreign criminal jurisdiction. Here a number of questions can be identified.

First, the period of time during which a person enjoys immunity (the period when he or she occupies the corresponding post; the period after he or she leaves the post).

Secondly, the acts of the State official covered by immunity from foreign criminal jurisdiction. Acts in an official capacity, acts in a private capacity. Criteria for distinguishing between these categories of acts. Acts carried out before, during and after the occupation of a post. Here it is also appropriate to examine the question of whether criminally punishable acts, in particular international crimes, can be regarded as having been committed in an official capacity.[38]

Thirdly, does the solution of the question of the immunity of a State official from foreign criminal jurisdiction depend on whether he or she committed the crime in the territory of the State exercising jurisdiction, or outside it? Does it depend on whether, at the time of the exercise of foreign criminal jurisdiction, he or she is in the territory of the State exercising jurisdiction, or outside it?

Fourthly, does immunity depend on the nature of the presence of the official in the territory of the foreign State exercising jurisdiction (official visit, private visit, exile, etc.)?

Fifthly, does the immunity of a State official from foreign criminal jurisdiction signify that a foreign State cannot pursue any criminal procedures in relation to this person, or does it preclude only specific criminal procedures (specifically, only those procedural acts which directly affect the person enjoying immunity, and restrict his or her ability to perform his or her official functions)? For example, judging by the order on provisional measures in *Certain Criminal Proceedings in France (Republic of the Congo v. France),* the ICJ does not consider that the immunity of a Head of State from foreign criminal jurisdiction is an obstacle to any criminal procedures pursued by a foreign State.[39]

Sixthly, does immunity depend on the gravity of the crime of which the official is suspected? This question, which is obviously crucial, can also be considered as the question of whether exceptions exist to immunity.

The view that immunity, including the immunity of current State officials, does not exist in the case of the most serious crimes under international law was set out, for example, in the House of Lords in the United Kingdom during consideration of the Pinochet case and, in considerable detail, in the Belgian memorandum in Arrest Warrant of 11 April 2000 before the ICJ.[40] It is even held that there is a principle of "absence of immunity" from foreign criminal jurisdiction in respect of international crimes.[41]

However, in the opinion of the ICJ, immunity is an obstacle to the exercise of foreign criminal jurisdiction in respect of a current senior State official irrespective of the gravity of the crime of which he or she is suspected.[42] Where current Heads of State and Government are concerned, this view was also reflected in the draft articles prepared by the Institute of International Law.[43]

Note that the issues relating to the scope or limits of the immunity must be considered separately in relation to current officials and former officials.

(7) If it is decided that the immunity of a State official from foreign criminal jurisdiction does not include the inviolability of this official, immunity from procedural enforcement and immunity from execution, the question arises whether these topics should also be considered in the framework of the subject. Here it would be possible to consider the question of immunity from procedural enforcement and execution in respect of the property of an official located in the territory of the foreign State exercising criminal jurisdiction.

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[37] *United States* v. *Noriega* (117 F.3d 1206; 47 Fed. R. Evid. Serv. (Callaghan) 786; 11 Fla. L. Weekly Fed. C 103).

[38] See, for example, *Arrest Warrant of 11 April 2000* (footnote 4 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 85.

[39] In any case, the Court did not consider those criminal procedures in respect of officials of the Republic of the Congo which were applied in France, and the cessation of which was demanded by the Republic of the Congo, as violating its rights arising from the immunity of those persons. Accordingly, the Court did not consider it necessary for these procedures to be halted (see *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003*, p. 102, at pp. 109–110, paras. 30–35).

[40] United Kingdom House of Lords: *Regina* v. *Bartle and the Commissioner of Police for the Metropolis and Others–Ex Parte Pinochet* (see footnote 1 above), pp. 581–663, at p. 651 (Lord Millett) and p. 661 (Lord Phillips of Worth Matravers); *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium)*, Counter Memorial of the Kingdom of Belgium, 28 September 2001, www.icj-cij.org, paras. 3.5.10–3.5.150. See also, for example, A. Watts, "The legal position in international law of Heads of States, Heads of Governments and Foreign Ministers", *Collected Courses of the Hague Academy of International Law, 1994-III*, vol. 247, pp. 82–84 (it must be borne in mind, however, that this section of Sir Arthur Watts's lecture is devoted to the international responsibility of the Head of State). See also *Arrest warrant of 11 April 2000, Judgment* (footnote 4 above), Dissenting Opinion of Judge Al-Khasawneh, paras. 5–7.

[41] Borghi, *op. cit.* (footnote 2 above), pp. 287–331.

[42] *Arrest Warrant of 11 April 2000, Judgment* (footnote 4 above), paras. 56–61.

[43] See footnote 11 above. See in particular article 2 of the resolution adopted by the Institute.

(8) It will be necessary to examine the question of waiver of immunity. It is obvious that it is not the official but the State which has the right to waive his or her immunity. The question concerns which organ of State (which law is applicable in determining it—domestic or international?) and in what manner the State has the right to waive the immunity of its official (explicit waiver, implied waiver, *ad hoc* waiver, waiver of a general nature, for example, through the conclusion of an international treaty, etc.).

(9) It is necessary to consider the question of the form which the final product of the Commission's work on the proposed topic should take.

If the Commission decides to draw up draft articles, then it would be appropriate to consider whether to include in them provisions relating to the following two issues:

(10) *Lex specialis*. It would seem that any draft articles should contain a provision defining their relationship with special treaty regimes which provide for a different manner of regulating the issue at hand.

(11) Dispute settlement. The Commission may consider it desirable to set up a special regime for the settlement of disputes between governments regarding the immunity of State officials from foreign criminal jurisdiction.

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Annex II

JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANIZATIONS

(Giorgio Gaja)

1. The adoption of the 1969 Vienna Convention on the Law of Treaties and of the draft articles on State responsibility for internationally wrongful acts, in 2001, prompted the Commission to take up parallel studies with regard to international organizations. The recent adoption through General Assembly resolution 59/38, of 2 December 2004, of the United Nations Convention on Jurisdictional Immunities of States and Their Property gives the opportunity for the Commission to reconsider whether it should undertake a study of the jurisdictional immunity of international organizations.

2. The subject was for thirty years on the agenda of the Commission, as part of the study of "Relations between States and international organizations". For the second part of the topic, entitled "Status, privileges and immunities of international organizations and their agents", Mr. Abdullah El-Erian and Mr. Leonardo Díaz González successively acted as Special Rapporteurs. Draft articles were referred to the Drafting Committee but were not referred back to the Plenary. In 1992, the Commission decided "to put aside for the moment the consideration of a topic which does not seem to respond to a pressing need of States or of international organizations".[1]

3. It is true that many constituent instruments of international organizations, protocols on privileges and immunities or headquarters agreements provide for immunity. However, those provisions are often very general. Moreover, the question of immunity arises not infrequently before courts of States which are not bound by any treaty in this regard. The relevance of the topic also depends on the ever-increasing activities of many international organizations. Some problems are raised, for instance, by the practice of arranging meetings outside the territory of States with whom headquarters agreements are in force.

4. The existence of an obligation under general international law to grant immunity to international organizations has been asserted by several courts. According to the Labour Court of Geneva in *ZM* v. *Permanent Delegation of the League of Arab States to the United Nations*,[2] "international organizations, whether universal or regional, enjoy absolute jurisdictional immunity". The Netherlands Supreme Court held in *Iran–United States Claims Tribunal* v. *AS*, that "even in cases where there is no treaty … it follows from unwritten international law that an international organization is entitled to the privilege of immunity from jurisdiction on the same footing as generally provided for in the treaties referred to above, in any event in the State in whose territory the organization has its seat, with the consent of the government of the State".[3] In *T. M.* v. *Ligue des États Arabes*, the Belgian Court of Cassation referred to immunity granted to international organizations either by a general principle of international law or by special agreements.[4]

5. Similar decisions were taken by the Court of Appeals for the District of Columbia in the United States in *Weidner* v. *International Telecommunications Satellite Organization*,[5] and in a string of judgements by the Supreme Court of the Philippines. For instance, in *Southeast Asian Fisheries Development Center* v. *Acosta*, the latter Court said that "[o]ne of the basic immunities of an international organization is immunity from local jurisdiction, i.e., that it is immune from the legal writs and processes issued by the tribunals of the country where it is found".[6]

6. Precedents like those referred to above suggest the need for a thorough inquiry into State practice with a view to reaching appropriate conclusions, whether on the basis of codification or progressive development.

7. A study on the jurisdictional immunity of international organizations would not simply involve ascertaining the extent to which rules governing State immunity may also be applied with regard to international organizations. Immunity of the latter has to be studied in the context of remedies that are available for bringing claims against an organization, according to the rules of that organization or to arbitration agreements. There is a need to avoid the risk of a denial of justice. Thus, for example, in the above-mentioned judgement of the Labour Court of Geneva, the Court considered whether there was a "real possibility of recourse to the administrative tribunal of the defendant Organization".[7] More recently, in *Pistelli* v. *Istituto universitario europeo*, the Italian Court of Cassation ruled that the immunity of an international organization from jurisdiction is admissible when the rules of the organization assure "jurisdictional protection of the same rights and interests in front of an independent and impartial court".[8]

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[1] *Yearbook ... 1992*, vol. II (Part Two), p. 53, para. 362.

[2] *ZM* v. *Permanent Delegation of the League of Arab States to the United Nations, Judgement of 17 November 1993*, ILR, vol. 116, pp. 643 *et seq.*, at p. 647.

[3] *Iran–United States Claims Tribunal* v. *AS, Judgement of 20 December 1985, ibid.*, vol. 94, pp. 327 *et seq.*, at p. 329.

[4] *T. M.* v. *Ligue des États Arabes, Judgement of 3 December 2001*, available at www.cassonline.be.

[5] *Weidner* v. *International Telecommunications Satellite Organization, Judgement of 21 September 1978*, ILR, vol. 63, p. 191 *et seq.*

[6] *Southeast Asian Fisheries Development Center* v. *Acosta, Judgement of 2 September 1993*, available at www.lawphil.net.

[7] *ZM* v. *Permanent Delegation of the League of Arab States to the United Nations* (see footnote 2 above), p. 649.

[8] *Pistelli* v. *Istituto universitario europeo, Judgement of 28 October 2005*, Rivista di Diritto Internazionale, vol. 89 (2006), pp. 248 *et seq.*, at p. 254.

8. **Major issues raised by the topic**

— Definition of international organizations which the study is intended to consider.

— Immunity from contentious jurisdiction. In particular: modalities to giving effect to immunity, consent to exercise of jurisdiction, effects of participation in a proceeding before a court, counterclaims; questions relating to commercial transactions, contracts of employment, property cases, participation in companies or other collective bodies; effect of an arbitration agreement.

— Immunity from measures of constraint in connection with proceedings before a court.

— Protection of the rights of natural and legal persons in relation to jurisdictional immunities of international organizations. In particular, the role of alternative means of settling disputes.

9. **Applicable treaties, general principles or relevant legislation or judicial decisions**

A few references to trends in treaties and national legislation and judicial decisions were made above. While treaties and legislation refer to a limited number of organizations, some judicial decisions considered also the question of jurisdictional immunity of international organizations in general terms.

10. **Existing doctrine**

Current views on the existence of rules of general international law covering immunities of international organizations are divided. While some studies still deny the existence of any such rule,[9] the prevailing trend in recent works is more favourable to admitting that some form of immunity[10]—sometimes, even absolute immunity—is part of international law. Immunity of jurisdiction from execution is more widely admitted.[11] A selected bibliographical note is attached.

11. **Advantages of preparing a draft convention**

Given the number of instances in which treaties concerning immunities of international organizations do not apply and given also the general character of most treaty provisions, it would be in the interest of all concerned that the rules of international law governing immunities of international organizations be more easily ascertainable. Due consideration should be made, where appropriate, to the need for progressive development. The increased importance of economic activities of international organizations, often in direct competition with the private sector, adds urgency to the matter.

Should the topic be retained, it would lend itself to the preparation of a draft convention. This would apply alongside the United Nations Convention on Jurisdictional Immunities of States and Their Property.

[9] See P. Glavinis, *Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées*, Paris, Librairie générale de droit et de jurisprudence, 1990, p. 122; S. De Bellis, *L'immunità delle organizzazioni internazionali dalla giurisdizione*, Bari, Cacucci Editore, 1992, p. 18; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*. Brussels, Bruylant, 1998, p. 230; and H. Fox, *The Law of State Immunity*, Oxford University Press, 2002, p. 469.

[10] See J.-F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Collected Courses of the Hague Academy of International Law, 1953–III*, vol. 84 (1955), pp. 209 *et seq.*, at p. 304; E. H. Fedder, "The functional basis of international privileges and immunities: a new concept in international law and organization", *American University Law Review*, vol. 9 (1960), pp. 60–69.; and B. Conforti, *Diritto internazionale*, Naples, Editoriale Scientifica, 2002, p. 259. Dominicé held that a customary rule has come in to existence only with regard to the United Nations and the specialized agencies (see Ch. Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales", *Collected Courses of the Hague Academy of International Law, 1984-IV*, vol. 187 (1985), pp. 145 *et seq.*, at p. 220).

[11] See F. Schröer, "Sull'applicazione alle organizzazioni internazionali dell'immunità statale dalle misure esecutive", *Rivista di diritto internazionale privato e processuale*, vol. 13 (1977), pp. 575 *et seq.*, at p. 584; Dominicé, *loc. cit.* (see footnote 10 above), p. 225; J. Moussé, *Le contentieux des organisations internationales et de l'Union européenne*, Brussels, Établissements Émile Bruylant, 1997, pp. 376–377; and C. Zanghì, *Diritto delle organizzazioni internazionali*, Turin, G. Giappichlli Editore, 2001, p. 330.

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Annex III

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

(Secretariat)

A. Introduction

1. The topic "Protection of persons in the event of disasters" would fall within the category of "new developments in international law and pressing concerns of the international community as a whole" as contemplated by the Commission, at its forty-ninth session, upon establishing guidelines for the inclusion of topics in the long-term programme of work.[1] The focus of the topic would, at the initial stage, be placed on the protection of persons in the context of natural disasters or natural disaster components of broader emergencies, through the undertaking of activities aimed at the prevention, and mitigation of the effects, of natural disasters as well as through the provision of humanitarian relief in the immediate wake of natural disasters. In light of the present state of development of existing international law regulating disaster relief, as well as the perceived need for a systematization of such law, particularly from among the ranks of the disaster relief community (both within and beyond the United Nations), the consideration of such a topic by the Commission is merited.

2. Natural disasters are, however, a subset of a broader range of types of disasters, which include man-made and other technological disasters. A further distinction can be made between emergencies arising from the onset of a single (natural or other type of) disaster, and "complex emergencies" which may involve multiple disasters, including natural and man-made (such as armed conflict).[2] Furthermore, it is appreciated that such a distinction between natural and other types of disasters, such as technological disasters, is not always maintained in existing legal and others texts dealing with disasters, nor that it is always possible to sustain a clear delineation. Accordingly, while it is proposed that the more immediate need may be for a consideration of the activities undertaken in the context of a natural disaster, this would be without prejudice to the possible inclusion of the consideration of the international principles and rules governing actions undertaken in the context of other types of disasters.

B. Background

Natural disasters

3. Leaving aside considerations of the impact of human activities on the environment, and their potential causal link to the frequency and severity of natural disasters, such disasters are distinguished by the fact that they emanate from naturally occurring episodes in the geological or hydrometeorological, as the case may be, history of the planet. Such "natural hazards" include: earthquakes, floods, volcanic eruptions, landslides, hurricanes (typhoons and cyclones), tornadoes, tsunamis (tidal waves), droughts and plagues. They are also typically costly in terms of loss of life and destruction of property.[3] Earthquakes often happen without warning and with widespread destruction and loss of life owing to the collapse of buildings, landslides or tsunamis.[4] While hurricanes (typhoons and cyclones), tornadoes and even volcanic eruptions may be predicted in advance, their onset can be sudden, violent and destructive over a large geographic area, resulting in widespread dislocation, disruption in food and clean water supply and the outbreak of epidemics. In contrast, drought, food shortage or crop failure leading to famine have a slow onset but have equally devastating ramifications. By undermining development gains in a short period of time, such disasters also constitute a major impediment to sustainable development and poverty reduction.[5]

4. The fact that such events become "disasters" speaks more to the susceptibility of human beings to the adverse effects of natural hazards.[6] Indeed, with the burgeoning presence of human settlements in historically disaster-prone zones, such as floodplains, coastal areas and on geological faults (so-called earthquake "hotspots"), the risks of loss and destruction have increased commensurately. In addition, nature knows no political boundaries. Many natural disasters affect several States at a time, or even entire regions, a point demonstrated by the 2004 tsunami. In such cases, disaster relief efforts take on an international dimension and character.

Contemporary activities in the provision of disaster relief

5. While in a disaster the responsibility for response and coordination lies with the affected State, international

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[1] *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238.

[2] Complex emergencies have been defined as "a humanitarian crisis in a country, region or society where there is a total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing United Nations programme" (Working Paper on the Definition of Complex Emergency, Inter-Agency Standing Committee, December 1994).

[3] According to one estimate, in 2004 alone, "there were 360 disasters affecting more than 145 million people and causing more than [US]$103 billion in material damage" (Report of the Secretary-General on the "Strengthening of the coordination of emergency humanitarian assistance of the United Nations", 2005, document A/60/87–E/2005/78, para. 4).

[4] *Ibid*. It is estimated that the massive earthquake that took place off the coast of Sumatra on 26 December 2004 and the resulting tsunami wave, which affected 12 countries across the entire Indian Ocean, killed more than 240,000 people and displaced well over a million more.

[5] Hyogo Declaration, adopted at the World Conference on Disaster Reduction, on 22 January 2005 (A/CONF.206/6 and Corr.1, resolution 1).

[6] See footnote 45 below for a discussion of the term "hazard" and its link to "disasters".

assistance may be requested by such a State. Indeed, the involvement of the international community is not limited to multinational disasters, but may be specifically requested by individual States seeking assistance in coping with the outcome of catastrophic events which take place entirely within their borders. Today, a diverse group of entities, including international organizations such as the United Nations and its specialized agencies, the major donor community and non-governmental organizations, devote a substantial amount of resources to providing assistance to States and their populations which have been adversely affected by disasters.[7]

6. The General Assembly, in resolution 46/182 of 19 December 1991, recognized the key activities undertaken in this area as being: disaster prevention and mitigation; preparedness including through enhanced early-warning capacities; improving standby capacity such as contingency funding arrangements; issuing consolidated appeals for assistance; and providing coordination, cooperation and leadership in the provision of disaster relief.[8] Such a classification of activities remains largely relevant today, even though the type of activities undertaken have evolved considerably since 1991.

7. At the operational level, time is of the essence in the wake of a disaster, with on-site coordination of response assets in real time being of particular importance.[9] Yet, humanitarian relief staff typically face a number of challenges in carrying out their mandates. These include: difficulties with sectoral coordination (both within and between sectors); limitations on the ability to mobilize technical expertise within the necessary timeframe; capacity gaps in water and sanitation, and shelter and camp management and protection; limitations on the availability of adequate and prompt funding; difficulties with national and local preparedness and response capacity deficiencies; and deliberate targeting and killing of humanitarian staff.

8. While some obstacles are of a technical nature, others are legal, where a regulatory framework would substantially expedite technical arrangements. Examples include inadequacies in existing regulatory frameworks, often designed for times of normalcy but ill-suited or ill-equipped to facilitate response measures during emergency situations. Expedited access for humanitarian relief personnel to the theatre of disaster may be impeded by visa, immigration and customs formalities, as well as overflight and landing rights procedures and clearances. Logistical bottlenecks and delays at trans-shipment points may arise from the imposition of export and import controls as well as documentation and customs duties. Questions may arise relating to immunities and privileges as well as to the delimitation of liability. In addition, the safety of humanitarian relief staff, particularly United Nations and associated personnel, has recently been a matter of interest for the international legal community.[10] In complex emergencies, these problems may be compounded by the prevailing political situation in the State confronted by a natural disaster.

Protection of victims

9. Humanitarian assistance, including disaster relief, is undertaken, *inter alia*, within the broader policy context of the question of the protection of victims of disasters, including natural disasters—an issue which continues to be the subject of discussion within the disaster relief community.[11] The present proposal is nonetheless also to be viewed as located within contemporary reflection on an emerging principle entailing the responsibility to protect,[12] which, although couched primarily in the context of conflict, may also be of relevance to that of disasters.

10. Of the three specific responsibilities identified in 2004 by the High-Level Panel on Threats, Challenges and Change as implicit in the overall responsibility to protect, the responsibility of the international community to prevent is considered the most pertinent to the topic at hand.[13] The principle of prevention, including through risk reduction, is well established in the field of disaster relief and was, most recently, reaffirmed in the Hyogo Declaration[14] adopted at the World Conference on Disaster Reduction held in January 2005. While recognizing the importance of involving all stakeholders, including regional and international organizations and financial institutions, civil society, including non-governmental organizations and volunteers, the private sector and the scientific community, the declaration affirms the primary responsibility of States to protect the people and property on their territory from hazards, whether natural or induced by human processes.[15]

C. Brief survey of existing norms and rules

11. The various activities undertaken at the international level in response to the incidence of disasters have come to be regulated by a series of legal norms which, taken

[7] Within the United Nations, the responsibility for coordination of international response to disasters devolves to the United Nations Relief Coordinator who is also the Under-Secretary General for Humanitarian Affairs responsible for the Office for the Coordination of Humanitarian Affairs (OCHA).

[8] The resolution further recognizes the link between relief, rehabilitation and development.

[9] See A. Katoch, "International natural disaster response and the United Nations", in V. Bannon (ed.), *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges*, Geneva, IFRC, 2003, p. 48.

[10] See the Convention on the Safety of United Nations and Associated Personnel, adopted in 1994, as well as the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, adopted by the General Assembly, in resolution 60/42 of 8 December 2005 (extending the scope of the 1994 Convention to cover United Nations operations established, *inter alia*, for the purposes of delivering emergency humanitarian assistance subject to the possibility that host States may make a declaration "opting out" of such a regime where humanitarian assistance is delivered for the sole purpose of responding to a natural disaster).

[11] See "Humanitarian Response Review: an independent report commissioned by the United Nations Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs" (August 2005), para. 4.2, pp. 30–31.

[12] See Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2004, document A/59/565 and Corr.1.

[13] It is proposed that the International Law Commission, in accordance with its traditional approach of focusing on the peaceful interaction between States, not consider the question of the responsibility to react in response, including through coercive measures and, in extreme cases, military intervention.

[14] See footnote 5 above, resolution 1.

[15] *Ibid.*, operative paragraphs 2 and 4, respectively.

collectively, have been referred to as "international disaster response law".[16] International disaster response law is not an entirely new area of international law.[17] Its origins may be traced back at least to the mid-eighteenth century, when Emer de Vattel wrote:

when the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk.[18]

[I]f a Nation is suffering from famine, all those who have provisions to spare should assist it in its need, without, however, exposing themselves to scarcity. … To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would absolutely refuse to do so. … Whatever be the calamity affecting a Nation, the same help is due to it.[19]

12. In its modern form, international disaster response law denotes those rules and principles for international humanitarian assistance that apply in the context of a disaster, whether natural or technological, in peacetime.[20] More specifically the "core" of international disaster response law has been described as being "[t]he laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response activities in times of non-conflict related disasters, which includes preparedness for imminent disaster and the conduct of rescue and humanitarian assistance activities".[21]

13. In themselves, disasters have not been viewed as a direct source of international rights and obligations. However, they have on occasion led to the conclusion of international agreements.[22] Today, international disaster response law is composed of a relatively substantial body of conventional law, including a number of multilateral (both global and regional)[23] agreements as well as a significant network of bilateral treaties which has emerged in Europe and elsewhere.[24] Many of these agreements relate to the provision of mutual assistance, regulating requests for, and offers of, assistance, facilitation of entry into sovereign territory, technical cooperation, information sharing and training. Other common provisions relate to the regulation of access of personnel and equipment and their internal movement, entry of relief goods and customs, status, immunity and protection of personnel, and costs relating to disaster relief operations.[25]

14. A further source of rules can be found in a substantial number of memoranda of understanding and headquarters agreements, typically entered into between intergovernmental or non-governmental organizations, and States. While many of these instruments tend to be context-specific, it is still possible to discern a number of general or common provisions that have come to be accepted as reflecting the received view as a matter of international law.

15. In addition, a significant amount of the development of international disaster response law has occurred in the realm of "soft law" in the context of, *inter alia*, resolutions of the General Assembly, the Economic and Social Council of the United Nations and other bodies such as the International Conference of the Red Cross; political declarations; and codes of conduct, operational guidelines, and internal United Nations rules and regulations which provide interpretative tools for preparedness, mobilization, coordination, facilitation and delivery of humanitarian assistance in times of disaster.[26]

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[16] The title of the present proposal refers to disaster "relief" by way of clarifying the broader scope of the topic, i.e. not limited to the "response" phase. However, to the extent that the reference to "response" may include other related actions such as pre-disaster risk-mitigation activities, the two phrases might be used interchangeably.

[17] See M. H. Hoffman, "What is the scope of international disaster response law?", in V. Bannon (ed.), *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges*, Geneva, IFRC, 2003, p. 13.

[18] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns,* Text of 1758, volumes I, II, III, IV, translation by Charles G. Fenwick with an introduction by Albert de Lapradelle, Carnegie Institution of Washington, 1916, vol. III, p. 114.

[19] *Ibid*., p. 115. He noted at the same time that if that State can pay for the provisions furnished they may be sold for a fair price, noting that "there is no duty of giving it what it can obtain for itself, and consequently no obligation of making a present of things which it is able to buy".

[20] See Hoffman, *loc. cit.* (footnote 17 above), p. 13.

[21] IFRC, "International Disaster Response Laws (IDRL): Project Report 2002–2003", 2003, p. 14.

[22] See J. H. W. Verzijl, *International Law in Historical Perspective*, Leiden, A. W. Sijthoff, 1973, p. 47.

[23] While only two major multilateral agreements dealing specifically with disaster relief have been adopted in the post-war era, namely the 1986 Convention on assistance in the case of nuclear accident or radiological emergency and the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted at the Intergovernmental Conference on Emergency Telecommunications, held at Tampere, Finland, from 16 to 18 June 1998), several other multilateral treaties may also be of relevance in that they deal with some aspects of disaster relief in the context of land, air and maritime transportation as well as customs procedures. Examples include the 1946 Convention on the Privileges and Immunities of the United Nations; the 1980 Convention concerning International Carriage by Rail; the 1944 Convention on International Civil Aviation; the 1965 Convention on facilitation of international maritime traffic; the 1990 Convention on temporary admission; the Convention on the simplification and harmonization of Customs procedures (adopted at Kyoto in 1973 under the auspices of the Customs Cooperation Council), as well as the (revised) International Convention on the Simplification and Harmonization of Customs Procedures (adopted at Kyoto in 1999 under the auspices of the World Customs Organization), which include provisions aimed at facilitating departure, entry or transit of relief supplies as well as easing customs procedures. Also of some relevance is the 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Optional Protocol (footnote 10 above), which, *inter alia,* establishes the duty of States to prevent and punish crimes against a specific class of protected personnel.

[24] Regional agreements include the 1987 Council of Europe Open Partial Agreement for the Prevention of, Protection Against and Organisation of Relief in Major Natural and Technological Disasters, Resolution (87) 2 (adopted by the Committee of Ministers on 20 March 1987) and 1960 Agreement on the temporary importation, free of duty, of medical, surgical and laboratory equipment for use on free loan in hospitals and other medical institutions for purposes of diagnosis or treatment; the 1991 Inter-American Convention to Facilitate Disaster Assistance (adopted at the twenty-first regular session of the General Assembly of the Organization of American States, held at Santiago, on 6 July 1991); and the 2005 Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response (adopted at Vientiane on 26 July 2005).

[25] See "International Disaster Response Laws (IDRL): Project Report 2002–2003" (footnote 21 above), p. 16.

[26] See, for example, the "Measures to Expedite International Relief", adopted at the 23rd International Conference of the Red Cross, res. 6, in ICRC/IFRC, *Handbook of the International Red Cross and Red Crescent Movement*, 13th ed., Geneva, 1994, p. 811–815); resolution 2102 (LXIII) of the Economic and Social Council, of 3 August 1977; the Declaration of principles for international humanitarian relief to the civilian population in disaster situations of 1969, adopted by the 21st

The contemporary "cornerstone" resolution is General Assembly resolution 46/182 of 19 December 1991, which, together with other instruments such as the resolution of the International Conference of the Red Cross on measures to expedite international relief,[27] is a key component of an expanding regulatory framework which built upon, and has been supplemented by, a series of General Assembly resolutions[28] as well as other instruments, the most recent being the Hyogo Framework for Action.[29]

Applicability of international humanitarian law and other relevant rules of international law

16. Usually, commentators point to international humanitarian law as a point of reference and comparison in any efforts to develop international disaster response law.[30] The linkages between the two fields reflect a common heritage in the humanitarian impulse and relate to the unique respective missions of the ICRC and the IFRC. While it is doubtful whether international disaster response law would develop along similar lines as that in international humanitarian law,[31] there exist examples of rules of international humanitarian law which would be applicable to the provision of disaster relief, even if only by analogy.

17. Similarly, some principles and aspects of other rules of international law, such as those dealing with the environment, human rights, refugees and internally displaced persons, may be of relevance to a broader legal framework for disaster relief.

Systematization through codification and progressive development

18. While there is a growing recognition of the existence of international disaster response law, there also exists an appreciation that the field largely lacks coherence as a set of rules constituting a single body of law.[32] Proposals for codification can be traced as far back as the late nineteenth century to unsuccessful suggestions to extend the "Geneva Law", regulating international humanitarian law, also to victims of disasters. The establishment of the International Relief Union in 1927,[33] under the auspices of the League of Nations, signalled the first major attempt in the twentieth century to provide a legal and institutional framework for the provision of international relief for disasters. The preamble of the Convention establishing the Union specifically envisaged as one of its purposes "to further the progress of international law in [the] field".

19. Although the Union proved largely ineffective and was superseded by the United Nations and its specialized agencies, several proposals for the codification of some aspects of international disaster response law have continued to be made in subsequent years.[34] In the United Nations, as early as 1971, the General Assembly, in resolution 2816 (XXVI), invited potential recipient countries to consider appropriate legislative and other measures to facilitate the receipt of aid, including overflight and landing rights and necessary privileges and immunities for relief units. In the early 1980s, a study was undertaken, on the initiative of the United Nations Disaster Relief Coordinator, on the possibility of negotiating an instrument on disaster relief operations. It was subsequently examined in 1983 by a group of international legal experts, chaired by the then-Chairperson of the International Law Commission, and resulted in a proposal by the Secretary-General for a draft international convention on expediting the delivery of emergency relief.[35] The proposal was not considered further after its initial presentation in the Economic and Social Council in 1984, nor did a subsequent proposal for a convention on the duty of humanitarian assistance, in the late 1980s, meet with approval, owing largely to resistance from several major non-governmental organizations.[36] A similar initiative was made at the fifteenth session of the World Food Council (of the World Food Programme), held in Cairo in 1989, which had before it a proposal for an international agreement on safe passage

International Conference of the Red Cross, resolution 26, *Handbook of the International Red Cross and Red Crescent Movement*, p. 808; the Recommendation of the Customs Co-operation Council to Expedite the Forwarding of Relief Consignments in the Event of Disasters, of 8 June 1970, document T2-423 (available at www.wcoomd.org/); *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response*, Geneva, Sphere Project, 2004; and the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, Annex VI to the resolutions of the 26th International Conference of the Red Cross and Red Crescent, *International Review of the Red Cross*, No. 310 (January–February 1996), pp. 119 *et seq.*

[27] See footnote 26 above.

[28] See General Assembly resolutions 2816 (XXVI) of 14 December 1971; 36/225 of 17 December 1981; 37/144 of 17 December 1982; 39/207 of 17 December 1984; 41/201 of 8 December 1986; 45/221 of 21 December 1990; 48/57 of 14 December 1993; 49/139 of 20 December 1994; 51/194 of 17 December 1996; 52/12 of 12 November 1997; 52/172 of 16 December 1997; 54/233 of 22 December 1999; 55/163 of 14 December 2000; 56/103 of 14 December 2001; 56/164 of 19 December 2001; 56/195 of 21 December 2001; 57/150 of 16 December 2002; 57/153 of 16 December 2002; 58/177 of 22 December 2003; and 59/231 of 22 December 2004.

[29] Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, adopted on 22 January 2005 at the World Conference on Disaster Reduction (A/CONF.206/6 and Corr.1, resolution 2).

[30] See Hoffman, *loc. cit.* (footnote 17 above), pp. 14–15.

[31] *Ibid.* p. 15.

[32] See IFRC, "International Disaster Response Law: A Preliminary Overview and Analysis of Existing Treaty Law. Summary of the study on existing treaty law prepared by Professor Horst Fischer, Bochum University, Germany" (January 2003), p. 2.

[33] Created by the Convention and Statute establishing an International Relief Union, which entered into force in 1932 with 30 States parties. See B. Morse, "Practice, Norms and Reform of International Rescue Operations", *Collected Courses of the Hague Academy of International Law, 1997-IV*, vol. 157 (1980), pp. 121–194, at pp. 132–133.

[34] For example, in 1980, the International Law Association, at its fifty-ninth conference, in Belgrade, adopted a report containing a draft agreement for cooperation in disaster relief. See International Law Association, *Report of the Fifty-ninth Conference, Belgrade, 17–23 August 1980*, London, 1982, p. 5.

[35] See document A/39/267/Add.1–E/1984/96/Add.1.

[36] See document A/45/587, at paras 43–44. A similar resistance had been earlier expressed to a proposal for the consideration of a "new international humanitarian order", which entailed, *inter alia*, the elaboration of an internationally recognized framework of comprehensive legal principles governing relations among peoples and nations in times of war and peace; see A/40/348.

of emergency food aid to people affected by civil strife, war and natural disasters.[37]

20. Summing up the situation in 1990, the Secretary-General, in his report on humanitarian assistance to victims of natural disasters and similar emergency situations, again acknowledged the perceived desirability of new legal instruments in order to overcome the obstacles in the way of humanitarian assistance, but limited his suggestions to "new legal instruments such as declarations of the rights of victims of disaster to relief and bilateral agreements between donors and recipient countries as well as between recipient countries".[38]

21. The idea of developing a legal framework for international assistance in the wake of natural disasters and environmental emergencies has been revived in recent years. In his 2000 report on "Strengthening of the coordination of emergency humanitarian assistance of the United Nations",[39] the Secretary-General noted that such a framework may outline responsibilities of States receiving and providing assistance. Accordingly, he suggested that Member States consider drafting a convention on the deployment and utilization of international urban search and rescue teams, asserting that:

> [s]uch a convention would provide a working framework for complex issues, such as utilization of air space, customs regulations for import of equipment, respective responsibilities of providing and recipient countries, that have to be resolved prior to international response to a sudden-onset natural disaster.[40]

22. Similarly, the *World Disasters Report 2000*, issued by the IFRC, also lamented generally the limited legal progress. After noting that elements of law which assist in humanitarian relief work exist in some treaties, the report described the situation as follows:

> [a]t the core is a yawning gap. There is no definitive, broadly accepted source of international law which spells out legal standards, procedures, rights and duties pertaining to disaster response and assistance. No systematic attempt has been made to pull together the disparate threads of existing law, to formalize customary law or to expand and develop the law in new ways.[41]

23. Moreover, increased emphasis has been placed on the risk reduction and prevention components of the topic following the adoption of the Hyogo Declaration, and the Hyogo Framework for Action 2005–2015 which specifically calls for consideration to be given to, *inter alia*, the strengthening of relevant international legal instruments related to disaster risk reduction.[42]

D. Proposal for consideration of the topic by the Commission

24. The objective of the proposal would be the elaboration of a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities, clarifying the core legal principles and concepts and thereby creating a legal "space" in which such disaster relief work could take place on a secure footing. A possible model would be the 1946 Convention on the Privileges and Immunities of the United Nations which, on the narrow aspect of privileges and immunities, serves as the basic reference point for the prevailing legal position, and which is routinely incorporated by reference into agreements between the United Nations and States and other entities. Similarly, the envisaged text regulating disaster relief could serve as the basic reference framework for a host of specific agreements between the various actors in the area, including, but not limited to, the United Nations.

25. Given the nature of what is a rapidly developing field, it is anticipated that the work on the topic would be primarily limited to the codification of existing norms and rules, with emphasis on progressive development as appropriate. The focus would thus be on the concretization of existing rules to facilitate activities being undertaken on the ground, as opposed to unnecessarily developing new norms which may inadvertently constrain such operational activities in an unforeseen manner.

Brief substantive overview

(a) *Scope*

26. As already mentioned (paras. 1–2 above), it is proposed that the Commission initially limit the scope *ratione materiae* of the topic to natural disasters (disasters linked to natural hazards), or natural disaster components of broader emergencies. At the same time, some reflection might be had as to the implications of drawing such distinction between natural and other disasters, even if by way of a "without prejudice" clause. In addition, various natural disasters have different distinguishing features: an

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[37] See *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 19* (A/44/19), Part One. At its sixteenth session in Bangkok in 1990, the Council's Executive Director was requested by Council Ministers to "further consult with all concerned institutions on the development of guidelines for more effective measures to ensure the safe passage of emergency food aid" (*ibid*., *Forty-fifth Session, Supplement No. 19* (A/45/19), para. 31). It also recommended that the Secretary-General consider endorsement by the General Assembly of an international draft agreement (*ibid*.).

[38] Document A/45/587, paras. 41 and 45.

[39] Document A/55/82–E/2000/61.

[40] *Ibid*., para. 135 (*m*).

[41] P. Walker and J. Walker (eds.), *World Disasters Report 2000*, Geneva, IFRC, 2000, p. 145. In 2001, the IFRC initiated a study on the adequacy of existing legal and other mechanisms to facilitate humanitarian activities in response to natural and technological disasters. The study seeks to identify the most common legal problems in international disaster response, analyse the scope and implementation of existing international standards and propose solutions for gap areas. See IFRC, *International Disaster Response Law: Briefing Paper*, April 2003, p. 2, and *Revised IDRL Strategic Plan*, 2005–2007, available at www.ifrc.org/idrl. In the preamble of its resolution 57/150 of 16 December 2002, the General Assembly noted this development and stressed the need for intergovernmental oversight, particularly with regard to principles, scope and objectives. In 2003, the 28th International Conference of the Red Cross and Red Crescent (comprised of all components of the Red Cross/Red Crescent Movement and the States parties to the 1949 Geneva Conventions for the protection of war victims) mandated the IFRC and national societies to "lead collaborative efforts, involving States, the United Nations and other relevant bodies, in conducting research and advocacy activities" in this area and to report back to the International Conference in 2007 (IFRC, *28th International Conference of the Red Cross and Red Crescent, Geneva, 2–6 December 2003. Declaration, Agenda for Humanitarian Action, Resolutions*, p. 25 (*Final Goal 3.2.6*)). For a different perspective on the efficacy of the resort to international law in this area, see D. P. Fidler, "Disaster relief and governance after the Indian Ocean tsunami: what role for international law?", *Melbourne Journal of International Law*, vol. 6, No. 2 (2005), pp. 458 *et seq*., at pp. 471–473.

[42] Hyogo Framework for Action 2005–2015 (see footnote 29 above), para. 22.

analysis of such features may have to be undertaken in the process of delineating the scope *ratione materiae*.

27. As regards the scope *ratione loci*, the topic would cover primarily those rules governing the theatre of the disaster, but would also extend to where the planning, coordination and monitoring efforts occur. *Ratione temporis*, the scope of the topic, would include not only the "response" phases of the disaster, but also the pre- and the post-disaster phases.[43]

28. Concerning the scope *ratione personae*, it is in the nature of the topic that, while State practice exists, it is primarily through the organs of intergovernmental organizations, such as the United Nations, as well as through the activities of non-governmental organizations and other non-State entities, such as the IFRC, that much of the activity occurs and, accordingly, where a large part of the development of legal norms takes place. While earlier instruments tend to exclude non-governmental organizations from their scope of application, whether explicitly or implicitly, it is proposed that the Commission adopt a broader approach to also cover the staff of such entities. This would accord with current trends, as evidenced by the approach taken in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, which extends, for example, the provisions on privileges and immunities to staff members of non-governmental organizations involved in the provision of telecommunication assistance as envisaged in the Convention.[44] It would also accord with the contemporary reality that a significant portion of the operational component of disaster relief operations is undertaken by non-governmental organizations.

29. Since existing international human rights obligations apply in the context of natural disasters, subject to the possibility of derogation in the situation of emergencies to the extent permissible under applicable international law, it may also be necessary to consider the human rights implications of the plight of victims of such disasters, particularly as regards the right to protection and access to disaster relief and basic needs. This may be limited to a reaffirmation of the affected State's obligation to respect and ensure the human rights of all individuals within its territory. Such reaffirmation may also be a factor in determining the emphasis to be placed on the scope of the topic *ratione personae*.

(b) *Definitions*

30. Defining the main concepts to be covered by a future text would be an important component of the work to be undertaken. Defining the terms "natural disaster" and "natural hazards"[45] would serve to distinguish other types of disasters, such as "technological disasters".

31. Examples of terms that have been defined in various texts relating, *inter alia*, to the provision of disaster relief include: "disaster relief personnel", "possessions of disaster relief personnel", "relief consignment", "United Nations relief operation", "international disaster relief assistance", "assisting State or organization", "receiving State", "transit State", "military and civil defence assets", "relief supplies", "relief services", "disaster mitigation", "disaster risk", "health hazard", "non-governmental organization", "non-State entities" and "telecommunications".

32. In addition, consideration might be given to the inclusion of specific technical terms relating to particular operational aspects of disaster relief, to the extent that it is decided to deal with such matters.

(c) *Core principles*

33. A number of core principles underpin contemporary activities in the realm of the protection of persons in the event of disasters. Many are a reflection of existing principles for humanitarian assistance, i.e., applicable in a context not limited to disaster relief for emergencies arising out of natural disasters, but nonetheless equally applicable. Others are taken from other fields such as international human rights law. While General Assembly resolution 46/182 of 19 December 1991, which adopted, *inter alia*, a set of Guiding Principles for emergency humanitarian assistance, is widely regarded as the key instrument, other similar pronunciations of principles also exist.[46] All share a common appreciation for the importance of humanitarian assistance for the victims of natural disasters and other emergencies.

34. Such principles include:[47]

— *The principle of humanity.* Human suffering is to be addressed wherever it exists, and the dignity and rights of all victims should be respected and protected;

— *The principle of neutrality.* The provision of humanitarian assistance takes place outside of the political, religious, ethnic or ideological context;

— *The principle of impartiality.* The provision of humanitarian assistance is based on needs assessments undertaken in accordance with internationally

[43] See footnote 16 above.

[44] Similarly, in the context of the protection regime established by the Convention on the Safety of United Nations and Associated Personnel, the General Assembly in resolution 58/82 of 9 December 2003, *inter alia*, took note of the development by the Secretary-General of a standardized provision for incorporation into the agreements concluded between the United Nations and humanitarian non-governmental organizations or agencies for the purposes of clarifying the application of the Convention to persons deployed by those organizations or agencies; see A/58/187.

[45] The Hyogo Framework for Action 2005–2015 (see footnote 29 above) places emphasis on the reduction of vulnerability and risk to a "hazard" which is defined as "[a] potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation. Hazards can include latent conditions that may represent future threats and can have different origins: natural (geological, hydrometeorological and biological) or induced by human processes (environmental degradation and technological hazards)" (para. 1, footnote 2).

[46] See, for example, the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief (footnote 26 above).

[47] Without prejudice to the applicability of some of the principles at a more general level.

recognized standards, giving priority to the most urgent cases of distress and in accordance with the principle of non-discrimination;

— *The principle of full respect for the sovereignty and territorial integrity of States, in accordance with the Charter of the United Nations.* Humanitarian assistance is provided with the consent of the affected country;

— *The principle of access*. States whose populations are in need of humanitarian assistance are to facilitate the work of intergovernmental and non-governmental organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which unrestricted access to affected areas and victims is essential;

— *The principle of non-discrimination*. The provision of relief is to be undertaken without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, age, disability or other status;

— *The principle of accountability.* Humanitarian assistance agencies and other entities providing humanitarian assistance are accountable to the people they assist and to those from whom they accept resources;

— *The principle of cooperation.* International cooperation[48] should be provided in accordance with international law and respect for national laws;

— *The principle of protection.* It is the primary responsibility of each State to take care of the victims of natural disasters and other emergencies occurring on its territory;

— *The principle of security.* The safety and security of humanitarian staff and their cargo and property is the basis upon which such assistance is provided;

— *The principle of prevention.* States are to review existing legislation and policies to integrate disaster risk reduction strategies into all relevant legal, policy and planning instruments, both at the national and international levels, in order to address vulnerability to disasters;

— *The principle of mitigation.* States are to undertake operational measures to reduce disaster risks at the local and national levels with a view to minimizing the effects of a disaster both within and beyond their borders.

35. It would have to be considered both the extent to which these principles are reflections of existing specific legal obligations of States and rights of individuals or whether they apply at a more general level.

(d) *Specific provisions*

36. It is proposed that the Commission also consider a number of specific legal questions relating to the operational aspects of the provision of disaster relief. These would not be limited to lacunae in the current legal framework. Instead, the approach would be more holistic, with a view to covering most of the legal aspects of the activities being undertaken in this area—even if only at a generalized level.

37. The following appendix sets out an outline of the issues that would require consideration in any legal instrument in this field.

[48] Both among States and between the affected State and the entities involved in the international humanitarian relief operation.

Appendix

PROPOSED OUTLINE

1. General provisions
    (*a*) Scope of application
    (*b*) Definitions
2. Applicable principles
    (*a*) Humanity
    (*b*) Neutrality
    (*c*) Impartiality
    (*d*) Sovereignty and territorial integrity of States, in accordance with the Charter of the United Nations
    (*e*) Access
    (*f*) Non-discrimination
    (*g*) Accountability
    (*h*) Cooperation
    (*i*) Protection
    (*j*) Security
    (*k*) Prevention
    (*l*) Mitigation
3. Disaster relief and protection
    (*a*) Right of victims to protection, safety and security
    (*b*) Right of victims to access to disaster relief and basic needs
    (*c*) Obligation of receiving State to protect disaster relief staff, their property, premises, facilities means of transport, relief consignments and equipment to be used in connection with the assistance
4. Provision of disaster relief
    (*a*) Conditions for the provision of assistance
    (*b*) Offers and requests for assistance
    (*c*) Coordination
    (*d*) Communications and exchange of information
    (*e*) Distribution and use of relief assistance
    (*f*) Costs relating to disaster response operations
    (*g*) Conformity with national laws, standards and regulations
    (*h*) Liability
    (*i*) Insurance
5. Access
    (*a*) Staff
        (i) Visas, entry and work permits
        (ii) Recognition of professional qualifications
        (iii) Freedom of movement
        (iv) Status
        (v) Identification
        (vi) Privileges and immunities
        (vii) Notification requirements
    (*b*) Relief consignments
        (i) Customs, duties, tariffs and quarantine
        (ii) Status
        (iii) Transportation and transit of goods
        (iv) Notification requirements
        (v) Identification
6. Disaster prevention and risk reduction
    (*a*) Early warning
    (*b*) Coordination activities
    (*c*) Training and information exchange

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Annex IV

PROTECTION OF PERSONAL DATA IN TRANSBORDER FLOW OF INFORMATION

(Secretariat)

1. It is proposed that the International Law Commission consider including the topic "Protection of personal data in the transborder flow of information" in its long-term programme of work.

A. Nature of the problem

2. Data collection or storage is not a new phenomenon. Public institutions and private entities, including natural and legal entities, have collected and kept data and records since time immemorial.[1] However, the radical and unimaginable changes brought about by advances in science and technology since the Second World War[2] and, more particularly, in information and communication technologies (ICTs),[3] from the 1960s on, have redefined ways in which information and personal data are generated, collected, stored, filed, disseminated and transferred. In particular, the Internet has proved a powerful global information infrastructure transcending the traditional physical boundaries, thereby challenging traditional conceptions of State sovereignty.[4] The electronic movement of data between States has become easier, cheaper, almost instantaneous and omnipresent. Time and space have been reduced remarkably. The data generated is detailed, processable, indexed to the individual and permanent.[5] The various actors—Governments, industry, other businesses and organizations and individual users—increasingly depend on ICTs for the provision of essential goods and services, the conduct of business and the exchange of information in a multitude of activities of human endeavour.[6] On a daily basis, personal data are collected in respect of individuals, for a variety of reasons, by various means and by a panoply of actors and kept by them in the public and private sectors.[7] When such data is shared or circulated by different actors, serious questions about the respect of the individual's right to privacy arise, although these concerns are not new.[8]

3. Public policy concerns over the invasion of privacy have ratcheted up the debate as new technologies have made identification and tracing of sources easier.[9] Improved technology in data surveillance, digital audio technology, integrated services digital network (ISDN), digital telephones, including mobile-phone location data, DNA and biometrics, black boxes, Radio Frequency Identification (RFID) chips and implantable GPS chips and their wide accessibility have commentators and civil libertarians warning, in Orwellian metaphor,[10] of the risk of turning into a surveillance society.[11]

4. Not surprisingly, the international community, most recently the World Summit on the Information Society (WSIS), has expressed concerns in the confidence

[1] Daniel J. Solove, in "Privacy and power: computer databases and the metaphors for information privacy", *Stanford Law Review*, vol. 53 (2000–2001), pp. 1393–1462, notes on page 1400 that in the eleventh century, William the Conqueror collected information about his subjects for taxation purposes. Many, if not all States, now conduct censuses periodically during which a variety of questions about personal details are asked.

[2] *Ibid*., p. 1402. The emergence of the mainframe computer in 1946 revolutionalized the collection of information.

[3] These include computers, cameras, sensors, wireless communication, the Global Positioning System (GPS), biometrics, remote sensing and other technologies.

[4] See J. S. Bauchner, "State sovereignty and the globalizing effects of the Internet: a case study of the privacy debate", *Brooklyn Journal of International Law*, vol. 26 (2000–2001), pp. 689–722.

[5] See J. Kang, "Information privacy in cyberspace transactions", *Stanford Law Review*, vol. 50 (1997–1998), pp. 1193–1294, at p. 1199.

[6] See General Assembly resolution 57/239 of 20 December 2002 on the creation of a global culture of cybersecurity. See also General Assembly resolution 59/220 of 22 December 2004, and paragraph 6 of the 2000 Ministerial declaration of the high-level segment [of the substantive session of 2000 of the Economic and Social Council] submitted by the President of the Council, *Official Records of the General Assembly, Fifth-fifth Session, Supplement No. 3* (A/55/3/Rev.1), chap. III.

[7] For example, information stored in computerized data files affecting individuals concerning banking, payroll, travel records, social security, insurance, as well as various subscriptions to membership clubs, newspapers and all other mundane social activities, are now easily filed and processed.

[8] The possibility that privacy issues may arise in horizontal relationships between natural persons or legal persons *qua* natural persons seems to distinguish the contemporary concerns from those of earlier decades when the vertical relationship concerns between the State and private individuals were dominant; see generally the 1974 report of the Secretary-General on the uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society (E/CN.4/1142 [and Corr.1] and Add.1–2). See also the 1973 report of the Secretary-General on respect for the privacy of individuals and integrity and sovereignty of nations in the light of advances in recording and other techniques (E/CN.4/1116 [and Corr.1] and Add.1–3 [and Add.3/Corr.1] and Add.4).

[9] See generally S. Hetcher, "Changing the social meaning of privacy in cyberspace", *Harvard Journal of Law and Technology,* vol. 15 (2001–2002), pp. 149–209. See also Asia–Pacific Economic Cooperation, *APEC Privacy Framework*, Singapore, APEC, 2005, preamble, para. 1. It may be noted that the increase in interconnectivity has also exposed information systems and networks to a growing number and wider variety of threats and vulnerabilities, heightening calls for cybersecurity. Computer hackers have challenged the integrity of networks. The Internet has been employed to engage in hate speech and different forms of criminality, including child pornography and identity theft.

[10] George Orwell, in *Nineteen Eighty-Four* (1949), used the metaphor "Big Brother".

[11] See the report of the American Civil Liberties Union, by Jay Stanley and Barry Steinhardt, "Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society" (2003), available at www.aclu.org.

and security in the use of ICTs and has sought ways to strengthen the "trust framework", including through the enhancement of the protection of personal information, privacy and data.[12] Moreover, an appeal has been made to the United Nations to prepare a legally binding instrument which sets out in detail the rights to data protection and privacy as enforceable human rights.[13]

5. Sceptics have questioned whether there was no more a law of "cyberspace" than there is a "law of the horse".[14] This debate—whether the cyberspace can or should be regulated—has essentially waned and is largely a historical milestone.[15] Nevertheless, a number of themes emerge and one of them has been what rights and expectations the users of the electronic and digital space have by virtue of their participation in cyberspace and their increasing reliance on ICTs.[16] Three different legal responses are discernible in dealing with computer-related problems.[17] Evidently, these responses are not so easily distinguishable and there are overlaps. In the first place, the existing law has often been applied to new situations; secondly, the existing law may not be adequate but is nevertheless adapted and applied to respond to new situations; thirdly, new problems demand the creation of new law.[18] In this law of cyberspace, various fields of law have been applied or adapted for application to address problems posed by ICTs.[19] On the one hand, the law of contracts, torts, evidence, intellectual property or conflict of laws is germane in resolving questions posed by the application and use of ICTs; and on the other, data protection has emerged as an example of the third type of legal response: a new law to be applied to a new situation.[20] The present proposal focuses on this aspect. Data protection is defined as the protection of the rights and freedoms and essential interests of individuals with respect to the processing of personal information relating to them, particularly in situations where ICTs aid the processing procedures.[21] Data protection aspires to ensure that the data is not abused and that the data-subjects have and retain the ability to correct errors.[22]

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[12] World Summit on the Information Society, Outcome Documents, Geneva 2003–Tunis 2005. The WSIS was held in two phases in Geneva on 10–12 December 2003, and in Tunis on 16–18 November 2005. The Geneva Declaration of Principles, the Geneva Plan of Action, the Tunis Commitment and the Tunis Agenda for the Information Society constitute the Outcome Documents and are available at www.itu.int/wsis.

[13] Montreux Declaration on "the protection of personal data and privacy in a globalised world: a universal right respecting diversity", adopted by Data Protection and Privacy Commissioners assembly in Montreux (Switzerland) for their Twenty-seventh International Conference of Data Protection and Privacy Commissioners, 14–16 September 2005, available at www.privacyconference2005.org. See also the interest in the subject as reflected in paragraph 51 of the declaration of the Heads of Governments and States of countries which share the French language at their summit in Ouagadougou, in November 2004:

> "Nous sommes convenus d'attacher une importance particulière à la protection des libertés et des droits fondamentaux des personnes, notamment de leur vie privée, dans l'utilisation des fichiers et traitements des données à caractère personnel. Nous appelons à créer ou consolider les règles assurant cette protection. Nous encourageons la coopération internationale entre les autorités indépendantes chargées dans chaque pays de contrôler le respect de ces règles." [We agreed to pay particular attention to the protection of freedoms and fundamental rights of persons, including of their private lives, in the use of files and the processing of data of a personal nature. We call to create or strengthen rules ensuring this protection. We encourage international cooperation between independent authorities responsible in each country for monitoring compliance with these rules.]

The Internet Governance Forum has also identified data protection as one of the issues requiring discussion, see generally www.intgovforum.org.

[14] F. H. Easterbrook, "Cyberspace and the law of the horse", *University of Chicago Legal Forum* (1996), pp. 207–216.

[15] See R. S. R. Ku, M. A. Faber and A. J. Cockfield, *Cyberspace Law: Cases and Materials*, New York, Aspen Law and Business, 2002, p. 37, quoted by V. N. Nguy in "Using architectural constraints and game theory to regulate international cyberspace behavior", *San Diego International Law Journal*, vol. 5 (2004), pp. 431–463, at p. 432.

[16] Other themes relate to governance: who should govern and ergo regulate the electronic and digital space offered by improved ICTs, how should this electronic and digital space be regulated and what tools can be applied to regulate it? Generally, the discursive response to the governance of electronic and digital space among the various actors has taken one of the following three positions: (*a*) a more traditional Statist approach, with the Government as the main regulator of Internet and ICT activities; (*b*) a *laissez faire* approach that perceives the Internet and ICT activities as a new social frontier where the traditional rules are inapplicable and inappropriate; instead self-rule and self-regulation are the dominant operational mantras; and finally (*c*) a more internationalist posture. The latter approach considers the global and interconnected nature of the Internet and the emergence of an information society as much more suited for regulation by international law. These responses overlap, interrelate and are mutually reinforcing. See generally V. Mayer-Schönberger, "The shape of governance: analyzing the world of Internet regulation", *Virginia Journal of International Law*, vol. 43 (2002–2003), pp. 605–673, who suggests these three types of cyberlaw discourses and terms them as (*a*) the State-based traditionalist discourse; (*b*) the cyber-separatist discourse; and (*c*) the cyber-internationalist discourse and provides a critique of each of these approaches (p. 612). The other theme is how should this electronic and digital space be regulated and what tools can be applied to regulate it?

[17] See F. W. Hondius, "Data law in Europe", *Stanford Journal of International Law*, vol. 16 (1980), pp. 87–111, at p. 88. The four kinds of constraints on human behaviour in ordinary life—the "real space", namely the law, social norms, the market and the "architecture," have all been deployed and interplay and interact in providing an analytical understanding of the law of the "cyberspace". Typically, the various actors involved in the transborder flow of data have used these tools to provide regulation at different levels. For example, the Government may pass a law on privacy and the providers of transmission lines and facilities may agree on a framework for technical compatibility standards, tariffs and protocols; the service providers may have their own privacy code; the users may conduct themselves in accordance with certain Internet etiquette; and the manufacturers may agree on certain codes by which compatibility and networking is assured. See generally L. Lessig, "The law of the horse: what cyberlaw might teach", *Harvard Law Review*, vol. 113 (1999–2000), pp. 501–549, who defines the architecture as "the physical world as 'we find it'" or "'how it has been made'" (p. 507). The architecture of the cyberspace is its code: "the software and the hardware that make the cyberspace the way it is" (p. 509).

[18] Hondius, *loc. cit.* (footnote 17 above), p. 88.

[19] The ITU focuses on the institutional infrastructure and technical functioning of transborder flows of data and other organizations are involved in the elaboration of standards for data processing, data transmission and data safety, see M. Bothe, "Data, transborder flow and protection", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1, Amsterdam, Elsevier, 1992, pp. 950–961, at p. 954. UNCITRAL adopted in 1985 a recommendation on the legal value of computer records (*Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), chap. VI, para. 360). In its resolution 40/71 of 11 December 1985, the General Assembly commended UNCITRAL on its recommendation. See also United Nations Convention on the Use of Electronic Communications in International Contracts. See also, for example, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*Official Journal of the European Communities*, No. L 167, 22 June 2001, p. 10) and the United States Digital Millennium Copyright Act of 1998.

[20] Hondius, *loc. cit.* (footnote 17 above), p. 88.

[21] *Ibid.*, p. 89.

[22] See B. P. Smith, review of *Policing Across National Boundaries, Yale Journal of International Law,* vol. 20 (1995), pp. 215–217, at pp. 216–217.

B. Brief survey of existing norms and rules

6. Data protection has been a concern of the international community since the late 1960s.[23] The general orientation has been to assure the free flow of information.[24] This general disposition has implications for the flow of international trade, protection of intellectual property and the protection of human rights, in particular the right to privacy. The various approaches taken by States or the industry tend to accentuate the differences in emphasis attached to the various values. A variety of binding and non-binding instruments, national legislations and judicial decisions regulate this area. Earlier efforts within the United Nations, the Council of Europe and the OECD culminated in the adoption of "first generation" instruments and provided synergies at the domestic level in the promulgation of "first generation" legislation, beginning in the 1970s.[25] These instruments recognize as the basic issue the conflict between the ideal of data protection and the ideal of free flow of information between States.[26] The state of Hesse in Germany was the first to enact general data protection legislation in 1970,[27] while Sweden was the first country to do so in 1973.[28] Some other States elected to adopt more sectoral, subject-specific legislation.[29]

7. Disparities and divergences in the implementation of the "first generation" legislation prompted action and further developments within the context of the European Union, and elsewhere. These led to the subsequent adoption of "second generation" instruments,[30] some of which,

[23] Paragraph 18 of the Proclamation of Teheran and resolution XI concerning human rights and scientific and technological developments of 12 May 1968 adopted by the International Conference on Human Rights (Final Act of the International Conference on Human Rights held in Teheran from 22 April to 13 May 1968 (United Nations publication, Sales No. E.68.XIV.2), A/CONF.32/41, pp. 5 and 12, respectively) expressed concern that recent scientific discoveries and technological advances, while opening vast prospects for economic, social and culture progress, may endanger the rights and freedoms of individuals and peoples. In its resolution 2450 (XXIII) of 19 December 1968, the General Assembly invited the Secretary-General to undertake a study of the problems in connection of human rights arising from developments in science and technology. See the reports referred to in footnote 8 above. The Commission on Human Rights was eventually seized with the matter; see, for example, Commission on Human Rights resolution 10 (XXVII) of 18 March 1971. The Council of Europe established the Committee of Experts on the Harmonisation of the Means of Programming Legal Data into Computers in 1968 and also constituted within the OECD was its first expert group, the Data Bank Panel in 1969. The subsequent expert group, the Group of Experts on Transborder Data Barriers and Privacy Protection, was established in 1978.

[24] The right to seek, receive and impart information and ideas regardless of frontiers is recognized in the Universal Declaration of Human Rights (art. 19) and the International Covenant on Civil and Political Rights (art. 19), as well as regional human rights instruments. See also article 10 of the 1950 European Convention on Human Rights; article 13 of the 1969 American Convention on Human Rights: "Pact of San José, Costa Rica"; article 9 of the 1981 African Charter on Human and People's Rights; the Concluding Document of Vienna Meeting 1986 of representatives of the participating States of the Conference on Security and Co-operation in Europe (ILM, vol. 28, No. 2 (1989), pp. 531 *et seq.*, at pp. 540–541, paras. 34–46); the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, of 29 June 1990 (*ibid.*, vol. 29, No. 5 (1990), pp. 1305 *et seq.*, at p. 1311, para. 9); the Document of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, of 3 October 1991 (*ibid.*, vol. 30, No. 6 (1991), pp. 1671 *et seq.*, at para. 26); and article 23 of the Cairo Declaration on Human Rights in Islam, adopted at the Islamic Conference of Foreign Ministers held in Cairo from 31 July to 5 August 1990.

[25] In 1973 the Council of Europe first adopted a resolution (Resolution (73) 22E, of 26 September 1973) on the protection of the privacy of individuals *vis-à-vis* electronic data banks in the private sector, and later, in 1974, another resolution (Resolution (74) 29E, of 20 September 1974) on the protection of the privacy of individuals *vis-à-vis* electronic data banks in the public sector. The OECD adopted the Guidelines on the Protection of Privacy and Transborder Flows of Personal data in 1980 and the Council of Europe adopted the Convention for the protection of individuals with regard to automatic processing of personal data in 1981. The efforts within the United Nations took longer to mature. The Commission on Human Rights in its resolution 10B (XXXIII), of 11 March 1977, requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to engage in a second study on relevant guidelines in the field of computerized personal files. Mr. Louis Joinet served as the Special Rapporteur of the Sub-Commission. The report recommended for consideration possible options for preparing minimum standards to be established by national and international legislation (see E/CN.4/Sub.2/1983/18). In resolution 45/95 of 14 December 1990, the General Assembly adopted the United Nations Guidelines concerning computerized personal data files, contained in resolution 1990/38 of 25 May 1990 of the Economic and Social Council. For follow-up developments concerning the implementation of the guidelines, see for example document E/CN.4/1995/75, prepared pursuant to decision 1993/113 of the Commission on Human Rights, of 10 March 1993; document E/CN.4/1997/67, prepared pursuant to decision 1995/114 of the Commission on Human Rights, of 8 March 1995; and document E/CN.4/1999/88 prepared pursuant to decision 1997/122 of the Commission on Human Rights, of 16 April 1997. In its decision 1999/109 on 28 April 1999, the Commission on Human Rights decided, without a vote: (*a*) to remove the question from its agenda, since the applicable guidelines are progressively being taken into consideration by States; and (*b*) to request the Secretary-General to entrust the competent inspection bodies with the task of ensuring the implementation of the guidelines by the organizations concerned within the United Nations system.

[26] See J. Bing, "The Council of Europe Convention and the OECD guidelines on data protection", *Michigan Yearbook of International Legal Studies,* vol. 5 (1984), pp. 271–303, at p. 273.

[27] Data protection derives its name from German "*Datenschutz*". Sweden: Data Act of 1973 (*Datalagen*, 1973:289), in force as of 1 July 1974. See also for example, Norway: Personal Data Registers Act of 1978 ((*lov om personregistre mm av 9 juni 1978 nr 48*), in force as of 1 January 1980; Denmark: Private Registers Act of 1978 (*lov nr 293 af 8 juni 1978 om private registre mv*) and Public Authorities' Registers Act of 1978 (*lov nr 294 af 8 juni 1978 om offentlige myndigheders registre*), both in force as of 1 January 1979; Canada: Human Rights Act of 1977 and the 1982 Federal Privacy Act; Germany: Federal Data Protection Act (*Bundesdatenschutzgesetz (BDSG)*) of 1977; France: Act No. 78–17 of 6 January 1978 on Data Processing, Files and Individual Liberties; United Kingdom: Data Protection Act 1984.

[28] Bing, *loc. cit.* (footnote 26 above), p. 271.

[29] In the United States, for example, the following pieces of legislation were passed: the Privacy Act of 1974, Pub. L. No. 93–579 (1974); the Fair Credit Reporting Act, Pub. L. No. 91–508 (1970); the Right to Financial Privacy Act, Pub. L. No. 95–630 (1978); the Cable Communications Policy Act of 1984, Pub. L. No. 98–549 (1984); and the Family Educational Rights and Privacy Act, Pub. L. No. 93–380 (1974).

[30] Article XIV, on general exceptions, of the 1994 WTO General Agreement on Trade in Services (Annex to the Marrakesh Agreement Establishing the World Trade Organization), envisages, *inter alia*, the possible adoption of enforcement of measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: … (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts". See also the 1995 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data, which provides a detailed privacy regulatory structure intended to be adopted by European Union member States domestically, *Official Journal of the European Communities*, No. L. 281, 23 November 1995, p. 31. See also the 2001 Additional Protocol to the Convention for the protection of individuals with regard to automatic processing of personal data, regarding supervisory authorities and transborder data flows; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002

(*Continued on next page.*)

like the European Union Directive, have implications for third States,[31] and "second generation" legislation.[32] Efforts have also been made to promote the enactment of legislation on the basis of model legislation prepared in a multilateral framework.[33] Some other States remain disposed towards the enactment of sectoral, subject-specific legislation.[34] The preferred options taken by States are deeply embedded in historical, legal and political traditions.[35] More generally, the laws adopted within the

(*Footnote 30 continued.*)

concerning the processing of personal data and the protection of privacy in the electronic communications sector, *Official Journal of the European Communities*, No. L 201, 31 July 2002, p. 37, which repeals the earlier Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, *ibid.*, No. L 24, 30 January 1998, p. 1. See also Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, *ibid.*, No. L 105, 13 April 2006, p. 54. Article 8 of the Charter of Fundamental Rights of the European Union proclaimed on 7 December 2000, not yet into force, contains a specific provision on the protection of personal data:

"1. Everyone has the right to the protection of personal data concerning him or her.

"2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

"3. Compliance with these rules shall be subject to control by an independent authority." (*Ibid.*, No. C 364, 18 December 2000, p. 1.)

In 2004, APEC also adopted an Asia–Pacific Economic Cooperation Privacy Framework to promote a consistent approach in information privacy as a means of ensuring the free flow of information in the Asia–Pacific region (see footnote 9 above).

[31] Article 25 of Directive 95/46/EC of the European Parliament and of the Council (see footnote 30 above) addresses the transfer of personal data to third countries on the basis of adequate level of protection, and article 26 sets forth circumstances in which derogations are permissible. In response to that Directive, the United States Department of Commerce adopted the Safe Harbor Privacy Principles encouraging companies to cooperate. The Safe Harbor Privacy Principles were issued by the United States Department of Commerce on 21 July 2000 (see *Federal Register*, vol. 65, Nos. 142 and 182 (2000); see also www.ita.doc.gov). European Commission decision 2000/520/EC of 26 July 2000 recognized these principles as providing adequate protection, *Official Journal of the European Communities*, No. L 215, 25 August 2000, p. 7. The adequacy of the level of protection appertaining to the transfer of data to the United States is a matter on which the Court of Justice of the European Communities rendered a judgment on 30 May 2006, in joined cases C-317/04 and C-318/04 (see *ibid.*, No. C 178, 29 July 2006, p. 1). The European Parliament *inter alia* sought the annulment of decision 2004/535/EC of 14 May 2004 of the Commission of European Communities, which authorized the transfer of air Passenger Name Records (PNR) data to United States Bureau of Customs and Border Protection, *ibid.*, No. L 235, 6 July 2004, p. 11. The Court annulled the decision of the Council on a technicality that the matter fell out of Community competence.

[32] Argentina: Ley de protección de los datos personales (Personal Data Protection Act) (Act No. 25.326) of 4 October 2000; Australia: 1988 Privacy Act and the 2000 Privacy Amendment Act (Private Sector); Austria: Personal Data Protection Act of 17 August 1999 and *Länder* legislation to implement the European Union Directive; Belgium: Law on Privacy Protection in relation to the Processing of Personal Data of 8 December 1992, modified by the implementation law of 11 December 1998 and Secondary Legislation of 13 February 2001; Brazil: Anteprojeto de Lei (draft law) No. 61/1996, and Anteprojeto de Lei (draft law) No. 151; Canada: 2001 Personal Information Protection and Electronic Document Acts (PIPEDA); Chile: Ley No. 19.628 sobre la protección de la vida privida (law on the protection of private life) of 28 August 1999; Cyprus: Processing of Personal Data (Protection of the Individual) Law of 2001, as amended in 2003, and the Regulation of Electronic Communications and Postal Services Law of 2004; Czech Republic: Personal Data Protection Act of 4 April 2000; Denmark: Act on Processing of Personal Data (Act No. 429) of 31 May 2000; Germany: Federal Data Protection Act (*Bundesdatenschutzgesetz*) of 18 May 2001, and *Länder* data protection laws adopted to implement the European Union Directive; Estonia: Data Protection Act of 12 February 2003; Finland: Finnish Personal Data Act (No. 523/1999) of 22 April 1999, as amended on 1 December 2000, and Finnish Data Protection Act in Working Places of 2004; France: Law No. 2004-801 modifying Law No. 78-17 of 6 January 1978; Greece: Implementation Law No. 2472 on the protection of individuals with regard to the processing of personal data, which entered into force on 10 April 1997; Hungary: Act No. LXIII on the Protection of Personal Data and Public Access to Data of Public Interest of 1992, Act No. IV of 1978 on the Criminal Code on misuse of personal data and misuse of personal information, and Data Protection Act No. XXVI of 14 December 2001, as amended by Act No. XXXI of 2002; Ireland: Data Protection Act of 1998, amended by the Data Protection Act of 2003 of 10 April 2003; Israel: data protection law enacted in 1981 and amended in 1996; Italy: Act No. 675 on the protection of individuals and other subjects with regard to the processing of personal data of 31 December 1996, and the New Data Protection Code, which entered into force on 1 January 2004; Japan: Act of the Protection of Personal Information, Act No. 57 of 2003; Latvia: Personal Data Protection Law amended by the Law of 24 October 2004; Lithuania: Law No. IX–1296 on Legal Protection of Personal Data of 21 January 2003, with amendments of 13 April 2004; Luxembourg: Data Protection Law of 2 August 2002; the Netherlands: Personal Data Protection Act of 6 July 2000 (the former sectoral codes of conduct are under review to become legislation); New Zealand: Privacy Act of 1 July 1993; Paraguay: data protection law in Paraguay, Act No. 1682 regulating private information; Poland: Act on the Protection of Personal Data of 29 August 1997, amended on 1 January 2004; Portugal: personal data protection law No. 67/98 of 26 October 1998; Republic of Korea: Act on the Protection of Personal Data maintained by Public Agencies (Act No. 4734) of 1994, Act on the Promotion and Protection of Information Infrastructure (Act No. 5835) of 1999; Russian Federation: Federal Law on Information, Informatization and Protection of Information of 25 January 1995; Slovakia: Act No. 428/2002 Coll. on Protection of Personal Data, as amended by Act No. 602/2003 Coll., Act No. 576/2004 Coll. and Act No. 90/2005 Coll.; Slovenia: 1999 Personal Data Protection Act (based on the Council of Europe Convention) and Act Amending the Personal Data Protection Act of July 2001; Spain: Ley orgánica No. 15/1999 de protección de datos de carácter personal (organic law on the protection of personal data) of 13 December 1999; Sweden: Personal Data Act 1998:204 of 29 April 1998, and Regulation 1998:1191 of 3 September 1998; Switzerland: Federal Act on Data Protection No. 235.1 (DPA) of 19 June 1992; Tunisia: personal data protection law No. 2004-63 of 27 July 2004; and United Kingdom: Data Protection Act of 16 July 1998, completed by legislation of 17 February 2000.

[33] The 2002 Meeting of the Commonwealth Law Ministers' Conference in Kingstown (Saint Vincent and Grenadines) proposed two draft models bills on privacy (for the private and the public sectors). The model law was influenced by the Canadian system of personal data protection and the 1998 United Kingdom Data Protection Act which implements the European Union Directive, as well as the OECD Guidelines.

[34] In the United States, the following legislation was passed: Privacy Act, 5 U.S.C. § 552a (2001); Fair Credit Reporting Act, 15 U.S.C. § 1681 (2001); Video Privacy Protection Act, 18 U.S.C. § 2710–2711 (2000); Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (2000); Drivers Privacy Protection Act, 18 U.S.C. § 2721–2725 (2000); Telephone Consumer Protection Act, 47 U.S.C. § 227 (2000); Family Educational Rights and Privacy Act, 20 U.S.C. § 1232 (2000); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191 (1996); and Children Online Privacy Protection Act, 15 U.S.C. § 6501–6506 (2000).

[35] See Hondius, *loc. cit.* (footnote 17 above), pp. 87–111. States have adopted either a single piece of legislation covering both the public and the private sectors equally (e.g. European Union member States, Argentina, Chile, Israel, the Russian Federation and Switzerland); a single Act addressing the public and private sectors in separate chapters, or two separate Acts covering the public and private sectors separately (e.g. Australia, Canada, Paraguay and Tunisia); or an Act covering the public sector and separate pieces of legislation for various aspects of private sector activities (e.g. Japan and the Republic of Korea). In some instances, general legislation is accompanied by alternative codes of conduct for various sectors (e.g. New Zealand).

European context establish limits on the collection of data.[36] They require *ex ante* notification of purposes for which the data are required. Moreover, any subsequent use of the data, unless authorized by the consent of the data subject or otherwise provided by law, must accord with the specified purposes. Secondly, the legislation imposes controls *ex post*, aimed at ensuring the continued reliability of the data. Notification about the existence of such data records, access and an opportunity to make corrections to erroneous data are elements of such reliability.[37] Thirdly, such legislation regulates aspects concerning security and protection of such data by making provision for storage and usage, including procedures for securing against loss, destruction and an unauthorized disclosure. Any use or disclosure must be recorded and the data-subject notified in the event of any unauthorized use or disclosure.[38] A framework is established to address these matters. Fourthly, a regime for grievance and redress is also contemplated.

8. On the other hand, the approach—particularly in the United States—is sectoral, relying on a combination of legislation, regulation and self-regulation,[39] and the responses are more market-driven. The legislation covers essentially the public sector or specialized areas of it; the data-subjects afforded protection are citizens and resident aliens. Moreover, there is no single agency charged with questions of enforcement.

9. It may also be noted that the industry has taken an active role in adopting self-regulatory codes to protect personal data.[40]

10. Case law has also recognized the importance of data protection. The European Court of Justice in the *Fisher* case confirmed that principles of data protection constituted general principles of Community law. It asserted that the Directive 95/46/EC of the European Parliament and of the Council adopted, at the Community level, general principles which already formed part of the law of member States in the area in question.[41] In the *Rechnungshof case*, the Court noted that the provisions of the Directive, insofar as they govern the processing of personal data liable to infringement, in particular the right to privacy, must necessarily be interpreted in the light of the fundamental rights, which form an integral part of the general principles of community law. It also deemed that "[a]rticles 6 (1) (*c*) and 7 (*c*) and (*e*) of Directive 95/46 are directly applicable, in that they may be relied on by an individual before the national courts to oust the application of rules of national law which are contrary to those provisions".[42] The European Court of Human Rights has expressly recognized the protection of personal data as a fundamental right as it is included in the right to privacy established under article 8 of the European Convention on Human Rights.[43]

11. The international binding and non-binding instruments, as well as the national legislation adopted by States, and judicial decisions reveal a number of core principles, including: (*a*) lawful and fair data collection and processing; (*b*) accuracy; (*c*) purpose specification and limitation; (*d*) proportionality; (*e*) transparency; (*f*) individual participation and in particular the right to access; (*g*) non-discrimination; (*h*) responsibility; (*i*) supervision and legal sanction; (*j*) data equivalency in the case of transborder flow of personal data; and (*k*) the principle of derogability.

C. Elaboration of proposal for consideration of the Commission

12. The objective of the present proposal would be to elaborate general principles that are attendant in the protection of personal data. The overview of existing norms and rules suggests that although there are differences in approach, there is a commonality of interests in a number of core principles. The precedents and other relevant material, including treaties, national legislation, judicial decisions and non-binding instruments, point to the possibility of elaboration of a set of provisions that flesh out the issues relevant in data protection in light of contemporary practice. Such an exercise would facilitate the preparation of a set of internationally acceptable best practices guidelines and would assist Governments in the development of national legislation. It would also assist the industry in devising models for self-regulation. The elaboration of a "third generation" of privacy principles would augur well with increasing calls for an international response on this matter. Although this is an area which is technical and

[36] See G. M. Epperson, "Contracts for transnational information services: securing equivalency of data protection", *Harvard International Law Journal*, vol. 22 (1981) pp. 157–175, at p. 162.

[37] *Ibid*.

[38] *Ibid*.

[39] Comments of the United States on Internet Governance, Released by the Bureau of Economic and Business Affairs, 15 August 2005: "*Data protection and privacy rights:* … Any effective approach to ensuring protection of personal information includes: appropriate laws to protect consumer privacy in highly sensitive areas such as financial, medical, and children's privacy; government enforcement of these laws; and encouragement of private sector efforts to protect consumer privacy" (WSIS-II/PC-3/DT/7E, p. 24); these comments are available on the website of the ITU, www.itu.int, "Compilation of comments received on the Report of the Working Group on Internet Governance (WGIG)", 30 August 2005.

[40] The International Chamber of Commerce is playing a lead role in this regard. See for example its Toolkit for Policymakers, at www.rfid-in-action.eu/public/rfid-knowledge-platform/all-rfid-documents/guidelines-on-privacy/iccwbo_privacy-toolkit. Accessed 27 November 2012.

[41] *The Queen* v. *Minister of Agriculture, Fisheries and Food* ex parte Fisher (Case No. C-369/98), Judgement of the European Court of Justice of 14 September 2000, *Official Journal of the European Communities,* No. C 355, 25 November 2000, p. 4. With regard to Directive 95/46/CE, see footnote 30 above.

[42] Joined Cases C-465/00, C-138/01 and C-139/01 (Reference for a preliminary ruling from the *Verfassungsgerichtshof* and *Oberster Gerichtshof*): *Rechnungshof* (C-465/00) v. *Österreichischer Rundfunk and Others* and between *Christa Neukomm* (C-138/01), *Joseph Lauermann* (C-139/01) *and Österreichischer Rundfunk* ("Protection of individuals with regard to the processing of personal data–Directive 95/46/EC–Protection of private life–Disclosure of data on the income of employees of bodies subject to control by the *Rechnungshof*"), Judgement of the European Court of Justice of 20 May 2003, *Official Journal of the European Union*, No. C 171, 19 July 2003, p. 3, para. 2.

[43] See also *Amann* v. *Switzerland, Application no. 27798/95, Judgement of 16 February 2000*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2000-II*, pp. 245 *et seq.*; *Leander case, Judgement of 26 March 1987*, European Court of Human Rights, *Series A: Judgements and Decisions*, vol. 116, pp. 6 *et seq.*; *Rotaru* v. *Romania, Application no. 28341/95, Judgement of 4 May 2000*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2000-V*, pp. 109 *et seq.*; *Turek* v. *Slovakia, Application no. 57986/00, Judgement of 14 February 2006*, European Court of Human Rights, *Reports of Judgments and Decisions 2006-II*, pp. 41 *et seq*.

specialized, it is also an area in which State practice is not yet extensive or fully developed. By applying its working methods, the Commission may nevertheless be able to identify emerging trends in legal opinion and practice which are likely to shape any global legal regime which would finally emerge.

Delineating the scope of the topic

13. There is a link between privacy and data protection. The right to privacy has centuries-old provenance and has attained constitutional status and recognition in many jurisdictions,[44] as well as in international binding and non-binding instruments.[45] However, the right to privacy is not absolute and its parameters and penumbras are not always easy to fathom and delineate. From philosophical and analytical perspectives, privacy conjures a variety of possibilities and ideas which may fall into one or cross-cut any of the following clusters: (*a*) spatial; (*b*) decisional; (*c*) informational;[46] and (*d*) privacy of communications.

14. Although the four clusters implicate and have a bearing on the other, the scope of the present proposal does not address the general question of privacy and would be narrower and more restricted in four respects.

15. First, its main focus is on the third cluster: the informational subset of privacy, which is concerned with the individual's control over the processing of personal information—its acquisition, disclosure and use,[47] a concept usefully referred to as "fair record management".[48] It would be necessary to consider the rights that the data-subject and users possess.

16. Secondly, it would address the protection to be afforded to the means of communication, that is to say, those aspects of the fourth cluster concerning the privacy of communications insofar as there is a connection in securing informational privacy: the security and privacy of mail, telephony, e-mail and other forms of ICTs. With improved technologies, the availability of information in the public domain challenges the traditional paradigm of privacy as one "protecting one's hidden world".[49] Data security, location data and traffic data have become elements within the penumbra of protection. Data security goes to the physical security of the data, an effort that seeks to ensure that data are not destroyed or tampered with in the place where they are located. Data are also always in a state of flux and movement and easily found in the custody of third parties. Where one is located (location data)[50] and what is being sent to another (traffic data)[51] are matters whose anonymity can no longer be guaranteed. The type and nature of protection to be given to the data—whether stationary or in traffic—are matters that would fall within the purview of the topic. However, the protection offered has to be weighed against society's need for tools that would ensure effective law enforcement, including in combating international terrorism and organized crime.

17. Thirdly, it would be restricted to addressing personal data flows.[52] Transborder data flows may involve different kinds of data, such as (*a*) operational data;[53] (*b*) actual financial transactions;[54] (*c*) scientific or technical information;[55] and (*d*) personally identifiable information relating for example to credit, medical history, criminal records, travel reservations, or it may simply be a name or an identification number. Only personally identifiable

[44] For example, in 1361, the Justices of the Peace Act 34 Edw. 3 c.1 in England provided for the arrest of peeping toms and eavesdroppers; a 1776 Public Records Act of Sweden required that all information held by Government be used for legitimate purposes; in the United States, in 1890, Samuel D. Warren and Louis D. Brandeis, in "The right to privacy", *Harvard Law Review*, vol. 4, No. 5 (1890), pp. 193–220, wrote that a right to privacy was "the right 'to be let alone'" (p. 195). In *Griswold v. Connecticut*, the United States Supreme Court gave an expansive interpretation of the Bill of Rights and averred that an individual had a constitutional right to privacy, United States Reports, vol. 381 (1965), p. 479.

[45] Article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights. See also articles V, IX and X of the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, held at Bogotá in 1948; article 8 of the 1950 European Convention on Human Rights Fundamental Freedoms; article 11 of the 1969 American Convention on Human Rights: "Pact of San José, Costa Rica"; the 1990 African Charter on the Rights and Welfare of the Child; and article 18 of the 1990 Cairo Declaration on Human Rights in Islam. See also article 18 of the 1981 African Charter on Human and Peoples' Rights. In the area of medical ethics, see, for example, the Nuremberg Code on Directions for Human Experimentation (*Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Nuernberg, October 1946–April 1949)*, 15-volume series, vol. II, Washington D.C., United States Government Printing Office, 1949–1953, p. 180), the 1948 Declaration of Geneva (World Medical Association, *Handbook of Declarations* (October 1996), 17.A) and the 1964 Declaration of Helsinki (*ibid.*, 17.C, or "World Medical Association Declaration of Helsinki. Ethical Principles for Medical Research Involving Human Subjects", *Bulletin of the World Health Organization*, 2001, 79 (4), p. 373).

[46] See Kang, *loc. cit.* (footnote 5 above), at pp. 1202–1203. In *Whalen* v. *Roe* (429 U.S 589 (1977)), the United States Supreme Court extended the substantive due process protection of privacy to information privacy.

[47] Kang, *loc. cit.* (footnote 5 above), at p. 1203.

[48] Epperson, *loc. cit.* (footnote 36 above): "Data protection does not, however, mean that all such privacy interests will be fully protected. The term refers less to absolute prohibition of the accumulation and usage of data than to the establishment of procedures guaranteeing to data-subjects the opportunity to know of the existence of data concerning them and of the uses to which such data will be put" (pp. 160–161).

[49] D. J. Solove, "Privacy and Power …", *loc. cit.* (footnote 1 above), at p. 1437.

[50] The latitude, longitude and altitude of the terminal equipment of the user, the direction of travel, the level and accuracy of the location information, the identification of the network cell and the time the location information was made are easily recordable.

[51] The routing, duration, time or volume of communication, the protocol used, the location of the terminal equipment of the sender or recipient, the network on which the communication originates or terminates, the beginning, end or duration of a communication, the format of conveyance of the communication are easily identifiable pieces in the traffic of data.

[52] See E. J. Novotny, "Transborder data flows and international law: a framework for policy-oriented inquiry", *Stanford Journal of International Law*, vol. 16 (1980), pp. 141 *et seq*. "Data" and "information" are used sometimes as synonymous terms. However, from a technical perspective:

> "'data' refers to a set of organized symbols capable of machine processing and information. 'Information' implies a higher class of data intelligible to a human being. The purpose of transborder data flows is to create, store, retrieve, and use information; at times information is reduced to data for intermediate purposes" (p. 144, footnote 7).

[53] *Ibid*., p. 156. These are intended to support the organizational decisions or that sustain certain administrative functions.

[54] *Ibid*., p. 157. These involve credits, debits and transfers of money.

[55] *Ibid*., p. 158. These reflect results of experiments, surveys, environmental or meteorological measurements or economic statistics.

data is intended to fall within the scope of the present proposal, although such data may also appear in the form of operational or financial transactions[56] as well as part of scientific and technical surveys, including demographic surveys.

18. What is personally identifiable information may bear on (*a*) authorship in relation to the individual; (*b*) a descriptive relation to the individual; or (*c*) an instrumental mapping in relation to the individual.[57] It is these aspects that may require protection from disclosure. Natural persons are ordinarily associated with personally identifiable information. In some States, legal persons and other entities may be affected.[58] The scope of the topic *ratione personae* would have to determine the treatment to be given to other entities other than natural persons.

19. Data flows include flows among the various actors, and these may include Governments, intergovernmental organizations, non-governmental organizations and the private sector, such as multinational corporations and enterprises, some of which provide data processing services. The span of activities in the public or private sector that may be involved would have to be taken into account in the treatment of the topic.

20. Fourthly, there are restrictions and exceptions and competing interests recognized in the protection of informational data. Indeed, the privacy protections offered by national Constitutions and in judicial decisions and international human rights instruments recognize possible restrictions and exceptions, in the form of derogations or limitations.

Definitions

21. Transborder flow of data has been defined as "the electronic transmission of data across political boundaries for processing and/or storage in [ICT] files".[59] The scope of the topic *ratione materiae* would be a matter that would require careful consideration, in particular whether it should be only automated computerized data, or any kind of data, including manually generated and processed data; and whether the scope should be defined through the technology used or through any kind of data involved regardless of the technology.

22. It would be necessary to define such terms as data; data-subject; data user; data file; data retention; data preservation; personally identifiable data; sensitive data; traffic data; location data; transborder flow of personal data; processing of personal data; communication; third party user; registration and transactional data; clickstream data. The definitions are only illustrative; they need to take into account the technological advances that are continuously taking place in the network environment.

Core principles

23. A number of core principles are discernible from developments in this field over almost forty years. Such principles include the following:[60]

— *Lawful and fair data collection and processing.* This principle presupposes that the collection of personal data would be restricted to a necessary minimum. In particular, such data should not be obtained unlawfully or through unfair means.

— *Accuracy.* The information quality principle is a qualitative requirement and entails a responsibility that the data is accurate and necessarily complete and up-to-date for the purpose intended.

— *Purpose specification and limitation.* This principle establishes the requirement that the purpose for which the data are collected should be specified to the data-subject. Data should not be disclosed, made available or otherwise used for purposes other than those specified. It has to be done with the consent or knowledge of the data-subject or under the operation of the law. Any subsequent use is limited to such purpose, or any other that is not incompatible with such purpose. Differences lie in the approaches taken by States. Some jurisdictions perceive the obligation for consent to be *ex ante*.

— *Proportionality.* Proportionality requires that the necessary measure taken should be proportionate to the legitimate claims being pursued.

— *Transparency.* Transparency denotes a general policy of openness regarding developments, practices and policies with respect to protection of personal data.

— *Individual participation and in particular the right to access.* This principle may be the most important for purposes of data protection. The individual should have access to such data as well as to the possibility of determining whether or not the keeper of the file has data concerning him and of obtaining such information or having

[56] *Ibid*., p. 157. See also a pending case (*Segerstedt-Wiberg and others* v. *Sweden, Application No. 62332/00*), which was declared admissible on 20 September 2005. The European Court of Human Rights had to determine whether the collection and storage of information about individuals which are "in connection with their public activities", "already in the public domain" and which are accurate and collected on national security grounds, might constitute an infringement of the right to privacy. It also entails the right to refuse to advise the individuals concerned of the full extent of the information collected. See in this regard the Court's judgement of 6 June 2006, *Reports of Judgments and Decisions 2006-VII*, pp. 131 *et seq*. The Supreme Court of Iceland in its judgement No. 151/2003 of 27 November 2003, *Guðmundsdóttir* v. *Iceland,* addressed the question on the definition of "personal data" in the context of DNA data and questions of identifiability as linked to a relation who was deceased. See R. Gertz, "An analysis of the Icelandic Supreme Court judgment on the Health Sector Database Act", *SCRIPTed–A Journal of Law, Technology and Society*, vol. 1, No. 2 (June 2004), pp. 241–258.

[57] Kang, *loc. cit.* (footnote 5 above), at pp. 1207–1208.

[58] Novotny, *loc. cit.* (footnote 52 above), at p. 157.

[59] International Barriers to Data flows, Background Report, Committee on Interstate and Foreign Commerce, House of Representatives, Ninety-Sixth Congress, First Session, April 1979, quoted by the panel on Legal Issues of Transborder Data Transmission, *American Society of International Law Proceedings*, vol. 74 (1980), p. 175.

[60] See generally M. D. Kirby, "Transborder data flows and the 'basic rules' of data privacy", *Stanford Journal of International Law*, vol. 16 (1980), pp. 27–66. See also J. M. Eger, "The global phenomenon of teleinformatics: an introduction", *Cornell International Law Journal*, vol. 14 (1981) pp. 203–236. See also Secretary's Advisory Committee on Automated Personal Data Systems, United States Department of Health, Education and Welfare, *Records, Computers and the Rights of Citizens* (1973), Appendix A, p. 147.

it communicated to him in a form, in a manner and at a cost that is reasonable. This holds with the right of an individual to know about the existence of any data file and its contents, to challenge the data and to have it corrected, amended or erased.

— *Non-discrimination.* This principle connotes that data likely to give rise to unlawful and arbitrary discrimination should not be compiled. This includes information collated on racial or ethnic origin, colour, sex life, political opinions, religious, philosophical and other beliefs as well as membership in an association or trade union.

— *Responsibility.* This principle embraces data security; data should be protected by reasonable and appropriate measures to prevent their loss, destruction, unauthorized access, use, modification or disclosure and the keeper of the file should be accountable for it.

— *Independent supervision and legal sanction.* Supervision and sanction require that there should be a mechanism for ensuring due process and accountability. There should be an authority legally accountable for giving effect to the requirements of data protection.

— *Data equivalency in the case of transborder flow of personal data.* This is a principle of compatibility; it is intended to avoid the creation of unjustified obstacles and restrictions to the free flow of data, as long as the circulation is consistent with the standard or deemed adequate for that purpose.

— *The principle of derogability.* This entails power to make exceptions and impose limitations if they are necessary to protect national security, public order, public health or morality or to protect the rights of others.

Derogability

24. While privacy concerns are of critical importance, such concerns have to be balanced with other value-interests. The privacy values to avoid embarrassment, construct intimacy and protect against misuse associated with the need to protect the individual have to be weighed against other counter-values against individual control over personal information, such as the need not to disrupt the flow of international trade and commerce and the flow of information and the importance of securing the truth, as well as the need to live in a secure environment.[61] There are allowable restrictions and exceptions, for example, with respect to national security, public order (*ordre public*),[62] public health or morality[63] or in order to protect the rights and freedoms of others, as well as the need for effective law enforcement and judicial cooperation in combating crimes at the international level, including the threats posed by international terrorism and organized crime.

25. The processing of personal data must be interpreted in accordance with human rights principles.[64] Accordingly, any of the objectives in the public interest would justify interference with private life if it is (*a*) in accordance with the law, (*b*) necessary in a democratic society for the pursuit of legitimate aims, and (*c*) not disproportionate to the objective pursued.[65] The phrase "in accordance with the law" goes beyond the formalism of having in existence a legal basis in domestic law: it requires that the legal basis be "accessible" and "foreseeable".[66] Foreseeability necessitates sufficiency of precision in formulation of the rule to enable any individual to regulate his conduct.[67]

26. A number of issues still arise in the practice of States. The first relates to *data retention and data preservation*. In the cyberworld, there are two basic ways in which personal information is collected: (*a*) through direct solicitation from users (registration and transactional data)[68]; and (*b*) surreptitiously through tracking the way people surf the Internet (clickstream data).[69] One way in which States have used the law to monitor activities in the cyberspace for purposes of law enforcement is to promulgate *data retention* legislation.[70] Essentially, Internet service providers are required to clickstream, collect and store data on the activities of their customers in the cyberspace. This has raised particular concerns because it

> "rearchitects" the Internet from a context of relative obscurity to one of greater transparency. This manipulation of context influences what values flourish on the Internet. Specifically, data retention, by making it easier to link acts to actors, promotes the value of accountability, while diminishing the values of privacy and anonymity.[71]

[61] See generally C. Crump, "Data retention: privacy, anonymity, and accountability online, *Stanford Law Review*, vol. 56 (2003–2004), pp. 191–229.

[62] See, for example, the Convention on cybercrime adopted by the Council of Europe at Budapest on 23 November 2001.

[63] For example, UNESCO adopted the Universal Declaration on the Human Genome and Human Rights on 11 November 1997 (UNESCO, *Records of the General Conference, Twenty-ninth Session*, vol. I, *Resolutions*, resolution 16), endorsed by General Assembly resolution 53/152 of 9 December 1998. See also the 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, and the 1998 Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings.

[64] Joined Cases C-465/00, C-138/01 and C-139/01 (see footnote 42 above).

[65] See *Fressoz and Roire* v. *France, Application no. 29183/95, Judgement of 21 January 1999*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 1999-I*, pp. 1 *et seq*. For example, when reviewing proportionality, the extent to which the data affect private life is taken into account. Data relating to private intimacy, health, family life or sexuality must be protected more strongly than data relating to income and taxes, which, while also personal, concern identity to a lesser extent and are therefore less sensitive.

[66] *Amann* v. *Switzerland* (see footnote 43 above), paras. 55–62.

[67] *Malone* v. *United Kingdom, Application no. 8691/79, Judgement of 2 August 1984*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 82, pp. 31–32, para. 66.

[68] D. J. Solove, "Privacy and power…", *loc. cit.* (footnote 1 above), at p. 1408.

[69] *Ibid.*, p. 1411.

[70] For example, Commission decision 2004/535/EC of 14 May 2004 (see footnote 31 above). Swiss Internet service providers are legally required to record the time, date, sender identity and receiver identity of all e-mails. Spain also requires Internet service providers to retain some types of data on their customers for one year. See also Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (footnote 30 above).

[71] C. Crump, *loc. cit.* (footnote 61 above), p. 194.

27. Unlike data retention, *data preservation* has a more limited remit as a tool to enable law enforcement to preserve records and other evidence in respect of a particular customer under investigation pending the issuance of a court order.[72] Protection of personal data in a form that permits identification of the data-subject may in some cases require that, once the purpose has expired, the data be destroyed, properly archived or reidentified. The longer the data are retained or the more general the edict for retention is, the higher the concerns are from a perspective of privacy in accordance with human rights principles.

28. A second related aspect is accessibility of Governments to private and public databases: the ability of Governments to purchase information on individuals for use in law enforcement from private databases. Such databases are often voluntarily compiled and shared voluntarily with governmental authorities.[73]

29. It may be necessary to identify safeguards that would assure that data retention or data preservation and accessibility to databases do not render the essence of privacy inoperable.

30. There is also recognition of limitations in respect of use of files for statistical uses or scientific research or in respect of journalistic purposes or for artistic or literary expression. The importance of securing the truth and the importance of the free flow of information necessitate that certain data files be treated differently even if they may relate to personally identifiable data. The use of files for statistical, technical or scientific research or concerning journalistic pursuits or artistic or literary expression falls into this category. The right of access to information may be restricted, provided such restrictions are based on law and are necessary in order to respect the rights and reputation of others, for the protection of national security or of public order (*ordre public*) or of public health or morals.

Data adequacy/equivalency

31. The transfer of data from one State to another raises questions of security and protection, such as whether and in what circumstances transfer should occur when the other State cannot ensure adequate levels of protection, what would be the applicable law and how problems that could arise would be resolved. Accordingly, data adequacy or data equivalency issues may need some treatment within the topic.

32. The following appendix outlines, for indicative purposes only, the issues that may have to be addressed:

Appendix

Scope: Protection of personal data and privacy of communications

Scope ratione personae: personal data

Scope ratione materiae: private and public sectors: query whether international organizations should be included

Possible exclusions: purely personal and household activities

Definitions: data; data-subject; data user; data file; data retention; data preservation; personally identifiable data; sensitive data; traffic data; location data; transborder flow of personal data; processing of personal data; communication; third party user; registration and transactional data; clickstream data

Core principles: lawful and fair data collection and processing; accuracy; purpose specification and limitation; proportionality; transparency; individual participation and in particular the right to access; non-discrimination; responsibility; independent supervision and legal sanction; data equivalency in the case of transborder flow of personal data; derogability

Restrictions to right of access: maintenance of public order; defence and security of the State; public health, etc.

Confidentiality and security: confidentiality of communications; security of sensitive data

Rights in respect of the data subject: to be informed; to withhold consent; access; rectification; to object to processing of data for a legitimate reason; to a remedy

Data processing: fairness and lawfulness; accountability

Criteria for legitimate data processing: consent; contractual obligation; other legal obligation; necessary to protect vital interest of data-subject; necessary in the public interest; necessary for the purposes of legitimate interest

Exceptions and limitations: national security; defence; public security; criminal law enforcement; fiscal concerns and economic well-being; protection of data-subject and others

Policymaking (census, population registers, surveys): scientific, research and statistics; journalistic and artistic activities

Sanction and remedy: administrative; judicial

Adequacy of level of transborder protection: principle of adequacy; determination of adequacy; derogations

Implementation: legislation; regulation; self-regulation

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[72] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 establishes numerous amendments to legislation in order to increase the investigative and surveillance capacities of the law enforcement agencies in the United States. The Wiretap Act, the Electronic Communications Privacy Act of 1986, the Computer Fraud and Abuse Act of 1986, the Foreign Intelligence Surveillance Act of 1978, Family Education Rights and Privacy Act, the Pen Registers and Trap and Trace Devices Statute, the Money Laundering Control Act of 1986, the Immigration and Nationality Act, the Bank Secrecy Act of 1970, the Right to Financial Privacy Act of 1978 and the Fair Credit Reporting Act have been amended by the USA Patriot Act.

[73] See generally D. J. Solove, "Digital dossiers and the dissipation of Fourth Amendment privacy", *Southern California Law Review,* vol. 75 (2002), pp. 1083–1167. The *New York Times*, in its edition of 21 March 2006, B.6 (A. L. Cowan, "Librarian is still John Doe, despite Patriot Act Revision"), notes that 30,000 national security letters are issued in a year demanding patron records. See also *John Doe, American Civil Liberties Union and American Civil Liberties Union Foundation* v. *Attorney-General, et al.*, United States Southern District Court of New York, opinion, decision and order of Judge Victor Marrero.

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Annex V

EXTRATERRITORIAL JURISDICTION

(Secretariat)

A. Background

1. Traditionally, the exercise of jurisdiction by a State was primarily limited to persons, property and acts within its territory and to relatively exceptional situations in which its nationals travelled beyond its borders. Today, the exercise of extraterritorial jurisdiction by a State with respect to persons, property or acts outside its territory has become an increasingly common phenomenon largely as a consequence of: (*a*) the increase in the movement of persons beyond national borders;[1] (*b*) the growing number of multinational corporations; (*c*) the globalization of the world economy,[2] including international banking and international stock exchanges; (*d*) the increase in transnational criminal activities, including drug trafficking, money laundering, securities fraud and international terrorism; (*e*) the increase in illegal migration;[3] and (*f*) the increasing use of the Internet across national borders for legal or illegal purposes, such as electronic contracts, e-commerce and cybercrimes.

2. The assertion of extraterritorial jurisdiction by a State is an attempt to regulate by means of national legislation, adjudication or enforcement the conduct of persons, property or acts beyond its borders which affect the interests of the State in the absence of such regulation under international law. The exercise of extraterritorial jurisdiction by a State tends to be more common with respect to particular fields of national law in view of the persons, property or acts outside its territory which are more likely to affect its interests, notably criminal law and commercial law.

3. The topic "extraterritorial jurisdiction" is in an advanced stage in terms of State practice, and is concrete. Although there appears to be a strong need for codification in this field, some may question whether the practice is sufficiently uniform or widespread to support a codification effort at this time. However, recent developments in this regard indicate that practice may be converging towards a more uniform view of the law. Moreover, innovations in communications and transportation make the codification and progressive development of the limits of the extraterritorial jurisdiction of States a timely and important endeavour.

[1] "Since 1965, the number of international migrants has doubled. As of the year 2000, there were approximately 175 million migrants throughout the world" (J.-D. Gerber, "Foreword", in A. T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, p. vii).

[2] "The world has been transformed by the process of globalization. States, societies, economies and cultures in different regions of the world are increasingly integrated and interdependent. New technologies enable the rapid transfer of capital, goods, services, information and ideas from one country and continent to another" (*Migration in an Interconnected World: New Directions for Action*, report of the Global Commission on International Migration, October 2005, p. 1, para. 1).

[3] "An estimated 2.5 to 4 million migrants cross international borders without authorization each year" (*ibid*, p. 85).

B. Brief survey of existing norms and rules

1. The notion of extraterritorial jurisdiction

4. The notion of extraterritorial jurisdiction may be understood as referring to the exercise of sovereign power or authority by a State outside of its territory. There are three aspects of this notion which may require consideration, namely, jurisdiction, extraterritoriality and applicable law.

5. The jurisdiction of a State may be understood as generally referring to the sovereign power or authority of a State.[4] More specifically, the jurisdiction of a State may be divided into three categories, namely, prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction.[5] Prescriptive jurisdiction refers to the authority of a State to adopt legislation providing norms of conduct which govern persons, property or conduct. Adjudicative jurisdiction refers to the authority of a State to determine the rights of parties under its law in a particular case. Enforcement jurisdiction refers to the authority of a State to ensure compliance with its law. The consideration of the various types of jurisdiction may be important for two reasons. First, the internationally valid exercise of

[4] See, for example, B. H. Oxman, "Jurisdiction of States", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3, Amsterdam, Elsevier, 1997, pp. 55–60, at p. 55.

[5] "The term 'jurisdiction' is most often used to describe the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons. A State exercises its jurisdiction by establishing rules (sometimes called the exercise of legislative jurisdiction or prescriptive competence), by establishing procedures for identifying breaches of the rules and the precise consequences thereof (sometimes called judicial jurisdiction or adjudicative competence), and by forcibly imposing consequences such as loss of liberty or property for breaches or, pending adjudication, alleged breaches of the rules (sometimes called enforcement jurisdiction or competence)" (Oxman, *loc. cit.* (footnote 4 above), at p. 55). See also R. O'Keefe, "Universal jurisdiction: clarifying the basic concept", *Journal of International Criminal Justice*, vol. 2, No. 1 (March 2004), pp. 735–760, at pp. 736–740; F. A. Mann, "The doctrine of jurisdiction in international law", *Recueil des cours* ... vol. 111 (1964–I), pp. 1–162, at p. 1; D. W. Bowett, "Jurisdiction: changing patterns of authority over activities and resources", BYBIL, vol. 53 (1982), pp. 1–26, at pp. 1 *et seq.*; I. Brownlie, *Principles of Public International Law,* 6th ed., Oxford University Press, 2003, at p. 297; and M. N. Shaw, *International Law*, 4th ed., Cambridge University Press, 1997, at p. 452. See, with respect to French-speaking literature, P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed., Paris, Librairie générale de droit et de jurisprudence, 1999, pp. 501 and 504, paras. 334 and 336; P.-M. Dupuy, *Droit international public*, 7th ed., Paris, Dalloz, 2004, at pp. 78 *et seq.*; and J. Combacau and S. Sur, *Droit international public,* 6th ed., Paris, Montchrestien, 2004, at pp. 343 *et seq*.

prescriptive jurisdiction in the adoption of a law is a prerequisite for the valid exercise of adjudicative or enforcement jurisdiction with respect to that law.[6] Secondly, the requirements for the lawful exercise of different types of jurisdiction may differ.[7] The potential interference resulting from the extraterritorial exercise of prescriptive jurisdiction is less than that resulting from either adjudicative or enforcement jurisdiction.

6. The notion of extraterritoriality may be understood in relation to a State as encompassing the area beyond its territory, including its land, internal waters and territorial sea, as well as the adjacent airspace. The area beyond the territory of a State may fall within the territory of another State or may be outside the territorial jurisdiction of any State, namely the high seas and adjacent airspace[8] as well as outer space.[9] From a practical as well as a legal perspective, the organs of a State generally perform legislative, judicial or enforcement functions only within the territory of a State.[10] Principles of international law relating to the territorial integrity and independence of States prevent the organs of one State from being physically present or performing their functions in the territory of another State without the consent of the latter State.[11] Moreover, the exceptional cases in which a State has attempted to exercise its jurisdiction within the territory of another State by sending its officials to that State without consent are generally considered to be a violation of the territorial integrity and independence of the other State.[12] Certain special situations in which the authorities of a State are physically present and exercise jurisdiction in the territory of another State, for example, in the case of diplomatic premises, consular premises and military bases located in the territory of another State, are governed by specific rules of international law[13] rather than by international law concerning extraterritorial jurisdiction.

7. As regards the applicable law, the notion of extraterritorial jurisdiction may be understood as referring to the exercise of jurisdiction by a State with respect to its national law in its own national interest rather than the application of *foreign law* or *international law*. A State's application of foreign law or international law rather than its own national law would therefore be excluded from the scope of this topic since these situations would not constitute the exercise of extraterritorial jurisdiction by a State in relation to its national law based on its national interests.

2. Principles of extraterritorial jurisdiction

8. The exercise of the jurisdiction or sovereign authority of a State is often provided for in the national law of a State. However, the lawfulness of the exercise of this jurisdiction or authority—including extraterritorial jurisdiction—is determined by international law.[14]

9. The decision of the Permanent Court of International Justice in the *Lotus* case may be regarded as the starting point for the consideration of the rules of international law governing the extraterritorial exercise of jurisdiction by a State.[15] The Court indicated that the jurisdiction of a

[6] "If the substantive jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful" (Brownlie, *op. cit.* (footnote 5 above), p. 308); "It is widely assumed that a State may not enforce its rules unless it has jurisdiction to prescribe those rules" (Oxman, *loc. cit.* (footnote 4 above), at p. 55; "A state may employ judicial or nonjudicial measures to induce or compel compliance or punish non-compliance with its laws or regulations, provided it has jurisdiction to prescribe…" (*Restatement of the Law Third, Restatement of the Law: The Foreign Relations Law of the United States*, vol. 1, St. Paul (Minnesota), American Law Institute Publishers, 1987, para. 431.(1), p. 321). With respect to criminal law: "A court cannot exercise jurisdiction in respect of an offence which the United States (or a State of the United States) could not constitutionally prescribe" (*ibid.*, para. 422, comment *c*, p. 314). There are different views concerning the distinction between the second and third types of jurisdiction in view of the close relationship between the two. See, for instance, with respect to literature addressing the adjudicative jurisdiction distinction, *Oppenheim's International Law,* 9th ed., vol. I, *Peace*, R. Y. Jennings and A. Watts (eds.), Harlow, Longman, 1992, p. 456; M. Akehurst, "Jurisdiction in international law", BYBIL, vol. 46 (1972–1973), pp. 145–257, at pp. 145 *et seq.*; and Oxman, *loc. cit.* (footnote 4 above), at p. 55.

[7] "These distinctions can be important in determining the limits of jurisdiction. The requisite contacts with a State necessary to support the exercise of jurisdiction differ depending on the nature of the jurisdiction being exercised" (Oxman, *loc. cit.* (footnote 4 above), at p. 55).

[8] Most of this matter is governed by treaties, for example, article 8 of the 1940 Treaty on International Penal Law; articles 1, 3 and 4 of the 1952 International Convention for the unification of certain rules relating to penal jurisdiction in matters of collision or other incidents of navigation; articles 5, 6 and 11 of the Convention on the High Seas; and articles 19 and 21 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.

[9] However, it should be noted that outer space law constitutes a separate field of international law which would not be appropriate for consideration under the present topic.

[10] In exceptional cases, a court of one State may sit in the territory of another State on the basis of an agreement between the States concerned. See the *Lockerbie case*, Security Council resolution 1192 (1998), 27 August 1998, paragraph 4; verdict and the appeal of the Scottish Court, of 31 January 2001 and 14 March 2002 respectively, available at www.scotcourts.gov.uk/search-judgments/lockerbie-trial. Accessed 27 November 2012.

[11] The principles of the territorial integrity and the political independence of States are among those recognized in Article 2, paragraph 4, of the Charter of the United Nations. In the *Island of Palmas* case, the sole arbitrator, Max Huber, observed as follows: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations" (*Island of* Palmas case *(Netherlands/United States of America), Award of 4 April 1928*, UNRIAA, vol. II (Sales No. 1949.V.I), pp. 829–871, at p. 838). "The governing principle is that a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter" (Brownlie, *op. cit.* (footnote 5 above), at p. 306).

[12] "There are many cases in which states have claimed the right to their own law enforcement abroad. But the (open or secret) performance of state acts on the territory of another state without its consent, such as the kidnapping of the Nazi criminal Eichmann in Argentina by Israel in 1960 and the kidnapping in the *Alvarez-Machain* case by US agents, or the sinking of *Rainbow Warrior* by French agents in a New Zealand harbour, although some are disputed, generally constitute violations of the principles of territorial integrity and non-intervention" (P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London, Routledge, 1997, at p. 110).

[13] Special agreements govern the exercise of jurisdiction by the sending or the receiving State with respect to military or civilian aliens present on a military base; see H. Rumpf, "Military bases on foreign territory", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3, Amsterdam, Elsevier, 1997, pp. 381–388, at pp. 381–382.

[14] See the *Case of the S.S.* "*Lotus*" *(France* v. *Turkey), Judgment No. 9 of 7 September 1927, P.C.I.J. Reports 1928, Series A, No. 10*, at pp. 18–19.

[15] *Ibid.* The *Lotus* case involved the exercise of adjudicative jurisdiction by Turkey with respect to the criminal responsibility of a French national on a French vessel for the deaths of Turkish nationals on a

State is territorial in nature and that a State cannot exercise jurisdiction outside its territory in the absence of a permissive rule of international law to the effect. However, the Court distinguished between the exercise of jurisdiction by a State outside its territory and the exercise of jurisdiction by a State within its territory with respect to persons, property or acts outside its territory. The Court indicated that States have broad discretion with respect to the exercise of jurisdiction in the latter sense as follows:

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.
>
> …
>
> In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.[16]

10. There have been a number of significant developments with respect to the extraterritorial jurisdiction of a State since the *Lotus* case was decided by the PCIJ in 1927. In particular, there are a number of principles of jurisdiction which may be asserted under contemporary international law in order to justify the extraterritorial jurisdiction of a State, including: (*a*) the "objective" territoriality principle; (*b*) the "effects doctrine"; (*c*) the protective principle; (*d*) the nationality principle; and (*e*) the passive personality principle. The common element underlying the various principles for the extraterritorial exercise of jurisdiction by a State under international law is the valid interest of the State in asserting its jurisdiction in such a case on the basis of a sufficient connection to the persons, property or acts concerned.

11. The *objective territoriality principle* may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts outside its territory when a constitutive element of the conduct sought to be regulated occurred in the territory of the State.

12. The *effects doctrine* may be understood as referring to jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory of a State which has a substantial effect within that territory. This basis, while closely related to the objective territoriality principle, does not require that an element of the conduct take place in the territory of the regulating State.

13. The *protective principle* may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts abroad which constitute a threat to the fundamental national interests of a State, such as a foreign threat to the national security of a State. This principle of jurisdiction may be viewed as a specific application of the objective territoriality principle or the effects doctrine.

Turkish vessel resulting from a collision of the two vessels on the high seas after the French vessel had arrived at Istanbul.

[16] *Ibid*., pp. 18–19.

14. The *nationality principle* may be understood as referring to the jurisdiction that a State may exercise with respect to the activities of its nationals abroad, including natural persons as well as corporations, aircraft or ships.[17] This well-established principle of jurisdiction is based on the sovereign authority of a State with respect to its nationals.

15. The *passive personality* principle may be understood as referring to the jurisdiction that a State may exercise with respect to conduct abroad which injures one or more of its nationals. This principle of jurisdiction, which was contested by some States in the past, has gained greater acceptance in recent years.[18]

16. The *universality principle* may be understood as referring to the jurisdiction that any State may exercise with respect to certain crimes under international law in the interest of the international community. A State may exercise such jurisdiction even in situations where it has no particular connection to the perpetrator, the victim or the *locus situs* of the crime. Thus, a State may exercise such jurisdiction with respect to a crime committed by a foreign national against another foreign national outside its territory. However, a State exercises such jurisdiction in the interest of the international community rather than exclusively in its own national interest, and thus, this principle of jurisdiction would fall outside of the scope of the present topic.

17. The principles relating to the extraterritorial jurisdiction of a State will be considered briefly in relation to fields of national law which are of particular relevance in this respect, namely, criminal law and commercial law.[19]

3. Extraterritorial jurisdiction with respect to particular fields of law

(a) *Criminal law*

18. The assertion of prescriptive or adjudicative jurisdiction by States in criminal law matters has traditionally been based on a number of well-established principles of jurisdiction. Although the territoriality principle is considered

[17] The nationality of a person, corporation, aircraft or ship depends upon the relevant rules of municipal law as well as international law. These rules have been addressed by the International Law Commission in its consideration of other topics.

[18] With respect to criminal law, see the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 76–77, para. 47. See also article 4 of the 1963 Convention on offences and certain other acts committed on board aircraft and article 5 of the 1979 International Convention against the taking of hostages.

[19] Extraterritorial jurisdiction may also be of growing relevance in the fields of immigration law and environmental law. The extraterritorial application of immigration laws has occurred with increasing frequency in recent years with respect to the interdiction of illegal aliens attempting to reach the shores of another State by sea as well as aliens suspected of terrorist activities. With regard to environmental law, a State may be tempted to regulate conduct or situations possibly producing harmful environmental effects on its own territory or at the global level, which occur in the high seas or in the territory of another State. See, for example, A. L. Parrish, "*Trail Smelter* déjà vu: extraterritoriality, international environmental law, and the search for solutions to Canadian–U.S. transboundary water pollution disputes", *Boston University Law Review*, vol. 85 (2005), pp. 363–429.

the primary basis for jurisdiction in criminal law matters,[20] the objective territorial principle and the nationality principle are also well established.[21] In contrast, reliance on other principles such as the passive personality principle, the protective principle and the effects doctrine, has been more controversial. More recently, however, the practice of States indicates a general tendency to broaden the classical bases for criminal jurisdiction in relation to certain specific types of crimes committed abroad, which have a particularly international scope and effect, such as terrorism, cybercrimes and drug offences.[22]

19. The passive personality principle, according to which States have jurisdiction over crimes committed abroad against one of their nationals, although disputed in the past[23] is "now reflected … in the legislation of various countries … and today meets with relatively little opposition, at least so far as a particular category of offences is concerned".[24] In the field of terrorism, in particular, some States that were originally reluctant to apply the passive personality principle now acknowledge it as an appropriate basis for jurisdiction. Recent United States statutes[25] and jurisprudence[26] relating to terrorism constitute paradigmatic examples in this respect.

20. The protective principle, which allows States to exercise jurisdiction over aliens who have committed an act abroad which is deemed to constitute a threat to some fundamental national interests, although usually limited to very specific crimes and to political acts,[27] may be of particular relevance to new types of cybercrimes and terrorist offences. In this regard, some States have broadened their interpretation of the concept of "vital interests" in order to address terrorism security concerns and introduced the protective principle in their legislation[28] and applied it in some court cases.[29]

21. The "effects doctrine", which justifies a State's exercise of jurisdiction when a conduct performed abroad has substantial effects within that State's territory, has also

[20] See the *Lotus* case (footnote 14 above), at p. 20.

[21] Common law countries tend to restrict the crimes over which they will exercise jurisdiction over their nationals abroad to very serious ones (such as treason, murder or bigamy), but they have never protested against the extensive use of the nationality principle as a basis for criminal jurisdiction. It is interesting to note in this respect that an Act was recently adopted by the United States Congress which establishes federal jurisdiction for crimes committed by civilians who accompany military forces outside the United States, as well as crimes by former members of the military who leave active duty before being prosecuted by courts martial. This Act, the Military Extraterritorial Jurisdiction Act of 2000 (Publ. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. 3261-67 (2002)) was intended to fill a jurisdictional gap with regard to crimes such as rape, arson, robbery, larceny and fraud (see M. J. Yost and D. S. Anderson, "The Military Extraterritorial Jurisdiction Act of 2000: closing the gap", AJIL, vol. 95 (2001), pp. 446–454). See, for cases in common law countries, *United States* v. *Bowman* (260 U.S. 94 (1922)), *Blackmer* v. *United States* (284 U.S. 421 (1932)) or *United States* v. *Boshell* (952 F.2d 1101 (9th Cir. 1991)).

[22] See, for such general enlargement regarding money laundering, the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (Pub. L. No. 107-56, 115 Stat. 272 (2001)).

[23] Particularly the United States and the United Kingdom: see for instance *United States* v. *Columba-Colella* (604 F.2d 356 (5th Cir. 1979)) and *United States* v. *Vasquez-Velasco* (15 F.3d 833 (9th Cir. 1994)); see also the *Cutting* case (in J. B. Moore, *A Digest of International Law, vol. 2,* Washington D.C., United States Government Printing Office, 1906, pp. 228–242) in which the United States strongly protested Mexico's assertion of jurisdiction over a crime committed by a United States citizen against a Mexican national in the United States. See, however, the rejection by France in 1974 of the Israel's request for extradition of a Palestinian terrorist on the ground that this request was based on the passive personality principle (*see* E. Cafritz and O. Tene, "Article 113-7 of the French Penal Code: the passive personality principle", *Columbia Journal of Transnational Law,* vol. 41 (2002–2003), pp. 585–599, at p. 594).

[24] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant of 11 April 2000* (see footnote 18 above), at pp. 76–77, para. 47. Indeed, international practice shows that most States, the United States included, give effect to this principle but limit its application to particular crimes (regarding terrorism, see below). With respect to the United States, see for example *Restatement of the Law Third…* (footnote 6 above), para. 402, at p. 240) which states that the passive personality principle has not been generally accepted for ordinary torts or crimes; China, Denmark and Italy limit the exercise of passive personality jurisdiction to certain classes of crimes or to crimes with a certain minimum degree of punishment; the dual criminality requirement is a statutory precondition to passive personality jurisdiction in Finland, Greece, Norway, and Sweden; the Norwegian Penal Code provides that only the king may commence legal proceedings based on passive personality jurisdiction; and Finland, Italy and Sweden also require executive consent for the application of the principle (see Cafritz and Tene (footnote 23 above), at pp. 596–598). Indeed, see in this respect the new article 113-7 of the French Penal Code which provides for the application of the passive personality principle to any kind of crime.

[25] See, for example, 18 U.S.C. 2332A (*a*)(1) (2004) concerning the use of weapons of mass destruction in relation to terrorism; 18 U.S.C. 2332F (*b*)(2)(B) (2002) concerning the bombing of places of public use, Government facilities, public transportation systems and infrastructure facilities in relation to terrorism. With respect to France, see, for example, an Act passed in 1975, Law No. 75-624 of 11 July 1975, *Journal officiel de la République française*, 13 July 1975, at p. 7219.

[26] See, for example, *United States* v. *Yunis* (681 F. Supp. 896 (1988)) and *United States* v. *Vasquez-Velasco* (footnote 23 above).

[27] See Harvard Law School, *Harvard Research in International Law*, Supplement to the AJIL, vol. 29 (1935), Codification of International Law, Part. II, "Jurisdiction with Respect to Crime" (draft convention on jurisdiction with respect to crime), pp. 435–651, at pp. 543 and 561); this draft convention links the concept of "protection" to those of "security of the State" and "counterfeiting". The protective principle is also usually applied to crimes such as currency, immigration or economic offenses (see Brownlie, *op. cit.* (footnote 5 above), at p. 302). See, for example, with regard to national applications of the protective principle, decisions of United States and United Kingdom courts, respectively *United States* v. *Pizzarusso*, 388 F.2d 8 (2nd Cir. 1968); *United States* v. *Egan*, 501 F. Supp. 1252 (S.D.N.Y. 1980); *Naim Molvan* v. *A.G. for Palestine* ((1948) AC 531, *Annual Digest/ILR*, vol. 15 (1948), p. 115); and *Joyce* v. *D.P.P.* ((1946) AC 347, *ibid.*, p. 91).

[28] See, for example, 18 U.S.C. 2332F (*b*)(2)(E) (2002) concerning the bombing of places of public use, Government facilities, public transportation systems and infrastructure facilities in relation to terrorism; and 18 U.S.C. 2332G (*b*)(4) (2004) concerning missile systems designed to destroy aircraft in relation to terrorism.

[29] See, for a recent case, *United States* v. *Bin Laden* (92 F. Supp. 2d 189 (S.D.N.Y. 2000)), in which the United States court concluded that extraterritorial jurisdiction under the Antiterrorism Act was justified by the protective principle under international law (*see* J. T. Gathii, "Torture, extraterritoriality, terrorism, and international law", *Albany Law Review*, vol. 67 (2003–2004), pp. 335–370, at p. 343); see, for older cases related to "terrorism", *Wechsler* (Conseil de Guerre de Paris, 20 July 1917, *Journal du droit international*, vol. 44, at p. 1745); *In re Urios* ([1919–1922] *Annual Digest/ILR*, vol. 1, p. 107 (No. 70 (Cour de Cassation, France, 1920)), or *Journal de droit international*, vol. 47 (1920), p. 195); *In re Bayot* ([1923–1924] *Annual Digest/ILR, vol. 2*, p. 109 (No. 54) (Cour de Cassation, France, 1923)), or *Recueil périodique et critique de jurisprudence, de législation et de doctrine en matière civile, commerciale, criminelle, administrative et de droit public, 1924*, p. 136); *Nusselein* v. *Belgian State* ([1950] *Annual Digest/ILR*, vol. 17, p. 136 (No. 35) (Cour de Cassation, Belgium, 1950)), or *Pasicrisie Belge. Recueil général de la jurisprudence des cours et tribunaux et du Conseil d'Etat de Belgique, 1950*, p. 450).

recently been applied in criminal matters.[30] The national legislation of some States provides for an extraterritorial effect by allowing such legislation to apply to persons who merely conspire or intend to import drugs from abroad although no conduct has been performed on the territory of the State asserting jurisdiction.[31]

22. With regard to the jurisdiction to enforce, a State may not enforce its criminal law, that is, investigate crimes or arrest suspects, in the territory of another State without that other State's consent.[32] However, in some instances, States have sent representatives into the territory of another State in order to enforce their criminal law, by *inter alia* conducting investigations[33] or arresting suspects on the territory of other countries[34] with respect to terrorism, cybercrimes and drug trafficking.[35]

(b) *Commercial law*

23. The increased globalization of the world economy has led States to rely increasingly on extraterritorial assertions of jurisdiction to protect their economic interests *vis-à-vis* multinational corporations and other global actors. Although the assertion of extraterritorial jurisdiction through national laws in the commercial sphere has engendered substantial resistance, in certain fields, such as competition law/antitrust law, there is some indication that such measures are slowly gaining acceptance. While the United States[36] remains the most active promulgator of extraterritorial measures in this field, other States and regional organizations such as the European Union,[37] France,[38] Germany[39] and, most recently, the Republic of Korea,[40] have also adopted laws with extraterritorial application.

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[30] Although in the jurisprudence of some States (mainly coming from the Western European States), the territoriality principle seems to be the main basis of jurisdiction relied upon for combating cybercrimes, it is interpreted in such a broad way that it may resemble an application of the effects doctrine or the protective principle. See, for apparent applications of the territoriality principle, the judgement of a British court regarding a pornographic content of a website, Southwark Crown Court, *R.* v. *Graham Waddon [2000]*, 30 June 1999, [2002] All ER (D) 502, 30 June 1999) and the judgement of the Australian High Court, *Dow Jones & Company Inc.* v. *Gutnick*, HCA 56, 10 December 2002. But see, for broad interpretations of the territoriality principle resembling applications of the effects doctrine or the protective principle, the decision of the German Federal Court of Justice in the *Töben* case (BGH 46, 212, decision of 12 December 2000) concerning Holocaust denial on the Internet, and the decision of a French court, the *Yahoo!* case (*Yahoo! Inc.* v. *La Ligue contre le Racisme et l'Antisémitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001)). See Y. A. Timofeeva, "Worldwide prescriptive jurisdiction in Internet content controversies: a comparative analysis", *Connecticut Journal of International Law,* vol. 20 (2005), pp. 199–225, at pp. 202 *et seq*.

[31] See the statutes applied by the United States Court in the *Noriega* case (*United States* v. *Noriega*, 117 F.3d 1206, at pp. 1515–1519 (11th Cir. 1997)); see also the United States Travel Act, 18 U.S.C. 1952 (*a*) (3) (2002).

[32] It should be noted, however, that the inability of a State to enforce its jurisdiction has been held by some national courts not to affect its ability to legislate or adjudicate the matter in question. See, for instance, the judgement of the Federal Court of Justice in Germany in the *Töben* case (footnote 30 above) and the *Yahoo!* case (*ibid.*).

[33] For instance, the United States acknowledged having conducted recent investigations on Russian territory to search for some data on the ground that would otherwise have been lost (for further details, see P. L. Bellia, "Chasing bits across borders", *University of Chicago Legal Forum* (2001), pp. 35–101, at p. 40).

[34] The important issue raised by these abductions was whether courts or tribunals had jurisdiction to judge people illegally brought before them. Case law is largely divided on this issue: regarding the United States courts, see *Ker* v. *Illinois* (119 U.S. 436 (1886)), *Frisbie* v. *Collins* (342 U.S. 519 (1952)), *United States* v. *Yunis* (924 F.2d 1086 (D.C. Cir. 1991)) and *United States* v. *Álvarez-Machain* (504 U.S. 655 (1992)); but see, for another solution given by a United States court, *United States* v. *Toscanino* (500 F.2d 267 (2nd Cir. 1974)); regarding other States: in Israel, the *Eichmann* case (*Attorney General of Israel* v. *Eichmann* (1961), District Court of Jerusalem, 12–15 December 1961, ILR, vol. 36 (1968), p. 5); in England, *Ex parte Susannah Scott* (1829) (*The English Reports*, vol. 109 (1910), p. 166); but see, for another solution given by a British court, *R.* v. *Horseferry Road Magistrates' Court (Ex parte Bennett)* (1993, 3 P, 138 (H.L)); in Canada, see *In re Hartnett* (1973, 1 O.R. (2d) 206, 207 (Can)); in Germany, see the decision of the Federal Constitutional Court in which the Court ruled that an abducted person only needs to be returned when the victim nation objects to the abduction (39 Neue Juritische Wochenschrift 1427 (1986) (German Federal Constitutional Court 1985)); in South Africa, see *State (South Africa)* v. *Ebrahim* (ILR, vol. 95, p. 417); see, in this respect, Timofeeva, *loc. cit.* (footnote 30 above), at pp. 202 *et seq*.

[35] It is usually asserted that such actions constitute a violation of the States' sovereignty, protected by Article 2, paragraph 4 of the Charter of the United Nations and, as far as abductions are concerned, an infringement of article 5 of the European Convention on Human Rights, provided that European States are involved (see, regarding the latter case, *Stocké* v. *Germany, Application no. 11755/85, Judgement of 19 March 1991*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 199 (1991), p. 5, and *Öcalan* v. *Turkey, Application no. 46221/99, Judgement of 12 May 2005*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2005-IV*).

[36] In this regard, two commercial laws of the United States can be highlighted: the Sherman Antitrust Act of 1890 and the Sarbanes-Oxley Act of 2002. The first is the leading American antitrust law, which prohibits any contract, trust or conspiracy aiming to restrain interstate or foreign trade and any attempt or actual monopolization of any part of this commerce. It provides for financial sanctions for engaging in any of those acts. The Sarbanes-Oxley Act of 2002 regulates the corporate governance of companies listed on the United States stock exchange and "calls for application to all companies that list stock on the U.S. capital markets" without any exception for foreign companies. See C. A. Falencki, "Sarbanes-Oxley: ignoring the presumption against extraterritoriality", *George Washington International Law Review*, vol. 36 (2004), pp. 1211–1238, at p. 1216.

[37] The European Union, despite its original resistance to extraterritorial jurisdiction and harsh criticisms towards American practice in this regard, also *de facto* extended its jurisdiction to control mergers, acquisitions and joint ventures outside the territories of its member States. Indeed, the Court of Justice of the European Communities recognized its own jurisdiction on some foreign corporations and their activities abroad and it applied to them the competition provision of articles 81 and 82 of the Treaty Establishing the European Economic Community (formerly articles 85 and 86) and the Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings amended by Council Regulation (EC) No. 1310/97 of 30 June 1997. See D. J. Feeney, "The European Commission's extraterritorial jurisdiction over corporate mergers", *Georgia State University Law Review*, vol. 19 (2002–2003), pp. 425–491, at p. 427.

[38] The best-known example of this is the highly criticized provision of the French Civil Code on the adjudication by French courts of contracts signed abroad between a French person and a foreigner. See Combacau and Sur, *op. cit.* (footnote 5 above), at p. 354.

[39] The German Act Against Restraints of Competition was initially enacted in 1957 and had several major revisions, the last one in 1998, with a last amendment in 1999: article 130 (2) states that "this Act shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area". Therefore, all prohibitions and notification requirements apply to activities which have a direct, reasonably foreseeable and significant (not necessarily substantial) effect. The Act has been regularly applied to foreign enterprises (see www.antitrust.de). See also A.V. Lowe, "The problems of extraterritorial jurisdiction: economic sovereignty and the search for a solution", *International and Comparative Law Quarterly*, vol. 34 (1985), pp. 724–746, at p. 736, citing also D. J. Gerber, "The extraterritorial application of the German antitrust laws", AJIL, vol. 77 (1983), pp. 756–783.

[40] The Republic of Korea has also recently given an extraterritorial application of its national antitrust law. On 1 April 2005, the amended Monopoly Regulation and Fair Trade Act, providing for an extraterritorial application of the Act, entered into force. This legal amendment

24. In commercial law, States have based their extraterritorial jurisdiction to prescribe primarily on the nationality principle and the "effects doctrine". The European Union, for example, has relied on an enlarged theory of nationality with respect to multinational corporations with local subsidiaries to establish jurisdiction over their activities.[41] The United States, on the other hand, has increasingly relied upon the "effects doctrine" to establish jurisdiction over the conduct of foreign actors abroad, as long as it is intended to and actually has an effect on the United States domestic market,[42] although with some international opposition.[43]

25. The extension of extraterritorial jurisdiction of a State and of the "effects doctrine" to cover activities contrary to the foreign policy interest of a State has proven particularly controversial. An example of this is the attempts by the United States to enforce economic sanctions against Cuba and Libya through extraterritorial measures such as the Helms-Burton Act[44] and the D'Amato-Kennedy Act[45] of 1996. Such measures provoked diplomatic protests, the adoption of blocking statutes and the institution of dispute resolution proceedings in the WTO by potentially affected States (see, below, the proposed outline for an instrument on extraterritorial jurisdiction, section E.7). Eventually, it was agreed that the enforcement of the extraterritorial provisions of these measures would be suspended indefinitely.

26. Reliance by a State on the passive personality principle to establish adjudicative jurisdiction in the commercial law context has also proven controversial with regard to a provision of the French Civil Code allowing for any dispute arising from a contract between a French national and a foreigner to be adjudicated in a French court.[46]

27. As regards enforcement jurisdiction, although the extraterritorial assertion of enforcement jurisdiction without the consent of the territorial State is generally prohibited under international law, States have in some instances concluded international agreements to allow for the extraterritorial enforcement of their commercial and competition laws.[47]

C. Consequences of the invalid assertion of extraterritorial jurisdiction

28. The assertion of extraterritorial jurisdiction by a State is entitled to recognition by other States only to the extent that it is consistent with international law. In the event that one State exercises extraterritorial jurisdiction that another State judges excessive, the other State may oppose such an exercise of jurisdiction in a number of different ways. Examples of such opposition have included diplomatic protests;[48] non-recognition of laws, orders and judgments;[49] legislative measures such as "blocking

aimed to make the law consistent with the recent practice of some Korean courts since 2002, to apply the domestic antitrust act to some foreign manufacturers. See Korea Fair Trade Commission decision of 4 April 2002 (case 2-77), confirmed by the Seoul High Court Decision of 26 August 2003 (2002nu 14647) and Korea Fair Trade Commission decision of 29 April 2003 (case 3-98); see also Y. Jung, "Korean competition law: first step towards globalization", *Journal of Korean Law*, vol. 4, No. 2 (2005), pp. 177–199, and W. Kim, "The extraterritorial application of U.S. antitrust law and its adoption in Korea", *Singapore Journal of International and Comparative Law*, vol. 7 (2003), pp. 386–411.

[41] *Imperial Chemical Industries Ltd.* v. *Commission of the European Communities, Case 48-69, Judgement of 14 July 1972, European Court Reports 1972, p. 619*; *Europemballage Corp. and Continental Can Co.* v. *Commission of the European Communities, Case 6-72, Judgement of 21 February 1973, European Court Reports 1973*, p. 215; *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation* v. *Commission of the European Communities, Joined Cases 6 and 7-73, Judgement of 6 March 1974, European Court Reports 1974*, p. 223. See also Feeney, *loc. cit.* (footnote 37 above), at p. 426, and J. J. Norton, "The European Court of Justice judgment in *United Brands*: extraterritorial jurisdiction and abuse of dominant position", *Denver Journal of International Law and Policy*, vol. 8 (1979), pp. 379–414.

[42] See, for example, *F. Hoffman-LaRoche, Ltd.* v. *Empagran* (542 U.S. 155, 124 S. Ct. 2359 (2004)).

[43] "[T]he so-called 'effects' doctrine of territorial jurisdiction [whatever its precise content and criteria] has developed considerable controversy in international legal circles, and has been the subject of heated discussion within the Community" (Norton, *loc. cit.* (footnote 41 above), at p. 385).

[44] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114 (1996).

[45] Iran and Libya Sanctions Act of 1996 (H. R. 3107).

[46] See Combacau and Sur, *op. cit.* (footnote 5 above), at p. 354.

[47] See the Convention concerning judicial competence and the execution of decisions in civil and commercial matters as amended (among European Community member States); the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (among member States of the European Community and the European Free Trade Association); Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (among OAS members); Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments; and Council [of the European Union] Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal of the European Communities* No. L 12, 16 January 2001, p. 1. See also the Articles of Agreement of the International Monetary Fund, which provide under article VIII.2(*b*) that "[e]xchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member". See also Lowe, "The problems of extraterritorial jurisdiction…", *loc. cit.* (footnote 39 above), at p. 732.

[48] For example, both the European Community and the United Kingdom submitted protests when the United States amended its Export Administration Regulations in such a way as to prohibit the export of oil or natural gas exploitation equipment to the Soviet Union. The comments of the European Community laid out the provisions of the disputed measures and stated, *inter alia*: "The U.S. measures as they apply in the present case are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of U.S. nationality in respect of their conduct outside the United States and particularly the handling of property and technical data of these companies not in the United States"; see Note and Comments of the European Community on the Amendments of 22 June 1982 to the Export Administration Act, presented to the United States Department of State on 12 August 1982; Note on the same subject presented by the Government of the United Kingdom on 18 October 1982; and a further *aide-mémoire* presented by the European Community on 14 March 1983, in A. V. Lowe, *Extraterritorial Jurisdiction: an Annotated Collection of Legal Materials*, Cambridge, Grotius, 1983, p. 197, at p. 201. Other examples of diplomatic protests made in response to extraterritorial exertions of jurisdiction include: *Aides-mémoire* by Japan of 23 August 1960 and 20 March 1961 to the United States Department of State, *ibid.*, at p. 121 (extract); and *Aide-mémoire* by the United Kingdom of 20 October 1969 to the Commission of the European Communities, *ibid.*, at p. 144.

[49] "Where a state or its courts have acted contrary to international law, including the rules relating to the exercise of jurisdiction, other states are in international law entitled (but not compelled) to refuse to give effect to the illegal act … . In practice most states, in their rules of private international law, ensure that a foreign state's laws and decisions which exceed the limits of jurisdiction permitted by international law are not recognised or enforced abroad" (*Oppenheim's International Law* (see footnote 6 above), at p. 485). In particular, some States generally decline to give effect to the public laws of other States, such as revenue, penal and confiscatory law. See generally *ibid.*, at pp. 488–498.

statutes"[50] and "claw-back statutes";[51] judicial measures such as injunctions;[52] and the institution of international proceedings.[53] The limitation on the recognition of extraterritorial jurisdiction as well as possible responses to invalid assertions of such jurisdiction could be addressed in the draft.

D. Priority in the event of competing valid jurisdictions

29. There may be situations in which the State asserting extraterritorial jurisdiction is the only State that has any connection to the relevant person, property or situation which is beyond the territory of any State. In such a case, the State would have exclusive jurisdiction. More often the extraterritorial jurisdiction of a State coincides with the jurisdiction of one or more other States—notably the territorial State. The concurrent jurisdiction of States may give rise to disputes concerning priority of jurisdiction. The question arises as to the relationship between extraterritorial jurisdiction and territorial jurisdiction in terms of priority.[54] In this regard, it may be necessary to distinguish between legislative or adjudicative jurisdiction and enforcement jurisdiction.

30. Questions of priority in the event of competing jurisdictions as a consequence of the assertion of extraterritorial jurisdiction most frequently arise with respect to legislative or adjudicative jurisdiction. Some States have developed general principles or rules for resolving these situations. For example, the national court of one State may be called upon to apply extraterritorially the legislation of another State. In order to minimize the likelihood of conflicts and to show deference to foreign States, national courts in some States have adopted a presumption against the extraterritorial application of their own national law.[55] Thus, unless there is a specific indication that a certain law or regulation was intended to apply to foreign nationals for actions committed abroad, a court will consider that no such intent existed on the part of the legislature. Such a rule is based in part on principles of comity and non-interference in the domestic affairs of other States, as well as practical considerations.

31. Another rule developed by courts to deal with competing assertions of jurisdiction resulting from extraterritorial measures is the foreign State compulsion doctrine. The foreign State compulsion doctrine provides that a party should not be held criminally or civilly liable for undertaking an activity in another State that is required under the laws of that State.[56] Therefore, an extraterritorial measure in direct conflict with a criminal law of the territorial State would not be applied by a competent court, even if it determined that the assertion of jurisdiction was reasonable.

32. Questions of competing jurisdiction do not often arise with respect to enforcement jurisdiction. As a general rule, States are not allowed to enforce their laws in the

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[50] A blocking statute is a law adopted by State disputing the validity of the exertion of jurisdiction designed to impede the enforcement of the disputed provision, often by creating a direct conflict of laws. Such provisions may, *inter alia*, prohibit cooperation in foreign court proceedings or investigations, prohibit compliance with extraterritorial laws of other States, declare judgements based on such measures unenforceable, and allow the recovery of damages suffered as a result of such measures. As a result of the foreign State compulsion doctrine discussed below, blocking statutes may have the additional effect of limiting the enforceability of an extraterritorial measure even in the State promulgating such a measure. In States that apply this doctrine, a national court would not require compliance with the extraterritorial measure in question, since compliance would involve a violation of the laws of the territorial State. For example, several States adopted protective measures in response to the United States' adoption of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (also known as the "Helms-Burton Act" (see footnote 44 above)), which sought to penalize non-United States companies for doing business with Cuba. Canada amended its Foreign Extraterritorial Measures Act (R.S.C., ch. F-29, para. 3 (1985), amended by ch. 28, 1996 S.C. (Can.)); Mexico adopted the Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law (www.diputados.gob.mx/LeyesBiblio/pdf/63.pdf); and the European Union adopted Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, *Official Journal of the European Communities, No. L 309*, 29 November 1996, p. 1. See J. W. Boscariol, "An anatomy of a Cuban pyjama crisis: reconsidering blocking legislation in response to extraterritorial trade measures of the United States", *Law and Policy in International Business*, vol. 30, No. 3 (1999), pp. 439–499, at pp. 441–442 and 471–474 (describing Canada's Foreign Extraterritorial Measures Act); A. Layton and A. M. Parry, "Extraterritorial jurisdiction—European responses", *Houston Journal of International Law*, vol. 26, No. 2 (2004), pp. 309–325, at pp. 311–312 (describing the United Kingdom's Protection of Trading Interests Act of 1980, c. 11 § 1(1)(*b*)(Eng.)); H. L. Clark, "Dealing with U.S. extraterritorial sanctions and foreign countermeasures", *University of Pennsylvania Journal of International Economic Law*, vol. 20 (1999), pp. 61–96, at pp. 81–92. See also Lowe, *Extraterritorial Jurisdiction…, op. cit.* (footnote 48 above), at pp. 79–219 (containing texts of blocking statutes from various States).

[51] See, for example, Council Regulation (EC) No. 2271/96, article 6 (footnote 50 above); and Canada's Foreign Extraterritorial Measures Act, article 9(1)(*a*) (*ibid.*).

[52] For example, in *U.S.* v. *Imperial Chemical Industries*, a British company was able to obtain an injunction from a British court restraining a party in the case from enforcing an extraterritorial order of the United States court. See *Oppenheim's International Law* (footnote 6 above), at p. 477, footnote 50 (citing, *inter alia, U.S.* v. *Imperial Chemical Industries* (1952), 105 F.Supp. 215).

[53] "In principle excess of jurisdiction gives rise to state responsibility even in absence of an intention to harm another state" (Brownlie, *op. cit.* (footnote 5 above), at p. 312). Thus, States have been able to seek redress in international forums for improper exercises of jurisdiction. The most relevant example of such recourse is the *Lotus* case (see footnote 14 above), where France sought damages for Turkey's allegedly excessive assertion of jurisdiction. In the *Eichmann* case (see footnote 34 above), the dispute over Israel's assertion of enforcement jurisdiction in Argentina was brought before the Security Council, and a settlement was reached between the two States.

[54] See *Oppenheim's International Law* (footnote 6 above), at p. 458 ("Territoriality is the primary basis for jurisdiction; even if another state has a concurrent basis for jurisdiction, its right to exercise is limited if to do so would conflict with the rights of the state having territorial jurisdiction"). See also Daillier and Pellet, *op. cit.* (footnote 5 above), at p. 502 ("La rigidité des solutions théoriques résultant de la hiérarchie des compétences et, en particulier, de la primauté de la souveraineté territoriale sur la compétence personnelle, qui exclut en principe toute application, au moins forcée, du droit national à l'étranger" [The rigidity of theoretical solutions resulting from the hierarchy of competencies and, in particular, from the primacy of territorial sovereignty over personal jurisdiction, which precludes in principle any application, at least forced, of national law abroad]).

[55] See Mann, *loc. cit.* (footnote 5 above), at pp. 63–64; and *F. Hoffman-LaRoche* v. *Empagran* (footnote 42 above): "*First*, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with other nations' sovereign authority" (p. 4).

[56] See Clark, *loc. cit.* (footnote 50 above), at pp. 92–93; Brownlie, *op. cit.* (footnote 5 above), at p. 308 (citing Judge R. Y. Jennings, "Extraterritorial jurisdiction and the United States antitrust laws", BYBIL, vol. 33 (1957), pp. 146–175, at p. 151); R. K. Gardiner, *International Law*, London, Pearson, 2003, at p. 325; and *Oppenheim's International Law* (footnote 6 above), at pp. 464–465.

territory of another State without the *consent* of the territorial State. As the PCIJ stated in the *Lotus* case, "a State … may not exercise its power in any form in the territory of another State".[57] Thus, when Israel captured Adolf Eichmann on Argentine soil and subsequently transferred him to Israel for trial, the Security Council requested the Government of Israel to make appropriate reparation to Argentina.[58]

E. Elaboration of an instrument

33. An instrument on this topic could aim at setting forth general principles and more specific rules governing the assertion of extraterritorial jurisdiction under public international law. The overview of the existing norms and rules indicates that there is a considerable amount of State practice relating to the assertion of extraterritorial jurisdiction upon which the Commission could draw in the elaboration of such an instrument.

34. Recent developments in technology and the globalization of the world economy, which limit the ability of States to protect their national interests by relying solely on traditional principles of jurisdiction, have contributed to the increasing level of disagreement and uncertainty with respect to certain aspects of the law governing extraterritorial jurisdiction. The elaboration of a draft instrument on the topic may therefore require substantial progressive development of the law in addition to codification. State practice indicates several strong trends in the emergence of new rules or the extension of traditional rules which may guide the Commission in resolving the areas of disagreement and thereby provide greater clarity and certainty in an area of international law which is of increasing practical importance, yet the elaboration of a draft instrument on the topic could prove to require some progressive development of the law.

1. Scope of the topic

35. The delimitation of the scope of the topic will be important in light of the breadth of the topic of jurisdiction in general. While some attempts at codification have considered extraterritorial jurisdiction from the broader perspective of jurisdiction in general,[59] the topic may be limited to extraterritorial assertions of jurisdiction only. Moreover, the topic may be restricted only to national law applied extraterritorially.

36. There are some fields of law in which questions of extraterritorial jurisdiction are likely to arise which are regulated to some extent by special regimes. Paramount amongst these are the law of the sea, outer space law, international humanitarian law and tax law. In addition, assertions of extraterritorial jurisdiction with respect to judicial and police assistance and cooperation as well as the recognition and enforcement of foreign judgments are, for the most part, regulated by existing international, regional or bilateral agreements. While these special rules may provide some guidance in the elaboration of general principles and rules with respect to extraterritorial jurisdiction, the draft instrument would be without prejudice to existing legal regimes.

37. Although the extraterritorial assertion of jurisdiction by States can often result in concurrent or conflicting attempts to exercise jurisdiction, it would not be necessary to revisit the rules of private international law developed by States to resolve such conflicts. However, it may be useful to include general principles of comity that are of particular relevance to the resolution of disputes resulting from assertions of extraterritorial jurisdiction.

38. One aspect of the topic which has not been fully addressed in previous codification efforts is the consequences of invalid assertions of extraterritorial jurisdiction. Although this aspect is to some extent addressed by the articles on the responsibility of States for internationally wrongful acts, there is also a sizeable body of State practice in this regard that could be explored in an effort to establish rules and procedures for resolving the specific issues that may arise in disputes relating to invalid assertions of extraterritorial jurisdiction.

2. Definitions

39. Defining the main concepts to be contained in an instrument would be one of the essential elements of the study. Definitions of the terms "jurisdiction" and "extraterritorial" are crucial to determining the scope of the draft text. Further consideration of the topic may indicate additional terms that would also need to be clearly defined in the draft.

40. The notion of the *jurisdiction* of a State may be understood as generally referring to the sovereign power or authority of a State. In this regard, a distinction could be drawn between three types of jurisdiction, namely prescriptive, adjudicative and enforcement jurisdiction.

41. The notion of *extraterritoriality* may be understood as referring to the area beyond the territory of a State, including its land, internal waters, territorial sea as well as the adjacent airspace. Such an area could fall within the territory of another State or outside the territorial jurisdiction of any State.

3. Core principles of extraterritorial jurisdiction

42. It is generally accepted that in order for a State to validly assert its jurisdiction over a natural or legal person, property or situation, it must have some connection to such person, property or situation. The types of connections that may constitute a sufficient basis for the exercise of extraterritorial jurisdiction are reflected in the general principles of international law which govern the exercise of such jurisdiction by a State. These principles are as follows:

[57] The *Lotus* case (footnote 14 above), p. 18.

[58] Security Council resolution 138 (1960) of 23 June 1960. However, see the *Eichmann* case (footnote 34 above), and the *Alvarez-Machain* case (*ibid.*).

[59] See Harvard Law School, *Harvard Research in International Law,* Codification of International Law… (footnote 27 above), p. 439; and American Law Institute, *Restatement of the Law (Third)…* (footnote 6 above). It should be noted that the Restatement, in particular, is of limited relevance for present purposes since it focuses primarily on United States practice.

— Territoriality principle as it relates to extraterritorial jurisdiction:

— Objective territoriality principle

— Effects doctrine

— Nationality principle

— Passive personality principle

— Protective principle

43. Any assertion of extraterritorial jurisdiction must be based on at least one of the above-mentioned principles to be valid under international law. More than one of the above principles may be relevant in determining the validity of extraterritorial jurisdiction in a particular case, depending on the circumstances.

4. Rules relating to the assertion of extraterritorial jurisdiction

44. The degree of the connection that a State must have with a person, property or situation in order to validly assert its jurisdiction extraterritorially may vary according to the type of jurisdiction the State is attempting to exercise. Accordingly, it would be necessary to indicate the extent to which the various jurisdictional principles may provide a valid basis for the extraterritorial assertion of prescriptive, adjudicative or enforcement jurisdiction. The exercise of extraterritorial jurisdiction may also raise special issues with respect to particular fields of law, such as those relating to cybercrimes in the field of criminal law, or e-commerce in the field of commercial law. It may be therefore also be useful to include specific provisions to address these types of special issues which may not be adequately addressed by the formulation of general principles and rules.

5. Limitations on the rights of States to assert extraterritorial jurisdiction

45. Assertions of extraterritorial jurisdiction are subject to limitations based on certain fundamental principles of international law such as the sovereign equality of States, the principle of the territorial integrity of a State and the principle of non-intervention in the domestic affairs of other States, as enshrined in the Charter of the United Nations. Considerations of comity should also be taken into account in the application of assertions of extraterritorial jurisdiction.

6. Consequences of invalid assertions of extraterritorial jurisdiction

46. In the event of an assertion of extraterritorial jurisdiction by one State which another State considers invalid under international law, States have a general obligation to cooperate to resolve the dispute. A legal instrument on this subject should also envisage a procedure for resolving such a dispute that would involve: giving notice that the assertion of jurisdiction is considered invalid; reviewing the validity of the assertion by the enacting State in light of the core principles; and taking into account the objections of the affected State.

7. Proposed outline for an instrument on extraterritorial jurisdiction

I. General provisions

1. Scope of application

2. Relationship to other legal regimes

(*a*) *lex specialis*

(*b*) pre-existing treaty regimes

3. Use of terms

II. Principles of jurisdiction

1. Territoriality principle

(*a*) objective territoriality principle

(*b*) effects doctrine

2. Nationality principle

3. Passive personality principle

4. Protective principle

III. Extraterritorial assertion of jurisdiction

1. Prescriptive jurisdiction

2. Adjudicative jurisdiction

3. Enforcement jurisdiction

4. Specific fields of law

IV. Limitations on the extraterritorial assertion of jurisdiction

1. Sovereignty, territorial integrity and non-intervention

2. Comity

(*a*) presumption against extraterritoriality

(*b*) foreign State compulsion doctrine

(*c*) principle of reasonableness

V. Dispute resolution

1. General duty to cooperate

2. Duty to give notice

3. Duty to review extraterritorial measures

4. General right to countermeasures

5. Dispute resolution mechanism

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