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Report of the International Law Commission

Sixty-seventh session
(4 May–5 June and 6 July–7 August 2015)

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Supplement No. 10 (A/70/10)

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The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971)* indicates a reference to the *Yearbook of the International Law Commission.*

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2015.*

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Chapter I

Introduction

1. The International Law Commission held the first part of its sixty-seventh session from 4 May to 5 June 2015 and the second part from 6 July to 7 August 2015 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Shinya Murase, First Vice-Chairman of the sixty-sixth session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Mohammed Bello Adoke (Nigeria)

Mr. Ali Mohsen Fetais Al-Marri (Qatar)

Mr. Lucius Caflisch (Switzerland)

Mr. Enrique J.A. Candioti (Argentina)

Mr. Pedro Comissário Afonso (Mozambique)

Mr. Abdelrazeg El-Murtadi Suleiman Gouider (Libya)

Ms. Concepción Escobar Hernández (Spain)

Mr. Mathias Forteau (France)

Mr. Juan Manuel Gómez-Robledo (Mexico)

Mr. Hussein A. Hassouna (Egypt)

Mr. Mahmoud D. Hmoud (Jordan)

Mr. Huikang Huang (China)

Ms. Marie G. Jacobsson (Sweden)

Mr. Maurice Kamto (Cameroon)

Mr. Kriangsak Kittichaisaree (Thailand)

Mr. Roman A. Kolodkin (Russian Federation)[1]

Mr. Ahmed Laraba (Algeria)

Mr. Donald M. McRae (Canada)

Mr. Shinya Murase (Japan)

Mr. Sean D. Murphy (United States of America)

Mr. Bernd H. Niehaus (Costa Rica)

Mr. Georg Nolte (Germany)

Mr. Ki Gab Park (Republic of Korea)

Mr. Chris Maina Peter (United Republic of Tanzania)

Mr. Ernest Petrič (Slovenia)

[1] See para. 3 below.

Mr. Gilberto Vergne Saboia (Brazil)

Mr. Narinder Singh (India)

Mr. Pavel Šturma (Czech Republic)

Mr. Dire D. Tladi (South Africa)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

Mr. Nugroho Wisnumurti (Indonesia)

Mr. Michael Wood (United Kingdom of Great Britain and Northern Ireland)

B. Casual vacancy

3. On 8 May 2015 the Commission elected Mr. Roman A. Kolodkin to fill the casual vacancy occasioned by the resignation of Mr. Kirill Gevorgian.

C. Officers and the Enlarged Bureau

4. At its 3244th meeting, on 4 May 2015, the Commission elected the following officers:

Chairman:	Mr. Narinder Singh (India)
First Vice-Chairman:	Mr. Amos S. Wako (Kenya)
Second Vice-Chairman:	Mr. Pavel Šturma (Czech Republic)
Chairman of the Drafting Committee:	Mr. Mathias Forteau (France)
Rapporteur:	Mr. Marcelo Vázquez-Bermúdez (Ecuador)

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission [2] and the Special Rapporteurs.[3]

6. The Commission set up a Planning Group composed of the following members: Mr. Amos S. Wako (Chairman), Mr. L. Caflisch, Mr. P. Comissário Afonso, Mr. A. El-Murtadi Suleiman Gouider, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. H. Huang, Ms. M.G. Jacobsson, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. P. Šturma, Mr. D.D. Tladi, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

D. Drafting Committee

7. At its 3245th, 3250th, 3257th, 3261st, 3269th, 3278th and 3280th meetings, on 5, 13 and 27 May and on 3 June and 14, 24 and 29 July 2015, the Commission

[2] Mr. L. Caflisch, Mr. E. Candioti, Mr. M. Kamto, Mr. B.H. Niehaus, Mr. E. Petrič and Mr. N. Wisnumurti.

[3] Ms. C. Escobar Hernández, Mr. J.M. Gómez-Robledo, Ms. M. G. Jacobsson, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. D.D. Tladi, Mr. E. Valencia-Ospina and Mr. M. Wood.

established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Identification of customary international law*: Mr. M. Forteau (Chairman), Mr. M. Wood (Special Rapporteur), Mr. M.D. Hmoud, Mr. H. Huang, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. P. Sturma, Mr. D.D. Tladi, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(b) *Protection of the atmosphere*: Mr. M. Forteau (Chairman), Mr. S. Murase (Special Rapporteur), Mr. M.D. Hmoud, Mr. H. Huang, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. D.D. Tladi, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(c) *Crimes against humanity*: Mr. M. Forteau (Chairman), Mr. S.D. Murphy (Special Rapporteur), Ms. C. Escobar Hernández, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. R.A. Kolodkin, Mr D.M. McRae, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. D.D. Tladi, Mr. A.S. Wako, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(d) *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*: Mr. M. Forteau (Chairman), Mr. G. Nolte (Special Rapporteur), Mr. K. Kittichaisaree, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. K.G. Park, Mr. P. Šturma, Mr. D.D. Tladi, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(e) *Protection of the environment in relation to armed conflicts*: Mr. M. Forteau (Chairman), Ms. M.G. Jacobsson (Special Rapporteur), Ms. C. Escobar Hernández, Mr. J.M. Gómez-Robledo, Mr. M.D. Hmoud, Mr. H. Huang, Mr. K. Kittichaisaree, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. G.V. Saboia, Mr. P. Šturma, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(f) *Immunity of State officials from foreign criminal jurisdiction*: Mr. M. Forteau (Chairman), Ms. C. Escobar Hernández (Special Rapporteur), Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. D.D. Tladi, Mr. A.S. Wako, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(g) *Provisional applications of treaties*: Mr. M. Forteau (Chairman), Mr. J.M. Gómez-Robledo (Special Rapporteur), Ms. C. Escobar Hernández, Mr. M. Kamto, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. D.D. Tladi, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

8. The Drafting Committee held a total of 34 meetings on the seven topics indicated above.

E. Study Group

9. At its 3249th meeting on 12 May 2015, the Commission reconstituted the following Study Group:

Study Group on The Most-Favoured-Nation clause: Mr. D.M. McRae (Chairman), Mr. L. Caflisch, Mr. M. Forteau, Mr. M.D. Hmoud, Mr. M. Kamto, Mr. S. Murase, Mr. S.D. Murphy, Mr. K.G. Park, Mr. N. Singh, Mr. P. Šturma, Mr. D.D. Tladi, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

10. The Planning Group reconstituted the following Working Group:

Working Group on Long-term Programme of work for the quinquennium: Mr. D. McRae (Chairman), Mr. L. Caflisch, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. N. Singh, Mr. P. Šturma, Mr. D.D. Tladi, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

F. Secretariat

11. Mr. Miguel de Serpa Soares, Under-Secretary-General and United Nations Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General from 4 May to 5 June 2015. Mr. Huw Llewellyn, Principal Legal Officer, served as Principal Assistant Secretary. Upon the retirement of Mr. George Korontzis and the appointment of Mr. Huw Llewellyn as Director of the Codification Division of the Office of Legal Affairs, Mr. Huw Llewellyn served as Secretary to the Commission from 8 June 2015. Mr. Trevor Chimimba and Mr. Arnold Pronto, Senior Legal Officers, served as Senior Assistant Secretaries. Ms. Hanna Dreifeldt-Lainé and Mr. David Nanopoulos, Legal Officers, served as Assistant Secretaries to the Commission.

G. Agenda

12. At its 3244th meeting, on 4 May 2015, the Commission adopted an agenda for its sixty-seventh session consisting of the following items:

1. Organization of the work of the session.
2. Immunity of State officials from foreign criminal jurisdiction.
3. Subsequent agreements and subsequent practice in relation to the interpretation of treaties.
4. The Most-Favoured-Nation clause.
5. Provisional application of treaties.
6. Identification of customary international law.
7. Protection of the environment in relation to armed conflicts.
8. Protection of the atmosphere.
9. Crimes against humanity.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Date and place of the sixty-eighth session.
12. Cooperation with other bodies.
13. Other business.

Chapter II
Summary of the work of the Commission at its sixty-seventh session

13. In relation to the topic "**The Most-Favoured-Nation clause**", the Commission received and welcomed with appreciation the final report on the work of the Study Group on The Most-Favoured-Nation clause and endorsed the summary conclusions of the Study Group. The Commission commended the final report to the attention of the General Assembly, and encouraged its widest possible dissemination. The Commission thus concluded its consideration of the topic (chap. IV).

14. With regard to the topic "**Protection of the atmosphere**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/681 and Corr.1 (Chinese only)), which, upon a further analysis of the draft guidelines submitted in the first report, presented a set of revised draft guidelines relating to the use of terms, the scope of the draft guidelines, and the common concern of humankind, as well as draft guidelines on the general obligation of States to protect the atmosphere and on international cooperation. Following its debate on the report, the Commission decided to refer draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report, to the Drafting Committee, with the understanding that draft guideline 3 be considered in the context of a possible preamble. Upon consideration of the report of the Drafting Committee (A/CN.4/L.851), the Commission provisionally adopted draft guidelines 1, 2 and 5 and four preambular paragraphs, together with commentaries thereto (chap. V).

15. As regards the topic "**Identification of customary international law**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/682), which contained, *inter alia*, additional paragraphs to three of the draft conclusions proposed in the second report and five new draft conclusions relating respectively to the relationship between the two constituent elements of customary international law, the role of inaction, the role of treaties and resolutions, judicial decisions and writings, the relevance of international organizations, as well as particular custom and the persistent objector. Following the debate in Plenary, the Commission decided to refer the draft conclusions contained in the third report to the Drafting Committee. The Commission received the report of the Drafting Committee (A/CN.4/L.869), and took note of draft conclusions 1 to 16 [15] provisionally adopted by the Drafting Committee at the sixty-sixth and sixty-seventh sessions (chap. VI).

16. With respect to the topic "**Crimes against humanity**", the Commission considered the first report of the Special Rapporteur (A/CN.4/680), which contained, *inter alia*, two draft articles relating respectively to the prevention and punishment of crimes against humanity and to the definition of crimes against humanity. Following the debate in Plenary, the Commission decided to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee. Upon consideration of the report of the Drafting Committee (A/CN.4/L.853), the Commission provisionally adopted draft articles 1 to 4, together with commentaries thereto (chap. VII).

17. As regards the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/683), which contained, *inter alia*, one draft conclusion relating to constituent instruments of international organizations. Following the debate in Plenary, the Commission decided to refer the draft conclusion proposed by the Special Rapporteur to the Drafting Committee. Upon

consideration of the report of the Drafting Committee (A/CN.4/L.854), the Commission provisionally adopted draft conclusion 11, together with a commentary thereto (chap. VIII).

18. With respect to the topic "**Protection of the environment in relation to armed conflicts**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/685), which, *inter alia*, identified and examined existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict. The report contained five draft principles and three draft preambular paragraphs relating to the scope and purpose of the draft principles as well as use of terms. Following the debate in Plenary, the Commission decided to refer the draft preambular paragraphs and the draft principles, as contained in the report of the Special Rapporteur, to the Drafting Committee, with the understanding that the provision on use of terms was referred for the purpose of facilitating discussions and was to be left pending by the Drafting Committee. The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.870), and took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee (chap. IX).

19. In relation to the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/686), which was devoted to the consideration of the remaining aspects of the material scope of immunity *ratione materiae*, namely what constituted an "act performed in an official capacity", and its temporal scope. The report contained proposals for draft article 2, subparagraph (f), defining an "act performed in an official capacity" and draft article 6 on the scope of immunity *ratione materiae*. Following the debate in Plenary, the Commission decided to refer the two draft articles to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.865), and took note of draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee (chap. X).

20. As regards the topic "**Provisional application of treaties**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/687), which considered the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties of 1969, and the question of provisional application with regard to international organizations. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. The Commission referred six draft guidelines, proposed by the Special Rapporteur, to the Drafting Committee. The Commission subsequently received an interim oral report, presented by the Chairman of the Drafting Committee, on draft guidelines 1 to 3, provisionally adopted by the Drafting Committee, and which was presented to the Commission for information only (chap. XI).

21. The Commission established a Planning Group to consider its programme, procedures and working methods (chap. XII, sect. A). The Commission decided to include the topic "*Jus cogens*" in its programme of work, and to appoint Mr. Dire Tladi as Special Rapporteur for the topic (chap. XII, sect. A.1).

22. The Commission continued its exchange of information with the International Court of Justice, the Asian-African Legal Consultative Organization, the Inter-American Juridical Committee, the Committee of Legal Advisers on Public International Law of the Council of Europe and the African Union Commission on International Law. The United Nations High Commissioner for Human Rights also addressed the Commission. An informal exchange of views was held between members of the Commission and the International Committee of the Red Cross.

23. The Commission recommended that its sixty-eighth session be held in Geneva from 2 May to 10 June and 4 July to 12 August 2016 (chap. XII, sect. B).

Chapter III
Specific issues on which comments would be of particular interest to the Commission

24. The Commission considers as still relevant the requests for information contained in Chapter III of its Report on its last session on the topics "Protection of the atmosphere"[4], "Identification of customary international law"[5] and "Crimes against humanity"[6], and would welcome any additional information.

25. The Commission would also welcome any information on the following issues, by 31 January 2016, in order to be taken into account in the respective reports of the Special Rapporteurs.

A. Subsequent agreements and subsequent practice in relation to the interpretation of treaties

26. It would assist the Commission if States and international organizations could provide it with:

(a) any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty; and

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

B. Protection of the environment in relation to armed conflicts

27. The Commission would appreciate being provided by States with information on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. The Commission would particularly appreciate receiving examples of:

(a) treaties, including relevant regional or bilateral treaties;

(b) national legislation relevant to the topic, including legislation implementing regional or bilateral treaties;

(c) case-law in which international or domestic environmental law was applied to disputes in relation to armed conflict.

28. The Commission would also invite information from States as to whether they have any instruments aimed at protecting the environment in relation to armed conflict, for example, national legislation and regulations; military manuals, standard operating procedures, Rules of Engagement or Status of Forces Agreements applicable during international operations; and environmental management policies related to defence-related activities. The Commission would, in particular, be interested in instruments related to preventive and remedial measures.

[4] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 27.
[5] *Ibid.*, paras. 29-30.
[6] *Ibid.*, para. 34.

C. Immunity of State officials from foreign criminal jurisdiction

29. The Commission would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction.

D. Provisional application of treaties

30. The Commission would appreciate being provided by States with information on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to:

(a) the decision to provisionally apply a treaty;

(b) the termination of such provisional application; and

(c) the legal effects of provisional application.

E. *Jus cogens*

31. The Commission would appreciate being provided by States with information, relating to their practice on the nature of *jus cogens*, the criteria for its formation and the consequences flowing therefrom as expressed in:

(a) official statements, including official statements before legislatures, courts and international organizations; and

(b) decisions of national and regional courts and tribunals, including quasi-judicial bodies.

Chapter IV

The Most-Favoured-Nation clause

A. Introduction

32. The Commission, at its sixtieth session (2008), decided to include the topic "The Most-Favoured-Nation clause" in its programme of work and to establish, at its sixty-first session, a Study Group on the topic.[7]

33. The Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),[8] and was reconstituted at the sixty-second (2010) and sixty-third (2011) sessions, under the same co-chairmanship.[9] At the sixty-fourth (2012), sixty-fifth (2013) and sixty-sixth sessions, the Commission reconstituted the Study Group, under the chairmanship of Mr. Donald M. McRae.[10] In the absence of Mr. McRae during the 2013 and 2014 sessions, Mr. Mathias Forteau served as chairman.

B. Consideration of the topic at the present session

34. At the present session, the Commission, at its 3249th meeting on 12 May 2015, reconstituted the Study Group on The Most-Favoured-Nation clause, under the chairmanship of Mr. Donald M. McRae.

35. The Study Group held two meetings, on 12 May and 16 July 2015, during which it undertook and completed a substantive and technical review of the draft

[7] At its 2997th meeting, on 8 August 2008 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 354). For the syllabus of the topic, see *ibid.*, annex B. The General Assembly, in paragraph 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[8] At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report of the Co-Chairmen of the Study Group on The Most-Favoured-Nation clause (*ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 211-216). The Study Group considered, *inter alia*, a framework that would serve as a road map for future work and agreed on a work schedule involving the preparation of papers intended to shed additional light on questions concerning, in particular, the scope of MFN clauses and their interpretation and application.

[9] At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the Co-Chairmen of the Study Group (*ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 359-373). The Study Group considered and reviewed the various papers prepared on the basis of the 2009 framework to serve as a road map of future work, and agreed upon a programme of work for 2010. At its 3119th meeting, on 8 August 2011, the Commission took note of the oral report of the Co-Chairmen of the Study Group (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 349-363). The Study Group considered and reviewed additional papers prepared on the basis of the 2009 framework.

[10] At its 3151st meeting, on 27 July 2012, the Commission took note of the oral report of the Chairman of the Study Group (*ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 245-265). The Study Group considered and reviewed additional papers prepared on the basis of the 2009 framework. At its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Study Group (*ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 154-164). The Study Group continued to consider and review additional papers. It also examined contemporary practice and jurisprudence relevant to the interpretation of MFN clauses. At its 3231st meeting, on 25 July 2014, the Commission took note of the oral report on the work of the Study Group (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 254-262). The Study Group undertook a substantive and technical review of the draft final report with a view to preparing a new draft to be agreed on by the Study Group.

final report. Overall, since it was first established in 2009, the Study Group held 24 meetings.

36. The Commission received and considered the final report of the Study Group at its 3264th and 3277th meetings on 6 and 23 July 2015, respectively. The final report appears as an annex to the present report. The Commission notes that the final report is divided into five parts. Part I provides the background, including the origins and purpose of the work of the Study Group, an analysis of the prior work of the Commission on the 1978 draft articles on the most-favoured-nation (MFN) clause, and of developments subsequent to the completion of the 1978 draft articles, in particular in the area of investment, as well as an analysis of MFN provisions in other bodies, such as the United Nations Conference on Trade and Development and the Organization for Economic Co-operation and Development. The general orientation of the Study Group has been not to seek a revision of the 1978 draft articles or to prepare a new set of draft articles.

37. Part II of the report addresses the contemporary relevance of MFN clauses and issues concerning their interpretation, including in the context of the General Agreement on Tariffs and Trade and the World Trade Organization, other trade agreements, and investment treaties. It also considers the types of MFN provisions in bilateral investment treaties (BIT) and highlights the interpretative issues that have arisen in relation to the MFN clauses in BITs, namely: (a) defining the beneficiary of an MFN clause; (b) defining the necessary treatment; and (c) defining the scope of the MFN clause.

38. Part III analyses: (a) the policy considerations in investment relating to the interpretation of investment agreements, taking into account questions of asymmetry in BIT negotiations and the specificity of each BIT; (b) the implications of investment dispute settlement arbitration as "mixed arbitration"; and (c) the contemporary relevance of the 1978 draft articles to the interpretation of MFN provisions.

39. Part IV seeks to provide some guidance on the interpretation of MFN clauses, setting out a framework for the proper application of the principles of treaty interpretation to MFN clauses. It surveys the different approaches in the case-law to the interpretation of MFN provisions in investment agreements, addressing in particular three central questions: (a) Are MFN provisions in principle capable of applying to the dispute settlement provisions of BITs?; (b) Is the jurisdiction of a tribunal affected by conditions in BITs regarding which dispute settlement provisions may be invoked by investors?; (c) In determining whether an MFN provision in a BIT applies to the conditions for invoking dispute settlement, what factors are relevant in the interpretative process? This Part also examines the various ways in which States have reacted in their treaty practice to the *Maffezini* decision[11], including by: (a) Specifically stating that the MFN clause does not apply to dispute resolution provisions; (b) specifically stating that the MFN clause does apply to dispute resolution provisions; or (c) specifically enumerating the fields to which the MFN clause applies.

40. Part V of the report contains the conclusions reached by the Study Group, underlining, in particular, the importance and relevance of the Vienna Convention of the Law of Treaties (VCLT), as a point of departure, in the interpretation of investment treaties. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT.

[11] *Emilio Agustin Maffezini v. Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB 97/7 (25 January 2000), *ICSID Reports*, vol. 5, p. 396.

41. At its 3277th meeting, on 23 July 2015, the Commission welcomed with appreciation the final report on the work of the Study Group. The Commission commended the final report to the attention of the General Assembly, and encouraged its widest possible dissemination.

42. At its 3277th meeting, on 23 July 2015, the Commission adopted the following summary conclusions:

(a) The Commission notes that MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, they do not provide answers to all the interpretative issues that can arise with MFN clauses.

(b) The Commission underlines the importance and relevance of the Vienna Convention of the Law of Treaties (VCLT), as a point of departure, in the interpretation of investment treaties. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT.

(c) The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. That is, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself.

(d) The application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, brought a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. Nonetheless, the matter remains one of treaty interpretation.

(e) Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

43. The Commission wishes to highlight that the interpretative techniques reviewed in the report of the Study Group are designed to assist in the interpretation and application of MFN provisions.

C. Tribute to the Study Group and its Chairman

44. At its 3277th meeting, on 23 July 2015, the Commission adopted the following resolution by acclamation:

> "*The International Law Commission*,
>
> *Having welcomed with appreciation* the report of the Study Group on The Most-Favoured Nation clause,
>
> *Expresses* to the Study Group and its Chairman, Mr. Donald M. McRae, its deep appreciation and warm congratulations for the outstanding contribution made in the preparation of the report on the Most-Favoured Nation clause and for the results achieved by the Study Group;
>
> *Recalls*, with gratitude, the contribution of Mr. A. Rohan Perera, who served as co-chairman of the Study Group, from 2009 to 2011, as well as of Mr. Mathias Forteau, who served as chairman, in the absence of Mr. McRae during the 2013 and 2014 sessions."

Chapter V
Protection of the atmosphere

A. Introduction

45. The Commission, at its sixty-fifth session (2013), decided to include the topic "Protection of the atmosphere" in its programme of work, together with an understanding, and appointed Mr. Shinya Murase as Special Rapporteur.[12]

46. The Commission received and considered the first report of the Special Rapporteur at its sixty-sixth session (2014).[13]

B. Consideration of the topic at the present session

47. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/681 and Corr.1 (Chinese only)). Building upon the first report, in the light of comments made in the Commission and the Sixth Committee of the General Assembly, the Special Rapporteur, in the second report, provided a further analysis of the draft guidelines submitted in the first report, offering a set of revised guidelines relating to the Use of terms, including a definition of the atmosphere, the Scope of the draft guidelines, and the Common concern of humankind. Moreover, the Special Rapporteur offered an analysis of the general obligation of States to protect the atmosphere and international cooperation for the protection of the atmosphere. Draft guidelines were presented on the General obligation of States to protect the atmosphere and on International cooperation.[14] He suggested that common concern

[12] At its 3197th meeting, on 9 August 2013 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10)), para. 168. The Commission included the topic in its programme on the understanding that: "(a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights; (b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to 'fill' gaps in the treaty regimes; (c) Questions relating to outer space, including its delimitation, are not part of the topic; (d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur's reports would be based on such understanding." The General Assembly, in paragraph 6 of its resolution 68/112 of 16 December 2013, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 365).

[13] First report on the protection of the atmosphere (Document A/CN.4/667).

[14] The text of the draft guidelines, as proposed by the Special Rapporteur in his report, read as follows (see section C.2, below, for the text of the draft guidelines and preambular paragraphs, as well as commentaries thereto, provisionally adopted by the Commission at the present session):

"**Draft guideline 1**

Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth, within which the transport and dispersion of degrading substances occurs.

of humankind, the general obligation of States to protect the atmosphere and international cooperation were established in State practice and fundamentally interconnected, thereby forming a trinity for the protection of the atmosphere. The Special Rapporteur also presented a detailed future plan of work, in light of comments made in the Commission in 2014 requesting such a plan. He estimated, on a tentative basis, that work on the topic could be completed in 2020, following a consideration of such issues as the principle of *sic utere tuo ut alienum non laedas*, the principle of sustainable development (utilization of the atmosphere and environmental impact assessment), the principle of equity, special circumstances and vulnerability, in 2016; prevention, due diligence and precaution, in 2017; principles guiding interrelationships with other fields of international law, in 2018; compliance and implementation, and dispute settlement, in 2019.

48. The Commission considered the report at its 3244th to 3249th meetings, on 4, 5, 6, 7, 8 and 12 May 2015.

(b) "Air pollution" means the introduction by human activities, directly or indirectly, of substances or energy into the atmosphere resulting in deleterious effects on human life and health and the Earth's natural environment.

(c) "Atmospheric degradation" includes air pollution, stratospheric ozone depletion, climate change and any other alterations of atmospheric conditions resulting in significant adverse effects to human life and health and the Earth's natural environment.

[Definition of other terms will be proposed at later stages.]

Draft guideline 2

Scope of the guidelines

(a) The present draft guidelines address human activities that directly or indirectly introduce deleterious substances or energy into the atmosphere or alter the composition of the atmosphere, and that have or are likely to have significant adverse effects on human life and health and the Earth's natural environment.

(b) The present draft guidelines refer to the basic principles relating to the protection of the atmosphere as well as to their interrelationship with other relevant fields of international law.

(c) Nothing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law.

Part II.

General principles

Draft guideline 3

Common concern of humankind

The atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, and hence the degradation of atmospheric conditions is a common concern of humankind.

Draft guideline 4

General obligation of States to protect the atmosphere

States have the obligation to protect the atmosphere.

Draft guideline 5

International cooperation

(a) States have the obligation to cooperate with each other and with relevant international organizations in good faith for the protection of the atmosphere.

(b) States are encouraged to cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric degradation. Cooperation could include exchange of information and joint monitoring."

49. In addition to the debate of the Commission, there was a dialogue with scientists organized by the Special Rapporteur on 7 May 2015.[15] Members of the Commission found the dialogue useful and were appreciative to the presenters for the contributions made.

50. Following its debate on the report, the Commission, at its 3249th meeting, on 12 May 2015, decided to refer draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report to the Drafting Committee, with the understanding that draft guideline 3 be considered in the context of a possible preamble. Moreover, the Special Rapporteur proposed to defer the referral by the Commission of draft guideline 4 on the general obligation of States to protect the atmosphere[16] to the Drafting Committee pending further analysis in 2016.

51. At its 3260th meeting, on 2 June 2015, the Commission received the report of the Drafting Committee and provisionally adopted draft guidelines 1, 2 and 5 and four preambular paragraphs (see section C.1, below).

52. At its 3287th to 3288th meetings, on 5 and 6 August 2015, the Commission adopted the commentaries to the draft guidelines provisionally adopted at the present session (see section C.2, below).

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission

1. Text of the draft guidelines, together with preambular paragraphs

53. The text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission is reproduced below.

Preamble

…

Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Recognising therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

Recalling that these draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty

[15] The dialogue with scientists on the protection of the atmosphere, was chaired by Mr. Shinya Murase, Special Rapporteur. Prof. Øystein Hov (President, Commission of Atmospheric Sciences, WMO); Prof. Peringe Grennfelt (Chair of the Working Group on Effects, Convention on Long-Range Transboundary Air Pollution); Mr. Masa Nagai (Deputy Director, Division of Environmental Law and Conventions, UNEP); Mr. Christian Blondin (Director Cabinet and External Relation Department, WMO); Ms. Albena Karadjova (Secretary of CLRTAP) and Ms. Jacqueline McGlade (Chief Scientist and Director, Division of Early Warning and Assessment, UNEP) made presentations. This was followed by a question and answer session.

[16] See *supra* note 14 above for the text of draft guideline 4, as proposed by the Special Rapporteur.

regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,[17]

[Some other paragraphs may be added, and the order of paragraphs may be coordinated, at a later stage.]

…

Guideline 1

Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin, of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

Guideline 2

Scope of the guidelines

1. The present draft guidelines [contain guiding principles relating to] [deal with][18] the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays-principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

Guideline 5

International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organisations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

[17] The terminology and location of this paragraph, which derives from paragraph 168 of the report of the International Law Commission on the work of its sixty-fifth session (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 168), will be revisited at a later stage in the Commission's work on this topic.

[18] The alternative formulations in brackets will be subject to further consideration.

2. Text of the draft guidelines together with preambular paragraphs, and commentaries thereto provisionally adopted by the Commission at its sixty-seventh session

54. The text of the draft guidelines, together with preambular paragraphs, and commentaries thereto, provisionally adopted by the Commission at its sixty-seventh session is reproduced below.

General commentary

The Commission recognises the importance of being fully engaged with the international community's present-day needs. It is acknowledged that both the human and natural environments can be adversely affected by certain changes in the condition of the atmosphere mainly caused by the introduction of harmful substances, causing transboundary air pollution, ozone depletion, as well as changes in the atmospheric conditions leading to climate change. The Commission seeks, through the progressive development of international law and its codification, to provide guidelines that may assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere. In doing so, the Commission does not desire to interfere with relevant political negotiations, including those on long-range transboundary air pollution, ozone depletion and climate change, seek to "fill" gaps in treaty regimes nor to impose on current treaty regimes legal rules or legal principles not already contained therein.

Preamble

…

Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Recognising therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

Recalling that these draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,[19]

[Some other paragraphs may be added, and the order of paragraphs may be coordinated, at a later stage.]

…

Commentary

[19] The terminology and location of this paragraph, which derives from paragraph 168 of the report of the International Law Commission on the work of its sixty-fifth session (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 168), will be revisited at a later stage in the Commission's work on this topic.

(1) On previous occasions, preambles have been prepared once the Commission has concluded work on the particular topic.[20] In the present case, the Commission referred draft guideline 3 (on the common concern of humankind), as contained in the Special Rapporteur's second report, to the Drafting Committee, for consideration in the context of a possible preamble. Accordingly, a preamble was prepared reflecting the current stage of consideration, it being understood that there may be additional preambular paragraphs as the work progresses.

(2) The preamble seeks to provide a contextual framework for the draft guidelines. The first preambular paragraph is overarching in acknowledging the essential importance of the atmosphere for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems. The atmosphere is the Earth's largest single and one of the most important natural resources. It was listed as a natural resource — along with mineral, energy and water resources — by the former United Nations Committee on Natural Resources,[21] as well as in the 1972 Stockholm Declaration on the Human Environment[22] and in the 1982 World Charter for Nature.[23] The atmosphere provides renewable "flow resources" essential for human, plant and animal survival on the planet, and it serves as a medium for transportation and communication. The atmosphere was long considered to be non-exhaustible and non-exclusive, since it was assumed that everyone could benefit from it without depriving others. That view is no longer held.[24] It must be borne in mind that the atmosphere is a limited resource with limited assimilation capacity.

[20] In the past, the Commission has generally presented to the General Assembly an outcome of its work without a draft preamble, leaving its elaboration to States. However, there have also been precedents during which the Commission has prepared such preambles. This was the case, for instance, with respect to the two draft conventions on the elimination of future statelessness (1954), *Yearbook … 1954*, vol. II, para. 25; on the reduction of the future statelessness (1954), *Yearbook … 1954*, vol. II, para. 25; the model rules on arbitral procedures (1958), *Yearbook … 1958*, vol. II, para. 22 (the preamble reflected fundamental rules for an undertaking to arbitrate); the draft articles on the nationality of natural persons in relation to the succession of States (1999), *Yearbook …, 1999*, vol. II, Part Two, para. 47 (reproduced in General Assembly resolution 55/153, annex, of 12 December 2000); the draft articles on prevention of transboundary harm from hazardous activities (2001), *Yearbook …, 2001*, vol. II, Part Two, para. 97 (reproduced in General Assembly resolution 62/68, annex, of 6 December 2007); the guiding principles applicable to unilateral declarations of States capable of creating legal obligations (2006), *Yearbook … 2006*, vol. II, Part Two, para. 176; the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006), *Yearbook … 2006*, vol. II, Part Two, para. 66 (reproduced in General Assembly resolution 61/36, annex, of 6 December 2006); and the draft articles on the law of transboundary aquifers (2008), *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 53 and 54.

[21] The inclusion of "atmospheric resources" among "other natural resources" by the former United Nations Committee on Natural Resources was first mentioned in the Committee's report on its first session (New York, 10 March 1971), section 4 ("other natural resources"), para. 94 (d). The work of the Committee (later United Nations Committee on Energy and Natural Resources for Development) was subsequently transferred to the Commission on Sustainable Development.

[22] "The natural resources of the earth including the air … must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate" (Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev.1, 16 June 1972, Principle 2).

[23] "… atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, …" (World Charter for Nature, GA Res 37/7 of 28 October 1982, General Principles, para. 4).

[24] The WTO Panel and Appellate Body recognized in the *Gasoline* case of 1996 that clean air was an "exhaustible natural resource" that could be "depleted." *United States–Standards for Reformulated and Conventional Gasoline* (1996), Report of the Appellate Body: WT/DS2/AB/R (1996).

(3) The second preambular paragraph addresses the functional aspect of the atmosphere as a medium through which transport and dispersion of polluting and degrading substances occur. The Commission considered it appropriate to refer to this functional aspect in the preamble. This decision reflects a concern that the inclusion of the functional aspect as part of the definition may suggest that this transport and dispersion is desirable, which is not the intention of the Commission. Long-range transboundary movement of polluting and degrading substances is recognized as one of the major problems of the present-day atmospheric environment,[25] with the Arctic region being identified as one of the areas most seriously affected by the worldwide spread of deleterious pollutants.[26]

(4) The third preambular paragraph pronounces, bearing in mind the aforementioned importance of the problems relating to the atmosphere, that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a "pressing concern of the international community as a whole." While a number of treaties and literature demonstrate some support for the concept of "common concern of humankind"[27], the Commission decided not to adopt this

[25] See the 2001 Stockholm Convention on Persistent Organic Pollutants, United Nations, *Treaty Series*, vol. 2256, p. 119 (noting in the preamble that "persistent organic pollutants, … are transported through air … across international boundaries and deposited far from their place of release, where they accumulate in terrestrial and aquatic ecosystems"). The 2012 amendment of the Gothenburg Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone (United Nations, *Treaty Series*, vol. 2319, p.81) indicates in the third preambular paragraph: "Concerned … that emitted [chemical substances] are transported in the atmosphere over long distance and may have adverse transboundary effects." The 2013 Minamata Convention on Mercury (adopted on 10 October 2013 at Kumamoto (Japan) on the occasion of the Conference of Plenipotentiaries on the Minamata Convention on Mercury held from 7 to 11 October 2013, text available at: <https://treaties.un.org/doc/Treaties/2013/10/20131010%2011-16%20AM/CTC-XXVII-17.pdf>), recognizes mercury as "a chemical of global concern owing to its long-range atmospheric transport" (first preambular para.); See, J. S. Fuglesvedt, K. P. Shine, T. Berntsen, J. Cook, D. S. Lee, A. Stenke, R. B. Skeie, G. J. M Velders, I.A. Waitz, "Transport impacts on atmosphere and climate: metrics," *Atmospheric Environment*, vol. 44:37 (2010), pp. 4648–4677; D. J. Wuebbles, H. Lei and J.-T Lin, "Inter-continental transport of aerosols and photochemical oxidants from Asia and its consequences," *Environmental Pollution*, vol. 150 (2007), pp. 65–84; J.-T Lin, X.-Z Liang and D. J. Wuebbles, "Effects of inter-continental transport on surface ozone over the United States: Present and future assessment with a global model," *Geophysical Research Letters*, vol. 35 (2008), L02805.

[26] Several of these pollution threats to the Arctic environment have been identified, such as persistent organic pollutants (POPs) and mercury, which originate mainly from sources outside the region. These pollutants end up in the Arctic from southern industrial regions of Europe and other continents via prevailing northerly winds and ocean circulation. See Timo Koivurova, Paula Kankaanpää and Adam Stepien, "Innovative Environmental Protection: Lessons from the Arctic," *Journal of Environmental Law*, vol. 27, (2015), pp. 1–27, at p. 13; Available at: <http://jel.oxfordjournals.org/content/early/015/02/13/jel.equ037.full.pdf?keytype=ref&ijkey=BjgzEgqY2lZXodu>.

[27] Paragraph 1 of the preamble to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) (United Nations, *Treaty Series* , vol. 1771, p. 107) acknowledges that "change in the Earth's climate and its adverse effects are a common concern of humankind." Likewise, the preamble to the 1992 Convention on Biological Diversity (United Nations, *Treaty Series*, vol. 1760, p. 79) shows parties to be "[c]onscious … of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere," (para, 2) and affirms that "the conservation of biological diversity is a common concern of humankind" (para. 3). The 1994 Convention to Combat Desertification in Those Countries Experiencing Drought and/or Desertification, Particularly in Africa (United Nations, *Treaty Series* , vol. 1954, p. 3) adopted phrases similar to common concern in its preamble, including "the centre of concerns", "the urgent concern of the international community" and "problems of global dimension" for combatting desertification and drought. Other instruments such as the Minamata Convention on Mercury, the Stockholm Convention on Persistent Organic Pollutants and the Gothenburg Protocol to the 1979 LRTAP Convention employ similar concepts to

language for the characterization of the problem, as the legal consequences of the concept of common concern of humankind remain unclear at the present stage of development of international law relating to the atmosphere. It was considered appropriate to express the concern of the international community as a matter of a factual statement, and not as a normative statement, as such, of the gravity of the atmospheric problems. In this context, therefore, the expression "a pressing concern of the international community as a whole" has been employed. This is an expression that the Commission has frequently employed as one of the criteria for the selection of new topics for inclusion in its long-term programme of work.[28]

(5) The fourth preambular paragraph is the reproduction of the 2013 understanding of the Commission on the inclusion of the topic in its programme of work at its sixty-fifth session in 2013. It was agreed that the terminology and location of this paragraph would be revisited at a later stage in the Commission's work on this topic.[29]

(6) Some other preambular paragraphs may be added, and the order of paragraphs may be coordinated, at a later stage.

Guideline 1
Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin, of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

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the common concern. See, Alan E. Boyle, "International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles," Robin Churchill and David Freestone, eds., *International Law and Global Climate Change*, (Leiden: Kluwer Academic Publishing, 1991), pp. 11–12; Duncan French, "Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?", p. 13; Alexander Kiss, "The Common Concern of Mankind", *Environmental Policy and Law*, vol. 27, (1997), p. 246; A.A. Cançado-Trindade and D.J. Attard, "The Implication of the "Common Concern of Mankind" Concept on Global Environmental Issues", in Toru Iwama, ed., *Policies and Laws on Global Warming: International and Comparative Analysis* (Tokyo: Environmental Research Center, 1991), pp. 7–13; Jutta Brunnée, "Common Areas, Common Heritage, and Common Concern", *The Oxford Handbook of International Environmental Law*, Daniel Bodansky, Jutta Brunnee and Helen Hey, eds.,(Oxford: Oxford University Press, 2007), pp. 565–566. See also Charlotte Kreuter-Kirchhoff, "Atmosphere, International Protection", *Max Planck Encyclopedia of Public International Law*, vol. I, Rüdiger Wolfrum, ed., (Oxford: Oxford University Press, 2012), pp. 737–744 (the atmosphere as a "common concern of mankind").

[28] *Yearbook … 1997*, vol. II, Part II, para. 238; *Yearbook … 1998*, vol. II, Part II, para. 553. See also *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 269. The Commission has agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

[29] See also *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 168.

Commentary

(1) The Commission has considered it desirable, as a matter of practical necessity, to provide a draft guideline on the "Use of terms" in order to have a common understanding of what is to be covered by the present draft guidelines. The terms used are provided only "for the purposes of the present draft guidelines", and are not intended in any way to affect any existing or future definitions of any such terms in international law.

(2) No definition has been given to the term "atmosphere" in the relevant international instruments. The Commission, however, considered it necessary to provide a working definition for the present draft guidelines, and the definition given in paragraph (a) is inspired by the definition given by a working group of the Intergovernmental Panel on Climate Change (IPCC).[30]

(3) The Commission considered it necessary that its legal definition be consistent with the approach of scientists. According to scientists, the atmosphere exists in what is called the atmospheric shell.[31] It extends upwards from the Earth's surface, which is the bottom boundary of the dry atmosphere. The average composition of the atmosphere up to an altitude of 25 kilometres is as follows: Nitrogen (78.08%), oxygen (20.95%), together with trace gases, such as argon (0.93%), helium and radiatively active greenhouse gases, such as carbon dioxide (0.035%) and ozone, as well as greenhouse water vapour in highly variable amounts.[32] The atmosphere also contains clouds and aerosols.[33] The atmosphere is divided vertically into five spheres on the basis of temperature characteristics. From the lower to upper layers, these spheres are: troposphere, stratosphere, mesosphere, thermosphere, and the exosphere. Approximately 80% of air mass exists in the troposphere and 20% in the stratosphere. The thin, white, hazy belt (with a thickness of less than 1% of the radius of the globe) that one sees when looking at the earth from a distance is the atmosphere. Scientifically these spheres are grouped together as the "*lower atmosphere*," which extends to an average altitude of 50 kilometres, and can be distinguished from the "*upper atmosphere*".[34] The temperature of the atmosphere changes with altitude. In the troposphere (up to the tropopause, at a height of about 12 kilometres), the temperature decreases as altitude increases because of the absorption and radiation of solar energy by the surface of the planet.[35] In contrast, in the stratosphere (up to

[30] 5th Assessment Report, Working Group III, Annex I. IPCC, Climate Change 2014, available at: <http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ ipcc_wg3_ar5_annex-i.pdf>.

[31] The American Meteorology Society defines the "atmospheric shell" (also called atmospheric layer or atmospheric region) as "any one of a number of strata or 'layers' of the earth's atmosphere" (available at: <http://amsglossary.allenpress.com/glossary/search?id=atmospheric-shell1>).

[32] Physically, water vapour, which accounts for roughly 0.25 per cent of the mass of the atmosphere, is a highly variable constituent. In atmospheric science, "because of the large variability of water vapor concentrations in air, it is customary to list the percentages of the various constituents in relation to dry air". Ozone concentrations are also highly variable. Over 0.1 ppmv (parts per million by volume) of ozone concentration in the atmosphere is considered hazardous to human beings. See John M. Wallace and Peter V. Hobbs, *Atmospheric Science: An Introductory Survey*, 2nd ed. (Boston, Elsevier Academic Press, 2006), p. 8.

[33] *Ibid.*

[34] The American Meteorological Society defines the "lower atmosphere" as "generally and quite loosely, that part of the atmosphere in which most weather phenomena occur (i.e., the troposphere and lower stratosphere); hence used in contrast to the common meaning for the upper atmosphere" (available at: <http://amsglossary.allenpress.com/glossary/search?p=1&query=lower+ atmosphere&submit=Search>). The "upper atmosphere" is defined as residual, that is "the general term applied to the atmosphere above the troposphere" (available at <http://amsglossary. allenpress.com/glossary/search?p=1&query=upper+atmosphere&submit=Search>).

[35] The thickness of the troposphere is not the same everywhere; it depends on the latitude and the season. The top of the troposphere lies at an altitude of about 17 km at the equator, although it is

the stratopause, at a height of nearly 50 kilometres), temperature gradually increases with height[36] because of the absorption of ultraviolet radiation by ozone. In the mesosphere (up to the mesopause, at a height of above 80 kilometres), temperatures again decrease with altitude. In the thermosphere, temperatures once more rise rapidly because of X-ray and ultraviolet radiation from the sun. The atmosphere "has no well-defined upper limit".[37]

(4) The definition, in paragraph (a), of the "atmosphere" as the envelope of gases surrounding the Earth represents a "physical" description of the atmosphere. There is also a "functional" aspect, which involves the large-scale movement of air. The atmospheric movement has a dynamic and fluctuating feature. The air moves and circulates around the earth in a complicated formation called "atmospheric circulation". The Commission has decided, as noted earlier in the commentary to the preamble, to refer to this functional aspect of the atmosphere in the second paragraph of the preamble.[38]

(5) It is particularly important to recognize the function of the atmosphere as a medium within which there is constant movement as it is within that context that the "transport and dispersion" of polluting and degrading substances occurs. Indeed, the long-range transboundary movement of polluting substances is one of the major problems for the atmospheric environment. In addition to transboundary pollution, other concerns relate to the depletion of the ozone layer and to climate change.

(6) Paragraph (b) defines "atmospheric pollution" and addresses transboundary air pollution, whereas paragraph (c) defines "atmospheric degradation" and refers to global atmospheric problems. By stating "by humans", both paragraphs (b) and (c) make it clear that the draft guidelines address "anthropogenic" atmospheric pollution and atmospheric degradation. The Commission is aware that the focus on human activity, whether direct or indirect, is a deliberate one as the present guidelines seek to provide guidance to States and the international community.

(7) The term "atmospheric pollution" (or, air pollution) is sometimes used broadly to include global deterioration of atmospheric conditions such as ozone depletion and climate change,[39] but the term is used in the present draft guidelines in a narrow sense, in line with existing treaty practice. It thus excludes the global issues from the definition of atmospheric pollution.

(8) In defining "atmospheric pollution", paragraph (b), uses the language that is essentially based on article 1 (a) of the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP),[40] which provides that:

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lower at the poles. On average, the height of the outer boundary of the troposphere is about 12 km. See Edward J. Tarbuck, Frederick K. Lutgens and Dennis Tasa, *Earth Science*, 13th ed. (Pearson, 2011), p. 466.

[36] Strictly, the temperature of the stratosphere remains constant to a height of about 20–35 km and then begins a gradual increase.

[37] See Tarbuck, Lutgens and Tasa, *supra* note 35, p. 467.

[38] See above para. (3) of the commentary to the preamble.

[39] For instance, article 1, paragraph 1 of the Cairo resolution (1987) of the Institute of International Law (*Institut de droit international*) on "Transboundary Air Pollution" provides that "[f]or the purpose of this Resolution, 'pollution' means any physical, chemical or biological *alteration in the composition* or quality of the atmosphere which results directly or indirectly from human action or omission and produces injurious or deleterious effects in the environment of other States or of areas beyond the limits of national jurisdiction." (emphasis added). Available at <http://www.idi-iil.org/idiE/resolutionsE/1987_caire_03_en.PDF>.

[40] United Nations, *Treaty Series* , vol. 1302, p. 217. The formulation of LRTAP article 1(a) goes back to the definition of pollution by the Council of the Organisation for Economic Cooperation and Development (OECD) in its Recommendation C(74)224 on "Principles concerning Transfrontier

> "[a]ir pollution" means "the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment, and 'air pollutants' shall be construed accordingly."

It may also be noted that article 1, paragraph (4), of the United Nations Convention on the Law of the Sea (UNCLOS)[41] defines the term "pollution" as meaning "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health …"[42] The deleterious effects arising from an introduction or release have to be of such a nature as to endanger human life and health and the Earth's natural environment, including by contributing to endangering them.

(9) While article 1 (a) of the LRTAP Convention and the article 1, paragraph 1 (4), of the UNCLOS provide for "introduction of energy" (as well as substances) into the atmosphere as part of the "pollution," the Commission has decided not to include the term "energy" in the text of paragraph (b) of the draft guideline. It is the understanding of the Commission that, for the purposes of the draft guidelines, the word "substances" includes "energy." "Energy" is understood to include heat, light, noise and radioactivity introduced and released into the atmosphere through human activities.[43]

Pollution", of 14 November 1974 (*International Legal Materials*, vol. 14, p. 242), which reads as follows: "For the purpose of these principles, pollution means the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment". See H. van Edig (ed.), *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977), p. 13; see also Patricia Birnie, Alan Boyle, Catherine Redgwell, *International Law and the Environment* (Oxford: Oxford University Press, 2009), pp. 188–189; A. Kiss and D. Shelton, *International Environmental Law* (London: Graham & Trotman, 1991), p. 117 (definition of pollution: "also forms of energy such as noise, vibrations, heat, radiation are included").

[41] United Nations, *Treaty Series*, vol. 1833, p. 3.

[42] Art. 212 of the UNCLOS provides for an obligation to prevent airborne pollution of the sea, and to that extent, the definition of "pollution" in this Convention is relevant to atmospheric pollution.

[43] With regard to heat, see WMO/IGAC Report: Impact of Megacities on Air Pollution and Climate, GAW Report No. 205, WMO, (September 2012); David Simon and Hayley Leck, "Urban Adaptation to Climate/Environmental Change: Governance, Policy and Planning", Special Issue, *Urban Climate*, vol. 7, (2014) pp 1–134; John A. Arnfield, "Two decades of urban climate research: a review of turbulence, exchanges of energy and water, and the urban heat island", *International Journal of Climatology*, vol. 23, pp.1–26; Lisa Gartland, *Heat Islands: Understanding and Mitigating Heat in Urban Areas*, (London: Earthscan, 2008); See in general, Brian Stone Jr., *The City and the Changing Climate: Climate Change in the Places We Live*, (Cambridge, MA: Cambridge University Press, 2012). Regarding light pollution, see Catherine Rich and Travis Longcore, eds., *Ecological Consequences of Artificial Night Lighting*, (Washington DC: Island Press, 2006); Pierantonio Cinzano and Fabio Falchi, "The propagation of light pollution in the atmosphere", *Monthly Notices of the Royal Astronomic Society*, vol. 427 (2012), pp. 3337–3357; Fereshteh Bashiri and Che Rosmani Che Hassan, "Light pollution and its effects on the environment", *International Journal of Fundamental Physical Sciences*, vol. 4 (2014), pp. 8–12. Regarding acoustic/noise pollution, see e.g. Annex 16 of the 1944 Convention on International Civil Aviation (United Nations, *Treaty Series*, vol. 15, p. 295), vol. I: *Aircraft Noise*, 5th edn. 2008; see P. Davies and J. Goh, "Air Transport and the Environment: Regulating Aircraft Noise", *Air and Space Law*, vol. 18 (1993), pp. 123–135. Concerning radioactive emissions, see Dietrich Rauschning, "Legal Problems of Continuous and Instantaneous Long-Distance Air Pollution: Interim Report", *Report of the Sixty-Second Conference of the International Law Association* (Seoul, 1986), pp. 198–223, at 219; and IAEA, *Environmental Consequences of the Chernobyl Accident and their Remediation: Twenty Years of Experience, Report of the Chernobyl*

(10) The expression "effects extending beyond the State of origin" in paragraph (b) clarifies that the draft guidelines address the transboundary effects in the sense provided in article 1 (b) of the 1979 LRTAP Convention that "[l]ong-range transboundary air pollution" means "air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources."

(11) Since "atmospheric pollution" is defined narrowly in paragraph (b), it is necessary, for the purposes of the draft guidelines, to address issues other than atmospheric pollution by means of a different definition. For this purpose, paragraph (c) provides the definition of "atmospheric degradation". This definition is intended to include problems of ozone depletion and climate change. It covers the alteration of the global atmospheric conditions caused by humans, whether directly or indirectly. These may be changes to the physical environment or biota or alterations to the composition of the global atmosphere. The 1985 Vienna Convention on the Protection of Ozone Layer[44] provides the definition of "adverse effects" in article 1, paragraph (2), as meaning "changes in the physical environment or biota, including changes in climate, which have significant deleterious effects on human health or on the composition, resilience and productivity of natural and managed ecosystems, or on materials useful to mankind." Article 1, paragraph (2), of the United Nations Framework Convention on Climate defines "climate change" as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."

(12) The term "significant deleterious effects" is intended to qualify the range of human activities to be covered by the draft guidelines. The Commission has frequently employed the term "significant" in its previous work.[45] The Commission has stated that "… *significant is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'*. The harm must lead to real detrimental effects [and]… such detrimental effects must be able to be measured by factual and objective standards."[46] Moreover, the term "significant", while determined by factual and objective criteria, also involves a value determination that depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation at a particular time might not be considered "significant" because at that time scientific knowledge or human

Forum Expert Group 'Environment' (Radiological Assessment Report Series), IAEA, April 2006, STI/PUB/1239. See also United Nations Scientific Committee on the Effects of Atomic Radiation 2013 Report to the General Assembly, Scientific Annex A: Levels and effects of radiation exposure due to the nuclear accident after the 2011 great east-Japan earthquake and tsunami, 2014, UN Publication Sales No. E14.IX.1, available at <http://www.unscear.org/docs/reports /2013/13-85418_Report_2013_Annex.A.pdf>. This is without prejudice to the peaceful uses of nuclear energy in relation to climate change in particular (see *Climate Change and Nuclear Power*, IAEA (2014), p. 7).

[44] United Nations, *Treaty Series* , vol. 1513, p. 293.

[45] See for example art.7 of the Convention on the Law of the Non-navigational Uses of International Watercourses (1997); draft article1 of the draft articles on prevention of transboundary harm from hazardous activities (2001) (General Assembly resolution 62/68, annex); draft principle 2 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006) (General Assembly resolution 61/36, annex); draft article 6 of the draft articles on the law of transboundary aquifers (2008) (General Assembly resolution 63/124, annex).

[46] Para. (4) of the commentary to draft article 2 of the draft articles on Prevention of transboundary harm from hazardous activities, 2001, *Yearbook … 2001*, Vol. II (Part Two), p.152, at para. 98.

appreciation did not assign much value to the resource. The question of what constitutes "significant" is more of a factual assessment.[47]

(13) While with respect to "atmospheric pollution" the introduction or release of substances has to contribute only to "deleterious" effects, in the case of "atmospheric degradation" the alteration of atmospheric conditions must have "significant deleterious effects". As is evident from draft guideline 2, on the Scope of the guidelines, the present guidelines are concerned with the protection of the atmosphere from both atmospheric pollution and atmospheric degradation. As noted in paragraph (11) above, "adverse effects" in the Vienna Convention on the Protection of Ozone Layer[48] refers to changes, which have significant deleterious effects. The word "deleterious" refers to something harmful, often in a subtle or unexpected way.

Guideline 2
Scope of the guidelines

1. The present draft guidelines [contain guiding principles relating to] [deal with] the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays-principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technologies to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law, nor questions related to outer space, including its delimitation.

Commentary

(1) Draft guideline 2 sets out the scope of the draft guidelines in relation to the protection of the atmosphere. Paragraph 1 describes the scope in a positive manner, indicating what is dealt with by the guidelines, while paragraphs 2 and 3 are formulated in a negative way, specifying what is not covered by the present draft guidelines. Paragraph 4 contains a saving clause on airspace and outer space.

(2) Paragraph 1 defines the scope of the draft guidelines on the basis of the definitions contained in paragraphs (b) and (c) of draft guideline 1. It deals with questions of the protection of the atmosphere in two areas, atmospheric pollution and atmospheric degradation. The draft guidelines are concerned only with anthropogenic causes and not with those of natural origins such as volcanic eruptions and meteorite collisions. The focus on transboundary pollution and global atmospheric degradation caused by human activity reflects the current realities,

[47] See, for example, the commentary to the draft articles on prevention of transboundary harm from hazardous activities, (Commentary to article 2, paras. 4 and 7). See also the commentary to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (Commentary to draft principle 2, paras. 1 to 3).

[48] United Nations, *Treaty Series* , vol. 1513, p. 293.

which are supported by the science.[49] According to the IPCC, the science indicates with 95 percent certainty that human activity is the dominant cause of observed warming since the mid-20th century. The IPCC noted that human influence on the climate system is clear. Such influence has been detected in warming of the atmosphere and the ocean, in changes in the global water cycle, in reductions in snow and ice, in global mean sea level rise, and in changes in some climate extremes.[50] The IPCC further noted that it is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in greenhouse gas concentrations and other anthropogenic "forcings" together.[51]

(3) The guidelines will also not deal with domestic or local pollution. It may be noted however that whatever happens locally may sometimes have a bearing on the transboundary and global context in so far as the protection of the atmosphere is concerned. Ameliorative human action, taken individually or collectively, may need to take into account the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.

(4) Sulphur dioxide and nitrogen oxides are the main sources of transboundary atmospheric pollution,[52] while climate change and depletion of the ozone layer are the two principal concerns leading to atmospheric degradation.[53] Certain ozone depleting substances also contribute to global warming.[54]

(5) Whether or not the draft guidelines "contain guiding principles relating to" or "deal with" the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a matter that will have to be given further consideration as the work progresses.

(6) Paragraphs 2 and 3, as well as the fourth preambular paragraph, reflect the 2013 Understanding of the Commission when the topic was included in the programme of work of the Commission at its sixty-fifth session in 2013.[55]

(7) Paragraph 4 is a saving clause that the draft guidelines do not affect the status of airspace under international law. The atmosphere and airspace are two entirely different concepts, which should be distinguished. Airspace is a static and spatial-based institution over which the State, within its territory, has "complete and exclusive sovereignty." For instance, article 1 of the Convention on International Civil Aviation,[56] provides that "… every State has complete and exclusive sovereignty over the 'airspace' above its territory".[57] In turn, article 2 of the same Convention deems the territory of a State to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State. The airspace beyond the boundaries of territorial waters is regarded as being

[49] See generally, IPCC *Climate Change 2013: The Physical Science Basis", Summary for Policy makers*, available at: <http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Summary Volume_FINAL.pdf>.

[50] *Ibid.*

[51] *Ibid.*

[52] Birnie, Boyle, Redgwell, *supra* note 40, p. 342.

[53] *Ibid.*, p. 336. The linkages between climate change and ozone depletion are addressed in the preamble as well as in Article 4 of the UNFCCC. The linkage between transboundary atmospheric pollution and climate change is addressed in the preamble and article 2, paragraph 1 of the 2012 amendment of the Gothenburg Protocol.

[54] *Ibid.*

[55] *Official Records of the General Assembly, Sixty-eighth Session, Supplement 10* (A/68/10), para. 168.

[56] United Nations, *Treaty Series*, vol. 15, p. 295.

[57] See article 2, paragraph 2, of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), which provides that "…sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil."(United Nations, *Treaty Series*, vol. 1833, p. 3).

outside the sovereignty of any State and is open for use by all States, like the high seas. On the other hand, the atmosphere, as an envelope of gases surrounding the Earth, is dynamic and fluctuating, with gases that constantly move without regard to territorial boundaries.[58] The atmosphere is invisible, intangible and non-separable.

(8) Moreover, while the atmosphere is spatially divided into spheres on the basis of temperature characteristics, there is no sharp scientific boundary between the atmosphere and outer space. Beyond 100 kilometres, traces of the atmosphere gradually merge with the emptiness of space.[59] The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies is silent on the definition of "outer space".[60] The matter has been under discussion within the context of the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) since 1959, which has looked at both spatial and function approaches to the questions of delimitation.[61]

(9) Accordingly, the Commission elected, in paragraph 4, to indicate that the draft guidelines do not affect the legal status of airspace nor address questions related to outer space. Moreover, the reference to outer space reflects of the 2013 Understanding of the Commission.

Guideline 5
International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organisations, for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

Commentary

(1) International cooperation is at the core of the whole set of draft guidelines on the protection of the atmosphere. The concept of international cooperation has undergone a significant change in international law,[62] and today is to a large extent built on the notion of common interests of the international community as a whole.[63]

[58] See generally Birnie, Boyle, Redgwell, *supra* note 40, chap. 6.

[59] Tarbuck, Lutgens and Tasa, *supra* note 35, pp. 465 and 466.

[60] United Nations, *Treaty Series*, vol. 610, p. 205.

[61] See generally, Bhupendra Jasani (ed), *Peaceful and Non-Peaceful uses of Space: Problems of Definition for the Prevention of an Arms Race,* United Nations Institute for Disarmament Research, (New York, Philadelphia, Washington DC, London, Taylor and Francis, 1991), especially Chap. 2 and 3.

[62] W. Friedmann, *The Changing Structure of International Law* (London: Stevens & Sons, 1964), pp. 60–71; Charles Leben, "The Changing Structure of International Law Revisited by Way of Introduction", *European Journal of International Law,* vol. 3 (1997), pp. 399–408. See also, Jost Delbrück, "The International Obligation to Cooperate — An Empty Shell or a Hard Law Principle of International Law? — A Critical Look at a Much Debated Paradigm of Modern International Law", H. P. Hestermeyer, *et al.*, eds., *Coexistence, Cooperation and Solidarity* (Liber Amicorum Rüdiger Wolfrum), vol. 1 (Leiden: Martinus Njihoff, 2012), pp. 3–16.

[63] Bruno Simma, "From Bilateralism to Community Interests in International Law", The Hague Academy of International Law, *Recueil des cours*, vol. 250, 1994, pp. 217-384; Naoya Okuwaki, "On Compliance with the Obligation to Cooperate: New Developments of 'International Law for Cooperation'", in Jun'ichi Eto, ed., *Aspects of International Law Studies* (Festschrift for Shinya Murase) (Tokyo: Shinzansha, 2015), pp. 5–46, at pp. 16–17 (in Japanese).

The third paragraph of the preamble to the present draft guidelines recognises this in stating that the protection of the atmosphere from atmospheric pollution and degradation is "a pressing concern of the international community as a whole".

(2) In this context, draft guideline 5, paragraph 1, provides the obligation of States to cooperate, as appropriate. In concrete terms, such cooperation is with other States and with relevant international organisations. The phrase "as appropriate" denotes certain flexibility and latitude for States in carrying out the obligation to cooperate depending on the nature and subject matter required for cooperation. The forms in which such cooperation may occur may also vary depending on the situation and the exercise of a certain margin of appreciation of States. It may be at the bilateral, regional or multilateral levels. States may also individually take appropriate action.

(3) International cooperation is found in several multilateral instruments relevant to the protection of the environment. Both the Stockholm Declaration on the Human Environment and the Rio Declaration on Environment and Development, in principle 24 and principle 27, respectively, stress the importance of cooperation.[64] In addition, in the *Pulp Mills* case, the International Court of Justice emphasized linkages attendant to the obligation to inform, cooperation between the parties and the obligation of prevention. The Court noted that, "it is by cooperating that the States concerned can jointly manage the risks of damage to the environment … so as to prevent the damage in question."[65]

(4) Among some of the existing treaties, the Vienna Convention for the Protection of the Ozone Layer (1985) provides, in its preamble, that the Parties to this Convention are "[*a*]*ware* that measures to protect the ozone layer from modifications due to human activities require international co-operation and action." Furthermore, the Preamble of the United Nations Framework Convention on Climate Change (1992) acknowledges that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response …," while reaffirming "the principle of sovereignty of States in international cooperation to address climate change."[66]

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[64] Principle 24 of the Stockholm Declaration states:

"International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States."

Report of the United Nations Conference on the Human Environment, United Nations Doc.A/CONF.48/14, at 2 and Corr.1 (1972).

Principle 24 of the Rio Declaration states:

"States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development."

Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

[65] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment*, *I.C.J. Reports 2010*, p. 49, para. 77.

[66] See also section 2 of Part XII of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), which provides for "Global and Regional Cooperation", setting out "Cooperation on global or regional basis" (Art. 194), "Notification of imminent or actual damage" (Art. 198), "Contingency plans against pollution" (Art. 199), "Studies, research programmes and exchange of information and data" (art. 200) and "Scientific criteria for regulations" (Art. 201). Section 2 of Part XIII on Marine Scientific Research of the UNCLOS provides for "International Cooperation", setting out "Promotion of international cooperation" (Art. 242), "Creation of

(5) Article 8 of the Convention on the Law of the Non-navigational Uses of International Watercourses, on the general obligation to cooperate, provides that:

> "[W]atercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse."

(6) In its work, the Commission has also recognized the importance of the obligation to cooperate. The Articles on prevention of transboundary harm from hazardous activities (2001) provide in draft article 4, on cooperation, that:

> "States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof."

Further, the Articles on the law of transboundary aquifers provide in draft article 7, General obligation to cooperate, that:

> "1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.
>
> 2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation."

(7) Finally, the draft articles on the protection of persons in the event of disasters, provisionally adopted on first reading in 2014, provides, in draft article 8, a duty to cooperate.[67]

(8) Cooperation could take a variety of forms. Paragraph (b) of the draft guidelines stresses, in particular, the importance of cooperation in enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Paragraph (b) also highlights the exchange of information and joint monitoring.

(9) The Vienna Convention for the Protection of the Ozone Layer provides, in its preamble, that international co-operation and action should be "based on relevant scientific and technical considerations", and in article 4, paragraph (1), on co-operation in the legal, scientific and technical fields, there is provision that:

> "The Parties shall facilitate and encourage the exchange of scientific, technical, socio-economic, commercial and legal information relevant to this Convention as further elaborated in annex II. Such information shall be supplied to bodies agreed upon by the Parties."

Annex II to the Convention gives a detailed set of items for information exchange. Article 4, paragrpah (2), provides for cooperation in the technical fields, taking into account the needs of developing countries.

(10) Article 4, paragraph (1), of the United Nations Framework Convention on Climate Change, regarding commitments, provides that:

favourable conditions" (art. 243) and "Publication and dissemination of information and knowledge" (Art. 244) (United Nations, *Treaty Series*, vol. 1833, p. 3).

[67] Draft article 8 provides that "**[**i]n accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations".

> "All Parties … shall (e) Cooperate in preparing for adaptation to the impacts of climate change; … (g) Promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies; (h) Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies; (i) Promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations …"

(11) The obligation to cooperate includes, *inter alia*, the exchange of information. In this respect, it may also be noted that article 9 of the Convention on the Law of the Non-navigational Uses of International Watercourses has a detailed set of provisions on exchange of data and information. Moreover, the LRTAP Convention provides in article 4 that the Contracting Parties "shall exchange information on and review their policies, scientific activities and technical measures aimed at combating, as far as possible, the discharge of air pollutants which may have adverse effects, thereby contributing to the reduction of air pollution including long-range transboundary air pollution." The Convention also has detailed provisions on cooperation in the fields of research and development (article 7); exchange of information (article 8); and implementation and further development of the cooperative programme for the monitoring and evaluation of the long-range transmission of air pollutants in Europe (article 9). Similarly, the Eastern Africa Regional Framework Agreement on Air Pollution (Nairobi Agreement, 2008)[68] and the West and Central Africa Regional Framework Agreement on Air Pollution (Abidjan Agreement, 2009)[69] have identical provisions on international cooperation. The parties agree to:

> "1.2 Consider the synergies and co-benefits of taking joint measures against the emission of air pollutants and greenhouse gases; 1.4 Promote the exchange of educational and research information on air quality management; 1.5 Promote regional cooperation to strengthen the regulatory institutions …"

(12) The second sentence of draft article 17, paragraph (4), of the Draft articles on the law of transboundary aquifers provides that: "Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance." In turn, the draft articles on the protection of persons in the event of disaster, provides in draft article 9, that "[f]or the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources". Further, draft article 10 (Cooperation

[68] Eleven countries — Burundi, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, Sudan, Tanzania, Uganda — agreed to this framework agreement, available at: <http://www.unep.org/urban_environment/PDFs/EABAQ2008-AirPollutionAgreement.pdf>.

[69] Twenty-one countries —Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Congo Brazzaville, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo — agreed to this agreement, available at: <http://www.unep.org/urban_environment/PDFs/BAQ09 _AgreementEn.Pdf>.

for risk reduction) provides that "[c]ooperation shall extend to the taking of measures intended to reduce the risk of disasters".

(13) In the context of protecting of the atmosphere, enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation is considered key by the Commission.

Chapter VI
Identification of customary international law

A. Introduction

55. At its sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Mr. Michael Wood as Special Rapporteur.[70] At the same session, the Commission had before it a Note by the Special Rapporteur (A/CN.4/653).[71] Also at the same session, the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic.[72]

56. At its sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/663), as well as a memorandum by the Secretariat on the topic (A/CN.4/659).[73] At the same session, the Commission decided to change the title of the topic to "Identification of customary international law". At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/672).[74]

57. Following its debate on the second report of the Special Rapporteur, the Commission, at its 3227th meeting, decided to refer draft conclusions 1 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. At the 3242nd meeting of the Commission, the Chairman of the Drafting Committee presented the interim report of the Drafting Committee on "Identification of customary international law", containing the eight draft conclusions provisionally adopted by the Drafting Committee at the sixty-sixth session.

B. Consideration of the topic at the present session

58. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/682). The Commission considered the report at its 3250th to 3254th meetings, from 13 to 21 May 2015.

59. At its 3254th meeting, on 21 May 2015, the Commission referred the draft conclusions contained in the third report of the Special Rapporteur, to the Drafting Committee.[75]

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[70] At its 3132nd meeting, on 22 May 2012 (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 157). The General Assembly, in paragraph 7 of its resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex A to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), pp. 305–314).

[71] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 157–202.

[72] *Ibid.*, para. 159.

[73] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 64.

[74] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 135.

[75] The text of the draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/682) read as follows:

Draft conclusion 3 [4]

Assessment of evidence for the two elements

….

2. Each element is to be separately ascertained. This generally requires an assessment of specific evidence for each element.

Draft conclusion 4 [5]

Requirement of practice

….

3. Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law.

Draft conclusion 11

Evidence of acceptance as law

....

3. Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction.

Part five
Particular forms of practice and evidence

Draft conclusion 12

Treaties

A treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question:

(a) at the time when the treaty was concluded, codifies an existing rule of customary international law;

(b) has led to the crystallization of an emerging rule of customary international law; or

(c) has generated a new rule of customary international law, by giving rise to a general practice accepted as law.

Draft conclusion 13

Resolutions of international organizations and conferences

Resolutions adopted by international organizations or at international conferences may, in some circumstances, be evidence of customary international law or contribute to its development; they cannot, in and of themselves, constitute it.

Draft conclusion 14

Judicial decisions and writings

Judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law.

Part six
Exceptions to the general application of rules of customary international law

60. At the 3280th meeting of the Commission, on 29 July 2015, the Chairman of the Drafting Committee presented the report of the Drafting Committee on "Identification of customary international law", containing draft conclusions 1 to 16 [15], provisionally adopted by the Drafting Committee at the sixty-sixth and sixty-seventh sessions (A/CN.4/L.869).[76] At its 3288th meeting, on 6 August 2015, the Commission took note of draft conclusions 1 to 16. It is anticipated that the Commission will, at its next session, consider the provisional adoption of the draft conclusions as well as the commentaries thereto.

61. At its 3288th meeting, on 6 August 2015, the Commission requested the Secretariat to prepare a memorandum concerning the role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of customary international law.

1. Introduction by the Special Rapporteur of the third report

62. When presenting his third report, the Special Rapporteur indicated that it sought to cover issues that were raised in 2014 regarding the two constituent elements ("a general practice" and "accepted as law (*opinio juris*)") as well as new issues such as particular custom and the persistent objector. The report proposed additional paragraphs to three of the draft conclusions proposed in the second report, as well as five new draft conclusions, which fell into two new parts (Part five "Particular form of practice and evidence" and Part six "Exceptions to the general application of rules of customary international law").

63. The third report comprised nine sections. The first section constituted an introduction recalling the history of the topic and, in particular, the work done during the previous session by the Commission, as well as the debate on the topic in the Sixth Committee in 2014. Section II of the report returned to the relationship between general practice and *opinio juris* (draft conclusion 3 [4], paragraph 2). Section III dealt with the role of inaction as a form of practice and/or evidence of acceptance as law (draft conclusion 11, paragraph 3). Other particular forms of practice and evidence were addressed under Sections IV and V: Section IV examined the role of treaties and resolutions of international organizations and conferences (draft conclusions 12 and 13 respectively), and two subsidiary means for the determination of rules of customary international law, namely judicial decisions and writings (draft conclusion 14), were considered in Section V. Section VI addressed

Draft conclusion 15

Particular custom

1. A particular custom is a rule of customary international law that may only be invoked by and against certain States.

2. To determine the existence of a particular custom and its content, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by each of them as law (*opinio juris*).

Draft conclusion 16

Persistent objector

A State that has persistently objected to a new rule of customary international law while that rule was in the process of formation is not bound by the rule for so long as it maintains its objection.

[76] The statement of the Chairman of the Drafting Committee, the annex to which contains the 16 draft conclusions provisionally adopted by the Drafting Committee, is available on the website of the Commission located at: <http://legal.un.org/ilc>.

the relevance of international organizations and of the practice of non-State actors (draft conclusion 4 [5], paragraph 3). Finally, sections VII and VIII of the report concerned, in different ways, the application *ratione personae* of rules of customary international law, to which Part six of the draft conclusions was devoted. Part six comprised two draft conclusions, on particular custom and on the persistent objector respectively (draft conclusions 15 and 16).

64. In his introduction, the Special Rapporteur expressed his appreciation for the input and support he had received in preparing the third report, as well as for the written submissions received on the topic from several Governments. He indicated that he had sought to complete the set of draft conclusions to be covered in the final product of the topic, and invited members to suggest any issues that had been overlooked. He highlighted the interconnections between the topic and other topics that had been, and were, on the International Law Commission's agenda, and affirmed that the Commission's work was to be seen as a whole.

65. The Special Rapporteur recalled that, further to the request made by the Commission, he had returned to the relationship between general practice and *opinio juris* in the third report. He concluded therein that, in seeking to ascertain whether a rule of customary international law had emerged, it was necessary in every case to consider and verify the existence of each element separately and that that generally required an assessment of different evidence for each element. Another point was that in identifying whether a rule of customary international law exists, what mattered was that both elements were present rather than their temporal order. Finally, the report indicated that there could be a difference in application of the two-element approach in different fields of international law and that, in some cases, a particular form (or particular instances) of practice, or particular evidence of acceptance as law, could be more relevant than in others.

66. The Special Rapporteur also revisited the question of inaction, in particular its possible contribution to a general practice and possible role as evidence of acceptance as law. He stressed that, despite the importance of inaction for establishing general practice in some cases, the circumstances in which inaction could be relevant were not always obvious. The Special Rapporteur added that inaction could serve as evidence of *opinio juris* when the circumstances called for some reaction. This entailed that the State concerned had to have had actual knowledge of the practice in question or that the circumstances had to have been such that it was deemed to have had such knowledge, and that the inaction needed to have been maintained over a sufficient period of time.

67. The third report considered certain particular forms of practice and of evidence of *opinio juris*, namely treaties and resolutions of international organizations and conferences, given that they are frequently resorted to in the identification of customary international law. The Special Rapporteur noted that similar considerations could also apply to other written texts, such as those produced by the International Law Commission. The report sought to advise caution when considering whether or not those texts may be relevant for the identification of customary international law and to reiterate that all the surrounding circumstances needed to be considered and weighed. In any event, the written texts could not, in and of themselves, constitute customary international law.

68. Regarding the relevance of treaties and treaty-making, the report recalled three ways in which such written texts could relate to customary international law: codification of existing law, crystallization of emerging law, or as the origin of new law. The report also addressed the question of the practice of States parties to multilateral conventions, as well as the possible relevance of bilateral treaties.

69. The report also dealt with the issue of the relevance of resolutions adopted by States at international organizations or international conferences as State practice or as evidence of *opinio juris*. The Special Rapporteur acknowledged the important role such resolutions could play, in certain circumstances, in the formation and identification of customary international law. They could not, in and of themselves, create customary international law, but could provide evidence of existing or emerging law and indeed give rise to practice that may lead to the formation of a new rule. In such a process of assessment, the particular wording used in a given resolution was of critical importance, as were the circumstances surrounding the adoption of the resolution in question.

70. The report also proceeded to consider two 'subsidiary', albeit significant, means for the determination of rules of customary international law: judicial decisions and writings. By judicial decisions, the report referred to both decisions of international courts and tribunals and decisions of national courts. The importance of the former was underlined. Decisions of national courts could also be influential, but had to be approached with some caution. The report also recognized that writings remained a useful source of information and analysis for the identification of rules of customary international law, although it was important to distinguish between those that were intended to reflect existing law (*lex lata*) and those that were put forward as emerging law (*lex ferenda*).

71. As regards the practice of international organizations as such, the report recalled the conclusion reached last year that, in certain cases, the practice of international organizations also contributed to the formation, or expression, of rules of customary international law. The Special Rapporteur emphasized the importance of the distinction between the practice of States within international organizations and that of the international organizations themselves. He also highlighted the importance of distinguishing between the practice of the organization that related to the internal operation of the organization and the practice of the organization in its relations with States and others. In addition, it was proposed that the conduct of non-State actors other than international organizations be addressed in the draft conclusions.

72. The report turned to the category of "particular custom", a term which was intended to cover, as explained by the Special Rapporteur, what were sometimes referred to as "special", "regional", "local" or "bilateral" customary rules. The Special Rapporteur stressed that, given the nature of particular custom as binding only on a limited number of States, it was essential to identify clearly which States had participated in the practice and accepted it as law. In order to determine the existence of such a custom, it was therefore necessary to ascertain whether there was a general practice among the States concerned that was accepted by each of them as law (*opinio juris*).

73. The report also addressed the persistent objector rule, whereby a State which had persistently objected to an emerging rule of customary international law, and maintained its objection after the rule had crystallized, was not bound by it. The Special Rapporteur emphasized that the rule was well established in jurisprudence, in the previous work of the Commission, and in the literature. The Special Rapporteur stressed the importance of addressing the rule, among other things in order to clarify its stringent requirements.

2. Summary of the debate

(a) General comments

74. The members of the Commission reiterated their support for the two-element approach followed by the Special Rapporteur. There was general agreement that the

outcome of the topic should be a set of practical and simple conclusions, with a commentary, aiming at assisting practitioners in the identification or rules of customary international law. Caution was advised against oversimplification and it was suggested that the draft conclusions would benefit from further specification.

75. An exchange of views took place as to the scope of the topic. Some members of the Commission indicated that the topic should deal more in depth with the formation of rules of customary international law. According to this view, the change in the name of the topic was not intended to affect the focus of the topic. According to another view, the draft conclusions should be restricted to the question of the identification of such rules and should not deal with the question of their formation as such. It was indicated, in this respect, that the topic was concerned with the identification of a customary rule at a precise time, without prejudice to the future evolution of this rule. Another view was that, while the topic was focused on identification, this did not preclude the consideration of formation issues to the extent that they were relevant for identification.

(b) Relationship between the two constituent elements

76. Some members of the Commission supported the conclusion that, although the two elements always needed to be present, there could be a difference in application of the two-element approach in different fields or with respect to different types of rule. It was stated, however, that a uniform standard had to be upheld regarding all different fields. Some members of the Commission indicated that the two elements had not been applied consistently and that the topic would benefit from further exploration of the respective weight of the two elements in different fields.

77. Support was expressed for the conclusion that each element was to be separately ascertained and that that generally required an assessment of specific evidence for each element. Several members of the Commission stressed that the separate assessment of the two requirements did not mean that the same material could not be evidence of both elements.

78. As regards the temporal relationship between the two elements of customary rules, a view was expressed that practice should precede *opinio juris*, while, according to another view, there was no necessary sequence between the two elements.

(c) Inaction as practice and/or evidence of acceptance as law (*opinio juris)*

79. While the analysis provided for in the third report on the relevance of inaction for the identification of rules of customary international law was generally welcomed, a number of members of the Commission pointed out the practical difficulty of qualifying inaction for that purpose. Several members expressed the need to clarify the specific circumstances under which inaction was relevant, especially in the context of the assessment of acceptance as law (*opinio juris*). It was suggested that the specific criteria to be taken into account to qualify inaction be indicated in the text of the draft conclusion itself.

80. The criteria enunciated in the report for inaction to serve as evidence of acceptance as law received broad support within the Commission. A number of members indicated that the situation should warrant reaction by the States concerned, that States must have actual knowledge of the practice in question and that inaction had to be maintained for a sufficient period of time. Different views were expressed, however, as to whether or not inaction, in that context, was to be equated with acquiescence. It was added that what was important was to establish if inaction, in a particular case, could be equated with *opinio juris*.

(d) The role of treaties and resolutions

81. A number of members of the Commission expressed support for the conclusion reached in the report on the role of treaties as evidence of customary international law. It was suggested by some members that references to the effect of treaties on the formation of customary rules be set aside and that focus be placed on their evidentiary value exclusively. The view was expressed that, for the purpose of the topic, there was no difference between the crystallization of a customary rule and the generation of a new rule through the adoption of a treaty. Furthermore, it was suggested to address article 38 of the Vienna Convention on the Law of Treaties. Some members stressed that all treaty provisions were not equally relevant as evidence of rules of customary international law and that only treaty provisions of a "fundamentally norm-creating character" could generate such rules.

82. The importance of establishing the criteria for the determination of the relevance of a treaty provision as evidence of a rule of customary international law was highlighted. Some members of the Commission stated that the concept of "specially affected States" was not acceptable, while the view was expressed that the geographical distribution of the parties to a treaty could serve as evidence of the general character of practice.

83. There were a range of views on the evidentiary value of resolutions adopted by international organizations or at international conferences. According to some members of the Commission, such resolutions, and in particular resolutions of the General Assembly of the United Nations, could under certain circumstances be regarded as sources of customary international law. A number of members of the Commission considered that the evidentiary value of these resolutions were in any case to be assessed with great caution. A series of elements to be taken into account, such as the composition of the organization, the voting and procedure used in adopting the resolution and the resolution's object were highlighted. It was also suggested that the relevance of resolutions adopted at international conferences depended on the participation of States to the conference in question.

84. Members of the Commission generally agreed that resolutions of international organizations and conferences could not, in and of themselves, constitute sufficient evidence of the existence of a customary rule. A view was expressed that it may, in some cases, be possible for resolutions to constitute evidence of the existence of rules of customary international law. It was noted that the evidentiary value of such resolutions depended on other corroborating evidence of general practice and *opinio juris*. It was pointed out that a separate assessment of whether a rule contained in a resolution was supported by a general practice that is accepted as law (*opinio juris*) was required in order to rely on a resolution (which may, however, serve as evidence for that purpose).

(e) Judicial decisions and writings

85. Members of the Commission welcomed the conclusion according to which judicial decisions and writings were relevant for the identification of rules of customary international law. There was an exchange of views regarding the specific roles played by judicial decisions and writings respectively. It was suggested that they did not have the same character and should therefore be dealt with in separate conclusions. It was also noted that their importance could not be addressed generally and should rather be considered on a case-by-case basis.

86. Some members of the Commission emphasized the special importance of judicial decisions, which could not be considered as secondary or subsidiary evidence. The central importance of the International Court of Justice was highlighted by some members, while some others indicated that the case-law of other

courts and tribunals could not be overlooked, as well as the role of separate and dissenting opinions of international judges. An exchange of view took place as to the relevance of decisions of national courts. According to some members, those decisions had to be included within the category of "judicial decision" for the purpose of the identification of rules of customary international law. Some other members of the Commission, however, considered that such decisions had to be addressed separately and that their role should be assessed with caution.

87. It was suggested that the term "writings" proposed by the Special Rapporteur was too broad and should be qualified. Several members of the Commission also stated that the selection of relevant writings could not amount to preference for writers from specific regions but had to be universal.

88. Several members affirmed that the work of the International Law Commission, which is a subsidiary organ of the General Assembly of the United Nations entrusted with the mandate to promote the progressive development of international law and its codification, could not be equated to "writings" or teachings of publicists.

(f) The relevance of international organizations and non-State actors

89. There were different views within the Commission as to the relevance of the practice of international organizations. In particular, a number of members of the Commission pointed out that such practice could contribute to the formation or expression of rules of customary international law, and that the importance of the practice of international organizations in some areas had to be emphasized. Some other members stressed that this could be the case only if the practice of an international organization reflected the practice or conviction of its member States or if it would catalyse State practice, but that the practice of international organizations as such was not relevant for the assessment of a general practice. A view was expressed that the proposed draft conclusion as written failed to address key issues, such as whether inaction of international organizations counted as practice, whether both practice and *opinio juris* of international organizations was required, and whether the rule to which the international organization contributes is binding only upon international organizations, only upon States, or upon both.

90. The draft conclusion proposed by the Special Rapporteur that the conduct of other non-State actors was not practice for the purposes of the formation or identification was supported by several members of the Commission. The term "other non-State actors" was not considered entirely clear since international organizations were composed of States. Some members of the Commission considered the proposal to be too strict, in particular in the light of the importance of the practice of certain non-State actors, such as the International Committee of the Red Cross, as well as in view of the importance of activities involving both States and non-State actors.

(g) Particular custom

91. A discussion took place regarding the question of particular custom. While a number of members of the Commission supported the draft conclusion proposed by the Special Rapporteur, some members of the Commission expressed the view that the question did not fall within the scope of the topic. Questions were also raised regarding the most appropriate terminology to designate such specific category of rules of customary international law, which had been referred to as "regional", "local" or "particular" customs. Moreover, it was suggested to clarify the notion of "region" and to address the question of the geographical nexus between parties to a regional custom.

92. It was stressed that special attention had to be paid to the importance of acquiescence for the identification of particular custom. According to some members, it followed that a stricter standard existed for particular custom than for general or universal custom. Some other members, however, indicated that all rules of customary international law were subject to the same conditions. A view was expressed that by envisaging the existence of a particular custom among a widely dispersed group of States having no geographical nexus, the proposed draft conclusion invited confusing claims as to the existence of such custom and risked fragmenting customary international law, without any basis in practice.

(h) Persistent objector

93. The persistent objector rule was the subject of wide-ranging debate. Several members supported the inclusion of the rule in the set of draft conclusions, while some other members considered that it was a controversial theory not supported by sufficient State practice and jurisprudence, and which could lead to the fragmentation of international law. It was suggested that concrete examples be provided in the commentary to substantiate the rule, which was, according to some members, largely accepted in the literature.

94. The members of the Commission also discussed extensively the conditions of application of the persistent objector rule, as well as its consequences. Some members indicated that, in any case, even if such a rule existed, it could not be applicable to obligations *erga omnes* or rules having a peremptory character (*jus cogens*).

(i) Future programme of work

95. As to the future programme of work on the topic, the suggestion by the Special Rapporteur to examine practical means of enhancing the availability of materials on the basis of which a general practice and acceptance as law may be determined was welcomed. Several members also suggested that the Special Rapporteur study the question of change of customary international law over time, as well as a number of related issues.

96. A number of members of the Commission indicated that sufficient time had to be be allocated for the completion of the work on the topic by the Commission and that progress on the topic could not be made at the expense of quality.

3. Concluding remarks of the Special Rapporteur

97. The Special Rapporteur emphasized that the aim of the topic was to assist in the determination of the existence or not of a rule of customary international law and its content. That was the task faced by judges, arbitrators and lawyers advising on the law as it existed at a particular time, as opposed to those advising on how the law might develop or be developed. An understanding of how customary rules emerged and evolved nevertheless formed part of the background to the topic and would be addressed in the commentary.

98. On the various questions relating to the interrelationship between the two elements, the Special Rapporteur considered that the temporal aspect of the relationship was more related to the formation of customary rules than to their identification, but was nevertheless an important aspect that needed to be covered in the commentary. Regarding the application of the two-element approach in different fields, he stressed that regard had to be had to the context in which the evidence arose and that that required a careful evaluation of the factual foundations of each case and their significance. Finally, on the issue of the separate assessment of the two elements, the Special Rapporteur noted the general agreement within the

Commission that each element had to be separately ascertained in order to identify rules of customary international law. The issue referred to at times as "double-counting" proved to be more controversial. On that aspect, the Special Rapporteur clarified that there could be occasions where the same evidence might be used in order to ascertain the two elements. The important aspect is that both elements needed to be present, and that theories according to which the extensive presence of one element could compensate for the lack of the other were not convincing.

99. The Special Rapporteur considered that the conclusion that the practice of international organizations as such was relevant for the purpose of the identification of rules of customary international law was not controversial since it appeared that the practice of international organizations in their relations among themselves, at least, could give rise to customary rules binding in such relations. Such conclusion was also important in the case of international organizations, such as the European Union, exercising competences on behalf of their member States. That conclusion, which had been recognized in the previous work of the Commission, seemed to be generally accepted by States. The Special Rapporteur stressed that the role of international organizations, despite their importance, was not comparable to that of States. Regarding the role of non-state actors, the Special Rapporteur indicated that such entities might have a role in the formation and identification of rules of customary international law – but through prompting or recording State practice and the practice of international organizations, and not by their own conduct as such.

100. On the role of inaction, the Special Rapporteur indicated that the suggestion that the corresponding paragraph of the draft conclusion needed to reflect the essence of the conditions set forth in the report deserved serious consideration.

101. With respect to the role of treaties in the identification of rules of customary international law, the Special Rapporteur, while acknowledging the importance of multilateral treaties, considered that bilateral treaties could not be excluded from the draft conclusions, even though their impact had to be approached with particular caution. The Special Rapporteur also indicated that the significance of article 38 of the Vienna Convention on the Law of Treaties for the topic would be addressed in the commentary and that the notion of "fundamentally norm-creating character" would be captured therein.

102. The Special Rapporteur noted that the draft conclusion on resolutions of international organizations and conferences had not been particularly controversial within the Commission. He acknowledged that their role could be expressed more positively, even if such resolutions needed to be referred to with caution.

103. The Special Rapporteur indicated that the proposed draft conclusion on judicial decisions and writings needed to be developed further and that the two sources should be dealt with in separate draft conclusions. The Special Rapporteur concurred with the view that in reality judicial decisions came into play as part of a single process of determining whether or not a certain customary rule existed. He also recognized that separate and dissenting opinions, while in his view not judicial decisions within the meaning of Article 38, paragraph (1) (d), were not without importance for the topic. The Special Rapporteur indicated that by "writings", he was referring to the "writings of jurists". He also pointed out that the benefit of considering the writings of jurists representing different legal systems of the world needed to be reflected in the commentary.

104. The Special Rapporteur noted that many colleagues had suggested that there should be a separate conclusion on work of the International Law Commission. He was not convinced of the need for a separate conclusion, as opposed to explaining the Commission's role in the commentaries. He nevertheless hoped that the Drafting Committee would consider the matter.

105. On particular custom, the Special Rapporteur confirmed that all the other draft conclusions were applicable to particular custom, including the draft conclusion on treaties, except in so far as draft conclusion 15 provided otherwise. He added that, even if in theory a geographical nexus between the States bound by such rule was not required, it was often called for in practice.

106. The Special Rapporteur noted that draft conclusion 16 on the persistent objector received widespread support and acknowledged that it had been illustrated by reference to practical examples in the commentary. He pointed out that the persistent objector rule could be and not infrequently is raised before judges asked to identify customary international law and that it was therefore important to provide practitioners with guidelines on the matter, and especially to clarify the requirements for a State to become a persistent objector.

107. As to the future programme of work on the topic, the Special Rapporteur indicated that, in the light of all that had been said in the debate, a realistic aim would be to complete a first reading of the draft conclusions and commentaries by the end of the sixty-eighth session (2016). The question would then be how to divide the work between this session and the next one. Given the importance of the commentaries, it seemed appropriate to have two stages. First, if the Drafting Committee was able to complete its work this session, and provisionally adopt a complete set of draft conclusions (complete, that is, subject to any additional provisions and suggestions that might emerge from the debate on a fourth report), the Special Rapporteur could then prepare draft commentaries on all the conclusions in time for the beginning of the 2016 session. Members would then have adequate time to consider the draft commentaries carefully, and hopefully the full set of first reading draft conclusions and commentaries could be adopted by the Commission by the end of its 2016 session.

Chapter VII
Crimes against humanity

A. Introduction

108. The Commission, at its sixty-fifth session (2013), decided to include the topic "Crimes against humanity" in its long-term programme of work,[77] on the basis of the proposal prepared by Mr. Sean D. Murphy and reproduced in annex B to the report of the Commission on the work of that session.[78] The General Assembly, in paragraph 8 of its resolution 68/112 of 16 December 2013, took note of the inclusion of this topic in the Commission's long-term programme of work.

109. At its sixty-sixth session (2014), the Commission decided to include the topic in its programme of work and appointed Mr. Sean D. Murphy as Special Rapporteur for the topic.[79] The General Assembly subsequently, in paragraph 7 of its resolution 69/118 of 10 December 2014, took note of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

110. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/680), which was considered at its 3254th to 3258th meetings, from 21 to 28 May 2015.[80]

111. In his first report, the Special Rapporteur, after assessing the potential benefits of developing a convention on crimes against humanity (section II), provided a general background synopsis with respect to crimes against humanity (section III) and addressed some aspects of the existing multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to crimes (section IV). Furthermore, the Special Rapporteur examined the general obligation that existed in various treaty regimes for States to prevent and punish such crimes (section V) and the definition of "crimes against humanity" for the purpose of the topic (section VI). The report also contained information as to the future programme of work on the topic (section VII). The Special Rapporteur proposed two draft articles corresponding to the issues addressed in sections V and VI, respectively.[81]

112. At its 3258th meeting, on 28 May 2015, the Commission referred draft articles 1 and 2, as contained in the Special Rapporteur's first report, to the Drafting Committee.

113. At its 3263rd meeting, on 5 June 2015, the Commission considered the report of the Drafting Committee and provisionally adopted draft articles 1, 2, 3 and 4 (see section C.1 below).

114. At its 3282th to 3284th meetings, on 3 and 4 August 2015, the Commission adopted the commentaries to the draft articles provisionally adopted at the current session (see section C.2 below).

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[77] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 169–170.

[78] *Ibid.*, annex B.

[79] *Ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 266.

[80] See the Provisional Summary Records of the 3254th to 3258th meetings (Documents A/CN.4/SR.3254, A/CN.4/SR.3255, A/CN.4/SR.3256, A/CN.4/SR.3257, and A/CN.4/SR.3258)

[81] See the First report on crimes against humanity, document A/CN.4/680 (draft article 1 "Prevention and punishment of crimes against humanity" and draft article 2 "Definition of crimes against humanity").

115. At its 3282th meeting, on 3 August 2015, the Commission requested the Secretariat to prepare a memorandum providing information on existing treaty-based monitoring mechanisms which may be of relevance to its future work on the present topic.[82]

C. Text of the draft articles on crimes against humanity provisionally adopted by the Commission at its sixty-seventh session

1. Text of the draft articles

116. The text of the draft articles provisionally adopted at the sixty-seventh session by the Commission is reproduced below.

Article 1
Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 2
General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Article 3
Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[82] This issue was raised during the Commission's debate in plenary of the Special Rapporteur's first report in May 2015 and was also discussed during of a visit to the Commission by the High Commissioner for Human Rights in July 2015.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Article 4
Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.[83]

2. Text of the draft articles and commentaries thereto, as provisionally adopted by the Commission at its sixty-seventh session

117. The text of the draft articles, together with commentaries, provisionally adopted by the Commission at its sixty-seventh session, is reproduced below.

Article 1
Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Commentary

(1) Draft article 1 establishes the scope of the present draft articles by indicating that they apply both to the prevention and to the punishment of crimes against humanity. Prevention of crimes against humanity is focused on precluding the commission of such offenses, while punishment of crimes against humanity is focused on criminal proceedings against persons after such crimes have occurred or when they are in the process of being committed.

(2) The present draft articles focus solely on crimes against humanity, which are grave international crimes wherever they occur. The present draft articles do not address other grave international crimes, such as genocide, war crimes or the crime of aggression. Although a view was expressed that this topic might include those crimes as well, the Commission decided to focus on crimes against humanity.

(3) Further, the present draft articles will avoid any conflicts with relevant existing treaties. For example, the present draft articles will avoid conflicts with treaties relating to statutes of limitations, refugees, enforced disappearances, and other matters relating to crimes against humanity. In due course, one or more draft articles will be considered to address any such conflicts.

(4) Likewise, the present draft articles will avoid any conflicts with the obligations of States arising under the constituent instruments of international or "hybrid" (containing a mixture of international law and national law elements) criminal courts or tribunals, including the International Criminal Court (hereinafter "ICC"). Whereas the Rome Statute[84] establishing the ICC regulates relations between the ICC and its States Parties (a "vertical" relationship), the focus of the present draft articles will be on the adoption of national laws and on inter-State cooperation (a "horizontal" relationship). Part IX of the Rome Statute on "International Cooperation and Judicial Assistance" assumes that inter-State cooperation on crimes within the jurisdiction of the ICC will continue to exist without prejudice to the Rome Statute, but does not direct itself to the regulation of that cooperation. The present draft articles will address inter-State cooperation on the prevention of crimes against humanity, as well as on the investigation, apprehension, prosecution, extradition, and punishment in national legal systems of persons who commit such crimes, an objective consistent with the Rome Statute. In doing so, the present draft articles will contribute to the

[83] The placement of this paragraph will be addressed at a further stage.

[84] Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, United Nations, *Treaty Series*, vol. 2187, p. 3 (hereinafter "Rome Statute").

implementation of the principle of complementarity under the Rome Statute. Finally, constituent instruments of international or hybrid criminal courts or tribunals address the prosecution of persons for the crimes within their jurisdiction, not steps that should be taken by States to prevent such crimes before they are committed or while they are being committed.

Article 2
General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Commentary

(1) Draft article 2 sets forth a general obligation of States to prevent and punish crimes against humanity. The content of this general obligation will be addressed through the various more specific obligations set forth in the draft articles that follow, beginning with draft article 4. Those specific obligations will address steps that States are to take within their national legal systems, as well as their cooperation with other States, with relevant intergovernmental organizations, and with, as appropriate, other organizations.

(2) In the course of stating this general obligation, draft article 2 recognizes crimes against humanity as "crimes under international law." The Charter of the International Military Tribunal (hereinafter "IMT") established at Nürnberg [85] included "crimes against humanity" as a component of the IMT's jurisdiction. Among other things, the IMT noted that "individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[86] Crimes against humanity were also within the jurisdiction of the Tokyo Tribunal.[87]

(3) The principles of international law recognized in the Nürnberg Charter were noted and reaffirmed in 1946 by the General Assembly of the United Nations.[88] The Assembly also directed the International Law Commission to "formulate" the Nürnberg Charter principles and to prepare a draft code of offences.[89] The Commission in 1950 produced the "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", which stated that crimes against humanity were "punishable as crimes under international law."[90] Further, the Commission completed in 1954 a Draft Code of Offences against the Peace and Security of Mankind, which in Article 2, paragraph 11, included as an offense a series of inhuman acts that are today understood to be crimes against humanity, and which stated in article 1 that "[o]ffences against the peace and

[85] Agreement for the prosecution and punishment of the major war criminals of the European Axis, and Charter of the International Military Tribunal, art. 6 (c), done at London on 8 August 1945, United Nations, *Treaty Series*, vol. 82, p. 279 (hereinafter "Nürnberg Charter").

[86] *Judgment of 30 September 1946, International Military Tribunal*, in *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 22 (1947), p. 466.

[87] Charter of the International Military Tribunal for the Far East, art. 5 (c), done at Tokyo on 19 January 1946 (as amended 26 April 1946), 4 Bevans 20. No persons, however, were convicted of this crime by that tribunal.

[88] *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, General Assembly resolution 95 (I) of 11 December 1946.

[89] *Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal*, General Assembly resolution 177 (II) of 21 November 1947.

[90] *Yearbook … 1950*, vol. II, p. 376, para. 109 (Principle VI).

security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished."[91]

(4) The characterization of crimes against humanity as "crimes under international law" indicates that they exist as crimes whether or not the conduct has been criminalized under national law. The Nürnberg Charter defined crimes against humanity as the commission of certain acts "whether or not in violation of the domestic law of the country where perpetrated."[92] In 1996, the Commission completed a Draft Code of Crimes Against the Peace and Security of Mankind, which provided, *inter alia*, that crimes against humanity were "crimes under international law and punishable as such, whether or not they are punishable under national law."[93] The gravity of such crimes is clear; the Commission has previously indicated that the prohibition of crimes against humanity is "clearly accepted and recognized" as a peremptory norm of international law.[94]

(5) Draft article 2 also identifies crimes against humanity as crimes under international law "whether or not committed in time of armed conflict". The reference to "armed conflict" should be read as including both international and non-international armed conflict. The Nürnberg Charter definition of crimes against humanity, as amended by the Berlin Protocol,[95] was linked to the existence of an international armed conflict; the acts only constituted crimes under international law if committed "in execution of or in connection with" any crime within the IMT's jurisdiction, meaning a crime against peace or a war crime. As such, the justification for dealing with matters that traditionally were within the national jurisdiction of a State was based on the crime's connection to inter-State conflict. That connection, in turn, suggested heinous crimes occurring on a large-scale, perhaps as part of a pattern of conduct.[96] The IMT, charged with trying the senior political and military leaders of the Third Reich, convicted several defendants for crimes against humanity

[91] *Yearbook … 1954*, vol. II, p. 150 at art. 1.

[92] Nürnberg Charter, *supra* note 85, at art. 6 (c).

[93] *Yearbook … 1996*, vol. II (Part Two), p. 17 at para. 50 (art. 1). The 1996 Draft Code contained five categories of crimes, one of which was crimes against humanity.

[94] *Yearbook … 2001*, vol. II (Part Two), p. 85 at (5) (commentary on draft article 26 of the draft articles on responsibility of States for internationally wrongful acts) (maintaining that those "peremptory norms that are clearly accepted and recognized include the prohibitions of ... crimes against humanity ..."); see also Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, document A/CN.4/L.682, para. 374 (13 April 2006), as corrected by document A/CN.4/L.682/Corr.1 (11 August 2006) (identifying crimes against humanity as one of the "most frequently cited candidates for the status of *jus cogens*").

[95] Protocol Rectifying Discrepancy in Text of Charter, done at Berlin on 6 October 1945, in *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 1 (1947), at pp. 17–18 (hereinafter "Berlin Protocol"). The Berlin Protocol replaced a semi-colon after "during the war" with a comma, so as to harmonize the English and French texts with the Russian text. *Ibid.*, p. 17. The effect of doing so was to link the first part of the provision to the latter part of the provision ("in connection with any crime within the jurisdiction of the Tribunal") and hence to the existence of an international armed conflict.

[96] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office, 1948), p. 179 ("Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.").

committed during the war, though in some instances the connection of those crimes with other crimes in the IMT's jurisdiction was tenuous.[97]

(6) The Commission's 1950 "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal," however, defined crimes against humanity in Principle VI (c) in a manner that required no connection to an armed conflict.[98] In its commentary to this principle, the Commission emphasized that the crime need not be committed during a war, but maintained that pre-war crimes must nevertheless be in connection with a crime against peace.[99] At the same time, the Commission maintained that "acts may be crimes against humanity even if they are committed by the perpetrator against his own population."[100] The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity referred, in Article 1(b), to "[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations ... ."[101]

(7) The jurisdiction of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") included "crimes against humanity." Article 5 of the ICTY Statute provides that the tribunal may prosecute persons responsible for a series of acts (such as murder, torture, or rape) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."[102] Thus, the formulation used in article 5 retained a connection to armed conflict, but it is best understood contextually. The ICTY Statute was developed in 1993 with an understanding that armed conflict in fact existed in the former Yugoslavia; the Security Council of the United Nations had already determined that the situation constituted a threat to international peace and security, leading to the exercise of the Security Council's enforcement powers under Chapter VII of the Charter of the United Nations. As such, the formulation used in article 5 ("armed conflict") was designed principally to dispel the notion that crimes against humanity had to be linked to an "international armed conflict." To the extent that this formulation might be read to suggest that customary international law requires a nexus to armed conflict, the ICTY Appeals Chamber later clarified that there was "no logical or legal basis" for retaining a connection to armed conflict, since "it has been abandoned" in State practice since Nürnberg.[103] The Appeals Chamber also noted that the "obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict."[104]

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[97] See, e.g., *Prosecutor v. Kupreškić et al.*, Judgment, Trial Chamber, Case No. IT-95-16-T, 14 January 2000, para. 576 (noting the tenuous link between the crimes against humanity committed by Baldur von Schirach and the other crimes within the IMT's jurisdiction) (hereinafter *Kupreškić 2000*).

[98] *Yearbook … 1950*, vol. II, p. 377 at para. 119.

[99] *Ibid.*, para. 123.

[100] *Ibid.*, para. 124.

[101] Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, done at New York on 26 November 1968, United Nations, *Treaty Series*, vol. 754, p. 73. As of August 2015, there are 55 States Parties to this Convention. For a regional convention of a similar nature, see European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, done at Strasbourg on 25 January 1974, Council of Europe, *Treaty Series*, No. 82. As of August 2015, there are eight States Parties to this Convention.

[102] *Statute of the International Criminal Tribunal for the former Yugoslavia*, Security Council resolution 827 (1993) of 25 May 1993, document S/RES/827, art. 5 (hereinafter "*Statute of the ICTY*").

[103] *Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995, para. 140.

[104] *Ibid*.

Indeed, the Appeals Chamber later maintained that such a connection in the ICTY Statute was simply circumscribing the subject-matter jurisdiction of the ICTY, not codifying customary international law.[105]

(8) In 1994, the Security Council established the International Criminal Tribunal for Rwanda (hereinafter "ICTR") and provided it with jurisdiction over "crimes against humanity." Although article 3 of the ICTR Statute retained the same series of acts as appeared in the ICTY Statute, the chapeau language did not retain the reference to armed conflict.[106] Likewise, Article 7 of the Rome Statute, adopted in 1998, did not retain any reference to armed conflict.

(9) As such, while early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed conflict, that connection has disappeared from the statutes of contemporary international criminal courts and tribunals, including the Rome Statute. In its place, as discussed in relation to draft article 3 below, are the "chapeau" requirements that the crime be committed within the context of a widespread or systematic attack directed against a civilian population in furtherance of a State or organizational policy to commit such an attack.

Article 3
Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

[105] See, e.g., *Prosecutor v. Kordić & Čerkez*, Judgment, Trial Chamber, Case No. IT-95-14/2-T, 26 February 2001, para. 33 (hereinafter "*Kordić 2001*"); *Prosecutor v. Tadić*, Judgment, Appeals Chamber, Case No. IT-94-1-A, 15 July 1999, paras. 249-251) (hereinafter "*Tadić 1999*") ("[T]he armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law.").

[106] *Statute of the International Criminal Tribunal for Rwanda*, Security Council resolution 955 (1994) of 8 November 1994, document S/RES/955, annex, article 3 (hereinafter "*Statute of the ICTR*"); see *Semanza v. Prosecutor*, Judgment, Appeals Chamber, Case No. ICTR-97-20-A, 20 May 2005, para. 269 ("... contrary to Article 5 of the ICTY Statute, Article 3 of the ICTR Statute does not require that the crimes be committed in the context of an armed conflict. This is an important distinction.").

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life including, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Commentary

(1) The first three paragraphs of draft article 3 establish, for the purpose of the present draft articles, a definition of "crime against humanity." The text of these three paragraphs is verbatim the text of Article 7 of the Rome Statute, except for three non-substantive changes (discussed below), which are necessary given the different context in which the definition is being used. Paragraph 4 of draft article 3 is a "without prejudice" clause which indicates that this definition does not affect any broader definitions provided for in international instruments or national laws.

Definitions in other instruments

(2) Various definitions of "crimes against humanity" have been used since 1945, both in international instruments and in national laws that have codified the crime. The Nürnberg Charter defined "crimes against humanity" as:

> "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."[107]

(3) Principle VI(c) of the Commission's 1950 "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" defined crimes against humanity as: "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime."[108]

(4) Further, the Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind identified as one of those offenses: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities."[109]

(5) Article 5 of the ICTY Statute stated that the tribunal "shall have the power to prosecute persons responsible" for a series of acts (such as murder, torture, and rape) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population … ."[110] Although the report of the Secretary-General of the United Nations proposing this article indicated that crimes against humanity "refer to inhumane acts of a very serious nature ... committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds",[111] that particular language was not included in the text of article 5.

(6) By contrast, the 1994 ICTR Statute, in article 3, retained the same series of acts, but the chapeau language introduced the formulation from the 1993 Secretary-

[107] Nürnberg Charter, *supra* note 85, at article 6 (c).

[108] *Yearbook … 1950*, vol. II, p. 377 at para. 119.

[109] *Yearbook … 1954*, vol. II, p. 150 at para. 49 (art. 2 (11)).

[110] *Statute of the ICTY*, *supra* note 102, at art. 5.

[111] Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), document S/25704, p. 13 at para. 48.

General's report of "crimes when committed as part of a widespread or systematic attack against any civilian population" and then continued with "on national, political, ethnic, racial or religious grounds ... ."[112] As such, the ICTR Statute expressly provided that a discriminatory intent was required in order to establish the crime. The Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind also defined "crimes against humanity" to be a series of specified acts "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group," but did not include the discriminatory intent language.[113] Crimes against humanity have also been defined in the jurisdiction of hybrid criminal courts or tribunals.[114]

(7) Article 5, paragraph 1 (b), of the Rome Statute includes crimes against humanity within the jurisdiction of the ICC.[115] Article 7, paragraph 1, defines "crime against humanity" as any of a series of acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[116] Article 7, paragraph 2, contains a series of definitions which, *inter alia*, clarify that an attack directed against any civilian population "means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[117] Article 7, paragraph 3, provides that "it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."[118] Article 7 does not retain the nexus to an armed conflict that characterized the ICTY Statute, nor (except with respect to acts of persecution)[119] the discriminatory intent requirement that characterized the ICTR Statute.

(8) The Rome Statute Article 7 definition of "crime against humanity" has been accepted by the more than 120 States Parties to the Rome Statute and is now being used by many States when adopting or amending their national laws. The Commission considered Rome Statute Article 7 as an appropriate basis for defining such crimes in paragraphs 1 to 3 of draft article 3. Indeed, the text of Article 7 is used verbatim except for three non-substantive changes, which are necessary given the different context in which the definition is being used. First, the opening phrase of paragraph 1 reads "For the purpose of the present draft articles" rather than "For the purpose of this Statute." Second, the same change has been made in the opening phrase of paragraph 3. Third, Rome Statute Article 7, paragraph 1 (h), criminalizes acts of persecution when undertaken "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court." Again, to adapt to the different context, this phrase reads in draft article 3 as "in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes." In due course, the ICC may exercise its jurisdiction over the crime of

[112] *Statute of the ICTR*, *supra* note 106, Annex, article 3.
[113] *Yearbook … 1996*, vol. II (Part Two), p. 47 at article 18.
[114] See, e.g., Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute), done at Freetown on 16 January 2002, United Nations, *Treaty Series*, vol. 2178, p. 137 at p. 145; "The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea," art. 5, 27 October 2004, located at <http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> (last visited 22 June 2015).
[115] Rome Statute, *supra* note 84.
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*
[119] See *ibid*., art. 7, para. 1 (h).

aggression when the requirements established at the Kampala Conference are met, in which case this paragraph may need to be revisited.

Paragraphs 1 to 3

(9) The definition of "crimes against humanity" set forth in paragraphs 1 to 3 of draft article 3 contains three overall requirements that merit some discussion. These requirements, all of which appear in paragraph 1, have been illuminated through the case law of the ICC and other international or hybrid courts and tribunals. The definition also lists the underlying prohibited acts for crimes against humanity and defines several of the terms used within the definition (thus providing definitions within the definition). No doubt the evolving jurisprudence of the ICC and other international or hybrid courts and tribunals will continue to help inform national authorities, including courts, as to the meaning of this definition, and thereby will promote harmonized approaches at the national level. The Commission notes that relevant case law continues to develop over time, such that the following discussion is meant simply to indicate some of the parameters of these terms as of 2015.

"*Widespread or systematic attack*"

(10) The first overall requirement is that the acts must be committed as part of a "widespread or systematic" attack. This requirement first appeared in the ICTR Statute,[120] though some ICTY decisions maintained that the requirement was implicit even in the ICTY Statute, given the inclusion of such language in the Secretary-General's report proposing that statute.[121] Jurisprudence of both the ICTY and the ICTR maintained that the conditions of "widespread" and "systematic" were disjunctive rather than conjunctive requirements; either condition could be met to establish the existence of the crime.[122] This reading of the widespread/systematic requirement is also reflected in the Commission's commentary to the 1996 Draft Code, where it stated that "an act could constitute a crime against humanity if either of these conditions [of scale or systematicity] is met."[123]

[120] Unlike the English version, the French version of article 3 of the ICTR Statute used a conjunctive formulation ("généralisée et systématique"). In the *Akayesu* case, the Trial Chamber indicated: "In the original French version of the Statute, these requirements were worded cumulatively ... , thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation." *Prosecutor v. Jean-Paul Akayesu*, Judgment, Trial Chamber I, Case No. ICTR-96-4-T, 2 September 1998, para. 579, n. 144 (hereinafter "*Akayesu 1998"*).

[121] *Prosecutor v. Blaškić*, Judgment, Trial Chamber, Case No. IT-95-14-T, 3 March 2000, para. 202 (hereinafter "*Blaškić 2000"*); *Prosecutor v. Tadić, Opinion and Judgment, Trial Chamber*, Case No. IT-94-1-T, 7 May 1997, para. 648 (hereinafter "*Tadić 1997"*).

[122] See, e.g., *Prosecutor v. Mrkšić,* Judgment, Trial Chamber II, Case No. IT-95-13/1-T, 27 September 2007, para. 437 (hereinafter "*Mrkšić 2007"*) ("[T]he attack must be widespread or systematic, the requirement being disjunctive rather than cumulative."); *Prosecutor v. Kayishema*, Judgment, Trial Chamber, Case No. ICTR-95-1-T, 21 May 1999, para. 123 (hereinafter *Kayishema 1999)* ("The attack must contain one of the alternative conditions of being widespread or systematic."); *Akayesu 1998*, *supra* note 120, at para. 579; *Tadić 1997*, *supra* note 121, at para. 648 ("[E]ither a finding of widespreadness ... or systematicity ... fulfills this requirement.").

[123] *Yearbook … 1996*, vol. II (Part Two), p. 47. See also *Official Records of the General Assembly, Fiftieth Session*, Supplement No. 22 (A/50/22), para. 78 (Report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court) ("[E]lements that should be reflected in the definition of crimes against humanity included ... [that] the crimes usually involved a widespread *or* systematic attack") (emphasis added); *Yearbook … 1995*, vol. II (Part Two), p. 25 at para. 90 ("the concepts of 'systematic' and 'massive' violations were complementary elements of the crimes concerned"); *Yearbook … 1994*, vol. II (Part Two), p. 40 ("the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread *or* systematic

(11) When this standard was considered for the Rome Statute, some States expressed the view that the conditions of "widespread" and "systematic" should be conjunctive requirements — that they both should be present to establish the existence of the crime — because otherwise the standard would be over-inclusive.[124] Indeed, if "widespread" commission of acts alone were sufficient, these States maintained that spontaneous waves of widespread, but unrelated, crimes would constitute crimes against humanity. Due to that concern, a compromise was developed that involved leaving these conditions in the disjunctive,[125] but adding to Rome Statute Article 7, paragraph 2 (a), a definition of "attack" which, as discussed below, contains a policy element.

(12) According to the ICTY Trial Chamber in *Kunarac*, "[t]he adjective 'widespread' connotes the large-scale nature of the attack and the number of its victims."[126] As such, this requirement refers to a "multiplicity of victims"[127] and excludes isolated acts of violence,[128] such as murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative. At the same time, a single act committed by an individual perpetrator can constitute a crime against humanity if it occurs within the context of a broader campaign.[129] There is no specific numerical threshold of victims that must be met for an attack to be "widespread."

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violations"); *Yearbook … 1991*, vol. II (Part Two), p. 103 ("Either one of these aspects — systematic or mass scale — in any of the acts enumerated ... is enough for the offence to have taken place.").

[124] See United Nations, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, document A/CONF/183/13 (Vol. II), p. 148 (India); *ibid*., p. 150 (United Kingdom of Great Britain and Northern Ireland, France); *ibid*., p. 151 (Thailand, Egypt); *ibid*., p. 152 (Islamic Republic of Iran); *ibid*., p. 154 (Turkey); *ibid*., p. 155 (Russian Federation); *ibid*., p. 156 (Japan).

[125] Case law of the ICC has affirmed that the conditions of "widespread" and "systematic" in Rome Statute Article 7 are disjunctive. See *Situation in the Republic of Kenya,* Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, ICC-01/09, 31 March 2010, para. 94 (hereinafter "*Kenya Authorization Decision 2010"*); see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, Pre-Trial Chamber II, ICC-01/05-01/08, 15 June 2009, para. 82 (hereinafter "*Bemba 2009"*).

[126] *Prosecutor v. Kunarac*, Judgment, Trial Chamber, Case No. IT-96-23-T, 22 February 2001, at para. 428 (hereinafter "*Kunarac 2001"*); see *Prosecutor v. Katanga*, Judgment, Trial Chamber II, ICC-01/04-01/07, 7 March 2014, para. 1123 (hereinafter *Katanga 2014*); *Prosecutor v. Katanga*, Decision on the Confirmation of Charges, Pre-Trial Chamber I, ICC-01/04-01/07, 26 September 2008, para. 394 (hereinafter "*Katanga 2008")*; *Prosecutor v. Blagojević & Jokić*, Judgment, Trial Chamber I, Case No. IT-02-60-T, 17 January 2005, paras. 545-46; *Prosecutor v. Kordić & Čerkez*, Judgment, Appeals Chamber, Case No. IT-95-14/2-A, 17 December 2004, para. 94 (hereinafter "*Kordić 2004"*).

[127] *Bemba 2009*, *supra* note 125, at para. 83; *Kayishema 1999*, *supra* note 122, at para. 123; *Akayesu 1998*, *supra* note 120, at para. 580; *Yearbook … 1996*, vol. II (Part Two), p. 47 at art. 18 (using the phrase "on a large scale" instead of widespread); see also *Mrkšić 2007*, *supra* note 122, at para. 437 ("'[W]idespread' refers to the large scale nature of the attack and the number of victims."). In *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, ICC-01/04-02/06, 9 June 2014, para. 24 (hereinafter "*Ntaganda 2014"*), the Chamber found that the attack against the civilian population was widespread "as it resulted in a large number of civilian victims."

[128] See *Prosecutor v. Ntaganda*, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, ICC-01/04-02/06, 13 July 2012, para. 19 (hereinafter "*Ntaganda 2012"*); *Prosecutor v. Harun*, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, ICC-02/05-01/07, 27 April 2007, para. 62 (hereinafter *Harun 2007*); see also *Prosecutor v. Rutaganda*, Judgment, Trial Chamber I, Case No. ICTR-96-3-T, 6 December 1999, paras. 67-69; *Kayishema 1999*, *supra* note 122, at paras. 122–123; *Yearbook … 1996*, vol. II (Part Two), p. 47; *Yearbook … 1991*, vol. II (Part Two), p. 103.

[129] *Kupreškić 2000*, *supra* note 97, at para. 550; *Tadić 1997*, *supra* note 121, at para. 649.

(13) "Widespread" can also have a geographical dimension, with the attack occurring in different locations.[130] Thus, in the *Bemba* case, the ICC Pre-Trial Chamber found that there was sufficient evidence to establish that an attack was "widespread" based on reports of attacks in various locations over a large geographical area, including evidence of thousands of rapes, mass grave sites, and a large number of victims.[131] Yet a large geographic area is not required; the ICTY has found that the attack can be in a small geographic area against a large number of civilians.[132]

(14) In its *Kenya Authorization Decision 2010*, the ICC Pre-Trial Chamber indicated that "[t]he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts."[133] An attack may be widespread due to the cumulative effect of multiple inhumane acts or the result of a single inhumane act of great magnitude.[134]

(15) Like "widespread", the term "systematic" excludes isolated or unconnected acts of violence,[135] and jurisprudence from the ICTY, ICTR, and ICC reflects a similar understanding of what is meant by the term. The ICTY defined "systematic" as "the organised nature of the acts of violence and the improbability of their random occurrence"[136] and found that evidence of a pattern or methodical plan establishes that an attack was systematic.[137] Thus, the Appeals Chamber in *Kunarac* confirmed that "patterns of crimes — that is the non-accidental repetition of similar criminal conduct on a regular basis — are a common expression of such systematic occurrence."[138] The ICTR has taken a similar approach.[139]

(16) Consistent with ICTY and ICTR jurisprudence, an ICC Pre-Trial Chamber in *Harun* found that "systematic" refers to "the organised nature of the acts of violence and improbability of their random occurrence."[140] An ICC Pre-Trial Chamber in *Katanga* found that the term "has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts, or as 'patterns of crimes' such that the crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis.'"[141] In applying the standard, an ICC Pre-Trial Chamber in *Ntaganda* found an attack to be systematic since "the perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions, they attacked villages with heavy weapons, and systematically chased the population by similar methods, hunting house by

[130] See, e.g., *Ntaganda 2012*, *supra* note 128, at para. 30; *Prosecutor v. Ruto*, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, Pre-Trial Chamber II, ICC-01/09-01/11, 23 January 2012, para. 177 (hereinafter "*Ruto 2012*").

[131] *Bemba 2009*, *supra* note 125, at paras. 117–24.

[132] *Kordić 2004*, *supra* note 126, at para. 94; *Blaškić 2000*, *supra* note 121, at para. 206.

[133] *Kenya Authorization Decision 2010*, *supra* note 125, at paras. 95–96.

[134] *Yearbook … 1996*, vol. II (Part Two), p. 47; see also *Bemba 2009*, *supra* note 125, at para. 83 (finding that widespread "entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians").

[135] See *Yearbook … 1996*, vol. II (Part Two), p. 47*; Yearbook … 1991*, vol. II (Part Two), p. 103.

[136] *Mrkšić 2007*, *supra* note 122, at para. 437; *Kunarac 2001*, *supra* note 126, at para. 429.

[137] See, e.g., *Tadić 1997*, *supra* note 121, at para. 648.

[138] *Prosecutor v. Kunarac, Judgment, Appeals Chamber*, Case No. IT-96-23/1-A, 12 June 2002, para. 94 (hereinafter "*Kunarac 2002*").

[139] *Kayishema 1999*, *supra* note 122, at para. 123; *Akayesu 1998*, *supra* note 120, at para. 580.

[140] *Harun 2007*, *supra* note 128, at para. 62 (citing to *Kordić 2004*, *supra* note 12826, at para. 94, which in turn cites to *Kunarac 2001*, *supra* note 126, at para. 429); see also *Ruto 2012*, *supra* note 130, at para. 179; *Kenya Authorization Decision 2010*, *supra* note 125, at para. 96; *Katanga 2008*, *supra* note 126, at para. 394.

[141] *Katanga 2008*, *supra* note 126, at para. 397.

house and into the bushes, burning all properties and looting."[142] Additionally, in the *Ntaganda* confirmation of charges decision, a Pre-Trial Chamber held that the attack was systematic as it followed a "regular pattern" with a "recurrent *modus operandi*, including the erection of roadblocks, the laying of land mines, and coordinated the commission of the unlawful acts ... in order to attack the non-Hema civilian population." [143] In *Gbagbo*, an ICC Pre-Trial Chamber found an attack to be systematic when "preparations for the attack were undertaken in advance" and the attack was planned and coordinated with acts of violence revealing a "clear pattern."[144]

"*Directed against any civilian population*"

(17) The second overall requirement is that the act must be committed as part of an attack "directed against any civilian population." Draft article 3, paragraph 2(a), defines "attack directed against any civilian population" for the purpose of paragraph 1 as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[145] As discussed below, jurisprudence from the ICTY, ICTR, and ICC has construed the meaning of each of these terms: "directed against", "any", "civilian", "population", "a course of conduct involving the multiple commission of acts", and "State or organizational policy."

(18) The ICTY has found that the phrase "directed against" requires that civilians be the intended primary target of the attack, rather than incidental victims.[146] The ICC Pre-Trial Chambers subsequently adopted this interpretation in the *Bemba* case and the *Kenya Authorization Decision 2010*.[147] An ICC Trial Chamber adopted the same interpretation in the *Katanga* trial judgment.[148] In the *Bemba* case, the ICC Pre-Trial Chamber found that there was sufficient evidence showing the attack was "directed against" civilians of the Central African Republic.[149] The Chamber concluded that Movement for the Liberation of Congo (hereinafter "MLC") soldiers were aware that their victims were civilians, based on direct evidence of civilians being attacked inside their houses or in their courtyards.[150] The Chamber further found that MLC soldiers targeted *primarily* civilians, demonstrated by an attack at one locality where the MLC soldiers did not find any rebel troops that they claimed to be chasing.[151] The term "directed" places its emphasis on the intention of the attack rather than the physical result of the attack.[152] It is the attack, not the acts of the individual perpetrator, which must be "directed against" the target population.[153]

[142] *Ntaganda 2012*, *supra* note 128, at para. 31; see also *Ruto 2012*, *supra* note 130, at para. 179.
[143] *Ntaganda 2014*, *supra* note 127, para. 24.
[144] *Prosecutor v. Gbagbo*, Decision on the Confirmation of Charges against Laurent Gbagbo, Pre-Trial Chamber II, ICC-02/11-01/11, 12 June 2014, para. 225 (hereinafter "*Gbagbo 2014*").
[145] Rome Statute, *supra* note 84; see also International Criminal Court, *Elements of Crimes*, document PCNICC/2000/1/Add.2, p. 5 (hereinafter ICC, *Elements of Crimes*).
[146] See, e.g., *Kunarac 2001*, *supra* note 126, at para. 421 ("The expression 'directed against' specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.").
[147] *Kenya Authorization Decision 2010*, *supra* note 125, at para. 82; *Bemba 2009*, *supra* note 125, at para. 76.
[148] *Katanga 2014*, *supra* note 126, para. 1104.
[149] *Bemba 2009*, *supra* note 125, at para. 94; see also *Ntaganda 2012*, *supra* note 128, at paras. 20–21.
[150] *Bemba* 2009, *supra* note 125, at para. 94.
[151] *Ibid.*, paras. 95–98.
[152] See, e.g., *Blaškić 2000*, *supra* note 121, at para. 208, n. 401.
[153] *Kunarac 2002*, *supra* note 138, at para. 103.

(19) The word "any" indicates that "civilian population" is to have a wide definition and should be interpreted broadly.[154] An attack can be committed against any civilians, "regardless of their nationality, ethnicity, or any other distinguishing feature",[155] and can be committed against either nationals or foreigners.[156] Those targeted may "include a group defined by its (perceived) political affiliation."[157] In order to qualify as a "civilian population" during a time of armed conflict, those targeted must be "predominantly" civilian in nature; the presence of certain combatants within the population does not change its character.[158] This approach is in accordance with other rules arising under international humanitarian law. For example, Additional Protocol I to the Geneva Conventions states: "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."[159] The ICTR Trial Chamber in *Kayishema* found that during a time of peace, "civilian" shall include all persons except those individuals who have a duty to maintain public order and have legitimate means to exercise force to that end at the time they are being attacked.[160] The status of any given victim must be assessed at the time the offence is committed;[161] a person should be considered a civilian if there is any doubt as to his or her status.[162]

(20) "Population" does not mean that the entire population of a given geographical location must be subject to the attack;[163] rather, the term implies the collective nature

[154]See, e.g., *Mrkšić 2007*, *supra* note 122, at para. 442; *Kupreškić 2000*, *supra* note 97, at para. 547 ("[A] wide definition of 'civilian' and 'population' is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity."); *Kayishema 1999*, *supra* note 122, at para. 127; *Tadić 1997*, *supra* note 121, at para. 643.

[155]*Katanga 2008*, *supra* note 126, at para. 399 (quoting *Tadić 1997*, *supra* note 121, at para. 635); see also *Katanga 2014*, *supra* note 126, at para. 1103.

[156]See, e.g., *Kunarac 2001*, *supra* note 126, at para. 423.

[157]*Ruto 2012*, *supra* note 130, at para. 164.

[158]See, e.g., *Katanga 2014*, *supra* note 126, at para. 1105 (holding that the population targeted "must be primarily composed of civilians" and that the "presence of non-civilians in its midst has therefore no effect on its status of civilian population"); *Mrkšić 2007*, *supra* note 122, at para. 442; *Kunarac 2001*, *supra* note 126, at para. 425 ("the presence of certain non-civilians in its midst does not change the character of the population"); *Kordić 2001*, *supra* note 105, at para. 180; *Blaškić 2000*, *supra* note 121, at para. 214 ("the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population"); *Kupreškić 2000*, *supra* note 97, at para. 549 ("the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian"); *Kayishema 1999*, *supra* note 122, at para. 128; *Akayesu 1998*, *supra* note 120, at para. 582 ("Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character."); *Tadić 1997*, *supra* note 121, at para. 638.

[159]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50(3), done at Geneva on 8 June 1977, United Nations, *Treaty Series*, vol. 1125, p. 3.

[160]*Kayishema 1999*, *supra* note 122, at para. 127 (referring to "all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale").

[161]*Blaškić 2000*, *supra* note 121, at para. 214 ("[T]he specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian."); see also *Kordić 2001*, *supra* note 105, at para. 180 ("[I]ndividuals who at one time performed acts of resistance may in certain circumstances be victims of a crime against humanity."); *Akayesu 1998*, *supra* note 120, at para. 582 (finding that civilian population includes "members of the armed forces who laid down their arms and those persons placed *hors de combat*").

[162]*Kunarac 2001*, *supra* note 126, at para. 426.

[163]See *Kenya Authorization Decision 2010*, *supra* note 125, at para. 82; *Bemba 2009*, *supra* note 125, at para. 77; *Kunarac 2001*, *supra* note 126, at para. 424; *Tadić 1997*, *supra* note 121, at para. 644; see

of the crime as an attack upon multiple victims.[164] As the ICTY Trial Chamber noted in *Gotovina*, the concept means that the attack is upon more than just "a limited and randomly selected number of individuals."[165] ICC decisions in the *Bemba case* and the *Kenya Authorization Decision 2010* have adopted a similar approach, declaring that the Prosecutor must establish that the attack was directed against more than just a limited group of individuals.[166]

(21) The first part of draft article 3, paragraph 2 (a), refers to "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population." Although no such language was contained in the statutory definition of crimes against humanity for the ICTY and ICTR, this language reflects jurisprudence from both these tribunals,[167] and was expressly stated in Rome Statute Article 7, paragraph 2 (a). The Elements of Crimes under the Rome Statute provides that the "acts" referred to in Article 7, paragraph 2 (a) "need not constitute a military attack."[168] The Trial Chamber in *Katanga* stated that "the attack need not necessarily be military in nature and it may involve any form of violence against a civilian population."[169]

(22) The second part of draft article 3, paragraph 2 (a), states that the attack must be "pursuant to or in furtherance of a State or organizational policy to commit such an attack." The requirement of a "policy" element did not appear as part of the definition of crimes against humanity in the statutes of international courts and tribunals until the adoption of the Rome Statute.[170] While the ICTY and ICTR Statutes contained no policy requirement in their definition of crimes against humanity,[171] some early jurisprudence required it.[172] Indeed, the *Tadić* Trial Chamber provided an important discussion of the policy element early in the tenure of the ICTY, one that would later influence the drafting of the Rome Statute. The Trial Chamber found that

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also *Yearbook … 1994*, vol. II (Part Two), p. 40 (defining crimes against humanity as "inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population *in whole or in part*") (emphasis added).

[164] See *Tadić 1997*, *supra* note 121, at para. 644.

[165] *Prosecutor v. Gotovina*, Judgment, Trial Chamber I, Case No. IT-06-90-T, 15 April 2011, para. 1704.

[166] *Kenya Authorization Decision 2010*, *supra* note 125, at para. 81; *Bemba 2009*, *supra* note 125, at para. 77.

[167] See, e.g., *Kunarac 2001*, *supra* note 126, at para. 415 (defining attack as "a course of conduct involving the commission of acts of violence"); *Kayishema 1999*, *supra* note 122, at para. 122 (defining attack as the "event in which the enumerated crimes must form part"); *Akayesu 1998*, *supra* note 120, at para. 581 ("The concept of attack may be defined as a unlawful act of the kind enumerated [in the Statute]. An attack may also be non violent in nature, like imposing a system of apartheid ... or exerting pressure on the population to act in a particular manner ...").

[168] See ICC, *Elements of Crimes*, *supra* note 145, at p. 5.

[169] *Katanga 2014*, *supra* note 126, at para. 1101.

[170] Article 6 (c) of the Nürnberg Charter contains no explicit reference to a plan or policy. The Nürnberg Judgment, however, did use a "policy" descriptor when discussing article 6 (c) in the context of the concept of the "attack" as a whole. See *Judgment of 30 September 1946*, *supra* note 86, at p. 493 ("The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out.") Article II (1) (c) of Control Council Law No. 10 also contains no reference to a plan or policy in its definition of crimes against humanity.

[171] The ICTY Appeals Chamber determined that there was no policy element on crimes against humanity in customary international law, see *Kunarac 2002*, *supra* note 138, at para. 98 ("There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes."), although that position has been criticized in writings.

[172] *Tadić 1997*, *supra* note 121, at paras. 644, 653–655 and 626.

> "the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts ... Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur."[173]

The Trial Chamber further noted that, because of the policy element, such crimes "cannot be the work of isolated individuals alone."[174] Later ICTY jurisprudence, however, downplayed the policy element, regarding it as sufficient simply to prove the existence of a widespread or systematic attack.[175]

(23) Prior to the Rome Statute, the work of the ILC in its draft codes tended to require a policy element. The Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind defined crimes against humanity as: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*."[176] The Commission decided to include the State instigation or tolerance requirement in order to exclude inhumane acts committed by private persons on their own without any State involvement.[177] At the same time, the definition of crimes against humanity included in the 1954 Draft Code did not include any requirement of scale ("widespread") or systematicity.

(24) The Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind also recognized a policy requirement, defining crimes against humanity as "any of the following acts, when committed in a systematic manner or on a large scale and *instigated or directed by a Government or by an organization or group*."[178] The Commission included this requirement to exclude inhumane acts committed by an individual "acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization."[179] In other words, the policy element sought to exclude "ordinary" crimes of individuals acting on their own initiative and without any connection to a State or organization.

(25) Draft article 3, paragraph 2 (a), contains the same policy element as set forth in Rome Statute Article 7, paragraph 2 (a). The Elements of Crimes under the Rome Statute provides that a "policy to commit such attack" requires that "the State or organization actively promote or encourage such an attack against a civilian population,"[180] and that "a policy may, in exceptional circumstances, be

[173] *Ibid*., para. 653.

[174] *Ibid*., para. 655 (citing to *Prosecutor v. Nikolić, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, *Trial Chamber*, Case No. IT-94-2-R61, 20 October 1995, para. 26).

[175] See, e.g., *Kunarac 2002*, *supra* note 138, at para. 98; *Kordić 2001*, *supra* note 105, at para. 182 (finding that "the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity"); *Kayishema 1999*, *supra* note 122, at para. 124 ("For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan."); *Akayesu 1998*, *supra* note 120, at para. 580.

[176] *Yearbook … 1954*, vol. II, p. 150 (emphasis added).

[177] *Ibid*.

[178] *Yearbook … 1996*, vol. II (Part Two), p. 47 (emphasis added).

[179] *Ibid*. In explaining its inclusion of the policy requirement, the Commission noted: "It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18."

[180] ICC, *Elements of Crimes*, *supra* note 145, at p. 5.

implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack."[181]

(26) This "policy" element has been addressed in several cases at the ICC.[182] In *Katanga* 2014, an ICC Trial Chamber stressed that the policy requirement is not synonymous with "systematic", since that would contradict the disjunctive requirement in Article 7 of a "widespread" or "systematic" attack.[183] Rather, while "systematic" requires high levels of organization and patterns of conduct or recurrence of violence,[184] to "establish a 'policy', it need be demonstrated only that the State or organization meant to commit an attack against a civilian population. An analysis of the systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community."[185] Further, the "policy" requirement does not require formal designs or pre-established plans, can be implemented by action or inaction, and can be inferred from the circumstances.[186] The Trial Chamber found that the policy need not be formally established or promulgated in advance of the attack and can be deduced from the repetition of acts, from preparatory activities, or from a collective mobilization.[187] Moreover, the policy need not be concrete or precise, and it may evolve over time as circumstances unfold.[188]

(27) Similarly, in its decision confirming the indictment of Laurent Gbagbo, an ICC Pre-Trial Chamber held that "policy" should not be conflated with "systematic."[189] Specifically, the Trial Chamber stated that "evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7 (1) and (2) (a) of the Statute."[190] The policy element requires that the acts be "linked" to a State or organization,[191] and it excludes "spontaneous or isolated acts of violence", but a policy need not be formally adopted[192] and proof of a particular rationale or motive is not required.[193] In the *Bemba* case, an ICC Pre-Trial Chamber found that the attack was pursuant to an organizational policy based on evidence establishing that the MLC troops "carried out attacks following the same pattern."[194]

(28) The second part of draft article 3, paragraph 2(a), refers to either a "State" or "organizational" policy to commit such an attack, as does article 7, paragraph 2(a), of the Rome Statute. In its *Kenya Authorization Decision 2010*, an ICC Pre-Trial Chamber suggested that the meaning of "State" in article 7, paragraph 2(a), is "self-

[181] *Ibid.* Other precedents also emphasize that deliberate failure to act can satisfy the policy element. See *Kupreškić 2000*, *supra* note 97, at paras. 554-55 ("approved," "condoned," "explicit or implicit approval"); *Yearbook … 1954*, vol. II, p. 150 (art. 2(11)) ("toleration"); Security Council, Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992), document S/1994/674, para. 85.

[182] See, e.g., *Ntaganda 2012*, *supra* note 128, at para. 24; *Bemba 2009*, *supra* note 125, at para. 81; *Katanga 2008*, *supra* note 126, at para. 396.

[183] *Katanga 2014*, *supra* note 126, at para. 1112; see also *ibíd*., para. 1101; *Gbagbo 2014*, *supra* note 144, at para. 208.

[184] *Katanga 2014*, *supra* note 126, at paras. 1111–13.

[185] *Ibid*., para. 1113.

[186] *Ibid*., paras. 1108–1109 and 1113.

[187] *Ibid*., para. 1109; see also *Gbagbo 2014*, *supra* note 144, at paras. 211–212, and 215.

[188] *Katanga 2014*, *supra* note 126, at para. 1110.

[189] *Gbagbo 2014*, *supra* note 144, at paras. 208 and 216.

[190] *Ibid*., para. 216.

[191] *Ibid*., para. 217.

[192] *Ibid*., para. 215.

[193] *Ibid*., para. 214 (footnotes omitted).

[194] *Bemba 2009*, *supra* note 125, at para. 115.

explanatory."[195] The Chamber went on to note that a policy adopted by regional or local organs of the State could satisfy the requirement of State policy.[196]

(29) Jurisprudence from the ICC suggests that "organizational" includes any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack. For example, a Pre-Trial Chamber in *Katanga* stated: "Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population."[197] An ICC Trial Chamber in *Katanga* held that the organization must have "sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts ... a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population."[198]

(30) In its *Kenya Authorization Decision 2010*, a majority of an ICC Pre-Trial Chamber rejected the idea that "only State-like organizations may qualify" as organizations for the purpose of article 7, paragraph (2)(a), and further stated that "the formal nature of a group and the level of its organization should not be the defining criterion. Instead ... a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values."[199] In 2012, an ICC Pre-Trial Chamber in *Ruto* stated that, when determining whether a particular group qualifies as an "organization" under Rome Statute Article 7:

> "the Chamber may take into account a number of factors, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria."[200]

(31) As a consequence of the "policy" potentially emanating from a non-State organization, the definition set forth in paragraphs 1 to 3 of draft article 3 does not require that the offender be a State official or agent. This approach is consistent with the development of crimes against humanity under international law. The Commission, commenting in 1991 on the draft provision on crimes against humanity for what would become the 1996 Draft Code of Crimes, stated "that the draft article

[195] *Kenya Authorization Decision 2010*, *supra* note 125, at para. 89.

[196] *Ibid.*

[197] *Katanga 2008*, *supra* note 126, at para. 396 (citing to ICTY and ICTR case law, as well as the Commission's 1991 Draft Code of crimes against the Peace and Security of Mankind, *Yearbook … 1991*, vol. II (Part Two), p. 103); see also *Bemba 2009*, *supra* note 125, at para. 81.

[198] *Katanga 2014*, *supra* note 126, at para. 1119.

[199] *Kenya Authorization Decision 2010*, *supra* note 125, at para. 90. This understanding was similarly adopted by the Trial Chamber in *Katanga*, which stated: "That the attack must further be characterised as widespread or systematic does not, however, mean that the organisation that promotes or encourages it must be structured so as to assume the characteristics of a State." *Katanga 2014*, *supra* note 126, at para. 1120. The Trial Chamber also found that "the 'general practice accepted as law'... adverts to crimes against humanity committed by States and organisations that are not specifically defined as requiring quasi-State characteristics." *Ibid*., para. 1121.

[200] *Ruto 2012*, *supra* note 130, at para. 185; see also *Kenya Authorization Decision 2010*, *supra* note 125, at para. 93; *Situation in the Republic of Côte d'Ivoire*, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", Pre-Trial Chamber III, ICC-02/11, 15 November 2011, paras. 45–46.

does not confine possible perpetrators of the crimes to public officials or representatives alone" and that it "does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code."[201] As discussed previously, the 1996 Draft Code added the requirement that, to be crimes against humanity, the inhumane acts must be "instigated or directed by a Government *or by any organization or group*."[202] In its commentary to this requirement, the Commission noted: "The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State."[203]

(32) ICTY jurisprudence accepted the possibility of non-State actors being prosecuted for crimes against humanity. For example, an ICTY Trial Chamber in the *Tadić* case stated that, "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory."[204] That finding was echoed in the *Limaj* case, where the Trial Chamber viewed the defendant members of the Kosovo Liberation Army as prosecutable for crimes against humanity.[205]

(33) In the *Ntaganda* case at the ICC, charges were confirmed against a defendant associated with two paramilitary groups, the *Union des Patriotes Congolais* and the *Forces Patriotiques pour la Libération du Congo* in the Democratic Republic of the Congo.[206] Similarly, in the *Callixte Mbarushimana* case, the prosecutor pursued charges against a defendant associated with the *Forces Démocratiques pour la Liberation du Rwanda*, described, according to its statute, as an "armed group seeking to 'reconquérir et défendre la souveraineté nationale' of Rwanda."[207] In the case against Joseph Kony relating to the situation in Uganda, the defendant is allegedly associated with the Lord's Resistance Army, "an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army"[208] which "is organised in a military-type hierarchy and operates as an army."[209] With respect to the situation in Kenya, a Pre-Trial Chamber confirmed charges of crimes against humanity against defendants due to their association in a "network" of perpetrators "comprised of eminent [Orange Democratic Movement Party (ODM)] political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders."[210] Likewise, charges were confirmed with respect to other defendants associated with "'coordinated attacks that were perpetrated by the Mungiki and pro-Party of National Unity ('PNU') youth in different parts of Nakuru and Naivasha'" that "were targeted at perceived [ODM]

[201] *Yearbook … 1991*, vol. II (Part Two), pp. 103–104.
[202] *Yearbook … 1996*, vol. II (Part Two), p. 47 (article 18) (emphasis added).
[203] *Ibid.*
[204] *Tadić 1997*, *supra* note 121, at para. 654. For further discussion of non-State perpetrators, see *ibid.*, para. 655.
[205] *Prosecutor v. Limaj et al*., Judgment, Trial Chamber II, Case No. IT-03-66-T, 30 November 2005, paras. 212–213.
[206] *Ntaganda 2012*, *supra* note 128, at para. 22.
[207] *Prosecutor v. Mbarushimana*, Decision on the confirmation of charges, Pre-Trial Chamber I, ICC-01/04-01/10, 16 December 2011, para. 2.
[208] *Situation in Uganda*, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, ICC-02/04-01/05, 27 September 2005, para. 5.
[209] *Ibid*., para. 7.
[210] *Ruto 2012*, *supra* note 130, at para. 182.

supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language."[211]

"*With knowledge of the attack*"

(34) The third overall requirement is that the perpetrator must commit the act "with knowledge of the attack." Jurisprudence from the ICTY and ICTR concluded that the perpetrator must have knowledge that there is an attack on the civilian population and, further, that his or her act is a part of that attack.[212] This two-part approach is reflected in the Elements of Crimes under the Rome Statute, which for each of the proscribed acts requires as that act's last element: "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population." Even so,

> "the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack." [213]

(35) In its decision confirming the charges against Laurent Gbagbo, an ICC Pre-Trial Chamber found that "it is only necessary to establish that the person had knowledge of the attack in general terms."[214] Indeed, it need not be proven that the perpetrator knew the specific details of the attack; [215] rather, the perpetrator's knowledge may be inferred from circumstantial evidence.[216] Thus, when finding in the *Bemba* case that the MLC troops acted with knowledge of the attack, an ICC Pre-Trial Chamber stated that the troops' knowledge could be "inferred from the methods of the attack they followed", which reflected a clear pattern.[217] In the *Katanga* case, an ICC Pre-Trial Chamber found that:

> "knowledge of the attack and the perpetrator's awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred."[218]

(36) Further, the personal motive of the perpetrator for taking part in the attack is irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack.[219] According to the ICTY Appeals Chamber in *Kunarac*, evidence that the perpetrator committed the prohibited acts for personal reasons could at most "be

[211] *Prosecutor v. Muthaura et al.*, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, Pre-Trial Chamber II, ICC-01/09-02/11, 23 January 2012, para. 102.

[212] See, e.g., *Kunarac 2001*, *supra* note 126, at para. 418; *Kayishema 1999*, *supra* note 122, at para. 133.

[213] ICC, *Elements of Crimes*, *supra* note 145, at p. 5.

[214] *Gbagbo 2014*, *supra* note 144, at para. 214.

[215] *Kunarac 2001*, *supra* note 126, at para. 434 (finding that the knowledge requirement "does not entail knowledge of the details of the attack").

[216] See *Blaškić 2000*, *supra* note 121, at para. 259 (finding that knowledge of the broader context of the attack may be surmised from a number of facts, including "the nature of the crimes committed and the degree to which they are common knowledge"); *Tadić 1997*, *supra* note 121, at para. 657 ("While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances."); see also *Kayishema 1999*, *supra* note 122, at para. 134 (finding that "actual or constructive knowledge of the broader context of the attack" is sufficient).

[217] *Bemba 2009*, *supra* note 125, at para. 126.

[218] *Katanga 2008*, *supra* note 126, at para. 402.

[219] See, e.g., *Kunarac 2002*, *supra* note 138, at para. 103; *Kupreškić 2000*, *supra* note 97, at para. 558.

indicative of a rebuttable assumption that he was not aware that his acts were part of that attack."[220] It is the perpetrator's knowledge or intent that his or her act is part of the attack that is relevant to satisfying this requirement. Additionally, this element will be satisfied where it can be proven that the underlying offence was committed by directly taking advantage of the broader attack, or where the commission of the underlying offence had the effect of perpetuating the broader attack.[221] For example, in the *Kunarac* case, the perpetrators were accused of various forms of sexual violence, acts of torture, and enslavement in regards to Muslim women and girls. An ICTY Trial Chamber found that the accused had the requisite knowledge because they not only knew of the attack against the Muslim civilian population, but also perpetuated the attack "by directly taking advantage of the situation created" and "fully embraced the ethnicity-based aggression."[222] Likewise, an ICC Trial Chamber has held that the perpetrator must know that the act is part of the widespread or systematic attack against the civilian population, but the perpetrator's motive is irrelevant for the act to be characterized as a crime against humanity. It is not necessary for the perpetrator to have knowledge of all the characteristics or details of the attack, nor is it required for the perpetrator to subscribe to the "State or the organisation's criminal design."[223]

Prohibited acts

(37) Like Rome Statute Article 7, draft article 3, paragraph 1, at subparagraphs (a)–(k), lists the prohibited acts for crimes against humanity. These prohibited acts also appear as part of the definition of crimes against humanity contained in article 18 of the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, although the language differs slightly. An individual who commits one of these acts can commit a crime against humanity; the individual need not have committed multiple acts, but the individual's act must be "part of" a widespread or systematic attack directed against any civilian population.[224] The offence does not need to be committed in the heat of the attack against the civilian population to satisfy this requirement; the offence can be part of the attack if it can be sufficiently connected to the attack.[225]

Definitions within the definition

(38) As noted above, draft article 3, paragraph 2(a), defines "attack directed against any civilian population" for the purpose of draft article 3, paragraph 1. The remaining sub-paragraphs (b)–(i) of draft article 3, paragraph 2, define further terms that appear in paragraph 1, specifically: "extermination"; "enslavement"; "deportation or forcible transfer of population"; "torture"; "forced pregnancy"; "persecution"; "the crime of apartheid"; and "enforced disappearance of persons." Further, draft article 3, paragraph 3, provides a definition for the term "gender". These definitions also appear in Rome Statute Article 7 and were viewed by the Commission as relevant for retention in draft article 3.

Paragraph 4

(39) Paragraph 4 of draft article 3 provides: "This draft article is without prejudice to any broader definition provided for in any international instrument or national

[220] *Kunarac 2002*, *supra* note 138, at para. 103.
[221] See, e.g., *Kunarac 2001*, *supra* note 126, at para. 592.
[222] *Ibid*.
[223] *Katanga 2014*, *supra* note 126, at para. 1125.
[224] See, e.g., *Kunarac 2002*, *supra* note 138, at para. 100; *Tadić 1997*, *supra* note 121, at para. 649.
[225] See, e.g., *Prosecutor v. Mrkšić et al.,* Judgment, Appeals Chamber, Case No. IT-95-13/1-A, 5 May 2009, para. 41; *Prosecutor v. Naletillić*, Judgment, Trial Chamber, Case No. IT-98-34-T, 31 March 2003, para. 234; *Mrkšić 2007*, supra note 122, at para. 438; *Tadić 1999*, *supra* note 105, at para. 249.

law." This provision is similar to article 1, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: "This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."[226] Rome Statute Article 10 (appearing in part II on "Jurisdiction, admissibility, and applicable law") also contains a "without prejudice clause," which reads: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

(40) Paragraph 4 is meant to ensure that the definition of "crimes against humanity" set forth in draft article 3 does not call into question any broader definitions that may exist in other international instruments or national legislation. "International instrument" is to be understood in the broad sense and not only in the sense of being a binding international agreement. For example, the definition of "enforced disappearance of persons" as contained in draft article 3 follows Rome Statute Article 7, but differs from the definition contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,[227] in the Inter-American Convention on Forced Disappearance of Persons,[228] and in the International Convention for the Protection of all Persons against Enforced Disappearance.[229] Those differences principally are that the latter instruments do not include the element "with the intention of removing them from the protection of the law," do not include the words "for a prolonged period of time", and do not refer to organizations as potential perpetrators of the crime when they act without State participation.

(41) In light of such differences, the Commission thought it prudent to include draft article 3, paragraph 4. In essence, while the first three paragraphs of draft article 3 define crimes against humanity for the purpose of the draft articles, this is without prejudice to broader definitions in international instruments or national laws. Thus, if a State wishes to adopt a broader definition in its national law, the present draft articles do not preclude it from doing so. At the same time, an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation. Any elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance.

Article 4
Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

[226] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on 10 December 1984, United Nations, *Treaty Series*, vol. 1465, p. 85 (hereinafter "Convention Against Torture").

[227] *Declaration on the Protection of All Persons from Enforced Disappearance*, General Assembly resolution 47/133 of 18 December 1992, document A/RES/47/133.

[228] Inter-American Convention on Forced Disappearance of Persons, done at Belém do Pará on 9 June 1994, OAS Doc. OEA/Ser.P/AG/doc 3114/94.

[229] International Convention for the Protection of All Persons from Enforced Disappearance, done at New York on 20 December 2006, United Nations, *Treaty Series*, vol. 2716, p. 3 (hereinafter Enforced Disappearance Convention).

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Commentary

(1) Draft article 4 sets forth an obligation of prevention with respect to crimes against humanity. In considering such an obligation, the Commission viewed it as pertinent to survey existing treaty practice concerning the prevention of crimes and other acts. In many instances, those treaties address acts that, when committed under certain circumstances, can constitute crimes against humanity (for example, genocide, torture, apartheid, or enforced disappearance). As such, the obligation of prevention set forth in those treaties extends as well to prevention of the acts in question when they also qualify as crimes against humanity.

(2) An early significant example of an obligation of prevention may be found in the 1948 Genocide Convention, which provides in Article I: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[230] Further, Article V provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III." Article VIII provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III." As such, the Genocide Convention contains within it several elements relating to prevention: a general obligation to prevent genocide; an obligation to enact national measures to give effect to the provisions of the Convention; and a provision on cooperation of States Parties with the United Nations for the prevention of genocide.

(3) Such an obligation of prevention is a feature of most multilateral treaties addressing crimes since the 1960s. Examples include: Convention for the suppression of unlawful acts against the safety of civil aviation;[231] Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents;[232] Convention on the Prevention and Punishment of the Crime of Apartheid;[233] Convention against the taking of hostages;[234] Convention

[230] Convention on the Prevention and Punishment of the Crime of Genocide, done at Paris on 9 December 1948, United Nations, *Treaty Series*, vol. 78, p. 277.

[231] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on 23 September 1971, United Nations, *Treaty Series*, vol. 974, p. 178. Article 10 (1) provides: "Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1."

[232] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, done at New York on 14 December 1973, United Nations, *Treaty Series*, vol. 1035, p. 167. Article 4 (1) provides: "States Parties shall cooperate in the prevention of the crimes set forth in article 2, particularly by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories ... ."

[233] International Convention on the Suppression and Punishment of the Crime of Apartheid, done at New York on 30 November 1973, United Nations, *Treaty Series*, vol. 1015, p. 243. Article IV (a) provides: "The States Parties to the present Convention undertake ... [t]o adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime ... ."

[234] International Convention Against the Taking of Hostages, done at New York on 17 December 1979, United Nations, *Treaty Series*, vol. 1316, p. 205. Article 4 (1) provides: "States Parties shall co-

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[235] Inter-American Convention to Prevent and Punish Torture; [236] Inter-American Convention on the Forced Disappearance of Persons;[237] Convention on the Safety of United Nations and Associated Personnel; [238] International Convention on the Suppression of Terrorist Bombings;[239] Convention against Transnational Organized Crime; [240] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the Convention against Transnational Organized Crime; [241] Optional Protocol to the Convention against Torture and other Cruel,

operate in the prevention of the offences set forth in article 1, particularly by: taking all practicable measures to prevent preparations in their respective territories for the commission of ... offences ... including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages."

[235]Convention Against Torture, *supra* note 226. Article 2(1) provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

[236]Inter-American Convention to Prevent and Punish Torture, done at Cartagena de Indias on 9 December 1985, Organization of American States, *Treaty Series*, No. 67. Article 1 provides: "The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention." Article 6 provides: "The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction."

[237]Inter-American Convention on Forced Disappearance of Persons, *supra* note 228. Article 1 (c)–(d) provides: "The States Parties to this Convention undertake ... [t]o cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; [t]o take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention."

[238]Convention on the Safety of United Nations and Associated Personnel, done at New York on 9 December 1994, United Nations, *Treaty Series*, vol. 2051, p. 363. Article 11 provides: "States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes."

[239]International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997, United Nations, *Treaty Series*, vol. 2149, p. 256. Article 15(a) provides: "States Parties shall cooperate in the prevention of the offences set forth in article 2 ..."

[240]United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000, United Nations, *Treaty Series*, vol. 2225, p. 209. Article 9 (1) provides: "In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials." Article 9 (2) provides: "Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions." Article 29 (1): "Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention." Article 31 (1) provides: "States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime."

[241]Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, done at New York on 15 November 2000, United Nations, *Treaty Series*, vol. 2237, p. 319. Article 9 (1) provides: "States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization."

Inhuman or Degrading Treatment or Punishment;[242] and International Convention for the Protection of All Persons from Enforced Disappearance.[243]

(4) Some multilateral human rights treaties, even though not focused on the prevention and punishment of crimes as such, contain obligations to prevent and suppress human rights violations. Examples include: International Convention on the Elimination of All Forms of Racial Discrimination;[244] Convention on the Elimination of All Forms of Discrimination against Women; [245] and Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.[246] Some treaties do not refer expressly to "prevention" or "elimination" of the act but, rather, focus on an obligation to take appropriate legislative, administrative, and other measures to "give effect" to or to "implement" the treaty, which may be seen as encompassing necessary or appropriate measures to prevent

[242]Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on 18 December 2002, United Nations, *Treaty Series*, vol. 2375, p. 237. The preamble provides: "Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures." Article 3 provides: "Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment ... ."

[243]Enforced Disappearance Convention, *supra* note 229. The preamble provides: "Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance." Article 23 provides: "1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized. 2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished. 3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy."

[244]International Convention on the Elimination of All Forms of Racial Discrimination, done at New York on 7 March 1966, United Nations, *Treaty Series*, vol. 660, p. 195. Article 3 provides: "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."

[245]Convention on the Elimination of All Forms of Discrimination against Women, done at New York on 18 December 1979, United Nations, *Treaty Series*, vol. 1249, p. 13. Article 2 provides: "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women." Article 3 provides: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

[246]Council of Europe Convention on preventing and combating violence against women and domestic violence, done at Istanbul on 5 November 2011, Council of Europe, *Treaty Series*, No. 210. Article 4 (2) provides: "Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the use of sanctions, where appropriate; abolishing laws and practices which discriminate against women."

the act. Examples include the International Covenant on Civil and Political Rights[247] and the Convention on the Rights of the Child.[248]

(5) International courts and tribunals have addressed these obligations of prevention. The International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* noted that the duty to punish in the context of that convention is connected to but distinct from the duty to prevent. While "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent",[249] the Court found that "the duty to prevent genocide and the duty to punish its perpetrators ... are ... two distinct yet connected obligations."[250] Indeed, the "obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty."[251]

(6) Such treaty practice, jurisprudence, and the well-settled acceptance by States that crimes against humanity are crimes under international law that should be punished whether or not committed in time of armed conflict, and whether or not criminalized under national law, imply that States have undertaken an obligation to prevent crimes against humanity. Paragraph 1 of draft article 4, therefore, formulates an obligation of prevention in a manner similar to that set forth in Article I of the Genocide Convention, by beginning: "Each State undertakes to prevent crimes against humanity ... ."

(7) In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the International Court of Justice analysed the meaning of "undertake to prevent" as contained in Article I of the 1948 Genocide Convention. At the provisional measures phase, the Court determined that such an undertaking imposes "a clear obligation" on the parties "to do all in their power to prevent the commission of any such acts in the future."[252] At the merits phase, the Court described the ordinary meaning of the word "undertake" in that context as

> "to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties ... . It is not merely hortatory or purposive. The undertaking is unqualified ... ; and it is not

[247] International Covenant on Civil and Political Rights, done at New York on 16 December 1966, United Nations, *Treaty Series*, vol. 999, p. 171. Article 2 (2): "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

[248] Convention on the Rights of the Child, done at New York on 20 November 1989, United Nations, *Treaty Series*, vol. 1577, p. 3. Article 4 provides: "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."

[249] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 219 at para. 426 (hereinafter "*Bosnia and Herzegovina* v. *Serbia and Montenegro"*).

[250] *Ibid*., para. 425.

[251] *Ibid*., p. 220 at para. 427.

[252] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order,I.C.J. Reports 1993*, p. 22 at para. 45.

> to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles."[253]

The undertaking to prevent crimes against humanity, as formulated in paragraph 1 of draft article 4, is intended to express the same kind of legally binding effect upon States; it, too, is not merely hortatory or purposive, and is not merely an introduction to later draft articles.

(8) In the same case, the International Court of Justice further noted that, when engaging in measures of prevention, "it is clear that every State may only act within the limits permitted by international law."[254] The Commission deemed it important to express that requirement explicitly in paragraph 1 of draft article 4, and therefore has included a clause indicating that any measures of prevention must be "in conformity with international law." Thus, the measures undertaken by a State to fulfill this obligation must be consistent with the rules of international law, including rules on the use of force set forth in the Charter of the United Nations, international humanitarian law, and human rights law. The State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity.

(9) As set forth in paragraph 1 of draft article 4, this obligation of prevention either expressly or implicitly contains four elements. First, by this undertaking, States have an obligation not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law."[255] According to the International Court of Justice, when considering the analogous obligation of prevention contained in Article I of the Convention against Genocide:

> "Under Article I the States parties are bound to prevent such an act, which it describes as 'a crime under international law', being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide."[256]

[253] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, *supra* note 249, p. 111 at para. 162.
[254] *Ibid*., p. 221 at para. 430.
[255] *Ibid*., p. 113 at para. 166.
[256] *Ibid*., p. 113 at para. 166.

(10) The Court also decided that the substantive obligation reflected in Article I was not, on its face, limited by territory but, rather, applied "to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligation [] in question."[257]

(11) A breach of this obligation not to commit directly such acts implicates the responsibility of the State if the conduct at issue is attributable to the State pursuant to the rules on State responsibility. Indeed, in the context of disputes that may arise under the Genocide Convention, Article IX refers, *inter alia*, to disputes "relating to the responsibility of a State for genocide." Although much of the focus of the Genocide Convention is upon prosecuting individuals for the crime of genocide, the International Court of Justice stressed that the breach of the obligation to prevent is not a *criminal* violation by the State but, rather, concerns a breach of international law that engages State responsibility.[258] The Court's approach is consistent with views previously expressed by the Commission,[259] including in the commentary to the 2001 articles on responsibility of States for internationally wrongful acts: "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them."[260]

(12) Second, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation "to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing" such acts.[261] For the latter, the State Party is expected to use its best efforts (a due diligence standard) when it has a "capacity to influence effectively the action of persons likely to commit, or already committing, genocide," which in turn depends on the State Party's geographic, political, and other links to the persons or groups at issue.[262] Such a standard with respect to the obligation of prevention in the Genocide Convention was analysed by the International Court of Justice as follows:

> "[I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of 'due diligence,' which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State

[257] *Ibid*., p. 120 at para. 183.
[258] *Ibid*., p. 114 at para. 167 (finding that international responsibility is "quite different in nature from criminal responsibility").
[259] *Yearbook … 1998*, Vol. II (Part Two), p. 65 at para. 248 (finding that the Genocide Convention "did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility").
[260] *Yearbook … 2001*, Vol. II (Part. Two), p. 142 (para. 3 of the Commentary to article 58).
[261] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, *supra* note 249, p. 113 at para. 166.
[262] *Ibid*., p. 221 at para. 430.

> and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce." [263]

At the same time, the Court maintained that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed."[264]

(13) Third, and following from the above, the undertaking set forth in paragraph 1 of draft article 4 obliges States to pursue actively and in advance measures designed to help prevent the offense from occurring, such as by taking "effective legislative, administrative, judicial or other preventive measures in any territory under their jurisdiction or control," as indicated in subparagraph (a). This text is inspired by Article 2, paragraph 1 of the Convention Against Torture, which provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[265]

(14) The term "other preventive measures" rather than just "other measures" is used to reinforce the point that the measures at issue in this clause relate solely to prevention. The term "effective" implies that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective measures. In commenting on the analogous provision in the Convention against Torture, the Committee Against Torture has stated:

> "States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State Party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted."[266]

(15) As to the specific types of measures that shall be pursued by a State, in 2015 the Human Rights Council of the United Nations adopted a resolution on the prevention of genocide[267] which provides some insights into the kinds of measures

[263] *Ibid*.

[264] *Ibid*., p. 221 at para. 431; see *Yearbook … 2001*, vol. II (Part Two), p. 27 (*Draft articles on responsibility of States for internationally wrongful acts*, art. 13 (3): "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs ...").

[265] Convention Against Torture, *supra* note 226, at art. 2 (1).

[266] See Committee Against Torture, General Comment No. 2, para. 4 (CAT/C/GC/2/CRP.1/Rev.4) (2007).

[267] Document A/HRC/28/L.25 (23 March 2015).

that are expected in fulfilment of Article I of the Genocide Convention. Among other things, the resolution: (1) reiterated "the responsibility of each individual State to protect its population from genocide, which entails the prevention of such a crime, including incitement to it, through appropriate and necessary means";[268] (2) encouraged "Member States to build their capacity to prevent genocide through the development of individual expertise and the creation of appropriate offices within Governments to strengthen the work on prevention";[269] and (3) encouraged "States to consider the appointment of focal points on the prevention of genocide, who could cooperate and exchange information and best practices among themselves and with the Special Adviser to the Secretary-General on the Prevention of Genocide, relevant United Nations bodies and with regional and subregional mechanisms."[270]

(16) In the regional context, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[271] contains no express obligation to "prevent" violations of the Convention, but the European Court of Human Rights has construed article 2, paragraph 1 (on the right to life) to contain such an obligation and to require that appropriate measures of prevention be taken, such as "putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions."[272] At the same time, the Court has recognized that the State Party's obligation in this regard is limited.[273] Likewise, although the 1969 American Convention on Human Rights[274] contains no express obligation to "prevent" violations of the Convention, the Inter-American Court of Human Rights, when construing the obligation of the States Parties to "ensure" the free and full exercise of the rights recognized by the Convention,[275] has found that this obligation implies a "duty to prevent," which in turn requires the State Party to pursue certain steps. The Court has said: "This duty

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

[269] *Ibid*., para. 3

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

[271] European Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, United Nations, *Treaty Series*, vol. 213, p. 221.

[272] *Makaratzis v. Greece*, Judgment (Merits and Just Satisfaction), Reports of Judgment and Decisions 2004-XI, ECHR, Grand Chamber, Application No. 50385/99, 20 December 2004, para. 57; see *Kiliç v. Turkey*, Judgment (Merits and Just Satisfaction), Reports of Judgments and Decisions 2000-III, ECHR, Chamber, Application No. 22492/93, 28 March 2000, para. 62 (finding that article 2, paragraph 1, obliged a State Party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction).

[273] *Mahmut Kaya v. Turkey*, Judgment (Merits and Just Satisfaction), Reports of Judgments and Decisions 2000-III, ECHR, Chamber, Application No. 22535/93, 28 March 2000, para. 86 ("Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2, paragraph 1,] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."); see also *Kerimova and others v. Russia*, Judgment (Merits and Just Satisfaction), ECHR, Chamber, Applications Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, and 5684/05, 3 May 2011 (final 15 September 2011), para. 246; *Osman v. United Kingdom*, Judgment (Merits and Just Satisfaction), Reports 1998-VIII, ECHR, Grand Chamber, Application No. 87/1997/871/1083, 28 October 1998, para. 116.

[274] American Convention on Human Rights, done at San Jose on 22 November 1969, Organization of American States, *Treaty Series*, No. 36.

[275] Article 1 (1) reads: The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination ... ." It is noted that Article 1 of the African Charter on Human and People's Rights provides that the States Parties "shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them (United Nations, *Treaty Series*, vol. 1520, p. 217).

to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party."[276] Similar reasoning has animated the Court's approach to interpretation of article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture.[277]

(17) Thus, the specific preventive measures that any given State shall pursue with respect to crimes against humanity will depend on the context and risks at issue for that State with respect to these offenses. Such an obligation usually would oblige the State at least to: (1) adopt national laws and policies as necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission; (2) continually to keep those laws and policies under review and as necessary improve them; (3) pursue initiatives that educate governmental officials as to the State's obligations under the draft articles; (4) implement training programmes for police, military, militia, and other relevant personnel as necessary to help prevent the commission of crimes against humanity; and (5) once the proscribed act is committed, fulfill in good faith any other obligations to investigate and either prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others.[278] Some measures, such as training programmes, may already exist in the State to help prevent wrongful acts (such as murder, torture or rape) that relate to crimes against humanity. The State is obligated to supplement those measures, as necessary, specifically to prevent crimes against humanity. Here, too, international responsibility of the State arises if the State has failed to use its best efforts to organize the governmental and administrative apparatus, as necessary and appropriate, in order to prevent as far as possible crimes against humanity.

(18) Draft article 4, paragraph 1 (a), refers to a State pursuing effective legislative, administrative, judicial or other preventive measures "in any territory under its jurisdiction or control." This formula is to be understood in the same way as prior topics of the Commission addressing prevention in other contexts, such as

[276] *Velasquez Rodríguez v. Honduras*, *Judgment* (Merits), 4 Inter-Am. CHR (ser. C), No. 4, 29 July 1988, para. 175; see also *Gómez-Paquiyauri Brothers v. Peru*, *Judgment* (Merits, Reparations and Costs), Inter-Am. CHR (ser. C), No. 110, Inter-m. CHR, 8 July 2004, para. 155; *Juan Humberto Sánchez v. Honduras*, *Judgment*, (Preliminary Objection, Merits, Reparations and Costs), Inter-Am. CHR (ser. C) No. 99, , 7 June 2003, paras. 137, 142.

[277] *Tibi v. Ecuador*, *Judgment*, (Preliminary Objections, Merits, Reparations and Costs), Inter-Am. CHR (ser. C) No. 114, 7 September 2004, para. 159; see also *Gómez-Paquiyauri Brothers v. Peru*, *supra* note 276, at para. 155.

[278] For comparable measures with respect to prevention of specific types of human rights violations, see Committee on the Elimination of Discrimination against Women, General Recommendation No. 6, paras. 1–2 (A/43/38) (1988); Committee on the Elimination of Discrimination against Women, General Recommendation No. 15 (A/45/38) (1990); Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, para. 9 (A/47/38) (1992); Committee on the Rights of the Child, General Comment No. 5, para. 9 (CRC/GC/2003/5) (2003); Human Rights Committee, General Comment 31 (CCPR/C/Rev.1/Add.13) (2004); Committee on the Rights of the Child, General Comment No. 6, paras. 50–63 (CRC/GC/2005/6) (2005); Committee on the Elimination of Racial Discrimination, General Recommendation 31, para. 5 (CERD/C/GC/31/Rev.4) (2005); see also *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, General Assembly resolution 60/147 of 16 December 2005, annex, document A/RES/60/147, para. 3 (a) ("The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to ... [t]ake appropriate legislative and administrative and other appropriate measures to prevent violations.").

prevention of environmental harm.[279] Such a formulation covers the territory of a State, but also covers activities carried out in other territory under the State's control. As the Commission has previously explained,

> "it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation. Reference may be made, in this respect, to the advisory opinion by ICJ in the *Namibia* case. In that advisory opinion, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the *de facto* control of South Africa over Namibia."[280]

(19) Fourth, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation to pursue certain forms of cooperation, not just with each other but also with organizations, such as the United Nations, the International Committee of the Red Cross, and the International Federation of Red Cross and Red Crescent Societies. The duty of States to cooperate in the prevention of crimes against humanity arises, in the first instance, from Article 1, paragraph 3, of the Charter of the United Nations,[281] which indicates that one of the purposes of the Charter is to "achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all ... ." Further, in Articles 55 and 56 of the Charter, all Members of the United Nations pledge "to take joint and separate action in cooperation with the Organization for the achievement of" certain purposes, including "universal respect for, and observance of, human rights and fundamental freedoms for all ... ." Specifically with respect to preventing crimes against humanity, the General Assembly of the United Nations recognized in its 1973 Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity. Among other things, the Assembly declared that "States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose."[282]

(20) Consequently, subparagraph (b) of draft article 4 indicates that States shall cooperate with each other to prevent crimes against humanity and cooperate with relevant intergovernmental organizations. The term "relevant" is intended to indicate that cooperation with any particular intergovernmental organization will depend, among other things, on the organization's functions, on the relationship of the State

[279] *Yearbook … 2001*, vol. II (Part Two), pp. 150–51 at paras. (7)–(12) (commentary to draft article 1 of the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities).

[280] *Ibid*., p. 151 at para. (12) (citing to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, p. 54 at para. 118); see also *Yearbook … 2006*, vol. II (Part Two), p. 70 at para. (25) (commentary to draft principle 2 of the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, p. 242 at para. 29 (referring to the general obligation of States to ensure that activities within their "jurisdiction and control" respect the environment of other States or of areas beyond national control).

[281] Charter of the United Nations, done at San Francisco on 26 June 1945.

[282] *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, General Assembly resolution 3074 (XXVIII) of3 December 1973, para. 3.

to that organization, and on the context in which the need for cooperation arises. Further, sub-paragraph (b) provides that States shall cooperate, as appropriate, with other organizations. These organizations include non-governmental organizations that could play an important role in the prevention of crimes against humanity in specific countries. The term "as appropriate" is used to indicate that the obligation of cooperation, in addition to being contextual in nature, does not extend to these organizations to the same extent as it does to States and relevant intergovernmental organizations.

(21) Draft article 4, paragraph 2, indicates that no exceptional circumstances may be invoked as a justification for the offence. This text is inspired by article 2, paragraph 2, of the Convention Against Torture,[283] but has been refined to fit better in the context of crimes against humanity. The expression "state of war or threat of war" has been replaced by the expression "armed conflict," as was done in draft article 2. In addition, the words "such as" are used to stress that the examples given are not meant to be exhaustive.

(22) Comparable language may be found in other treaties addressing serious crimes at the global or regional level. For example, article 1, paragraph 2, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance contains similar language,[284] as does article 5 of the 1985 Inter-American Convention to Prevent and Punish Torture.[285]

(23) One advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors. At the same time, the paragraph is addressing this issue only in the context of the obligation of prevention and not, for example, in the context of possible defenses by an individual in a criminal proceeding or other grounds for excluding criminal responsibility, which will be addressed at a later stage.

[283]Convention Against Torture, *supra* note 226. Article 2 (2) provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

[284]Enforced Disappearance Convention, *supra* note 229. Article 1 (2) provides: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."

[285]Inter-American Convention to Prevent and Punish Torture, *supra* note 236. Article 5 provides: "The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture."

Chapter VIII
Subsequent agreements and subsequent practice in relation to the interpretation of treaties

A. Introduction

118. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session.[286] At its sixty-first session (2009), the Commission established the Study Group on Treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[287]

119. From the sixty-second to the sixty-fourth session (2010–2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairman, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction;[288] the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;[289] and subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[290]

120. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,[291] decided (a) to change, with effect from its sixty-fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[292]

121. At the sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/660) and provisionally adopted five draft conclusions.[293]

[286] At its 2997th meeting, on 8 August 2008. See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353. For the syllabus of the topic, see *ibid.*, annex A. The General Assembly, in paragraph 6 of resolution 63/123 of 11 December 2008, took note of the decision.

[287] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 220–226.

[288] *Ibid.*, *Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 344–354; and *ibid.*, *Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 337.

[289] *Ibid.*, *Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 338–341; and *Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 230–231.

[290] *Ibid.*, *Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 232–234. At the sixty-third session (2011), the Chairman of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairman presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairman and agreed upon by the Study Group (*ibid.*, paras. 235–239).

[291] *Ibid.*, *Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 226 and 239.

[292] *Ibid.*, para. 227.

[293] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 33 to 39. The Commission provisionally adopted draft conclusion 1 (General rule and means of treaty interpretation); draft conclusion 2 (Subsequent agreements and subsequent practice as authentic means of interpretation); draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time); draft conclusion 4

122. At the sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/671) and provisionally adopted five draft conclusions.[294]

B. Consideration of the topic at the present session

123. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/683), which offered an analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are the constituent instruments of international organizations and which proposed draft conclusion 11 on the issue. In particular, after addressing Article 5 of the Vienna Convention on the Law of Treaties (Treaties constituting international organizations and treaties adopted within an international organization), the third report turned to questions related to the application of the rules of the Vienna Convention on treaty interpretation to constituent instruments of international organizations. It also dealt with several issues relating to subsequent agreements under article 31, paragraph 3 (a) and (b), as well as article 32, of the Vienna Convention on the Law of Treaties, as a means of interpretation of constituent instruments of international organizations.

124. The Commission considered the report at its 3259th to 3262nd meetings, on 29 May, 2, 3 and 4 June 2015.

125. Following its debate on the third report, the Commission, at its 3262nd meeting on 4 June 2015, decided to refer draft conclusion 11 on Constituent instruments of international organizations, as presented by the Special Rapporteur, to the Drafting Committee.

126. At its 3266th meeting, on 8 July 2015, the Commission received the report of the Drafting Committee and provisionally adopted draft conclusion 11 (see section C.1 below).

127. At its 3284th, to 3285th and 3288th meetings, on 4 and 6 August 2015, respectively, the Commission adopted the commentary to the draft conclusion provisionally adopted at the present session (see section C.2 below).

C. Text of the draft conclusions on Subsequent agreements and subsequent practice in relation to the interpretation of treaties provisionally adopted so far by the Commission

1. Text of the draft conclusions

128. The text of the draft conclusions provisionally adopted so far by the Commission is reproduced below.[295]

Conclusion 1
General rule and means of treaty interpretation

(Definition of subsequent agreement and subsequent practice); and draft conclusion 5 (Attribution of subsequent practice).

[294] *Ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 70 to 76. The Commission provisionally adopted draft conclusion 6 (Identification of subsequent agreements and subsequent practice); draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation); draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation); draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty); and draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties).

[295] For the commentaries to draft conclusions 1 to 5, see *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 39. For the commentaries to draft conclusions 6 to 10, see *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 76.

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Conclusion 2
Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

Conclusion 3
Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A “subsequent agreement” as an authentic means of interpretation under article 31, paragraph 3 (a) is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A “subsequent practice” as an authentic means of interpretation under article 31, paragraph 3 (b) consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other “subsequent practice” as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

Conclusion 5
Attribution of subsequent practice

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

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Conclusion 6
Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

Conclusion 7
Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

Conclusion 8
Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

Conclusion 9
Agreement of the parties regarding the interpretation of a treaty

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Conclusion 10
Decisions adopted within the framework of a Conference of States Parties

1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

Conclusion 11
Constituent instruments of international organizations

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

2. Text of the draft conclusion and commentary thereto provisionally adopted by the Commission at its sixty-seventh session

129. The text of the draft conclusion, together with commentary thereto, provisionally adopted by the Commission at the sixty-seventh session, is reproduced below.

Conclusion 11
Constituent instruments of international organizations

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4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

Commentary

(1) Draft conclusion 11 refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation under articles 31 and 32 of the Vienna Convention on the Law of Treaties.

(2) Constituent instruments of international organizations are specifically addressed in article 5 of the Vienna Convention on the Law of Treaties, which provides:

> "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."[296]

(3) A constituent instrument of an international organization under article 5, like any treaty, is an international agreement "whether embodied in a single instrument or in two or more related instruments" (article 2 (1) (a)). The provisions which are contained in such a treaty are part of the constituent instrument.[297]

(4) As a general matter, article 5, by stating that the Vienna Convention applies to constituent instruments of international organizations without prejudice to any relevant rules of the organization,[298] follows the general approach of the Convention according to which treaties between States are subject to the rules set forth in the Convention "unless the treaty otherwise provides."[299]

(5) Draft conclusion 11 only refers to the interpretation of constituent instruments of international organizations. It therefore does not address every aspect of the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties involving international organizations. In particular, it does not apply to the interpretation of treaties adopted within an international organization or to treaties concluded by international organizations which are not themselves constituent

[296] See also the parallel provision of article 5 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, A/CONF.129/15.

[297] Article 20 (3) of the Vienna Convention requires the acceptance, by the competent organ of the organization, of reservations relating to its constituent instrument. Twelfth report on reservations to treaties, *Yearbook …* 2007, vol. II (Part One), p. 47, paras. 75-77, document A/CN.4/584; S. Rosenne, *Developments in the Law of Treaties 1945–1986* (Cambridge, Cambridge University Press, 1989), p. 204.

[298] *Yearbook … 1966*, vol. II, p. 191; K. Schmalenbach, "Art. 5", in *Vienna Convention on the Law of Treaties – A Commentary*, O. Dörr and K. Schmalenbach, eds., Heidelberg, Springer, 2012, p. 89, para. 1.

[299] See e.g. articles 16; 19 (a) and (b); 20 (1), (3), (4) and (5); 22; 24 (3); 25 (2); 44 (1); 55; 58 (2); 70 (1); 72 (1); 77 (1) of the Vienna Convention on the Law of Treaties, 1969 (United Nations, *Treaty Series*, vol. 1155, p. 331).

instruments of international organizations.[300] In addition, draft conclusion 11 does not apply to the interpretation of decisions by organs of international organizations as such,[301] including to the interpretation of decisions by international courts,[302] or to the effect of a "clear and constant jurisprudence"[303] ("*jurisprudence constante*") of courts or tribunals.[304] Finally, the conclusion does not specifically address questions relating to pronouncements by a treaty monitoring body consisting of independent experts, as well as to the weight of particular forms of practice more generally, matters which may be dealt with at a later stage.

(6) *The first sentence of paragraph 1 of draft conclusion 11* recognizes the applicability of articles 31 and 32 of the Vienna Convention to treaties which are constituent instruments of international organizations.[305] The International Court of Justice has confirmed this point in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*:

> From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply.[306]

(7) The Court has held with respect to the Charter of the United Nations:

> "On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics."[307]

(8) At the same time, article 5 suggests, and decisions by international courts confirm, that constituent instruments of international organizations are also treaties

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[300] The latter category is addressed by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (A/CONF.129/15).

[301] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 442, para. 94 ("While the rules on treaty interpretation embodied in articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account."); see also H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989, Part Eight", *British Yearbook of International Law*, vol. 67 (1996), p. 1, at p. 29; M.C. Wood, "The Interpretation of Security Council Resolutions", *Max Planck Yearbook of United Nations Law*, vol. 2 (1998), p. 73, at p. 85; R. Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2nd ed. 2015), p. 127.

[302] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.*Thailand) *(Cambodia* v. *Thailand), Judgment, I.C.J. Reports 2013*, p. 281, at p. 307, para. 75 ("A judgment of the Court cannot be equated to a treaty, an instrument which derives its binding force and content from the consent of the contracting States and the interpretation of which may be affected by the subsequent conduct of those States, as provided by the principle stated in article 31, paragraph 3 (b), of the 1969 Vienna Convention on the Law of Treaties.").

[303] See *Regina v. Secretary of State for the Environment, Transport and the Regions ex parte Alconbury (Developments Limited and others)* [2001] UKHL 231; *Regina v. Special Adjudicator ex parte Ullah; Do (FC) v. Immigration Appeal Tribunal* [2004] UKHL 26 [20] (Lord Bingham); *Regina (On The Application of Animal Defenders International) v. Secretary of State For Culture, Media and Sport* [2008] UKHL 15.

[304] Such jurisprudence may be a means for the determination of rules of law as indicated, in particular, by article 38, paragraph (1) (d), of the Statute of the International Court of Justice of 26 June 1945.

[305] Gardiner, *supra* note 301, pp. 281-82.

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

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

of a particular type which may need to be interpreted in a specific way. Accordingly, the International Court of Justice has stated:

> "But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties."[308]

(9) The *second sentence of paragraph 1 of draft conclusion 11* more specifically refers to elements of articles 31 and 32 which deal with subsequent agreements and subsequent practice as a means of interpretation and confirms that subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for constituent instruments of international organizations.

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

> "According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted 'in their context and in the light of its object and purpose' and there shall be 'taken into account, together with the context:
>
> […] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'"[309]

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

> "… in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises "within the scope of [the] activities" of that Organization."[310]

(11) The *Land and Maritime Boundary between Cameroon and Nigeria* case is another decision in which the Court has emphasised, in a case involving the interpretation of a constituent instrument of an international organization,[311] the subsequent practice of the parties. Proceeding from the observation that "Member

[308] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 75, para. 19.

[309] *Ibid*.

[310] *Ibid*.

[311] See Art. 17 Convention and Statute relating to the Development of the Chad Basin (Treaty of Fort-Lamy von 1964), *Heidelberg Journal of International Law*, vol. 34 (1974), at p. 80; generally: P.H. Sand, "Development of International Water Law in the Lake Chad Basin", *ibid.*, pp. 52–76.

States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts",[312] the Court concluded that:

> "From the treaty texts and the practice [of the parties] analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter."[313]

(12) Article 31 (3) (a) is also applicable to constituent treaties of international organizations.[314] Self-standing subsequent agreements between the member States regarding the interpretation of constituent instruments of international organizations, however, are not common. When questions of interpretation arise with respect to such an instrument, the parties mostly act as members within the framework of the plenary organ of the organization. If there is a need to modify, to amend, or to supplement the treaty, the Member States either use the amendment procedure which is provided for in the treaty, or they conclude a further treaty, usually a protocol.[315] It is, however, also possible that the parties act as such when they meet within a plenary organ of the respective organization. In 1995:

> "[T]he Governments of the fifteen Member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions"[316].

That is to say that:

> "the name given to the European currency shall be euro. […] The specific name euro will be used instead of the generic term 'ECU' used by the Treaty to refer to the European currency unit."[317]

This decision of the "Member States meeting within" the European Union has been regarded, in the literature, as a subsequent agreement under article 31 (3) (a).[318]

(13) It is sometimes difficult to determine whether "Member States meeting within" a plenary organ of an international organization intend to act in their capacity as members of that organ, as they usually do, or whether they intend to act in their independent capacity as States parties to the constituent instrument of the organization.[319] The Court of Justice of the European Union, when confronted with this question, initially proceeded from the wording of the act in question:

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

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

[314] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening),International Court of Justice, Judgment of 31 March 2014*, para. 46, available at <http://www.icj-cij.org/docket/files/148/18136.pdf>; see also *infra* note 341 and accompanying text.

[315] See articles 39–41 of the Vienna Convention.

[316] See Madrid European Council, Conclusions of the Presidency, European Union Bulletin, No. 12 (1995), p. 10 at I.A.I.

[317] *Ibid.*

[318] See A. Aust, *Modern Treaty Law and Practice*, 3rd ed. (Cambridge, Cambridge University Press, 2013), p. 215; G. Hafner, "Subsequent Agreements and Practice: Between Interpretation, Informal Modification and Formal Amendment", in *Treaties and Subsequent Practice*, G. Nolte, ed. (Oxford, Oxford University Press, 2013), p. 105, at pp. 109–110.

[319] P.C.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European* Communities, 3rd ed. (London, Kluwer Law International, 1998), pp. 340–343.

> "It is clear from the wording of that provision that acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court."[320]

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

> "Consequently, it is not enough that an act should be described as a 'decision of the Member States' for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council."[321]

(14) Apart from subsequent agreements or subsequent practice which establish the agreement of all the parties under article 31 (3) (a) and (b), other subsequent practice by one or more parties in the application of the constituent instrument of an international organization may also be relevant for the interpretation of that treaty.[322] Constituent instruments of international organizations, like other multilateral treaties, are, for example, sometimes implemented by subsequent bilateral or regional agreements or practice.[323] Such bilateral treaties are not, as such, subsequent agreements under article 31 (3) (a), if only because they are concluded between a limited number of the parties to the multilateral constituent instrument. They may, however, imply assertions concerning the interpretation of the constituent instrument itself and may serve as supplementary means of interpretation under article 32.

(15) *Paragraph 2 of draft conclusion 11* highlights a particular way in which subsequent agreements and subsequent practice under articles 31 (3) and 32 may arise or be expressed. Subsequent agreements and subsequent practice of States parties may "arise from" their reactions to the practice of an international organization in the application of a constituent instrument. Alternatively, subsequent agreements and subsequent practice of States parties to a constituent agreement may be "expressed in" the practice of an international organization in the application of a constituent instrument. "Arise from" is intended to encompass the generation and development of subsequent agreements and subsequent practice, while "expressed in" is used in the sense of reflecting and articulating such agreements and practice. Either variant of the practice in an international organization may reflect subsequent

[320] Case C-181/91 and C-248/91, *Parliament v. Council and Commission* [1993], ECR I-3713, para 12.

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

[322] See draft conclusions 1 (4) and 4 (3), Report of the International Law Commission on its sixty-fifth session, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Chapter IV, pp. 11–12; pp. 16–17, para. 10; pp. 37–41, paras. 22–36.

[323] This is true, for example, for the Convention on International Civil Aviation (Chicago Convention) (United Nations, *Treaty Series*, vol. 15, p. 295) signed at Chicago on 7 December 1944; P.P.C. Haanappel, "Bilateral Air Transport Agreements – 1913–1980", *The International Trade Law Journal*, vol. 5 (1980), p. 241, at pp. 241–267; L. Tomas, "Air Transport Agreements, Regulation of Liability", in *Max Planck Encyclopedia of Public International Law* (located at <http://www.mpepil.com>); B.F. Havel, *Beyond Open Skies, A New Regime for International Aviation* (Alphen aan den Rijn, Kluwer Law International, 2009), p. 10.

agreements or subsequent practice by the States parties to the constituent instrument of the organization (see draft conclusion 4).[324]

(16) In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice recognized the possibility that the practice of an organization may reflect an agreement or the practice of the Member States as parties to the treaty themselves, but found that the practice in that case did not "express or amount to" a subsequent practice under article 31 (3) (b):

> "Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons."[325]

(17) In this case, when considering the relevance of a resolution of an international organization for the interpretation of its constituent instrument the Court considered, in the first place, whether the resolution expressed or amounted to "a practice establishing agreement between the members of the Organization" under article 31 (3) (b).[326]

(18) In a similar way, the WTO Appellate Body has stated in general terms:

> "Based on the text of Article 31(3)(a) of the Vienna Convention, we consider that a decision adopted by Members may qualify as a 'subsequent agreement between the parties' regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the interpretation or application of a provision of WTO law."[327]

(19) Regarding the conditions under which a decision of a plenary organ may be considered to be a subsequent agreement under article 31 (3) (a), the WTO Appellate Body held:

> "263.With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO.
>
> […] With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an

[324] R. Higgins, "The Development of International Law by the Political Organs of the United Nations", *ASIL Proceedings 59th Annual Meeting* (1965), p. 116, at p. 119; the practice of an international organization, in addition to arising from, or being expressed in, an agreement or the practice of the parties themselves under paragraph 2, may also be a means of interpretation in itself under paragraph 3 (see below at paras. (25)–(35)).

[325] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 81, para. 27.

[326] The Permanent Court of International Justice had adopted this approach in its *Competence of the International Labour Organization to regulate, incidentally, the personal Work of the Employer, Advisory Opinion, 1926, P.C.I.J. Series B No. 13*, at pp. 19–20; see S. Engel, "'Living' International Constitutions and the World Court (the Subsequent Practice of International Organs under their Constituent Instruments)", *International and Comparative Law Quarterly*, vol. 16 (1967), p. 865, at p. 871.

[327] WTO, Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 4 April 2012, para. 262.

agreement between Members on the *interpretation* or *application* of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*.

264. We recall that paragraph 5.2 of the Doha Ministerial Decision provides:

Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

265. In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*. The Appellate Body observed that the International Law Commission (the 'ILC') describes a subsequent agreement within the meaning of Article 31(3)(a) of the *Vienna Convention* as 'a further *authentic element of interpretation* to be taken into account together with the context'. According to the Appellate Body, 'by referring to 'authentic interpretation', the ILC reads Article 31(3)(a) as referring to *agreements bearing specifically upon the interpretation of the treaty*.' Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*. […]

268. For the foregoing reasons, we uphold the Panel's finding […] that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*."[328]

(20) The International Court of Justice, although it did not expressly mention article 31 (3) (a) when relying on the General Assembly Declaration on Friendly Relations between States for the interpretation of Article 2 (4) of the Charter, emphasized the "attitude of the Parties and the attitude of States towards certain General Assembly resolutions" and their consent thereto.[329] In this context, a number of writers have concluded that subsequent agreements within the meaning of article 31 (3) (a) may, under certain circumstances, arise from or be expressed in acts of plenary organs of

[328] *Ibid.* (footnotes omitted); Although the Doha Ministerial Decision does not concern a provision of the WTO Agreement itself, it concerns an annex to that Agreement (the "TBT Agreement") which is an "integral part" of the Agreement establishing the WTO (article 2 (2) WTO Agreement).

[329] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 100, para. 188: "The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves". This statement, whose primary purpose is to explain the possible role of General Assembly resolutions for the formation of customary law, also recognizes the treaty-related point that such resolutions may serve to express the agreement, or the positions, of the parties regarding a certain interpretation of the UN Charter as a treaty ("elucidation"); similarly: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 437, para. 80; in this sense, for example, L. B. Sohn, "The UN System as Authoritative Interpreter of its Law", in *United Nations Legal Order*, vol. 1, O. Schachter and C.C. Joyner, eds. (Cambridge, American Society of International Law/Cambridge University Press, 1995), p. 169, at pp. 176–177 (noting in regard to the *Nicaragua* case that "[t]he Court accepted the Friendly Relations Declaration as an authentic interpretation of the Charter").

international organizations,[330] such as the General Assembly of the United Nations.[331] Indeed, as the WTO Appellate Body has indicated with reference to the Commission,[332] the characterization of a collective decision as an "authentic element of interpretation" under article 31 (3) (a) is only justified if the parties of the constituent instrument of an international organization acted as such, and not, as they usually do, institutionally as members of the respective plenary organ.[333]

(21) Paragraph 2 refers to the practice of an international organization, rather than to the practice of an organ of an international organization. The practice of an international organization can arise from the conduct of an organ but can also be generated by the conduct of two or more organs.

(22) Subsequent agreements and subsequent practice of the parties, which may "arise from, or be expressed in" the practice of an international organization, may sometimes be very closely inter-related with the practice of the organization as such. For example, in its *Namibia* advisory opinion, the International Court of Justice arrived at its interpretation of the term "concurring votes" in article 27 (3) of the Charter of the United Nations as including abstentions primarily by relying on the practice of the competent organ of the organization in combination with the fact that this practice was then "generally accepted" by Member States:

> "[…] the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally

[330] H.G. Schermers and N.M. Blokker, *International Institutional Law*, 5th ed. (Leiden/Boston, Martinus Nijhoff, 2011), p. 854 (referring to interpretations by the Assembly of the Oil Pollution Compensation Fund regarding the constituent instruments of the Fund); M. Cogen, "Membership, Associate Membership and Pre-Accession Arrangements of CERN, ESO, ESA, and EUMETSAT", *International Organizations Law Review*, vol. 9 (2012), p. 145, at 157–158 (referring to a unanimously adopted decision of the CERN Council of 17 June 2010 interpreting the admission criteria established in the CERN Convention as a subsequent agreement under article 31 (3) (a)).

[331] See E. Jiménez de Aréchega, "International Law in the Past Third of a Century", *Recueil des Cours*, vol. 159 (1978), p. 32 (stating in relation to the Friendly Relations Declaration that "[t]his Resolution […] constitutes an authoritative expression of the views held by the totality of the parties to the Charter as to these basic principles and certain corollaries resulting from them. In the light of these circumstances, it seems difficult to deny the legal weight and authority of the Declaration both as a resolution recognising what the Members themselves believe constitute existing rules of customary law and as an interpretation of the Charter by the subsequent agreement and the subsequent practice of all its members"); O. Schachter, "General Course in Public International Law", *Recueil des Cours*, vol. 178 (1982), p. 113 ("The law-declaring resolutions that construed and 'concretized' the principles of the Charter — whether as general rules or in regard to particular cases — may be regarded as authentic interpretation by the parties of their existing treaty obligations. To that extent they were interpretation, and agreed by all Member States, they fitted comfortably into an established source of law"); P. Kunig, "United Nations Charter, Interpretation of", in *Max Planck Encyclopedia of Public International Law*, vol. X, R. Wolfrum, ed. (Oxford, Oxford University Press, 2012), p. 273, at 275 (stating that, "[i]f passed by consensus, they [i.e. General Assembly resolutions] are able to play a major role in the […] interpretation of the UN Charter"); Aust, *supra* note 318, p. 213 (mentioning that General Assembly resolution 51/210 ("Measures to eliminate international terrorism") can be seen as a subsequent agreement about the interpretation of the UN Charter). All resolutions to which the writers are referring to have been adopted by consensus.

[332] See *supra* note 327, para. 265.

[333] Y. Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge, Cambridge University Press, 2014), pp. 114–115.

> accepted by Members of the United Nations and evidences a general practice of that Organization."[334]

In this case, the Court emphasized both the practice of one or more organs of the international organization and the "general acceptance" of that practice by the Member States, and characterized the combination of those two elements as being a "general practice of the organization".[335] The Court followed this approach in its advisory opinion regarding *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by stating that:

> "The Court considers that the *accepted* [emphasis added] practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter."[336]

By speaking of the "accepted practice of the General Assembly",[337] the Court implicitly affirmed that acquiescence on behalf of the member States regarding the practice followed by the organization in the application of the treaty permits to establish the agreement regarding the interpretation of the relevant treaty provision.[338]

(23) On this basis it is reasonable to consider "that relevant practice will usually be that of those on whom the obligation of performance falls",[339] in the sense that "where States by treaty entrust the performance of activities to an organization, how those activities are conducted can constitute practice under the treaty; but whether such practice establishes agreement of the parties regarding the treaty's interpretation may require account to be taken of further factors."[340]

(24) Accordingly, in the *Whaling in the Antarctic* case, the International Court of Justice referred to (non-binding) recommendations of the International Whaling Commission (which is both the name of an international organization established by the Convention for the Regulation of Whaling[341] and that of an organ thereof), and clarified that when such recommendations are "adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its

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[334] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 22.

[335] H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989, Part Two", *British Yearbook of International Law*, vol. 61 (1990), p. 61, at 76–77 (mentioning that "[t]he Court's reference to the practice as being 'of' the Organization is presumably intended to refer, not to a practice followed by the Organization as an entity in its relations with other subjects of international law, but rather a practice followed, approved or respected throughout the Organization. Seen in this light, the practice is […] rather a recognition by the other members of the Security Council at the relevant moment, and indeed by all member States by tacit acceptance, of the validity of such resolutions").

[336] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149–150.

[337] Ibid., at p. 150.

[338] See Commentaries to Draft Conclusion 9, para. 2, second sentence, Report of the International Law Commission on its sixty-sixth session, *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), Chapter VII, pp. 201–205, paras. 13–24; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), pp. 431–432, para. 22; J. Arato, "Treaty Interpretation and Constitutional Transformation", *Yale Journal of International Law*, vol. 38 (2013), p. 289, at p. 322.

[339] Gardiner, *supra* note 301, p. 281.

[340] *Ibid*.

[341] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change* (Cambridge, Cambridge University Press, 2014), pp. 37–38; A. Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Cheltenham, Edward Elgar, 2005), p. 411.

Schedule".[342] At the same time, however, the Court also expressed a cautionary note according to which:

> "[…] Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties."[343]

(25) This cautionary note does not, however, exclude that a resolution which has been adopted without the support of all Member States may give rise to, or express, the position or the practice of individual member States in the application of the treaty which may be taken into account under article 32.[344]

(26) *Paragraph 3 of draft conclusion 11* refers to another form of practice which may be relevant for the interpretation of a constituent instrument of an international organization: the practice of the organization *as such*, meaning its "own practice", as distinguished from the practice of the Member States. The International Court of Justice has in some cases taken the practice of an international organization into account in its interpretation of constituent instruments without referring to the practice or acceptance of the Member States of the organization. In particular, the Court has stated that the international organization's "own practice […] may deserve special attention" in the process of interpretation.[345]

(27) For example, in its advisory opinion on the *Competence of the General Assembly regarding Admission to the United Nations*, the Court stated that:

> "The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of the recommendation of the Security Council."[346]

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

> "In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials. […] In

[342] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, International Court of Justice, Judgment of 31 March 2014, para. 46, available at <http://www.icj-cij.org/docket/files/148/18136.pdf>.

[343] *Ibid.*, para. 83.

[344] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 (referring to General Assembly resolution 1600 (XV) of 15 April 1961, UN Doc. A/RES/1600 (adopted with 60 votes in favor, 23 abstentions, and 16 votes against, including the USSR and other States of the "East bloc"); General Assembly resolution 1913 (XVIII) of 13 December 1963, U.N. Doc. A/RES/1913 (adopted by 91 affirmative votes over 2 negative votes of Spain and Portugal).

[345] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 74; See also D. Simon, *L'interprétation judiciaire des traités d'organisations internationales*, Paris, Pedone, 1981, pp. 379-384

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

> all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22."[347]

(29) In its *IMCO* advisory opinion, the International Court of Justice referred to "the practice followed by the Organization itself in carrying out the Convention" as a means of interpretation.[348]

(30) In its advisory opinion on *Certain Expenses of the United Nations* the Court explained why the practice of an international organization, as such, including that of a particular organ, may be relevant for the interpretation of its constituent instrument:

> "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'".[349]

(31) Many international organizations share the same characteristic of not providing for an "ultimate authority to interpret" their constituent instrument. The conclusion which the Court has drawn from this circumstance is therefore now generally accepted as being applicable to international organizations.[350] The identification of a presumption, in the *Certain Expenses* advisory opinion, which arises from the practice of an international organization, including by one or more of its organs, is a way of recognizing such practice as a means of interpretation.[351]

(32) Whereas it is generally agreed that the interpretation of the constituent instruments of international organizations by the practice of their organs constitutes a relevant means of interpretation,[352] certain differences exist among writers about how to explain the relevance, for the purpose of interpretation, of an international

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

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

[349] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 168.

[350] J. Klabbers, *An Introduction to Institutional Law*, 2nd ed. (Cambridge, Cambridge University Press, 2009), p. 90; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge, Cambridge University Press, 2005), p. 25; J. E. Alvarez, *International Organizations as Law-Makers* (Oxford, Oxford University Press, 2006), p. 80; Rosenne, *supra* note 297, pp. 224–225.

[351] E. Lauterpacht, "The Development of the Law of International Organizations by the Decisions of International Tribunals", *Recueil des Cours*, vol. 152 (1976), p. 377, at p. 460; N. M. Blokker, "Beyond 'Dili': On the Powers and Practice of International Organizations", in *State, Sovereignty, and International Governance*, G. Kreijen, ed. (Oxford, Oxford University Press, 2002), pp. 312–318.

[352] C. Brölmann, "Specialized Rules of Treaty Interpretation: International Organizations", in *The Oxford Guide to Treaties*, D. Hollis, ed. (Oxford, Oxford University Press, 2012), pp. 520–521; S. Kadelbach, "The Interpretation of the Charter", in *The Charter of the United Nations: A Commentary*, B. Simma *et al.*, eds. 3rd ed. (Oxford, Oxford University Press, 2012), p. 71, at p. 80; Gardiner, *supra* note 301, pp. 127 and 281.

organization's "own practice" in terms of the Vienna rules of interpretation.[353] Such practice can, at a minimum, be conceived as a supplementary means of interpretation under article 32.[354] The Court, by referring to acts of international organizations which were adopted against the opposition of certain member states,[355] has recognized that such acts may constitute practice for the purposes of interpretation, but generally not a (more weighty) practice that establishes agreement between the parties regarding the interpretation and which would fall under article 31 (3). Writers largely agree, however, that the practice of an international organization, as such, will often also be relevant for clarifying the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[356]

(33) The Commission has confirmed, in its commentary to draft conclusion 1, that "given instances of subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty".[357] These considerations are also relevant with regard to the practice of an international organization itself.

(34) The possible relevance of an international organization's "own practice" can thus be derived from articles 31 (1) and 32 of the Vienna Convention on the Law of Treaties. Those rules permit, in particular, taking into account practice of an organization itself, including by one or more of its organs, as being relevant for the determination of the object and purpose of the treaty, including the function of the international organization concerned, under article 31 (1).[358]

(35) Thus, Article 5 of the Vienna Convention allows for the application of the rules of interpretation in articles 31 and 32 in a way which takes account of the practice of an international organization, in the interpretation of its constituent instrument, including taking into account its institutional character.[359] Such elements may

[353] Gardiner, *supra* note 301, p. 282; Schermers and Blokker, *supra* note 330, p. 844; J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford, Oxford University Press, 2012), p. 187; Klabbers, *supra* note 350, pp. 89–90; see also *Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of those Shares*, 22 November 2002, UNRIAA, vol. XXIII, p. 183, at p. 224, para. 145.

[354] The Commission may revisit the definition of "other subsequent practice" in draft conclusions 1 (4) and 4 (3) in order to clarify whether the practice of an international organization as such should be classified within this category which, so far, is limited to the practice of Parties; see Report of the International Law Commission on its sixty-fifth session, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Chapter IV, pp. 11–12.

[355] *Supra* note 344.

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

[357] Report of the International Law Commission on its sixty-fifth session, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Chapter IV, p. 19, footnote 58; see in particular, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at pp. 306–307, para. 67.

[358] See *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, Separate Opinion of Judge Lauterpacht, I.C.J. Reports 1955*, p. 67, at p. 106 ("A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization").

[359] Commentators are debating whether the specific institutional character of certain international organizations, in combination with the principles and values which are enshrined in their constituent instruments, could also yield a "constitutional" interpretation of such instruments which receives inspiration from national constitutional law, see e.g. J.E. Alvarez, "Constitutional Interpretation in International Organizations", in *The Legitimacy of International Organizations* J.-M. Coicaud and V. Heiskanen, eds. (Tokyo, United Nations University Press, 2001), pp. 104–154;. A. Peters, « L'acte constitutif de l'organisation internationale », *in* E. Lagrange, J.-M. Sorel (dir.), *Droit des*

thereby also contribute to identifying whether, and if so how, the meaning of a provision of a constituent instrument of an international organization is capable of evolving over time.[360]

(36) Paragraph 3, like paragraph 2, refers to the practice of an international organization as a whole, rather than to the practice of an organ of an international organization.The practice of an international organization in question can arise from the conduct of an organ, but can also be generated by the conduct of two or more organs.[361] It is understood that the practice of an international organization can only be relevant for the interpretation of its constituent instrument if that organization is competent, since it is a general requirement that international organizations do not act *ultra vires*.[362]

(37) Paragraph 3 of draft conclusion 11 builds on the previous work of the Commission. Draft conclusion 5 is addressing "subsequent practice" as defined in draft conclusion 4, which concerns conduct by *parties* to a treaty in the application of that treaty. Draft conclusion 5 does not imply that the practice of an international organization, as such, in the application of its constituent instrument cannot be relevant practice under articles 31 and 32. In its commentary to draft conclusion 5 the Commission has explained that:

> "Decisions, resolutions and other practice by international organizations can be relevant for the interpretation of treaties in their own right. This is recognized, for example, in article 2 (j) of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations which mentions the 'established practice of the organization' as one form of the 'rules of the organization'".[363]

(38) *Paragraph 4 of draft conclusion 11* reflects article 5 of the Vienna Convention and its formulation borrows from that article. The paragraph applies to the situations covered under paragraphs 1 to 3 and ensures that the rules referred to therein are applicable, interpreted and applied "without prejudice to any relevant rules of the organization". The term "rules of the organization" is to be understood in the same way as in article 2 (1) (j) of the 1986 Vienna Convention on the Law of Treaties, as well as in article 2 (b) of the articles on responsibility of international organizations of 2011.

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organisations internationales (Paris, LGDJ, 2013), pp. 216-218 ; M. Wood, "'Constitutionalization' of International Law: A Sceptical Voice", in K. H. Kaikabad, M Bohlinder (eds.), *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick,* (Leiden/Boston, Brill/Nijhoff, 2009), pp. 85-97.

[360] *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, para. 53; See also draft conclusion 3, Report of the International Law Commission on its sixty-fifth session, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Chapter IV, pp. 12 and 24–30; O. Dörr, "Art. 31 General rule of interpretation", in *Vienna Convention on the Law of Treaties – A Commentary*, O. Dörr and K. Schmalenbach, eds. (Heidelberg, Springer, 2012), p. 537, para. 31; Schmalenbach, *supra* note 298, p. 92, para. 7.

[361] See *supra*, para. (21).

[362] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 168 ("But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.")

[363] Report of the International Law Commission on its sixty-fifth session, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Chapter IV, p. 45, para. 14. The Commission may, however, eventually revisit the formulation of draft conclusion 5 in the light of draft conclusion 11 in order to clarify their relationship, See also *supra*,note 354.

(39) The Commission has stated in its general commentary to the 2011 articles on the responsibility of international organizations:

> "There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound."[364]

(40) Paragraph 4 implies, *inter alia*, that more specific "relevant rules" of interpretation which may be contained in a constituent instrument of an international organization may take precedence over the general rules of interpretation under the Vienna Convention.[365] If, for example, the constituent instrument contains a clause according to which the interpretation of the instrument is subject to a special procedure, it is to be presumed that the parties, by reaching an agreement after the conclusion of the treaty, do not wish to circumvent such a procedure by reaching a subsequent agreement under article 31 (3) (a). The special procedure under the treaty and a subsequent agreement under article 31 (3) (a) may, however, be compatible if they "serve different functions and have different legal effects".[366] Few constituent instruments contain explicit procedural or substantive rules regarding their interpretation.[367] Specific "relevant rules" of interpretation need not be formulated explicitly in the constituent instrument; they may also be implied therein, or derive from the "established practice of the organization".[368] The "established practice of the organisation" is a term which is narrower in scope that the term "practice of the organisation" as such.

(41) The Commission has noted in its commentary to article 2 (j) of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, that the significance of a particular practice of an organization may depend on the specific rules and characteristics of the respective organization, as expressed in its constituent instrument:

> "It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules. However, the reference in question is in no way intended to suggest that practice has the

[364] Draft articles on the responsibility of international organizations, General commentary, para. 7 (Report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), Chapter V, p. 70, para. 88).

[365] See, for example, Klabbers, *supra* note 350, p. 88; Schmalenbach, *supra* note 298, p. 89, para. 1 and p. 96, para. 15; Brölmann, *supra* note 352, p. 522; Dörr, *supra* note 360, p. 538, para. 32.

[366] WTO, Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 4 April 2012, paras. 252-257.

[367] Most so-called interpretation clauses determine which organ is competent authoritatively to interpret the treaty, or certain of its provisions, but do not formulate specific rules "on" interpretation itself, see C. Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (Berlin/Heidelberg, Springer, 2007), pp. 26–27; Dörr, *supra* note 360, p. 537, para. 32.

[368] See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Art. 2 (j); and the International Law Commission's Draft articles on the responsibility of international organizations, Art. 2 (b), Report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), Chapter V, 54; C. Peters, "Subsequent practice and established practice of international organizations", *Göttingen Journal of International Law*, vol. 3 (2011), pp. 617–642.

same standing in all organizations; on the contrary, each organization has its own characteristics in that respect."[369]

(42) In this sense, the "established practice of the organization" may also be a means for the interpretation of constituent instruments of international organizations. Article 2 (1) (j) of the Vienna Convention of 1986 and article 2 (b) of the articles on the responsibility of international organizations[370] recognize the "established practice of the organization" as a "rule of the organization". Such practice may produce different legal effects in different organizations and it is not always clear whether those effects should be explained primarily in terms of traditional sources of international law (treaty or custom) or of institutional law.[371] But even if it is difficult to make general statements, the "established practice of the organization" usually encompasses a specific form of practice,[372] one which has generally been accepted by the members of the organization, albeit sometimes tacitly.[373]

[369] Report of the International Law Commission on its thirty-fourth session, *Official Records of the General Assembly, Thirty-Seventh Session, Supplement No. 10* (A/37/10), Commentary to art. 2 (1) (j), Chapter II, p. 21, para. 25.

[370] Report of the International Law Commission on its sixty-third session, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), Chapter V, p. 52.

[371] Higgins, *supra* note 324, at p. 121 ("aspects of treaty interpretation and customary practice in this field merge very closely"); Peters, *supra* note 368, at p. 631 ("should be considered a kind of customary international law of the organization"); it is not persuasive to limit the "established practice of the organization" to so-called internal rules since, according to the Commission, "there would have been problems in referring to the 'internal' law of an organization, for while it has an internal aspect, this law also has in other respects an international aspect", Report of the International Law Commission on its thirty-fourth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10* (A/37/10), Commentary to Art. 2 (1) (j), Chapter II, p. 21, para. 25; Schermers and Blokker, *supra* note 330, at p. 766; but see C. Ahlborn, The Rules of International Organizations and the Law of International Responsibility, *International Organizations Law Review*, vol. 8 (2011), 397, at. pp. 424–428.

[372] Blokker, *supra* note 351, p. 312.

[373] Lauterpacht, *supra* note 351, p. 464 ("consent of the general body of membership"); Higgins, *supra* note 324, p. 121 ("[t]he degree of length and acquiescence need here perhaps to be less marked than elsewhere, because the U.N. organs undoubtedly have initial authority to make such decisions [regarding their own jurisdiction and competence]"); Peters, *supra* note 368, pp. 633–641.

Chapter IX
Protection of the environment in relation to armed conflicts

A. Introduction

130. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic.[374]

131. At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/674 and Corr. 1).[375]

B. Consideration of the topic at the present session

132. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/685), which it considered at its 3264th to 3269th meetings, from 6 to 10 July and on 14 July 2015.

133. At its 3269th meeting, on 14 July 2015, the Commission referred the preambular paragraphs and draft principles 1 to 5, as contained in the second report of the Special Rapporteur,[376] to the Drafting Committee, with the understanding that

[374] The decision was made at the 3171st meeting of the Commission, on 28 May 2013. *Official Records of the General Assembly, Sixty-eighth session Supplement No. 10* (A/68/10), para. 167. For the syllabus of the topic, see *ibid.*, *Sixty-sixth session Supplement No. 10* (A/66/10), annex E.

[375] *Ibid.*, *Sixty-ninth session, Supplement No. 10* (A/69/10), paras. 186-222.

[376] The text proposed by the Special Rapporteur, in her second report (A/CN.4/685), read as follows:

"**Preamble**

Scope of the principles

The present principles apply to the protection of the environment in relation to armed conflicts.

Purpose

These principles are aimed at enhancing the protection of the environment in relation to armed conflicts through preventive and restorative measures. They also are aimed at minimizing collateral damage to the environment during armed conflict.

Use of terms

For the purposes of the present principles

(a) "armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups or between such groups within a State;

(b) "environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristics of the landscape.

Principle 1

The natural environment is civilian in nature and may not be the object of an attack, unless and until portions of it become a military objective. It shall be respected and protected, consistent with applicable international law and, in particular, international humanitarian law.

Principle 2

During an armed conflict, fundamental principles and rules of international humanitarian law, including the principles of precautions in attack, distinction and proportionality and the rules on military necessity, shall be applied in a manner so as to enhance the strongest possible protection of the environment.

the provision on "use of terms" was referred for the purpose of facilitating discussions and to be left pending by the Drafting Committee at this stage.

134. At its 3281st meeting, on 30 July 2015, the Chairman of the Drafting Committee presented[377] the report of the Drafting Committee on "Protection of the environment in relation to armed conflicts", containing the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee at the sixty-seventh session (A/CN.4/L.870),[378] which can be found on

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Principle 3

Environmental considerations must be taken into account when assessing what is necessary and proportionate in the pursuit of lawful military objectives.

Principle 4

Attacks against the natural environment by way of reprisals are prohibited.

Principle 5

States should designate areas of major ecological importance as demilitarized zones before the commencement of an armed conflict, or at least at its outset."

[377] The statement of the Chairman of the Drafting Committee is available on the website of the Commission, located at <http://legal.un.org/ilc>.

[378] The text provisionally adopted by the Drafting Committee read as follows:

"**Introduction**

Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict.

Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.

Part One
Preventive measures

Draft principle I-(x)
Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

Part Two
Draft principles applicable during armed conflict

Draft principle II-1
General protection of the [natural] environment during armed conflict

1. The [natural] environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Care shall be taken to protect the [natural] environment against widespread, long-term and severe damage.
3. No part of the [natural] environment may be attacked, unless it has become a military objective.

Draft principle II-2
Application of the law of armed conflict to the [natural] environment

the website of the Commission .The Commission took note of the draft introductory provisions and draft principles as presented by the Drafting Committee. It is anticipated that commentaries to the draft principles will be considered at the next session.

1. Introduction by the Special Rapporteur of the second report

135. The purpose of the second report consisted in identifying existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict and included an examination of such rules. The report also contained proposals of a preamble and five draft principles. The preambular paragraphs contained provisions on the scope of the draft principles, the purpose and use of terms, delineating the terms "armed conflict" and "environment" for the purposes of the draft principles. The suggested formulations on "armed conflict" and "environment" had been submitted already in the preliminary report. Draft principle 1 contained a provision on the protection of the environment during armed conflict, and was general in nature. Draft principle 2 concerned the application of the law of armed conflict to the environment and draft principle 3 addressed the need to take into account environmental considerations when assessing what is necessary and proportionate in the pursuit of military objectives. Draft principle 4 contained a prohibition on attacks against the environment by way of reprisals and draft principle 5 concerned the designation of areas of major ecological importance as demilitarized zones. When introducing the report, the Special Rapporteur clarified that "principles" had been proposed as the most adequate outcome of work since they offered sufficient flexibility to cover all stages of the topic. Referring to the proposed preamble, the Special Rapporteur reiterated her doubts as to need for a provision on "use of terms" but observed that it would have been premature to exclude it in light of views expressed by some members of the Commission and by States with regard to the value of such a clause. The need for such a provision would be reevaluated in light of the discussions during the present session.

136. The Special Rapporteur indicated that, in addition to an examination of the law applicable during an armed conflict, the report addressed some aspects of methodology and sources. It also provided a brief recapitulation of the discussions within the Commission during the previous session, as well as information on views and practice of States and of select relevant case law. Concerning the information

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The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the [natural] environment, with a view to its protection.

Draft principle II-3
Environmental considerations

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Draft principle II-4
Prohibition of reprisals
Attacks against the [natural] environment by way of reprisals are prohibited.

Principle II-5
Protected zones

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective."

provided by States, the Special Rapporteur noted that such information was highly heterogeneous since States have chosen to provide information on different matters and that it was therefore difficult to draw too far-reaching conclusions. Nevertheless, two conclusions were worth highlighting, namely that the majority of regulations on peacetime military obligations was of recent date and that multilateral operations were increasingly undertaken within a framework of relatively newly adopted environmental regulations. Regarding the section of the report concerning case law, the Special Rapporteur drew attention to the challenges that presented themselves in analyzing the cases with regard to the distinction between property, livelihood, nature, land and natural resources, which entailed a clear link to human rights, in particular where indigenous peoples are affected. She concluded that there is reason to revert to this issue.

137. The core of the second report related to the law applicable during armed conflict. It provided an analysis of the directly applicable treaty provisions and relevant principles of the law of armed conflict, such as the principles of distinction, proportionality and precaution in attack, as well as the rules on military necessity. The Special Rapporteur emphasized however that since it was not the task of the Commission to revise the law of armed conflict, the report avoided analyzing the operational interpretations of such provisions. The report thus limited itself to establishing whether or not the application of the provisions also covered measures aimed at protecting the environment.

138. The report also addressed protected zones and areas and examined the legal framework with regard to demilitarized zones, nuclear-weapon-free zones and natural heritage zones and areas of major ecological importance in relation to the topic. The Special Rapporteur noted that this section aimed at analyzing the relationship between environmental and cultural heritage zones, as well as the right of indigenous peoples to their environment as a cultural and natural resource.

139. The Special Rapporteur further drew attention to certain issues that the second report did not cover, including the Martens clause, multilateral operations, the work of the United Nations Compensation Commission and situations of occupation, all of which would be analyzed in the third report in light of their relevance also to phase III — post-conflict obligations.

140. The Special Rapporteur concluded by describing the proposed future programme of work, noting that her third report would include proposals on post-conflict measures, including cooperation, sharing of information and best practices, as well as reparative measures. The third report would also aim to close the circle of the three temporal phases and it would therefore consist of three parts. The first part would focus on the law applicable in post-conflict situations, the second would address issues that had not yet been examined, such as occupation, and the third would contain a summary analysis of all three phases. The Special Rapporteur indicated her intention to continue consultations with other entities and regional organizations and observed that it would be of assistance if States would continue to submit information of national legislation and case law relevant to the topic.

2. Summary of the debate

(a) General comments

141. The importance that was attached to this topic was reiterated by some members, noting not only its contemporary relevance but also the challenges it presented, in particular in attempting to achieve a proper balance between safeguarding legitimate rights that exist under the law of armed conflict and protecting the environment. In order to achieve such equilibrium, it was suggested that an in-depth analysis of the

notion of "widespread, long-term and severe damage" as well as of the standards used for those criteria would be essential.

142. Some members acknowledged that the purpose of the second report was to identify the existing rules of armed conflict that are directly relevant to the protection of the environment. At the same time, some members also stressed the need to methodically examine rules and principles of international environmental law to consider their continued applicability during armed conflict and their relationship with that legal regime. An analysis of that nature was key to the topic as a whole, and in particular with regard to the second phase currently under discussion. It was recommended that such a systematic review should use the draft articles on effects of armed conflict on treaties adopted by the Commission in 2011 as a point of departure. It was acknowledged that the law of armed conflict applied, in principle, as *lex specialis* during armed conflict. It was nevertheless also observed that legal gaps would be avoided by not ruling out the parallel applicability of international environmental law. This was an approach the Commission had used to address similar questions in relation to the topic protection of persons in the event of disasters. Some members also drew attention to the relevance of other legal fields to the topic, such as human rights, and encouraged the Special Rapporteur to examine further how these fields interrelate. In this context, it was suggested that the question how the topic is intended to interact with the debate surrounding the relationship between international humanitarian law and human rights law be addressed. Such an analysis should seek to clarify both the way in which the environmental protections will be applied and how these will fit with related human rights protections.

143. Also from a methodological perspective, caution was expressed by some members against an attempt to simply transpose provisions of the law of armed conflict as they applied with regard to the protection of civilians or civilian objects to the protection of the environment. The material, personal and temporal scope of application of the law of armed conflict had to be respected. It was suggested that it might be more appropriate to develop specific rules for the protection of the environment instead of overcoming gaps in the regime of environmental protection during armed conflict simply by stating that it is civilian.

144. The detailed information on State practice and analysis of applicable rules contained in the report was generally welcomed, though some members also observed that it was not clear what conclusions could be drawn from it and how the information fed into the elaboration and content of the proposed draft principles. It was stressed that the Commission would need to know how to use the information in its work, whether the practice represented customary international law, emerging rules or new trends. The view was also expressed that some rules under the law of armed conflict relating to the protection of the environment did not seem to reflect customary international law. The Commission would therefore have to consider to what extent the final outcome would contribute to the development of *lex ferenda*.

145. Concerning the terminology used in the draft principles, several members questioned the lack of uniformity of concepts, in particular with regard to terms such as "environment" and "natural environment" which were used inconsistently in the text, giving rise to confusion. Furthermore, members generally questioned the placement of the provisions concerning scope, purpose and use of terms in the preamble. While they were sympathetic to the view of the Special Rapporteur that such provisions were not "principles" *per se*, they referred to past practice of the Commission and encouraged the Special Rapporteur to consider their placement, including by moving some of them into the operative part of the draft principles. It was also suggested, however, that they could be joined under an introductory heading.

146. With regard to the outcome and form of the topic, some members expressed a preference for draft articles, as this corresponded better with the prescriptive nature of the terminology used in some of the proposed draft principles. Several members supported the Special Rapporteur's proposal to develop draft principles. They did not agree with the view of some members that the Commission had adopted principles only when motivated by a desire to influence the development of international law, rather than laying down normative prescriptions. In their view, principles would indeed have legal significance, albeit at a more general and abstract level than rules. It was also argued that draft principles were particularly appropriate if the intention was not to develop a new convention. It was also pointed out that the Commission may not wish to limit itself to principles but also to propose recommendations, or best practices. While several members considered that the structure of the draft principles should align with the temporal phases, it was also observed that since some the draft principles would span over more than one phase, a strict temporal division would neither be desirable nor feasible.

(b) Scope

147. There was substantial discussion on the limitations of the scope of the topic. Some members noted that it might be useful to add an element of threshold indicating that the topic aimed at addressing situations of a *certain degree* of damage caused to the environment during armed conflict. While there was widespread agreement that both international and non-international armed conflict should be covered by the topic, the need to clarify how the differences between these types of conflict were reflected was also noted. It was pointed out that if the Commission decided to adopt one single regime covering both types of armed conflict, an approach that had its merits, it would be important to clearly indicate the methodology followed for this purpose. Several members also underlined the need for further research on the practice of non-State actors, in the context of non-international armed conflicts.

148. On the question of specific weapons, divergent views were expressed whether or not the draft principles would apply, as a matter of existing law, to nuclear weapons and other weapons of mass-destruction. In light of the declarations made by States upon ratification of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) concerning its non-applicability to nuclear weapons, it was suggested that the draft principle address this question by means of a "without prejudice" clause. The view was also expressed that the further clarification on the scope of the topic in relation to weapons might be needed.

149. Some members were of the view that natural and cultural heritage should be excluded, though it was also observed that the issue had important linkages with the environment and merited being addressed. The importance of clearly differentiating between the human environment and the natural environment was also highlighted by some members who considered the former concept to be outside the scope of the topic. Whereas some members emphasized that the exploitation of natural resources was not directly linked to the scope of the topic, it was suggested that the question of human rights infringements caused by actions affecting the natural resources should be dealt with. Furthermore, some members were of the view that the draft principles should include a provision on indigenous peoples in light of their special relationship with the environment.

150. Some members referred to what they considered to be a certain *lacunae* in the proposed draft principles and various proposals concerning additional provisions were made. In this context, several members considered it important to reflect in the draft principles the prohibition to "employ methods or means of warfare which are

intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" as set forth in article 35, paragraph 3, of the Additional Protocol I. While the high threshold of this provision was acknowledged, it was noted that at least it provided a minimum standard. A reference was also made to the duty of care expressed in article 55, paragraph 1, of the Additional Protocol, namely that "[c]are shall be taken in warfare to protect the natural environment against wide-spread, long-term and severe damage". It was suggested that this provision be reflected either in draft principle 1 or in a separate draft principle. The view was also expressed that it would be appropriate to reflect in the draft principles the obligation in the Convention on the prohibition of military or any other hostile use of environmental modification technique[379] "not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury". Besides the uncertainty on its customary international law status, it was observed that it would be difficult to contest the value of the principle in relation to contemporary international environmental law. It was further suggested that the draft principle ought to contain a prohibition against the destruction of the environment, not justified by military necessity and carried out wantonly, drawing from language in General Assembly resolution 47/37 of 25 November 1992. It did not seem that this aspect was covered in draft principle 1, which addressed "attacks" but not necessarily the notion of "destruction".

151. Some members regretted that the assertion in the report concerning the importance of national legislation on the protection of the environment had not been translated into the draft principles. A separate draft principle was therefore proposed to reflect a duty for States to undertake to protect the environment in relation to armed conflict through legislative measures consistent with applicable international law.

(c) Purpose

152. Several members expressed the view that the proposed provision on purpose was unduly restrictive. In addition to preventive and restorative measures, the draft principles also contained prohibitive clauses as well as obligations to undertake precautionary measures. Several members proposed to delete the term "collateral". It was pointed out that the aim was to minimise all damage, whether collateral or not. It was also suggested that a distinction be made between intentional and collateral damage. The view was expressed that the question of collateral damage could be addressed in a separate draft principle, though some members observed that the term required further analysis.

(d) Use of terms

153. Several members supported the inclusion of a provision on the use of terms in the draft principles; such a provision would assist in properly determining the scope of the text and clarify the subject matter at hand. Caution was nevertheless also voiced regarding any attempt to define, for the purpose of this topic, the terms "armed conflict" and "environment", which involved highly complex issues. With regard to the definition of "armed conflict" several members noted that it was broad enough to cover non-international armed conflicts, which are more common, more difficult to regulate, and more damaging to the environment. It was furthermore suggested that it might require some clarification to ensure that the draft principles only applied to situations in which the protracted use of force reached a certain level of intensity. Situations of internal disturbances of a pure law-enforcement nature

[379] United Nations, *Treaty Series*, vol. 1108, p. 151.

would thus be excluded from the scope of the present topic. The broad manner in which the term "environment" had been defined was questioned by a number of members and it was suggested that the scope of protection should be limited to the environment as relevant to armed conflict situations. In this regard, it was observed that it was not possible to borrow a definition from an instrument dealing with peacetime situations and simply transpose it to situations of armed conflict.

(e) Draft principle 1

154. Whereas some members supported draft principle 1, several members expressed concern over the labelling of the environment as a whole as "civilian in nature", which they considered was too broad and ambiguous. The proposition seemed to imply an equation between the environment as a whole with the concept of a "civilian object", which would lead to significant difficulties when applying the principle of distinction. It was pointed out that the law of armed conflict did not address protection of persons or things in the abstract. It would therefore be more appropriate to express the rule of environmental protection in terms of its specific parts or features. It was also suggested that it be defined as a civilian object. Such an approach would enable a classification of protection under the rules applicable to the protection of civilian objects, though it was also observed that such rules could not automatically apply to the environment. It was pointed out that the circumstances in which a civilian object becomes a military objective, as well as the distinction whether it becomes such objective in whole or in part, required clarification. Some other members emphasized that the environment could not be considered a civilian "object" although it included such objects.

155. Some members drew attention to the second sentence of draft principle 1, which they considered could serve as the first principle, permitting to first address the protection of the environment as whole, then its parts. As such, the second sentence should either be reversed with the first or addressed in a separate principle all together. It was also suggested that the scope of "applicable international law" be clarified, and that the pertinent rules under international humanitarian law be identified.

(f) Draft principle 2

156. Members agreed in general with the thrust of draft principle 2, though concern over the formulation "strongest possible" protection was also voiced. It was pointed out that the expression did not accurately reflect the requirement under international humanitarian law, which sets forth an obligation of taking feasible precautions to avoid and in any event minimise damage, excessive to the concrete military advantage. Furthermore, it was noted that the wording did not seem to recognize that in certain circumstances it would not be possible to satisfy such standard for both the protection of civilians and the environment. The view was also expressed that it would be necessary to adapt the principles referred to in this provision to the specificity of the environment, as well as to clarify their applicability in light of the civilian status the environment had been ascribed in draft principle 1. With regard to the principle of precaution, it was noted that the standard to be applied for the required assessment of "damage" should be clarified, in particular whether it was distinct from the criteria "widespread, severe and long-term damage". The point was also made that the draft principle should clarify the applicability of the principle of proportionality with regard to the parts of the environment that had lost their protection. A suggestion was made that a specific reference to the principle of humanity should be included.

(g) Draft principle 3

157. Several members supported draft principle 3, which they observed had been drawn from the International Court of Justice's advisory opinion on *Nuclear Weapons*.[380] However, the view was also expressed that the Court seemed to have addressed the issue of environmental considerations in relation to *jus ad bellum* and not *jus in bello*, which would render the proposition in draft principle 3 problematic. The counter point was also made that reference in the opinion was to *jus in bello*. Attention was also drawn to the fact that there may be situations in which environmental considerations were simply not relevant; the provision should include a caveat to acknowledge this. A suggestion was made that the content of draft principle 3 be elaborated to clarify how environmental consideration should be taken into account in assessing necessity and proportionality. In this context, it was pointed out that "environmental consideration" would need to be properly defined and that the limit of such consideration be clarified. A proposal was made to add a sentence to the effect that such assessments should be done objectively and on the basis of the information available at the time. A certain overlap between draft principles 2 and 3 was observed by some members and the possibility of merging the two draft principles was therefore put forward. However, it was observed that draft principle 3 was more specific than draft principle 2 and should be retained.

(h) Draft principle 4

158. Several members noted that draft principle 4 mirrored the provision laid down in article 55, paragraph 2, of Additional Protocol I and expressed support for its inclusion. An absolute prohibition seemed appropriate; if the environment, or part thereof, became a military objective other rules applied concerning attacks against it. Anything less than an absolute prohibition therefore did not seem warranted. It was further observed that the fact that the prohibition may exist only as a treaty obligation and not as a customary rule could be explained in the commentaries; the task of the Commission was not to produce a catalogue of customary rules. However, some other members considered highly pertinent the fact that the prohibition against reprisals was not generally accepted as a rule under customary international law and should be reflected as such in the draft principle. The drafting of the prohibition in such absolute terms as had been proposed by the Special Rapporteur was thus questioned by those members. Moreover, it was observed that in exceptional cases, belligerent reprisals could be considered lawful when used as an enforcement measures in reaction to unlawful acts of the other party. In this context, references were made to the reservations made by States to article 55, paragraph 2, of the Additional Protocol 1, as well as to the definition of reprisals contained in the ICRC customary international law study.[381] To the extent that the draft principles addressed all armed conflict — international and non-international — attention was drawn to the fact that neither common article 3 to the Geneva Conventions nor Additional Protocol II contained a specific prohibition of belligerent reprisals. The draft principle should therefore be redrafted with appropriate caveats. The view was nevertheless also expressed that this was an area where the Commission may wish to engage in the progressive development of the law in order to extend the prohibition of reprisals to non-international armed conflicts.

(i) Draft principle 5

159. While several members expressed support for the thrust of draft principle 5, which concerned the designation of areas of major ecological importance as demilitarised zones prior to an armed conflict or at its outset, they observed that it

[380] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226.

[381] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law, vols. I and II (Cambridge, Cambridge University Press, 2005).

raised several important questions that required further examination, both with regard to the practical application of such a provision and its normative implications. A doubt was nevertheless also expressed with regard to the legal foundation of this draft principle and to its realisation.

160. Whereas some members were of the view that this provision related to phase I, peacetime obligations, some other members pointed out that it could apply also to phase II, during armed conflict, or even phase III concerning post-conflict obligations. Suggestions were accordingly made to extend the temporal scope of draft principle 5, as well as to address the legal implications of such zones vis-à-vis the other parties to a conflict, including obligations not to attack them. It was observed that the conclusion of mutual agreements between the parties to a conflict establishing such areas and zones would offer a higher degree of protection rather than unilateral designations; the draft principle should include language to this effect. Some members also expressed the view that cultural and natural heritage sites should fall within the scope of this draft principle. A proposal was made to include a separate draft principle on nuclear-weapon free zones in respect to the protection of their environment, as well as on the need for implementation by third States of the obligations engaged by them to respect such zones.

161. Several members encouraged the Special Rapporteur to analyse in more detail the complex legal and practical issues that arose in connection with this draft principle in her next report, and to elaborate the proposed regime.

(j) Future programme of work

162. Some members expressed support for the proposal by the Special Rapporteur to address in her third report the law applicable in post-conflict situations, issues that had not yet been examined during the second phase, and to provide a summary analysis of the three phases. Nevertheless, it was also observed that it was not entirely clear how the Special Rapporteur intended to proceed with the topic after her third report and it was hoped that this could be clarified further. It was suggested that an outline of the draft principles envisaged by the Special Rapporteur be elaborated so as to facilitate work.

163. Regarding specific issues to be considered in the third report, the view was expressed that the Special Rapporteur should analyze in greater depth other treaties on international humanitarian law that limit the means and methods of warfare that might have an adverse effect on the natural environment, and in particular to examine developments of new technologies and weaponry. The Special Rapporteur's intention to consider the question of occupation in relation to both phases II and III, was welcomed by a number of members. It was also suggested that the Special Rapporteur propose draft principles relating to training of armed forces and to the development and dissemination of relevant educational materials. Finally, the view was expressed that the Special Rapporteur should include propositions concerning ways and means international organizations can contribute to the legal protection of the environment in relation to armed conflict. Some members encouraged the Special Rapporteur to structure the future draft principles to correspond with the temporal phases.

164. Some members welcomed the Special Rapporteur's intention to continue consultation with other entities, such as the ICRC, UNESCO and UNEP, as well as regional organizations. They also agreed that it would be of useful if States would continue to provide examples of legislation and relevant case law.

3. Concluding remarks of the Special Rapporteur

165. In light of the comments made during the plenary debate concerning the structure and methodology of the report and the draft principles, the Special Rapporteur considered it useful to clarify that the overall outline for the topic would consist of several draft principles grouped together in relation to their functional purpose, so as to reflect to the extent possible the three temporal phases. It was further reiterated that the draft principles proposed in the present report related to the second temporal phase, (i.e. during armed conflict), which was the focus of the report. The placement and numbering of the draft principles should therefore be seen from that context, and accordingly provisional in nature; draft principles on phases I and III would be added in a future report. The Special Rapporteur shared the view that the topic needs a proper preamble and this may be elaborated at a later stage in the process. Furthermore, the Special Rapporteur underlined that the question of what other rules may apply during an armed conflict, including rules and principles of international environmental law; was the core of the topic and hence she was in full agreement with the comments made regarding the necessity of addressing these issues. However, in light of the focus of the second report on identifying rules and principles of the law of armed conflict that relate to the protection of the environment, it was not possible to add into this examination other fields of the law. Such an examination would be done at a subsequent stage.

166. In response to questions raised with regard to the use of both the term “environment” and “natural environment” in the draft principles, the Special Rapporteur explained that the rationale behind this was linked to the scope of the topic, which was broad and referred to the term “environment”. As such, this must be reflected in the provision on the scope and purpose. The draft principles relating to phase II, however, reflected provisions of the law of armed conflict which use a more narrow concept, namely the “natural environment”. In order not to be perceived as expanding the scope of the law of armed conflict, the term natural environment had been retained for this specific context. It was this distinction that the two terms had sought to capture.

167. The Special Rapporteur noted that draft principle 1 had generated much debate. She clarified that the proposed formulation that “the environment is civilian in nature”, was informed by the principle of distinction in the law of armed conflict between civilian objects and military objectives, which meant that the environment fell into either of these two categories for the purpose of applying the law of armed conflict. It was this notion that she had sought to capture in her formulation. She had refrained from referring to the environment as a civilian “object”, since it could be confusing, although in her view, parts of the environment could constitute a civilian object. Nevertheless, she agreed that labelling the environment as a whole an “object” would not be appropriate. Since the proposition had created some confusion she considered that it may be better to avoid its further use in the draft principle.

168. Concerning the term “collateral damage” the Special Rapporteur observed that the concept had become almost synonymous for damage to civilians and civilian property that may occur as a consequence of a legitimate attack and was directly linked to the principle of proportionality. In light of the comments made in the debate, the Special Rapporteur suggested that it may be deleted from the draft principles.

169. With regard to the views expressed by some members that the prohibition against reprisals was not a rule under customary international law, the Special Rapporteur stressed that the purpose of the topic was not to establish customary rules but to set a standard. Furthermore, in view of the large number of States parties to Additional Protocol I, it would be regrettable if the Commission would not be in a position to recognize the important prohibition or to downplay it.

170. Finally, the Special Rapporteur expressed the view that it would not be appropriate for the Commission to attempt to address the question of thresholds with regard to certain terms used in the law of armed conflict, in particular with regard to articles 35 and 55 of Additional Protocol I, as had been suggested by some members.

Chapter X
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

171. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[382] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session.[383]

172. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[384] The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[385]

173. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission. The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013) and her third report during the sixth-sixth session (2014).[386] On the basis of the draft articles proposed by the Special Rapporteur in the second and third reports, the Commission has thus far provisionally adopted five draft articles, together with commentaries thereto. Draft article 2 on the use of terms is still a developing text.[387]

B. Consideration of the topic at the present session

[382] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[383] *Ibid.*, *Sixty-second Session, Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[384] A/CN.4/601 (preliminary report); A/CN.4/631 (second report); and A/CN.4/646 (third report).

[385] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid.*, *Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[386] A/CN.4/654 (preliminary report); A/CN.4/661 (second report) and A/CN.4/673 and Corr.1 (third report).

[387] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48 and 49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto. *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 48 and 49. At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto.

174. The Commission had before it the fourth report of the Special Rapporteur (A/CN.4/687). The Commission considered the report at its 3271st to 3278th meetings, on 16 July and 21 to 24 July 2015.

175. At its 3278th meeting, on 24 July.2015, the Commission decided to refer draft article 2 (f) and draft article 6, [388] proposed by the Special Rapporteur, to the Drafting Committee.

176. At its 3284th meeting, on 4 August 2015, the Chairman of the Drafting Committee presented[389] the report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing draft articles 2, subparagraph (f) and 6, provisionally adopted by the Drafting Committee at the sixty-seventh session (A/CN.4/L.865),[390] which can be found on the website of the Commission. The Commission took note of the draft articles as presented by the Drafting Committee. It is anticipated that commentaries to the draft articles will be considered at the next session.

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[388] The text proposed by the Special Rapporteur in her fourth report, as corrected, read as follows:

"Draft article 2
Definitions

For the purposes of the present draft articles:

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

Draft article 6

Scope of immunity ratione materiae

1. State officials, acting as such, enjoy immunity ratione materiae, both while they are in office and after their term of office has ended.

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

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

[389] The statement of the Chairman of the Drafting Committee is available on the website of the Commission, located at <http://legal.un.org/ilc>.

[390] The text provisionally adopted by the Drafting Committee read as follows:

"**Draft article 2**
Definitions

For the purposes of the present draft articles:

...

(f) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Draft article 6
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity ratione personae in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office."

1. Introduction by the Special Rapporteur of the fourth report

177. The fourth report represented a continuation of the analysis, commenced in the third report (A/CN.4/646), of the normative elements of immunity *ratione materiae*. Since the subjective scope of such immunity (who are the beneficiaries of such immunity) was already addressed in the third report, the fourth report was devoted to consideration of the remaining material scope (an "act performed in an official capacity") and the temporal scope. As a consequence of the analysis, the report also contained proposals of draft article 2 (f) defining, for the general purpose of immunity, an "act performed in an official capacity" and draft article 6 on the material and temporal scope of immunity *ratione materiae*, which contains a specific reference to the application of immunity *ratione materiae* to former Heads of State, former Heads of Government and former Ministers of Foreign Affairs.

178. In her introduction of the report, the Special Rapporteur noted that it had to be read with previous reports, as together these reports constituted a unitary whole. It was noted that the present report, like the previous treatment of immunity *ratione personae*, did not address directly the question of limitations and exceptions to immunity, a matter which would be addressed in her fifth report in 2016. The Special Rapporteur pointed to some problems of translation of the report in the various language versions from the original Spanish, concerning which she introduced the appropriate changes through a corrigendum that was distributed to the members of the Commission. The Special Rapporteur requested that the Secretariat prepare a corrigendum with a view to distributing it as an official document of this session.

179. The fourth report submitted by the Special Rapporteur, when dealing with the normative elements of immunity *ratione materiae*, started by highlighting the basic characteristics of this type of immunity, namely that it is granted to all State officials, that it is granted only in respect of "acts performed in an official capacity" and that it is not time-limited. As to the normative elements of immunity *ratione materiae*, the subjective scope having been dealt with in the third report, the fourth report was focused on the material and temporal scope, as indicated above.

180. The concept of an "act performed in an official capacity" was first the subject of some general considerations which emphasized the importance of this concept in the context of immunity *ratione materiae*. Such importance derives from the functional nature of this type of immunity. The report then approached the distinction between "acts performed in an official capacity" and "acts performed in a private capacity". The study of this distinction led, among other things, to the conclusion that it was not equivalent to the distinction between *acta iure imperii* and *acta iure gestionis*, or to the distinction between lawful and unlawful acts.

181. The report then focused on providing criteria for identifying an "act performed in an official capacity", which involves the successive analysis of judicial practice (international and national), treaty practice and previous work of the Commission. The analysis of international judicial practice emphasized the significance of various judgments issued by the International Court of Justice, the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia. The study of national judicial practice was based on a large number of national cases referring to several aspects of immunity *ratione materiae*, and took into consideration both criminal and civil proceedings as the forms of conduct that could be identified with "acts performed in an official capacity" manifested themselves in both types of proceedings and elements common to such acts could be inferred from them. The analysis of treaty practice considered various United Nations conventions directly or indirectly referring to immunities, and international criminal law treaties (universal and regional) that include references to the official nature of acts characterized as conduct prohibited by international criminal law. As for the analysis

of the previous work of the International Law Commission, emphasis was placed on the articles on responsibility of States for internationally wrongful acts, the Nürnberg Principles, the Draft Code of Offences against the Peace and Security of Mankind of 1954, the Draft Code of Crimes against the Peace and Security of Mankind of 1996 and the articles on the responsibility of international organizations of 2011.

182. Having conducted the foregoing research, the Special Rapporteur went on to examine the resulting characteristics of an "act performed in an official capacity" for the purposes of immunity from foreign criminal jurisdiction, namely, the criminal nature of the act, the attribution of the act to the State and the exercise of sovereignty and elements of the governmental authority when the act is performed. Referring to the criminal nature of the act served the purpose of highlighting the link with criminal jurisdiction of the situations in which immunity *ratione materiae* might be invoked. It led to a model of relation between individual and State responsibility termed by the Special Rapporteur as "single act, dual responsibility", whose alternatives were detailed in the report. A consideration of the attribution of the act to the State was necessary as immunity *ratione materiae* is justified only when a link exists between the State and the act performed by a State official. Of particular interest, in this regard, was the conclusion that certain criteria for attribution contained in the articles on responsibility of States for internationally wrongful acts were not useful for the purposes of immunity. Finally, a third teleological feature was identified as characterizing "acts performed in an official capacity", namely that such acts are a manifestation of sovereignty and a form of exercise of elements of the governmental authority. Examples of some elements were given in the report. This section concluded with a consideration of the relation between international crimes and acts performed in an official capacity. The concept of an "act performed in an official capacity" was finally defined as a conclusion to Part B of the report.

183. Part C of the report briefly analysed the temporal element, reflecting the consensus on the indefinite nature of immunity *ratione materiae* and the relevance of considering the distinction between when the act was performed and when immunity is invoked. Part D of the report focused on the scope of immunity *ratione materiae* and resulted in the proposition of draft article 6 on this issue. The fourth report concluded with a reference to the future work plan on this topic, with the Special Rapporteur announcing a fifth report on the limits and exceptions to immunity.

184. The Special Rapporteur noted that the report was patterned on the third report in terms of the methodological approach taken, essentially basing the analysis of the issues on the judicial (international and national) and treaty practice, as well as previous work of the Commission. Account was also taken of comments received from Governments in 2014 and 2015, which were taken into account as appropriate as at the time of submission, as well as the observations contained in the oral statements made by delegates in the Sixth Committee of the General Assembly. The Special Rapporteur also drew the attention of the Commission to the statements made by the Netherlands and Poland, which were received after the completion of the fourth report.

185. The report centred on the analysis of the concept of an "act performed in an official capacity". The Special Rapporteur noted that the analysis of the temporal element was brief because the matter was mostly uncontroversial in nature; there was broad consensus in the practice and doctrine on the "indefinite" or "permanent" nature of the immunity *ratione materiae*. She nevertheless pointed to the need to analyse what the nature of that element (limit or condition) was, as well as the critical dates which were to be taken into account for the purposes of determining if the temporal element was met; whether it was at the time of commission of the act or

when the claim of immunity was made. She also drew attention to the draft article proposed.

186. The Special Rapporteur highlighted that the core of the report was the analysis of the material scope of immunity *ratione materiae*. It therefore constituted a study of an "act performed in an official capacity", which in turn addressed the distinction between "acts performed in an official capacity" and "acts performed in a private capacity", offered the identifying criteria of an "act committed in an official capacity" and the characteristics thereof, concluding with a draft article on the definition of this category of acts. Draft article 6, paragraph 2, for its part, referred to acts performed in an official capacity as the only acts performed by State officials that are covered by immunity *ratione materiae.*

187. It was noted that the concept of "act performed in an official capacity", which is a central issue to the topic as a whole, has special significance to immunity *ratione materiae*; only acts performed by State officials in their official capacity were under the cover of immunity from foreign criminal jurisdiction. It was acknowledged that a variety of terms have been used to refer to the concept, but in this case the term "act performed in an official capacity" was employed to ensure continuity of terminological usage within the Commission, following the terminology used by the International Court of Justice in the *Arrest Warrant* case.

188. The Special Rapporteur observed that the expression had not been defined in contemporary international law. It was often interpreted in opposition to an "act performed in a private capacity", which itself was an undefined category. However, on the basis of an analysis of the relevant practice, the Special Rapporteur offered certain discernible criteria for identifying acts performed in an official capacity. In particular, it was observed that: (a) the acts were *inter alia* connected with a limited number of crimes, including crimes under international law, systematic and serious violations of human rights, certain acts performed by the armed forces and law enforcement officials and acts related to corruption; (b) some multilateral treaties link the commission of certain acts to the official capacity of the perpetrators of such acts; (c) an act was considered to have been performed in an official capacity when committed by a State official acting on behalf of the State, exercising prerogatives of public power or performing acts of sovereignty; (d) immunity was generally denied in corruption-related cases, by national courts, the logic advanced being that officials cannot benefit from immunity for activities that are closely linked to private interest and whose objective is the personal enrichment of the official and not the benefit of the sovereign; (e) what was meant by "exercising the prerogatives of public power" or "sovereign acts" was not easily defined. Courts, however, have considered as falling into that category activities such as policing, activities of the security forces and of the armed forces, foreign affairs, legislative acts, administration of justice and administrative acts of diverse content; (f) the concept of an act performed in an official capacity did not automatically correspond to the concept of *acta jure imperii*. Far from that, an "act performed in an official capacity" may exceed the limits of an act *iure imperii*, and may also refer to some *acta iure gestionis* performed by State officials while fulfilling their duties and exercising State functions. (g) the concept bore no relation to the lawfulness or unlawfulness of the act in question; and (h) for the purposes of immunity, the identification of such an act was always done on case by case basis.

189. In view of the foregoing criteria, the Special Rapporteur, highlighted the following as the characteristics of an act performed in an official capacity: (a) it was an act of a criminal nature; (b) the act was performed on behalf of the State; and (c) it involved the exercise of sovereignty and elements of governmental authority.

190. The criminal nature of the act performed in an official capacity had implications for immunity in that the criminal nature of the act could conceivably occasion two different types of responsibility, one criminal in nature attributable to the perpetrator, and another civil in nature attaching to the perpetrator or to a State. The Special Rapporteur attached particular stress to the fact that the "single act, dual responsibility" model brought about several scenarii, which were relevant for immunity, including (a) exclusive responsibility of the State in cases where the act was not attributable to the individual by whom it was committed; (b) responsibility of the State and the individual criminal responsibility of an individual, when the act was attributable to both; (c) exclusive responsibility of the individual when the act was solely attributable to such individual, even though he or she acted as a State official. The Special Rapporteur also observed that on the basis of the three possible scenarii, a claim of immunity may be invoked based on: (a) State immunity, in the event that the act could only be attributed to the State and only the State alone could be held responsible; (b) State immunity and immunity *ratione materiae* of a State official, where the act is attributable to both the State and the individual.

191. In the view of the Special Rapporteur, the immunity of State officials from foreign criminal jurisdiction *ratione materiae* was individual in nature and distinct from the immunity of the State *stricto sensu*. This differentiation had a maximum effect in the case of immunity from foreign criminal jurisdiction of State officials, in view of the different basis for responsibility, which, in the case of the State was civil, while for the State official it was criminal. Moreover, the nature of the jurisdiction from which immunity was invoked was different. The Special Rapporteur noted that this distinction was not always made with sufficient clarity in the literature and in practice, largely as a result of the traditional emphasis on the State (and its rights and interests) as the beneficiary of the protection afforded by immunity. She explained that immunity *ratione materiae* was recognized in the interest of the State, whose sovereignty is to be protected, but directly benefits the official when he or she acted in the manifestation of such sovereignty. In the view of the Special Rapporteur, for the exercise of immunity *ratione materiae* to be justified, there had to be a link between the State and the act carried out by a State official. This link implied the possibility of attributing the act to a State. She nevertheless found questionable whether all the criteria for attribution contained in the articles on responsibility of States for internationally wrongful acts were useful for the purposes of immunity, singling out as particularly unsuitable the criteria set out in articles 7, 8, 9, 10 and 11.

192. She noted that although determining the existence of a connection between act and sovereign was not easy, judicial practice showed that certain activities which, by their nature, were considered as expressions of, or inherent to, the sovereignty of the State (police, administration of justice, activities of the armed forces, or foreign affairs), as well as certain activities that functionally occur pursuant to State policies and decisions involving an exercise of sovereignty, satisfied such connection criteria. She contended for a strict interpretation an "act performed in an official capacity" which would place immunity where it rightly belonged, namely to protect the sovereignty of the State. She noted that the qualification as international crimes of such acts performed by State officials in their official capacity must not result in the automatic and mechanical recognition of immunity from foreign criminal jurisdiction in respect of such category of acts. The question will be analysed in greater detail in the fifth report.

2. Summary of the debate

(a) General comments

193. Members generally welcomed the Special Rapporteur's fourth report for its rich, systematic and well documented examples of treaty practice, as well as an

analysis of international and national case-law, while managing to establish a clear connection between the analysis and the draft articles proposed. In doing so, the report provided a comprehensive picture of the various considerations relevant for determining the material and temporal scope of immunity *ratione materiae*; a step that had helped to throw more light on an essential element of the topic. It was readily recognized that the subject matter was legally complex and raised issues that were politically sensitive and important for States.

194. A view was expressed that State practice was not uniform, and more crucially, the direction of State practice was in a "state of flux" such that it was not easy to identify the clear and unambiguous applicable rules. The Commission was not only confronting theoretical and doctrinal questions concerning the topic in relation with other fields of law in the overall international legal system, but also the difficulty of making choices in the codification and progressive development that would help to advance international law. The view was also expressed that it was necessary to strike a balance between fighting impunity and preserving stability in inter-State relations. In such circumstances, it was considered essential that there be transparency and an informed debate on whatever choices were to be made and on the direction to be taken.

195. It was noted by some members that the report opened up the possibility of conceptually approaching the whole subject from the standpoint that limitations or exceptions to the scope of immunity *ratione materiae* existed, as opposed to the inclusion of all acts, including those constituting international crimes, within the scope of acts performed in an official capacity. It was suggested by some other members that circumstances present an opportunity for the Commission for progressive development, given current recourse in the practice of States to restrictive immunity regarding jurisdictional immunities of States.

196. There was general support for the referral of the draft articles proposed by the Special Rapporteur to the Drafting Committee. Some members made comments and observations, including on some of the reasoning and conclusions as contained in the report.

197. Attention was drawn by some members to the continuing relevance of the distinction between the status-based immunity *ratione personae* and the conduct-based immunity *ratione materiae*. On some accounts, the two had some basic elements in common and, more fundamentally, the basis of their legal foundation was the same, namely the principle of the sovereign equality of States. At the same time, caution was urged against overreliance on the principle of sovereign equality of States to explain the complicated issues involved in the topic, since the principle does not explain, for instance, the restrictive approach to jurisdictional immunity of States, which allowed a State to exercise jurisdiction over commercial and other non-public activities of another State. According to this view, the proper test for granting the official immunity for an act performed in an official capacity should depend upon the benefit of the act to his or her State and upon ensuring the effective exercise of its function. While some members recognised the differences existing among the various rules and regimes governing the international legal system, the cautionary point was made that the Commission risked establishing a regime that was inconsistent with the regime under the Rome Statute of the International Criminal Court, which the Commission itself helped to create. It was on the other hand recalled that unlike the present topic, which was based on a "horizontal relationship" among States, the international criminal jurisdiction established a "vertical relationship" among them. This key consideration presented a set of different factors requiring critical review.

198. It was, for instance, suggested that in determining the scope of immunity *ratione materiae*, there were certain acts that could potentially be beyond the benefit of immunity *ratione materiae*. This was the case for acts involving allegations of serious international crimes, *ultra vires* acts, *acta jure gestionis*, or acts performed in an official capacity but exclusively for personal benefit, as well as acts performed on the territory of the forum State without its consent.

199. To address such acts, according to some members of the Commission, two possibilities existed; either to be inclusive and asserting that an act constituting a crime was an act performed in an official capacity and be confronted with the problem of whether they were public or private, or both, or deal with such questions as limitations or exceptions. Some members indicated that while it was difficult to categorize serious international crimes, *ultra vires* acts, or acts *jure gestionis* as being private acts, it was suggested that it was better to address these matters as limitations or exceptions rather than as part of a definition of official or unofficial acts. This approach seemed to have the advantage that practice has followed similar approaches before with respect to jurisdictional immunities of States. Some members indicated that such an approach would also make it possible to find solutions which combined acceptance of limitations and exceptions with appropriate procedural safeguards and due process guarantees.

(b) Methodology

200. The methodical approach taken by the Special Rapporteur of analysing systematically the available practice in seeking to determine the scope of immunity *ratione materiae* was generally considered praiseworthy for the wealth of materials reviewed and the pertinence of the analysis made. Some members, however, noted that in some instances, the report merely referred to cases without analysing them in their full context. Moreover, in some situations, categorical statements were made that went further than was needed or justified, while in other parts, it was not always clear how the materials referred to in the report were related to the particular formulations made.

201. It was also noted by some members that there was heavy reliance on cases from particular jurisdictions or regions, or on cases relating to the exercise of civil jurisdiction, even though the topic concerned immunity from criminal jurisdiction. The Special Rapporteur was suggested to survey even more widely, so as to include the case-law of all legal traditions and the various regions. It was pointed out that there was need to be careful about the reliance on such case-law; while it was conceivable that there was no material difference between civil or criminal jurisdiction when exercised in determining what constituted an act performed in an official capacity, in some situations it might be critical to analyse the context in which immunity might have been granted or denied; immunity might differ depending on whether the case was against a foreign sovereign or against an individual in a civil context or a criminal context.

202. Some members also questioned the assertion made in the report about the irrelevance of national law for the purposes of determining acts performed in an official capacity, considering that such law constituted practice in determining customary international law; and indeed the Special Rapporteur had, in her analysis, relied upon case-law interpreting and applying such national law. It was also noted that there was need to place more stress on the analysis of national legislative and executive practice of States, as well as to give more importance to the analysis to international judicial practice, including the full implications of judgments such as

the *Arrest Warrant* case[391] and *Certain questions of Mutual Assistance in Criminal Matters*[392] rendered by international courts and tribunals, which it was contended had dealt with some of the issues with a certain degree of consistency.

(c) Draft article 2 (f): Definition of an "act performed in an official capacity"

203. While draft article 2 (f) is definitional in nature and is briefly formulated, comments were made on it in the light of the extensive analysis that the Special Rapporteur had offered in her report to base its formulation.

(i) "Act performed in an official capacity" versus "act performed in a private capacity"

204. It was recognised that an "act of state doctrine" was an entirely different legal concept from immunity *ratione materiae*. In general, there was support for the assertion that an "act performed in an official capacity" was defined and appreciated in contradistinction to "acts performed in a private capacity". It was also appreciated that an act performed in a private capacity was not necessary identical with acta *jure gestionis*, nor was an act performed in an official capacity coterminous with *acta jure imperii*. Moreover, the distinction between an "act performed in an official capacity" and an "act performed in a private capacity" had no relation whatsoever to the distinction between lawful and unlawful acts. The point was however made that these concepts of contrast still provided some useful elements that could be helpful in understanding whether an act was performed in an official capacity or in private capacity, or indeed whether an act was lawful or unlawful. Well-crafted commentaries capturing the various nuances could facilitate a better understanding of an act performed in an official capacity.

205. Some members were not convinced that there was a need to define an official act or an act performed in an official capacity for the purposes of the present topic. It was noted that legal concepts tend to be indeterminate and did not always lend themselves to legal definition. It was not entirely clear whether it would be helpful to provide a definition beyond the dichotomy between acts performed in an official capacity and acts performed in a private capacity. Any attempt to go beyond the common places would be an impossible task. It was considered that the distinction between acts performed in an official capacity and acts performed in a private capacity was general and sufficient to allow for a case by case determination based on the circumstances of each case. This binary opposition was borne out by the practice, in international and domestic case law. It was doubted by some members whether the collection of numerous references of instances where the terms like "official act" or an "act performed in official capacity" were employed was useful, as such collection was bound to be under-inclusive and would require deeper analysis to understand the context. It was suggested that the Special Rapporteur should have explored more fully the question of how far a State may determine the range of activities which it considered as constituting acts performed in an official capacity. However, other members maintained that a definition, if properly drafted, could be necessary or useful. It was further suggested that the commentary could cite examples of acts performed in an official capacity.

(ii) Criminal nature of the act

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

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

206. Some members observed that certain treaties considered the participation of a State official in the commission of the act as part of the definition of a crime, while in other instances that participation was not an express element of the crime in question, but that did not necessarily exclude the possibility of an official being involved in that capacity in the commission of the crime in question. However, according to that view, the prescriptive or descriptive nature of a particular characterization of a crime had no bearing necessarily on the question whether the person had acted in an official capacity.

207. Some members were of the view that, the central issue which was determinative of an act performed in an official capacity for the purposes of immunity was not the nature of the act but the capacity in which one acted.

208. Some members noted that while the criminal nature of the act did not alter its official character, that did not mean that the criminality of the act could be considered as an element of the definition of the act performed in an official capacity. It was also noted that the characterization as criminal of an act performed in an official capacity, which appeared to be incorporated in the proposed definition would lead to a surprising result, since it considered any act performed in an official capacity as a crime. This was tantamount to suggesting that every "act performed in an official capacity", by definition, constituted a crime, and necessarily that State officials always commit crimes when they act in an official capacity. An act was a crime not by its nature but rather by its criminalization at the levels of national or international criminal law.

209. The view was expressed that the whole point of the international law of immunity was for a court of the forum State to determine, as procedural matter, whether a particular act performed by an official was amenable to its jurisdiction. These matters were considered in *limine litis*. If the lawfulness of the act, as such, would be a relevant criterion for determining the existence of jurisdiction, the law of immunity *ratione materiae*, would to that extent, be rendered superfluous. Such an approach would also have implications for the presumption of innocence.

210. For some members, the reference to "criminal nature" of the act merely sought to reflect a descriptive notion for the purposes of the present draft articles. It was not intended to mean that all official acts were "criminal". Some members observed that they did not understand the logic that immunity applied because the act had been performed in an official capacity and not because it had a criminal element. In this regard, it was recalled that suggestions had been made in the past for a definition of criminal conduct. It was also wondered what would be the whole point of arresting an official if it was not for having allegedly committed a criminal act, and indeed at that point it was doubted that the presumption of innocence would be engaged.

211. It was countered, in turn, that draft article 1, on scope, provisionally adopted by the Commission in 2013 already provided that the draft articles were focused on criminal jurisdiction.

212. A variety of proposals were made to qualify and remove from the text of the proposed definition any connotation that an act performed in an official capacity *per se* was a crime. In particular, it was suggested that draft article 2, paragraph (f), should be recast in such a way as to remove the requirements of criminality.

213. On the question of "single act, dual responsibility", it was, in the view of some members, well established in international law. It was clear that any act of a State official performed in an official capacity was attributable not only to the person (for the purpose of his individual criminal responsibility) but also to the State (for the purpose of State responsibility). For other members, even though not opposed to such a description, it was not entirely apparent how the "single act, dual

responsibility" model related to the conclusion that acts performed in an official capacity must be criminal in nature. It was suggested that there seemed to be a confusion of understanding between the question of jurisdiction and of immunity, themselves different albeit interrelated concepts, with responsibility, whether individual criminal responsibility or State responsibility.

(iii) Attribution of the act to the State

214. Some members considered it important that the report had addressed the question of attribution, as it helped to clarify certain questions concerning the scope of immunity *ratione materiae*.

215. For other members, the reference, in the context of immunity *ratione materiae*, to the rules of attribution for State responsibility was only logical, as the immunity in question, in their view, belonged solely to the State. They therefore expressed doubts regarding the assertion of the Special Rapporteur that "any criminal act covered by immunity *ratione materiae* was not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed", finding it confusing and complicating matters.

216. It was also recalled that rules of the immunity of the State were procedural in nature and were confined to determining whether or not a forum State may exercise jurisdiction over another. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.

217. Several members were not prepared to concede that the immunity of a State official from the criminal jurisdiction of another State was aligned with the immunity of the State. In their view, the differentiation was useful and needed to be further explored; as developments in international criminal law particularly since the end of the Second World War had shown, immunity *ratione materiae* need not be aligned always with State immunity. Other members pointed to the right of a State to waive the immunity of its officials, which demonstrated the connection between all forms of State-based immunity.

218. Some members also shared in the view of the Special Rapporteur that not all criteria of attribution, as set out in articles 4 to 11 of the Articles on the responsibility of States for internationally wrongful acts were relevant for the purposes of immunity. It was noted for instance that conduct of persons attributed under certain circumstances to the State under articles 7, 8, 9, 10 and 11, of the Articles did not constitute acts performed in an official capacity for the purpose of the immunity of such persons.

219. Considering that there seemed to be scant State practice or pertinent case law, several members wondered about the basis on which the Special Rapporteur had made the assertion that the term "State official" excluded for the purposes of immunity individuals who were usually regarded as *de facto* officials. There was need, for some members, to take a broader approach to cover acts of a person acting under governmental direction and control. The point was also made that the trend from recently concluded agreements and elaborated principles on private contractors was in favour of restricting or denying immunity to such actors.

220. According to another view, the law of immunity and the law of State responsibility were different regimes, whose rationale for existence was different with the consequent result that they provided different solutions and remedies.

221. In specific relation to the draft definition as proposed, some members welcomed the fact that the Special Rapporteur had not introduced the attribution of the act to the State in the text as it was not a helpful criterion when determining what constituted an act performed in an official capacity.

(iv) Sovereignty and exercise of elements of the governmental authority

222. According to some members, it was important, as noted in the report, to distinguish acts which are performed in an official capacity in the sense that they were in the exercise of a public function, or of the sovereign prerogative of the State, and those which are merely in furtherance of a private interest. They found the extrapolations of "representative" and the "functional" aspects of State functioning well reflected in the Special Rapporteur's formulations. Attention was drawn with approval to the use of "elements of governmental authority" in the Articles on State responsibility for internationally wrongful acts. Other members viewed the context in which those Articles dealt with that term to be different. Several members also pointed to the difficulty of defining sovereignty and the exercise of elements of governmental authority.

223. For some members, the argument that an international crime was contrary to international law did not provide any additional element of relevance for the characterization of an act performed in an official capacity, yet the proposition that an act in an official capacity was criminal in nature seemed to suggest that the Special Rapporteur had effectively taken a stand on the matter even though the question of limitations and exception will be taken up in the fifth report in 2016. Other members agreed with the Special Rapporteur that given the nature of international crimes and their gravity there is an obligation to take them into account for the purposes of defining the scope of immunity from foreign criminal jurisdiction.

224. Some members disagreed with the Special Rapporteur that the relationship between the acts performed in an official capacity and international crimes was settled. They pointed to the joint separate opinion by Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case "... that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone can perform ..."[393] Other members observed that the Special Rapporteur had concentrated on the question whether international crimes may ever be "acts performed in an official capacity" without addressing the question of limitations or exceptions. It was suggested that the commentaries to be adopted on the draft provision should be prepared in such a way so as not to prejudge the discussion about immunities in relation to international crimes.

225. Nevertheless, some members asserted, on the basis of the *Arrest Warrant* case, that the "international crime exception" was not applicable with respect to immunity *ratione personae*. On the other hand, it was noted that that case left open the question of possible exceptions with respect to immunity *ratione materiae* for when the International Court of Justice pronounced that it was unable to deduce from practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Minister of Foreign Affairs, it had confined the finding to immunity *ratione personae*.

226. Some members, questioning the need for a definition, doubted the usefulness of the formulation "act performed by a State official exercising elements of governmental authority", viewing the word "elements" to be unclear and "governmental", question begging. The alternative was to employ the formulation contained in draft article 2, paragraph (e), provisionally adopted by the Commission in 2014, in which case reference would be made to an "act performed by a State official when representing the State or when exercising State functions". It was recalled that when the Commission adopted that provision it discussed and refrained

[393] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p.2, at p. 89, para. 85.

from using of the term "governmental authority". Other members however viewed this term as useful in the context of this topic.

227. Some members noted that if the Commission adopted a definition of an act performed in an official capacity, then it might be appropriate to amend accordingly draft article 5, as provisionally adopted by the Drafting Committee.

(d) Draft article 6: Scope of immunity *ratione materiae*

228. Draft article 6 was found generally acceptable. It was suggested however that paragraphs 1 and 2 be reformulated so as to avoid the impression that it only covered elected officials. This could be done by employing the formulation "*while they are representing the State or exercising State functions, and thereafter*". The possibility of reversing the order in which paragraphs 1 and 2 appeared was also raised as this would clearly distinguish immunity *ratione materiae* from immunity *ratione personae*. The point was also made that while draft paragraph 2 was acceptable its acceptance does not prejudge or prejudice the question of possible exceptions.

229. It was noted that paragraph 3 was superfluous as it stated an aspect already covered by paragraph 3 of draft article 4, and the commentary thereto provisionally adopted by the Commission in 2013. It ought to be addressed in the commentary but if, retained, there was need to delete the word "former" as immunity *ratione materiae* also covered Heads of State, Heads of Government and Ministers for Foreign Affairs while in office.

(e) Future workplan

230. The consideration of limitations and exceptions to immunity was considered a key aspect of the topic. In this respect, some members stressed the importance of a thorough analysis of the comments received from Governments, not only for the evidence of State practice but also for the nuance in the positions taken, including whether they viewed international law generally in this area as being settled. Some other members, regretted that the analysis of limitations and exceptions to immunity would only be addressed in 2016, even though it has been often mentioned in previous reports with little discussion.

231. The Special Rapporteur was encouraged by some members to address the question of limitations and exceptions together with questions of procedure not only because the two aspects were inter-related but also because to do so might ultimately assist the Commission overcome some of the thorny issues related to the topic as a whole. It was even suggested that procedural issues be taken up first. Some other members noted that it would be premature to deal with limitations and exceptions next year since there were still some general matters to be dealt with.

3. Concluding remarks by the Special Rapporteur

232. The Special Rapporteur addressed the issues raised during the debate, dividing them into two groups, dealing first with certain methodological issues raised by various members of the Commission and then with issues related to the concept of an "act performed in an official capacity".

233. With regard to the first group of issues, the Special Rapporteur made the general point that some of the Commission members' observations went beyond solely methodological concerns. Nonetheless, in that regard, she addressed their comments concerning the analysis and value of the case-law considered, the treatment of national legislation and the consideration given to statements and communications by States.

234. Regarding case-law, she welcomed the positive response of a large number of Commission members to the analysis of judicial practice contained in the report. With respect to comments by some members of the Commission concerning the usefulness of the analysis of national case law, she reiterated the importance that she attached to national case-law in the treatment of immunity *ratione materiae*, particularly in view of the fact that it was national courts that were directly confronted with immunity-related issues. She emphasized that, even if national case-law was not consistent and homogeneous, a finding to that effect was in itself relevant to the work of the Commission. The Special Rapporteur also acknowledged the importance of the case-law of international courts and tribunals, but she stressed her disagreement with the idea that a sort of hierarchy existed between international case law and national case law. At the same time, she noted that she did not share the view that had been expressed that international case-law was fully coherent and consistent.

235. With respect to the weight given to national legislation in defining the concept of an "act performed in an official capacity" for the purposes of the current draft articles, she acknowledged that the word "irrelevant" as used in paragraph 32 of the report was not the most suitable term. However, she pointed out that her intention was not to deprive national legislation of all value, but to emphasize that it should serve solely as a complementary interpretive tool, especially in view of the considerable differences that could be found in the various national legislations and the difficulty in identifying which national laws were relevant for the purposes of defining the concept of an "act performed in an official capacity". Furthermore, national laws on State immunity contained no definition of an "act performed in an official capacity".

236. Lastly, with regard to the statements and comments submitted by States, the Special Rapporteur reiterated the importance that she had always accorded to such valuable material, which she had used systematically when preparing her reports. She welcomed the fact that members of the Commission considered those statements and comments to be important and useful, not only for the purposes of reporting on national practice but also with a view to ascertaining how States perceived the various legal questions that came within the scope of the current topic.

237. With regard to the comments made concerning the definition of an "act performed in an official capacity", the Special Rapporteur made several concluding remarks on the importance of including such a definition in the draft articles; the link that existed between such an act and sovereignty and the exercise of elements of governmental authority; the criminal dimension linked to the concept of an "act performed in an official capacity"; and the relationship between responsibility and immunity.

238. On the importance of defining an "act performed in an official capacity", the Special Rapporteur reaffirmed her conviction that it was necessary to have such a definition for the purposes of the draft articles, a view which had been endorsed by a considerable number of members of the Commission. In her opinion, such a definition would assist in achieving legal certainty, in particular bearing in mind that the concept could not be defined solely by opposition to an act performed in a private capacity, which also had not been defined, and the diversity and lack of homogeneity of case law, which militated against the view that it was an indeterminate legal concept that could be identified by judicial means. Moreover, its definition would contribute to the codification and progressive development of international law and assist practitioners, including national courts. On that point, the Special Rapporteur expressed her view that repeatedly applying the technique of "deregulation" (in the case in question, failing to adopt a definition) did not appear to be in accordance with the Commission's mandate.

239. On the question of sovereignty and the exercise of sovereign authority, she stressed that qualifying "an act performed in the official capacity" as a material, as opposed to a subjective, element, required a special bond between the State official and the State. Even though "sovereignty" did not lend itself to a precise definition, it was possible to identify examples in the practice of "inherent acts of sovereignty" or "acts inherently sovereign", in particular the examples contained in paragraphs 54 and 58 of the report. Moreover, the term "exercise of governmental authority" had already been employed by the Commission in its earlier work on State responsibility. She recalled that it was a matter that the Commission had set aside for further elaboration.

240. With respect to the relationship between responsibility and immunity, the Special Rapporteur reiterated that, while it was true that the two regimes pursued different aims, they nevertheless had certain elements in common, which precluded a radical separation of the two. A good example in that regard was the question of international crimes and their relationship to immunity, an issue that had been raised by various members of the Commission during the debate. Accordingly, in her view, one could not overlook questions relating to responsibility in dealing with the topic, at least with regard to certain rules concerning the attribution of the act to the State. The Special Rapporteur said that she did not share the view expressed by a member of the Commission that an act was not official because it had been carried out by an official of the State.

241. With regard to draft article 6, the Special Rapporteur highlighted the combination of the two elements (material and temporal) and said that she was in favour of considering the option of reversing the order of paragraphs 1 and 2. Regarding paragraph 3 of draft article 6, she was of the view that it should be retained, but left open the possibility that the Commission might decide to delete it and to incorporate its content and the reasons for it in the commentaries.

242. The Special Rapporteur responded to various questions raised by some members of the Commission. Lastly, regarding the future workplan, she said that the interesting debate in the plenary Commission was — to a great extent — a repeat of a debate that had previously taken place within the Commission. She recalled that the Commission had endorsed the workplan at the time and that a large number of members of the Commission had supported her proposal to address the issue of limits and exceptions in her next report. She had, however, taken careful note of the suggestions made by a number of Commission members to consider first, or concurrently, the procedural aspects of the topic. In that regard, she indicated that she would, to the extent necessary and possible, deal with procedural issues in her next report.

243. In conclusion, the Special Rapporteur recommended that the Commission should refer the two draft articles to the Drafting Committee, on the understanding that the latter would consider them in the light of the plenary debate.

Chapter XI
Provisional application of treaties

A. Introduction

244. At its sixty-fourth session (2012), the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur for the topic. At the same session, the Commission took note of an oral report, presented by the Special Rapporteur, on the informal consultations held on the topic under his chairmanship. The General Assembly subsequently, in resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work.

245. At its sixty-fifth session (2013), the Commission had before it the first report of the Special Rapporteur (A/CN.4/664) which sought to establish, in general terms, the principal legal issues that arose in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The Commission also had before it a memorandum by the Secretariat (A/CN.4/658), which traced the negotiating history of article 25 of the the 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention") both in the Commission and at the Vienna Conference of 1968–69, and included a brief analysis of some of the substantive issues raised during its consideration.

246. At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur (A/CN.4/675) which sought to provide a substantive analysis of the legal effects of the provisional application of treaties.

B. Consideration of the topic at the present session

247. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/687), which continued the analysis of State practice, and considered the relationship of provisional application to other provisions of the 1969 Vienna Convention, as well as the question of provisional application with regard to international organizations. The report included proposals for six draft guidelines on provisional application.[394]

[394] The text proposed by the Special Rapporteur read as follows:

Draft guideline 1

States and international organizations may provisionally apply a treaty, or parts thereof, when the treaty itself so provides, or when they have in some other manner so agreed, provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application.

Draft guideline 2

The agreement for the provisional application of a treaty, or parts thereof, may be derived from the terms of the treaty, or may be established by means of a separate agreement, or by other means such as a resolution adopted by an international conference, or by any other arrangement between the States or international organizations.

Draft guideline 3

A treaty may be provisionally applied as from the time of signature, ratification, accession or acceptance, or as from any other time agreed by the States or international organizations, having

248. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986 ("1986 Vienna Convention").

249. The Commission considered the second report at its 3269th to 3270th, and 3277th to 3279th meetings, held on 14, 15, 23, 24 and 28 July 2015.

250. At its 3279th meeting, on 28 July 2015, the Commission referred draft guidelines 1 to 6 to the Drafting Committee.

251. At its 3284th meeting, on 4 August 2015, the Chairman of the Drafting Committee presented an interim oral report on draft guidelines 1 to 3, as provisionally adopted by the Drafting Committee at the sixty-seventh session. The report was presented for information only at this stage, and is available, together with the draft guidelines, on the Commission's website.[395]

1. Introduction by the Special Rapporteur of the third report

252. In introducing his third report, the Special Rapporteur recalled the work carried out by the Commission at previous sessions, and the content and purpose of his first two reports. In particular, he recalled his assessment that, subject to the specific characteristics of the treaty in question, the rights and obligations of the State which had consented to provisionally apply a treaty were the same as the rights and obligations that stemmed from the treaty itself as if it were in force; and that a violation of an obligation stemming from the provisional application of a treaty activated the responsibility of the State.

253. Approximately twenty member States had provided comments on their practice. While he noted that the practice of States was not uniform, the Special Rapporteur continued to be of the opinion that it was not necessary to carry out a comparative study of internal laws. He noted that the number of treaties that provided for the provisional application of treaties and which had been applied provisionally was relatively high.

254. His third report focused on two major issues: first, the relationship with other provisions of the 1969 Vienna Convention, and, second, the provisional application of treaties with regard to the practice of international organizations. As regards the former, his analysis, which had not been intended to be exhaustive, focused on articles 11 (Means of expressing consent to be bound by a treaty), 18 (Obligation not to defeat the object and purpose of a treaty), 24 (Entry into force), 26 (*Pacta sunt*

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regard to the terms of the treaty or the terms agreed by the negotiating States or negotiating international organizations.

Draft guideline 4

The provisional application of a treaty has legal effects.

Draft guideline 5

The obligations deriving from the provisional application of a treaty, or parts thereof, continue to apply until: (i) the treaty enters into force; or (ii) the provisional application is terminated pursuant to article 25, paragraph 2, of the Vienna Convention on the Law of Treaties or the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, as appropriate.

Draft guideline 6

The breach of an obligation deriving from the provisional application of a treaty, or parts thereof, engages the international responsibility of the State or international organization.

[395] Located at <http://legal.un.org/ilc>.

servanda) and 27 (Internal law and observance of treaties). Those provisions were chosen because they enjoyed a natural and close relationship with provisional application. As regards the provisional application of treaties between States and with international organizations, or among international organizations, the Special Rapporteur observed that the Secretariat's memorandum had clearly indicated that the States took as valid the formulation adopted in the 1969 Vienna Convention. Nonetheless, the Special Rapporteur reiterated his view that an analysis of whether article 25 of the 1969 Vienna Convention reflected customary international law would not affect the general approach to the topic.

255. Chapter IV of his report focused on several aspects: (1) international organizations or international regimes created through the provisional application of treaties; (2) the provisional application of treaties negotiated within international organizations, or at diplomatic conferences convened under the auspices of international organizations; and (3) the provisional application of treaties of which international organizations were parties. As regards the creation of the international organizations or international regimes, the Special Rapporteur clarified that he was referring to those international bodies created by treaties, and which played a significant role in the application of the treaty, even though they were not designed to become fully fledged international organizations. As regards the provisional application of treaties negotiated within international organizations, or at diplomatic conferences convened under the auspices of international organizations, the Special Rapporteur referred, in particular, to the establishment of the Organization for the Nuclear Test Ban Treaty (CTBTO). Despite the fact that the convention was not in force, the CTBTO in its transitional form had been operating for nearly twenty years. The Special Rapporteur also referred to more than fifty treaties negotiated under the auspices of ECOWAS, a significant number of which made provision for the provisional application of treaties. He submitted for the consideration of the Commission the possibility of studying the practice of the provisional application of treaties in the context of regional international organizations.

256. In his view, the task before the Commission was to develop a series of guidelines for States wishing to resort to the provisional application of treaties, and he proposed that the Commission could also consider within those guidelines the preparation of model clauses to guide negotiating States. He noted that the six draft guidelines on the provisional application of treaties were the outcome of the consideration of the three reports which had to be read each in the light of the other. The starting point for their drafting was article 25 of both the 1969 and 1986 Vienna conventions.

2. Summary of the debate

(a) General remarks

257. The view was generally expressed that internal laws and practice on the way in which States enter into treaties, whether or not provisionally, differed considerably, and any attempt at categorization, even if possible, would likely not be pertinent for the purpose of identifying relevant rules under international law. Caution was also advised with regard to the classification of States as to whether their internal law accepted or not, and to what extent, the provisional application of treaties. It was pointed out that in some national legal systems, the possibility of provisionally applying treaties was the subject of ongoing dispute.

258. Others were of the view that internal rules could not be ignored. There was value in analysing the different internal laws and practices on the processes applied prior to consenting to provisional application, which could provide greater insights into how States viewed the nature of provisional application as a legal phenomenon.

It could, for example, be worth assessing whether States, in their practice, appeared to interpret article 25 in a manner that suggested that, as a matter of international law, it could only be resorted to by a State where its internal law so provided. It was also suggested that the Commission had to first take a position on the applicability of article 46 of the 1969 Vienna Convention (Provisions of internal law regarding competence to conclude treaties) to the provisional application of treaties. It was observed that the interplay between internal law and international law could take two different forms. First, provisions of internal law could address the procedure or conditions for the expression of the consent of a State to its provisional application of the treaty. Second, the relevant provisions of a given treaty that allows for provisional application sometimes referred also to internal substantive law.

259. Some members of the Commission noted that while article 25 of the 1969 Vienna Convention was the basis of the legal regime of provisional application of treaties, it did not answer all the questions related to the provisional application of treaties. It was suggested that the Commission should provide guidance to States on such questions as: which States may agree on the provisional application of treaties (only negotiating States or other States as well); whether an agreement on provisional application must be legally binding; and whether such an agreement can be tacit or implied. It was also noted that the Commission should provide guidance to States as to which other rules of international law, for example on responsibility and succession, apply to provisionally applied treaties.

260. It was generally agreed that the provisional application of treaties had legal effects and created rights and obligations. The Special Rapporteur was nonetheless called upon to further substantiate his conclusion that the legal effects of provisional application were the same as those after the entry into force of the treaty, and that such effects could not be subsequently called into question in view of the provisional nature of the treaty's application. What was not entirely clear was whether provisional application would produce the exact same effects as the entry into force of the treaty. Several possibilities were raised. One solution was to compare provisional application to the regime of the termination of treaties, under article 70 of the 1969 Vienna Convention. Another possibility was to refer to the provisions of the 1969 Vienna Convention on the consequences of the invalidity of treaties (art. 69), whereby acts performed in good faith areopposable to the parties to the treaty. A further view was that, while the legal effects of provisional application might be practically the same as those after entry into force of the treaty, provisional application was merely provisional, had legal effects for only those States that agreed to apply a treaty provisionally, and had such effects for only those parts of a treaty on which there was such agreement. Furthermore, it was suggested that the Special Rapporteur could also address whether the termination and suspension processes for both regimes were identical.

261. Members endorsed the Special Rapporteur's assessment that the legal effects of a provisionally applied treaty were the same as those stemming from a treaty in force. It was maintained that a State could not hide behind the fact that the treaty was being provisionally applied to contend that it could not accept the validity of some of the effects produced by the obligation to provisionally apply that treaty. Accordingly a provisionally applied treaty was subject to the *pacta sunt servanda* rule in article 26 of the 1969 Vienna Convention. Its breach would also trigger the operation of the applicable rules on international responsibility for wrongful acts, as in the case of the breach of a treaty in force. A further view was that the distinction between treaties in force and those being provisionally applied was less substantive and more procedural, with provisional application simpler to commence and to end. Some members noted that that article 27 of the 1969 Vienna Convention was also applicable to provisionally applied treaties.

262. As regards the example, cited in the report, of the provisional application of the Chemical Weapons Convention as a result of a unilateral declaration by Syria, the view was expressed by some members that it did not concern provisional application *stricto sensu* under article 25 of the 1969 Vienna Convention, unless the Special Rapporteur considered that the agreement of the Parties had been evidenced by their silence or inaction in relation to Syria's unilateral declaration. If so, then further analysis of the phrase "have in some other manner so agreed", in article 25, was needed, with a view to determining whether acquiescence in the form of silence or inaction could represent agreement for the provisional application of the treaty. The view was also expressed that the Parties in question had tacitly consented to the provisional application of the treaty in view of the fact that the declaration of provisional application by Syria was notified by the depositary to the States Parties and none objected to such decision.

263. As regards future work, it was proposed that the Special Rapporteur focus on the legal regime and modalities for the termination and suspension of provisional application. For example, it would be interesting to know to what extent the provisional application of a treaty might be suspended or terminated by, for example, violations of the treaty by another party which was also applying it provisionally, or in situations where it was uncertain if the treaty would enter into force. The view was expressed that the indefinite continuation of provisional application, particularly given that it allowed for a simplified means of termination as provided in article 25, paragraph 2, could have undesirable consequences.

264. It was also suggested that the Special Rapporteur could seek to identify the type of treaties, and provisions in treaties, which were often the subject of provisional application, and whether or not certain kinds of treaties addressed provisional application similarly. Likewise, the question of who the beneficiaries of provisional application were was considered worth discussing. It was also suggested that the Special Rapporteur could undertake an analysis of limitation clauses used to modulate the obligations being undertaken in order to comply with internal law, or conditioning provisional application on respect for internal law.

265. Some members supported the view that it was worth drafting model clauses which could be of practical importance to States and international organizations in the context of the draft guidelines. However, the Special Rapporteur was cautioned by other members against developing model clauses on the provisional application of treaties which could prove complex due to the differences between national legal systems.

(b) Relationship with other provisions of the 1969 Vienna Convention

266. The report's treatment of the relationship of article 25 with the other provisions of the 1969 Vienna Convention was welcomed. It was pointed out that additional provisions of the 1969 Vienna Convention were also relevant. For example, article 60 was relevant, since the material breach of a provisionally applied treaty could, according to that view, lead to the suspension or termination of provisional application. The view was also expressed that it was to be doubted that article 60 would operate in the same manner in relation to a treaty being provisionally applied. With regard to the relationship with article 26, it was noted that the *pacta sunt servanda* rule could be used to explain the situation which might result from the unilateral termination of provisional application.

267. By another view, it was not necessary to extend the review of the relationship of article 25 to other rules of the law of treaties and also study the relationship with articles 19 and 46 of the 1969 Vienna Convention, as the focus was best placed on

specifying the differences between a treaty being provisionally applied and from that which is in force for a particular State.

(c) Provisional application of a treaty with the participation of international organizations

268. Some speakers expressed doubts as to the assertion that the 1986 Vienna Convention, in its entirety, reflected customary international law. It was noted, however, that it could be possible to assert that article 25 of the 1969 Vienna Convention, and perhaps article 25 of the 1986 Vienna Convention, reflected a rule of customary international law. However, further analysis into the matter, in a future report of the Special Rapporteur, would be necessary before any such conclusion could be reached.

269. It was observed that even if a treaty was negotiated within an international organization, or at a diplomatic conference convened under the auspices of an international organization, the conclusion of the treaty was an act of the States concerned and not of the international organization.

270. It was further observed that the provisional application of treaties with the participation of international organizations was different. Such arrangements were more complicated, because they were often designed to ensure the greatest participation simultaneously of the members of the Organization and of the Organization itself. It was considered worth investigating whether international organizations had considered or were considering provisional application as being a useful mechanism, and if such mechanism had been incorporated in their constituent rules.

271. It was also suggested that the Special Rapporteur look at other categories of treaties which might be subject to a special form of provisional application. For example, headquarters agreements were not typically permanent, but were often agreed for a specific conference or event to be held by the international organization in the State in question. By their nature they needed to be implemented immediately and therefore often provided for provisional application.

272. Some members noted that it would be appropriate to undertake first the examination of questions related to the provisional application of treaties concluded by States and only afterwards to proceed to the consideration of provisional application of treaties with the participation of international organizations.

(d) Comments on the draft guidelines

273. In general, members supported the approach taken by the Special Rapporteur to prepare draft guidelines for the purpose of providing States and international organizations with a practical tool. Some members were, however, of the view that the draft guidelines proposed by the Special Rapporteur were better presented as draft conclusions. Another general remark was that it would be better to separate the case of States from that of treaties with the participation of international organizations.

274. Several drafting suggestions were made concerning draft guideline 1, with a view to bringing the provision more into line with article 25 of the 1969 Vienna Convention. For example, it was noted that the reference to internal law not prohibiting provisional application did not appear to be in accordance with article 25, and needed to be deleted since it suggested that States could turn to their internal laws to escape an obligation to provisionally apply a treaty. It was also suggested that the draft guideline could be coupled with another on the scope of the draft guidelines.

275. Concerning draft guideline 2, it was proposed that the reference to a resolution by an international organization be clarified. The view was expressed that resolutions in many cases could not be equated with an agreement establishing provisional application. It was also suggested that reference be made to other forms of agreement such as an exchange of letters or diplomatic notes. The view was also expressed that the provision could also be clearer as to the possibility of acquiescence by negotiating or contracting States to provisional application by a third State.

276. Regarding draft guideline 3, it was suggested, *inter alia*, that the provision could be simplified; and that reference be made to the fact that provisional application only occured prior to the entry into force of the treaty for the relevant party. It was suggested that the elements of the means of expressing consent, and the temporal starting point of provisional application, could be separated into two draft guidelines.

277. It was suggested that the term "legal effects" in draft guideline 4 be clarified and the provision further developed, since it was the key provision of the draft guidelines. For example, it could be considered whether the obligations of provisional application extended to the whole treaty or only to select provisions. Another possibility was to indicate that the legal effect of provisional application of a treaty could continue after its termination. It was also suggested that the provision could be drafted taking into account the formulation of article 26 of the 1969 Vienna Convention, and that it could be specified that the provisional application of a treaty could not result in the modification of the content of the treaty.

278. Concerning draft guideline 5, it was suggested that it be clarified that the effects of obligations arising from provisional application depended on what States had provided for when they agreed upon the provisional application. Furthermore, it was necessary to take into account which entry into force of a treaty was being referred to, i.e., that of the treaty itself or of the entry into force for the State itself. It was observed that when a multilateral treaty entered into force, provisional application terminated only for those States that had ratified or acceded to the treaty. Provisional application continued, however, for any State that had not yet ratified or acceded to the treaty, until such time as the treaty entered into force for that State. The view was also expressed that the draft guideline could recognize the possibility of setting specific terms for the termination of provisional application.

279. While some members expressed doubts on the need to include draft guideline 6, others expressed support. It was pointed out that the draft guideline had omitted the question of whether the unilateral suspension or termination of provisional application, under the law of treaties, was wrongful under international law, thereby triggering the rules of international law on the responsibility of States for internationally wrongful acts.

3. Concluding remarks of the Special Rapporteur

280. The Special Rapporteur indicated that, in his opinion, article 25 of the 1969 Vienna Convention was the point of departure for the Commission's consideration of the topic. It could go beyond the article only to the extent that it proved useful to ascertain the legal consequences of provisional application. In his view, the primary beneficiary of provisional application was the treaty itself, since it was being applied despite not being in force. In addition, those negotiating States who could partake in the provisional application were also potentially beneficiaries.

281. The Special Rapporteur observed that the preponderance of views within the Commission were not in favour of undertaking a comparative study of internal legislation applicable to provisional application. At the same time, he recalled that

he continued to receive submissions from member States as to their practice, which invariably also included information about the prevailing position under their respective internal law. Nonetheless, this did not contradict his stated intention of not undertaking a comparative law analysis, as the primary focus was on the international practice of States. To remove any doubt, he could accept the deletion of the reference to internal law in draft guideline 1, and the discussion of the matter instead in the corresponding commentary.

282. The Special Rapporteur did not agree with the assertion that the provisional application of a treaty might also be terminated if it were uncertain that the treaty would enter into force, or if it had been applied provisionally for a prolonged period of time. In his view, it was not feasible to refer to termination of provisional application of the treaty solely on the basis of the unpredictability of its entry into force. Furthermore, article 25 imposed no such limitation on the termination of provisional application.

283. He indicated his intention to consider the question of the termination of provisional application and its legal regime, in his next report, together with a study of other provisions in the 1969 Vienna Convention of relevance to provisional application, including articles 19, 46 and 60.

Chapter XII

Other decisions and conclusions of the Commission

A. Programme, procedures and working methods of the Commission and its documentation

284. At its 3248th meeting, on 8 May 2015, the Commission established a Planning Group for the current session.[396]

285. The Planning Group held three meetings. It had before it Section I, entitled "Other decisions and conclusions of the Commission", of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session; General Assembly resolution 69/118 of 10 December 2014 on the Report of the International Law Commission on the work of its sixty-sixth session; and General Assembly resolution 69/123 of 10 December 2014 on the rule of law at the national and international levels.

1. Inclusion of a new topic in the programme of work of the Commission

286. At its 3257th meeting, on 27 May 2015, the Commission decided to include the topic "*Jus cogens*" in its programme of work and to appoint Mr. Dire Tladi as the Special Rapporteur for the topic.

2. Working Group on the Long-term Programme of Work

287. At its 1st meeting, on 11 May 2015, the Planning Group decided to reconstitute for the current session the Working Group on the Long-term Programme of Work, under the chairmanship of Mr. Donald M. McRae. The Chairman of the Working Group submitted an oral progress report on the work of the Working Group at the current session to the Planning Group, at its 3rd meeting, on 30 July 2015.

3. Consideration of General Assembly resolution 69/123 of 10 December 2014 on the rule of law at the national and international levels

288. The General Assembly, in resolution 69/123 of 10 December 2014 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. Since its sixtieth session (2008), the Commission has commented annually on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report (A/63/10) remain relevant and reiterates the comments made at its previous sessions.[397]

[396] The Planning Group was composed of: Mr. A. S. Wako (Chairman), Mr. L. Caflisch, Mr. P. Comissário Afonso, Mr. A. El-Murtadi Suleiman Gouider, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. H. Huang, Ms. M.G. Jacobsson, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. P. Šturma, Mr. D.D. Tladi, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio)*.

[397] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 231; *ibid., Sixty fifth Session, Supplement No. 10* (A/65/10), paras. 390 to 393; *ibid., Sixty-sixth*

289. The Commission recalls that the rule of law is of the essence of its work. The Commission's object, as set out in Article 1 of its Statute, is the promotion of the progressive development of international law and its codification.

290. Having in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level, and aims at promoting respect for the rule of law at the international level.

291. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission will continue to take into account, where appropriate, the rule of law as a principle of governance and the human rights that are fundamental to the rule of law as reflected in the preamble and in Article 13 of the Charter of the United Nations and in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels.[398]

292. In its current work, the Commission, is aware of "the interrelationship between the rule of law and the three pillars of the United Nations (peace and security, development, and human rights)",[399] without emphasizing one at the expense of the other. In fulfilling its mandate concerning the progressive development and codification of international law, the Commission is conscious of current challenges for the rule of law.

293. In the course of the present session the Commission has continued to make its contribution to the rule of law, including by working on the topics "The protection of the atmosphere", "Crimes against humanity", "Identification of customary international law", "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", "The protection of the environment in relation to armed conflicts", "The immunity of state officials from foreign criminal jurisdiction", "Provisional application of treaties" and "The Most-Favoured-Nation clause". In addition, the Commission has appointed a Special Rapporteur for the topic "Jus cogens".

294. The Commission notes that the General Assembly has invited Member States to comment in particular on "The role of multilateral treaty processes in promoting and advancing the rule of law".[400] The Commission wishes to recall the work of the Commission on different topics which, on the basis of proposals under articles 16 and 23 of its Statute, have become subject to multilateral treaty processes, such as the *Draft Articles on Jurisdictional Immunities of States and Their Property, 2001,* the *Draft Code of Crimes against the Peace and Security of Mankind,* 1996, the *Draft Statute for an International Criminal Court, 1994*, and the *Draft Articles on the Law of Non-Navigational Watercourses, 1994.* The Commission also draws attention to its recent work on different topics, including the:

- Draft articles on responsibility of States for internationally wrongful acts, 2001

Session, Supplement No.10 (A/66/10), paras. 392 to 398; *ibid.*, *Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 274 to 279; *ibid.*, *Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 171 to 179; *ibid.*, *Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 273-280.

[398] General Assembly resolution 67/1 of 30 November 2012 ("Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels"), document A/RES/67/1, para. 41.

[399] Report of the Secretary-General on Measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations, S/2013/341, 11 June 2013, para. 70.

[400] General Assembly resolution 69/123 of 10 December 2014, para. 20.

- Draft articles on prevention of transboundary harm from hazardous activities, 2001
- Draft articles on diplomatic protection, 2006
- Draft articles on the law of transboundary aquifers, 2008
- Draft articles on the effects of armed conflicts on treaties, 2011
- Draft articles on the responsibility of international organizations, 2011
- Draft articles on the expulsion of aliens, 2014

Furthermore, the Commission recalls the Guide to practice on reservations to treaties (2011).

295. The Commission reiterates its commitment to the rule of law in all of its activities.

4. Consideration of paragraphs 10 to 13 of General Assembly resolution 69/118 of 10 December 2014 on the Report of the International Law Commission on the work of its sixty-sixth session

296. The Commission took note of paragraphs 10 to 13 of General Assembly resolution 69/118, by the terms of which the Assembly welcomed the efforts of the Commission to improve its methods of work, and encouraged it to continue this practice; recalled that the seat of the Commission is at the United Nations Office at Geneva; noted that the Commission was considering the possibility of holding part of its future sessions in New York, underlined, to that purpose, the importance of the Commission taking into account estimated costs and relevant administrative, organizational and other factors, and called upon the Commission to deliberate thoroughly the feasibility of holding part of its sixty-eighth session in New York; and decided, without prejudice to the output of those deliberations, to revert to the consideration of the recommendation contained in paragraph 388 of the report of the Commission on the work of its sixty-third session during the seventieth session of the General Assembly.

297. The Commission recalled that, during its sixty-third session, in the context of the discussion of its relationship with the Sixth Committee, it had expressed the wish that consideration be given to the possibility of having one half session each quinquennium in New York so as to facilitate direct contact between the Commission and delegates of the Sixth Committee. The Commission further recalled that it had on previous occasions held sessions other than at its Headquarters. In particular, the Commission noted that, as part of the overall arrangements concerning the convening of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, it held the first part of its fiftieth session at its seat at the United Nations Office at Geneva, from 20 April to 12 June 1998, and the second part at United Nations Headquarters in New York, from 27 July to 14 August 1998.

298. The Commission considered the feasibility of holding part of its sixty-eighth session in New York based on information provided by the Secretariat regarding estimated costs and relevant administrative, organizational and other factors, including its anticipated workload in the final year of the present quinquennium. Having regard to all the factors at its disposal, the Commission came to the conclusion that it would not be feasible for it to hold part of its sixty-eighth session in New York without causing undue disruptions. The Commission nevertheless affirmed its wish that consideration be given to the possibility of having one half session in the next quinquennium in New York. Such a possibility ought to be anticipated in the planning of future sessions of the Commission for the next quinquennium. In that regard, the Commission noted that such convening, taking

into account the estimated costs and relevant administrative, organizational and other factors, could be anticipated during the first segment of a session either during the first (2017) or second (2018) year of the next quinquennium. Based on the information made available to it, the Commission recommends that preparatory work and estimates proceed on the basis that the first segment of its seventieth session (2018) would be convened at the United Nations Headquarters in New York. Accordingly, the Commission requested the Secretariat to proceed to make the necessary arrangements for that purpose so as to facilitate the taking of the appropriate decision by the Commission at its sixty-eighth session in 2016.

5. Honoraria

299. The Commission reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which has been expressed in the previous reports of the Commission.[401] The Commission emphasizes that resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research work.

6. Documentation and publications

300. The Commission reiterated its recognition of the particular relevance and significant value to the work of the Commission of the legal publications prepared by the Secretariat.[402] It recalled that the Codification Division had been able significantly to expedite the issuance of its publications through its highly successful desktop publishing initiative which greatly enhanced the timeliness and relevance of these publications to the Commission's work for more than a decade. The Commission reiterated its regret as regards the curtailment and possible discontinuation of this initiative due to lack of resources and that consequently that no new legal publications were distributed at its current session. The Commission reiterated its view that the continuation of this initiative was essential to ensure the timely issuance of these legal publications, in particular *The Work of the International Law Commission* in the various official languages. The Commission again reiterated the particular relevance and significant value of the legal publications prepared by the Codification Division to its work, and reiterated its request that the Codification Division continue to provide it with those publications.

301. The Commission reiterated its satisfaction that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, would not be subject to arbitrary length restrictions. The Commission noted with satisfaction that the experimental measures to streamline the processing of the Commission's Summary records introduced at the 2013 session had resulted in the more expeditious transmission of the provisional records to members of the Commission for timely correction, and prompt release. The Commission also welcomed the fact that the new working

[401] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement 10* (A/57/10), paras. 525–531; *ibid.*, *Fifty-eighth Session, Supplement 10* (A/58/10), para. 447; *ibid.*, *Fifty-ninth Session, Supplement 10* (A/59/10), para. 369; *ibid.*, *Sixtieth Session, Supplement 10* (A/60/10), para. 501; *ibid.*, *Sixty-first Session, Supplement 10* (A/61/10), para. 269; *ibid.*, *Sixty-second Session, Supplement 10* (A/62/10), para. 379; *ibid.*, *Sixty-third Session, Supplement 10* (A/63/10), para. 358; *ibid.*, *Sixty-fourth Session, Supplement 10* (A/64/10), para. 240; *ibid.*, *Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 396, and *ibid.*, *Sixty-sixth Session, Supplement No.10* (A/66/10), para. 399; *ibid.*, *Sixty-seventh Session, Supplement 10* (A/67/10), para. 280; *ibid.*, *Sixty-eighth Session, Supplement 10* (A/68/10), para. 181; and *Sixty-ninth Session, Supplement 10* (A/69/10), para. 281.

[402] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 387–395. See also *ibid.*, *Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 185.

methods had led to the more rational use of resources and called on the Secretariat to continue its efforts to facilitate the preparation of the definitive records in all languages, without compromising their integrity.

302. The Commission expressed its gratitude to all Services involved in the processing of documents, both in Geneva and in New York, for their timely and efficient processing of the Commission's documents, often under narrow time constraints. It noted that such timely and efficient processing contributed to the smooth conduct of the Commission's work.

303. The Commission expressed its appreciation to the United Nations Office at Geneva Library, which assisted members of the Commission very efficiently and competently.

7. *Yearbook of the International Law Commission*

304. The Commission reiterated that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolution 69/118, expressed its appreciation to governments that had made voluntary contributions to the Trust Fund on the backlog relating to the *Yearbook*, and encouraged further contributions to the Trust Fund.

305. The Commission recommends that the General Assembly, as in its resolution 69/118, *express its satisfaction* with the remarkable progress achieved in the last few years in catching up with the backlog of the *Yearbook* in all six languages, and welcome the efforts made by the Division of Conference Management, especially its Editing Section of the United Nations Office at Geneva in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; and *encourage* the Division of Conference Management to continue providing all necessary support to the Editing Section in advancing work on the *Yearbook*.

8. Assistance of the Codification Division

306. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and, in particular, the ongoing assistance provided to Special Rapporteurs and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission.

9. Websites

307. The Commission expressed its deep appreciation to the Secretariat for the establishment of a new website for the Commission, and called on it to continue updating and managing the website.[403] The Commission reiterated that the website and other websites maintained by the Codification Division[404] constitute an invaluable resource for the Commission and for researchers of the work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website on the work of the Commission included information on the current status of the topics on the agenda of the Commission, as

[403] Located at <http://legal.un.org//ilc>.
[404] Generally accessible through: <http://www.un.org/law/lindex.htm>.

well as advance edited versions of the summary records of the Commission. The Commission also expressed its gratitude to the Secretariat for the successful completion of the digitization and posting on the website of the *Yearbooks* of the Commission in Russian.

10. United Nations Audiovisual Library of International Law

308. The Commission noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law in promoting a better knowledge of international law and the work of the United Nations in this field, including the International Law Commission.

B. Date and place of the sixty-eighth session of the Commission

309. The Commission recommends that the sixty-eighth session of the Commission be held in Geneva from 2 May to 10 June and 4 July to 12 August 2016.

C. Tribute to the Secretary of the Commission

310. At its 3263rd meeting, on 5 June 2015, the Commission paid tribute to Mr. George Korontzis, who had acted with high distinction as Secretary of the Commission since 2013, and who retired during the present session. It expressed its gratitude for the outstanding contribution made by Mr. Korontzis to the work of the Commission and to the codification and progressive development of international law; acknowledged with appreciation his professionalism, dedication to public service and commitment to international law; and extended its very best wishes to him in his future endeavours.

D. Cooperation with other bodies

311. At the 3274th meeting, on 22 July 2016, Judge Ronny Abraham, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.[405] An exchange of views followed.

312. The Asian-African Legal Consultative Organization (AALCO) was represented at the present session of the Commission by its Secretary-General, Mr. Rahmat Mohamad, who addressed the Commission at the 3250th meeting, on 13 May 2015.[406] He briefed the Commission on the current activities of AALCO and provided an overview of the deliberations of AALCO at its fifty-fourth annual session held in Beijing from 13 to 17 April 2015, which focused, *inter alia*, on four topics on the programme of work of the Commission, namely "Identification of customary international law"; "Expulsion of aliens"; "Protection of the Atmosphere"; and "Immunity of State officials from foreign criminal jurisdiction". An exchange of views followed.

313. The Inter-American Juridical Committee was represented at the present session of the Commission by Vice-President of the Inter-American Juridical Committee, Mr. Carlos Mata Prates, who addressed the Commission at the 3265th meeting, on 7 July 2015.[407] He gave an overview of the activities of the Committee in 2014/2015 on various legal issues in which the Committee was engaged. An exchange of views followed.

[405] This statement is recorded in the summary record of that meeting.
[406] *Ibid.*
[407] *Ibid*.

314. The Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe was represented at the present session of the Commission by the Chair of the Committee of Legal Advisers on Public International Law, Mr Paul Rietjens, and the Head of Public International Law Division and Treaty Office of the Directorate of Legal Advice and Public International Law, Ms. Marta Requena, both of whom addressed the Commission at the 3268th meeting, on 10 July 2015.[408] They focused on the current activities of CAHDI in the field of public international law, as well of the Council of Europe. An exchange of views followed.

315. The African Union Commission on International Law (AUCIL) was represented at the present session of the Commission by Justice Solo Kholisani and Mr. Ebenezer Appreku, Members of the African Union Commission on International Law, as well as Mr. Mourad Ben-Dhiab, Secretary of the AUCIL. Justice Solo Kholisani and Mr. Ebenezer Appreku addressed the Commission at the 3276th meeting, on 23 July 2015.[409] They gave an overview of the activities of the African Union Commission on International Law. An exchange of views followed.

316. The United Nations High Commissioner for Human Rights, Mr. Zeid Ra'ad Al Hussein addressed the Commission at the 3272nd meeting, on 21 July 2015. [410] He gave an overview of the activities of his Office and some of its concerns in the area of human rights and commented on some of the topics on the programme of work of the Commission, namely "Crimes against humanity"; and "Immunity of State officials from foreign criminal jurisdiction". An exchange of views followed.

317. On 9 July 2015, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on topics of mutual interest. Presentations were given on the preparations for the 32nd International Conference of the Red Cross and Red Crescent Movement, and updating of the ICRC Commentaries on the Geneva Conventions and Additional Protocols. Presentations were also made on topics on the programme of work of the Commission, including the "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Crimes against humanity".[411]

E. Representation at the seventieth session of the General Assembly

318. The Commission decided that it should be represented at the seventieth session of the General Assembly by its Chairman, Mr. Narinder Singh.

F. International Law Seminar

319. Pursuant to General Assembly resolution 69/118, the fifty-first session of the International Law Seminar was held at the Palais des Nations from 6 to 24 July 2015, during the present session of the Commission. The Seminar is intended for young

[408] *Ibid.*
[409] *Ibid.*
[410] *Ibid.*
[411] Statements were made by Ms. Christine Beerli, Vice President of the ICRC, Mr. Narinder Singh, Chairman of the Commission. Presentations were made on "Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties", by Mr Georg Nolte and "Crimes against Humanity" by Mr Sean D. Murphy, "Preparations for the 32nd International Conference of the Red Cross and Red Crescent Movement", by Dr. Knut Doermann, Chief Legal Officer and Head of the ICRC Legal Division and "Updating the ICRC Commentaries on the Geneva Conventions and Additional Protocols", by Dr Jean-Marie Henckaerts, Head of the Commentaries Update Project, ICRC.

jurists specializing in international law, young professors or government officials pursuing an academic or diplomatic career in posts in the civil service of their country.

320. Twenty-four participants of different nationalities, from all regional groups took part in the session [412]. The participants attended plenary meetings of the Commission, specially arranged lectures, and participated in working groups on specific topics.

321. Mr. Narinder Singh, Chairman of the Commission, opened the Seminar. Mr. Markus Schmidt, Senior Legal Adviser to the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar. The University of Geneva ensured the scientific coordination of the Seminar. Mr. Vittorio Mainetti, international law expert from the University of Geneva, acted as coordinator, assisted by Mr. Cédric Apercé, Ms. Yusra Suedi, legal assistants, and Ms. Cami Schwab, intern in the Legal Liaison Office of UNOG.

322. The following members of the Commission gave lectures: Mr. Ernest Petrič: "*The Work of the International Law Commission*"; Mr. Dire Tladi: "*Jus cogens"*; Mr. Pavel Šturma: "*State succession in relation to State responsibility*"; Ms. Concepción Escobar Hernández: "*Immunity of State officials from foreign criminal jurisdiction*"; Mr. Shinya Murase: "*Protection of the atmosphere*"; Mr. Georg Nolte: "*Subsequent agreements and subsequent practice in relation to the interpretation of treaties* "; Mr. Michael Wood: "*Identification of customary international law*"; Ms. Marie Jacobsson: "*Protection of the environment in relation to armed conflicts*"; and Mr. Sean D. Murphy: "*Crimes against humanity*".

323. Seminar participants attended six external sessions. They attended a workshop organised by the University of Geneva in collaboration with the Geneva Water Hub, on the topic: "*International Water Law: Issues of Implementations*". The following speakers made statements: Ms. Danae Azaria (Lecturer, University College of London), Prof. Laurence Boisson de Chazournes (University of Geneva), Mr. Lucius Caflisch (member of the International Law Commission), Mr. Maurice Kamto (member of the International Law Commission), Prof. Attila Tanzi (University of Bologna, Italy), Ms. Christina Leb (World Bank), Prof. Marco Sassòli (University of Geneva) and Ms. Mara Tignino (University of Geneva). The workshop was followed by a reception offered by the Geneva Water Hub. A special session on "*International Administrative Tribunals*" was held at the International Labour Organization (ILO), led by Mr. Drazen Petrovic, Registrar of the ILO Administrative Tribunal. Seminar participants also took part in a presentation on "*International Refugee Law*" given by Mr. Cornelis Wouters, Senior Legal Adviser of the United Nations High Commissioner for Refugees. They also attended the annual Lalive Lecture at the invitation of the Graduate Institute of International and Development Studies. The lecture was given by Mr. Sean D. Murphy, on *"A Rising Tide: Dispute Settlement under the Law of the Sea"*. A briefing at the International Telecommunications Union (ITU) was also given by Mr. Nikos Volanis, Legal Officer of the ITU, followed by a

[412] The following persons participated in the Seminar: Ms. Kakanang Amaranand (Thailand), Mr. Hamedi Camara (Mauritania), Eleen A. Cañas Vargas (Costa Rica), Francis W. Changara (Zimbabwe), Namgay Dorji (Bhutan), Fatoumata P. Doumbouya (Guinea), Pilar Eugenio (Argentina), Soaad Hossam (Egypt), Gedeon Jean (Haiti), Akino Kowashi (Japan), Gift Kweka (Tanzania), Lucia Leontiev (Moldova), Matilda Mendy (Gambia), Momchil Milanov (Bulgaria), Quyen T.H. Nguyen (Viet Nam), Elinathan Ohiomoba (United States of America), Francisco J. Pascual Vives (Spain), Ye Joon Rim (Republic of Korea), Matteo Sarzo (Italy), Cornelius V.N. Scholtz (South Africa), Darcel G. Smith-Williamson (Bahamas), Luka M. Tomazic (Slovenia), Shuxi Yin (China), Franz J. Zubieta (Bolivia (Plurinational State of)). The Selection Committee, chaired by Mr. Makane Moïse Mbengue, Professor of International Law at the University of Geneva, met on 7 April 2015 and selected 25 candidates out of 102 applications. One selected candidate could not attend the Seminar.

visit of the ITU Museum. Finally, a special session was organised at the World Health Organization, where presentations on "*International Law and Health*" were given by Steven A. Solomon, Principal Legal Officer, and Mr. Jakob Quirin, Associate Legal Officer.

324. Two Seminar working groups on *"Jus cogens"* and *"State succession in relation to State responsibility"* were organised. Each Seminar participant was assigned to one of them. Two members of the Commission, Mr. Dire Tladi and Mr. Pavel Šturma, supervised and provided guidance to the working groups. Each group prepared a report and presented its findings during the last working session of the Seminar. The reports were compiled and distributed to all participants as well as to the members of the Commission.

325. The Republic and Canton of Geneva offered its traditional hospitality at the Geneva Town Hall where the Seminar participants visited the Alabama room and attended a cocktail reception.

326. The Permanent Representative of the United Kingdom to the United Nations and other International Organisations in Geneva invited the Seminar participants for a reception at the residence.

327. Mr. Narinder Singh, Chairman of the International Law Commission, Mr. Markus Schmidt, Director of the International Law Seminar, and Mr. Momchil Milanov, on behalf of the Seminar participants, addressed the Commission during the closing ceremony of the Seminar. Each participant was presented with a certificate of attendance.

328. The Commission noted with particular appreciation that since 2013 the Governments of Argentina, Austria, China, Finland, India, Ireland, Mexico, Sweden, Switzerland, and of the United Kingdom had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The *Circolo di diritto internazionale* (CIDIR), a private association for the promotion of international law based in Rome (Italy), also contributed to the Seminar. Even though the financial crisis of recent years had seriously affected the finances of the Seminar, a sufficient number of fellowships to deserving candidates especially from developing countries in order to achieve adequate geographical distribution of participants were awarded from the trust fund. This year, fourteen fellowships (nine for travel and living expenses, three for living expenses only and two for travel expenses only) were granted.

329. Since 1965, year of the Seminar inception, 1163 participants, representing 171 nationalities, have taken part in the Seminar. 713 have received a fellowship.

330. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many International Organizations based in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2016 with as broad participation as possible.

Annex

Final report

Study Group on the Most-Favoured-Nation clause

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Introduction

1. This report reflects the work of a Study Group established by the Commission to consider contemporary issues relating to the most-favoured nation (MFN) clause. The Commission studied the topic of the MFN clause from 1967 until 1978, although no multilateral treaty was concluded on the basis of the draft articles it had elaborated. Since then MFN had become the cornerstone of the WTO and had been included in countless bilateral and regional investment agreements. In particular, controversies had arisen in the context of bilateral investment agreements over the extension of MFN from substantive obligations to dispute settlement provisions. The report surveys those developments and provides some commentary on the interpretation of MFN provisions.[413]

2. In considering this topic, the Study Group sought to determine whether it could produce an outcome that would be useful in practice both in respect of the inclusion of MFN clauses in treaties and in the interpretation and application of MFN clauses in the decisions of tribunals and elsewhere. The Study Group considered whether there was any utility in revising the 1978 draft articles or in preparing a set of new draft articles and came to the conclusion that there was not.[414] While the Study Group focused its particular attention on MFN clauses in the context of investment agreements, it also sought to consider MFN clauses in a broader context. The conclusions of the Study Group are set out in paragraphs 212-217 below.

Part I – Background

3. This Part sets out the background to the Study Group's work and describes the previous work of the Commission on MFN clauses. It then considers developments in the use of MFN clauses since 1978.

A. Genesis and purpose of the Study Group's work

4. In 1978, the Commission adopted draft articles on the topic of the most-favoured-nation (MFN) clause.[415] No action was taken by the General Assembly to convene a conference to turn these draft articles into a convention. In 2006, at the fifty-eighth session of the ILC, the Working Group on the Long-Term Programme of Work discussed whether the MFN clause should be considered again. The matter was considered by an informal working group of the Commission at its fifty-ninth session (2007), and at its sixtieth session (2008) the Commission decided to include the topic of the most-favoured-nation clause on the long-term work programme. At the same session, the Commission decided to include the topic in its current programme of work and to establish a study group at its sixty-first session, which was co-chaired by Mr. Donald McRae and Mr. Rohan Perera.[416] Since 2012, the Study Group has been chaired by Mr. McRae and, in his absence, by Mr. Mathias Forteau.

5. In deciding to look again at the question of the most-favoured-nation clause, the Commission was influenced by the developments that had taken place since 1978, including the expansion of the application of MFN in the context of the WTO, the pervasive inclusion of

[413] The terms "MFN clause" and "MFN provision" are used interchangeably in this report.

[414] Some members of the Study Group felt that it would be appropriate to undertake a revision of the 1978 draft articles.

[415] *Yearbook … 1978*, vol. II (Part Two), pp. 16-72.

[416] *Official Records of the General Assembly, Sixty-third Session*, *Supplement No. 10* (A/63/10), paras. 351-352. See also *ibid., Sixty-fourth Session Supplement No. 10* (A/64/10), paras. 211-216; *ibid., Sixty-fifth Session Supplement No. 10* (A/65/10), paras. 359-373; *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 349–363.

MFN provisions in bilateral investment treaties and investment provisions in regional economic integration arrangements, and the specific difficulties that had arisen in the interpretation and application of MFN provisions in investment treaties.

6. The Study Group held 24 meetings between 2009 and 2015. The Study Group agreed upon a framework that would serve as a road map for its work, in the light of issues highlighted in the syllabus on the topic.[417] Its work proceeded on the basis of informal working papers and other informal documents were prepared by members of the Commission to assist the Study Group in its work.[418]

7. Throughout its consideration of the topic, the Commission received comments from States in the Sixth Committee on the work of the Study Group. Although some States showed reluctance over the Commission's consideration of the topic,[419] the general view was that the Commission could make a contribution in this area. The Commission had to respect the fact that MFN provisions come in a variety of forms and uniformity in interpretation or application could not necessarily be expected.[420] In line with the general orientation of the Study-Group, the view was frequently expressed that the Commission should not produce new draft articles nor attempt to revise the 1978 draft articles.[421] Generally, it was felt that the Commission should identify trends in the interpretation of MFN clauses and provide guidance for treaty negotiators, policy makers and practitioners in the investment area.[422]

[417] *Ibid., Sixty-fourth Session Supplement No. 10* (A/64/10), para. 216.

[418] The Study Group considered working papers on the following: (a) Review of the 1978 Draft Articles of the MFN Clause (Mr. Shinya Murase); (b) MFN in the GATT and the WTO (Mr. D.M. McRae); (c) The Most-Favoured-Nation Clause and the *Maffezini case* (Mr. A.R. Perera); (d) The Work of OECD on MFN (Mr. M.D. Hmoud); (e) The Work of UNCTAD on MFN (Mr. S.C. Vasciannie); (f) The Interpretation and application of MFN clauses in investment agreements (Mr. D.M. McRae); (g) The Interpretation of MFN Clauses by Investment Tribunals (Mr. D.M. McRae) (this working paper was a restructured version of the working paper, "Interpretation and Application of MFN Clauses in Investment Agreements"); (h) The Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions (Mr. M. Forteau); (i) A BIT on Mixed Tribunals: Legal Character of Investment Dispute Settlements (Mr. S. Murase); and (j) Survey of MFN language and Maffezini-related Jurisprudence (Mr.M.D. Hmoud). The Study Group also had before it: (a) A *Catalogue of MFN provisions* (prepared Mr. D.M. McRae and Mr. A.R. Perera); (b) an informal document, in tabular form, identifying the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision that was being interpreted; (c) an informal working paper on Model MFN clauses post-*Maffezini*, examining the various ways in which States have reacted to the *Maffezini* case; (d) an informal working paper providing an overview of MFN-type language in Headquarters Agreements conferring on representatives of States to the organization the same privileges and immunities granted to diplomats in the host State; (e) an informal working paper on MFN clauses in Diplomatic treaties; (f) an informal working paper on Navigation Agreements and the MFN clause; (g) an informal working paper on "Bilateral Taxation Treaties and the MFN clause".

[419] See e.g.: A/C.6/65/SR.25, at para. 75 (Portugal); A/C.6/66/SR.27, at para. 49 (Iran (Islamic Republic of)); A/C.6/67/SR.23, at para. 27 (Iran (Islamic Republic of)).

[420] See e.g.: A/C.6/64/SR.23, at para. 52 (United States of America); A/C.6/64/SR.23, para.31 (Japan); A/C.6/65/SR.26, at para. 17 (United States of America); A/C.6/66/SR.27, at para. 94 (United States of America); A/C.6/67/SR.21, at para. 103 (United States of America).

[421] See e.g.: A/C.6/64/SR.23, at para. 52 (United States of America); A/C.6/65/SR.25, at para. 82 (United Kingdom); A/C.6/65/SR.26, at para. 17 (United States of America); A/C.6/69/SR.25, at para. 115 (Austria); A/C.6/69/SR.26, at para. 18 (United Kingdom); A/C.6/69/SR.27, at para. 26 (United States of America).

[422] See e.g.: A/C.6/64/SR.18, at para. 66 (Hungary); A/C.6/64/SR.22, at para.75 (New Zealand); A/C.6/65/SR.26, at para. 45 (Sri Lanka); A/C.6/66/SR.27, at para. 28 (Sri Lanka); A/C.6/66/SR.27, at para. 69 (Russian Federation); A/C.6/66/SR.27, at para. 78 (Portugal); A/C.6/66/SR.27, at para. 89 (Viet Nam); A/C.6/66/SR.28, at para. 21 (Canada); A/C.6/67/SR.20, at para. 109 (Canada); A/C.6/69/SR.25, at para. 21 (Viet Nam); A/C.6/69/SR.26, at para. 69 (Singapore); A/C.6/69/SR.26, at para. 73 (Australia); A/C.6/69/SR.27, at para. 76 (Republic of Korea).

8. The Study Group decided not to attempt to decide between the conflicting views of investment tribunals over the application of MFN clauses to dispute settlement provisions. The Commission does not have an authoritative role in relation to the decisions of investment tribunals, and to conclude that one tribunal was right and another wrong would simply insert the Commission as just another voice in an ongoing debate.

9. Instead, the Study Group considered that some explanation or elaboration of the Commission's approach in 1978 would be useful, particularly in light of the uncertainty about how MFN clauses are to be interpreted. The Study Group also felt that it would be useful to elaborate on the application of the rules of treaty interpretation to the interpretation of MFN provisions.

B. The 1978 draft articles

1. Origins

10. When the topic of MFN was first proposed in the Commission in 1964, it was in the context of the discussion of "treaties and third States."[423] And when the Commission decided to include the topic in its programme of work in 1967, the title of the topic was "the most-favoured-nation clause in the law of treaties."[424] It was a topic, therefore, on treaty law.

11. Historically, MFN clauses were contained in bilateral treaties of friendship, commerce and navigation whose main function was to regulate a variety of matters between the parties, usually of a commercial nature.[425] Although the Special Rapporteurs for the 1978 draft articles looked broadly at the way in which MFN clauses had been applied in domestic courts, in treaties, and in the decisions of international tribunals, the 1978 draft articles focused generally on the traditional function of MFN clauses in bilateral treaties on trade.

12. Thus, while the core function of an MFN clause is often seen today to be its automatic and unconditional extension of benefits, the 1978 draft articles contain detailed and lengthy provisions on the "condition of compensation" and "condition of reciprocal treatment," reflecting perhaps a preoccupation in part with the situation of State trading countries which did not favour the completely automatic operation of the MFN clauses. Furthermore, controversy was to develop over the treatment of matters such as customs unions and preferences for developing countries.

2. Key provisions

13. Although the 1978 draft articles dealt with a variety of matters, some of which appear to have been supplanted by subsequent developments, they laid out the core elements of MFN provisions and provided directions for their application that are key to the functioning of MFN clauses today. The definition of an MFN clause was as follows:

> "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State."[426]

[423] United Nations, *The Work of the International Law Commission*, Eighth ed., vol. 1, (2012), U.N. Sales No. E.12.V.2 (ISBN 978-92-1-133720-4), p.171.
[424] *Ibid*, p.172.
[425] Shinya Murase, *Kokusaiho no Keizaiteki Kiso* (Tokyo: Yuhikaku, 2001), pp. 14-201 [in Japanese]; Shinya Murase, "The Most-Favored-Nation Treatment in Japan's Treaty Practice 1854-1905", *American Journal of International Law*, vol.70 (1976), pp. 273-297.
[426] See for example, draft art. 5 of the 1978 draft articles, *Yearbook…1978*, vol. II, Part Two, p. 21.

Although this definition has been criticized as being obscure[427] it does contain the key elements of an MFN clause, and the subsequent provisions of the draft articles elaborate on this.

14. In particular, the draft articles make clear that MFN treatment is not an exception to the general rule of the effect of treaties vis-à-vis third States.[428] The right to MFN treatment is premised on the treaty containing the MFN clause being the basic treaty establishing the juridical link between the granting State and the beneficiary State. In other words, the right of the beneficiary State to MFN treatment arises only from the MFN clause in a treaty between the granting State and the beneficiary State and not from a treaty between the granting State and the third State. Thus, no *jus tertii* is created. In this regard, the Commission was giving effect to what had already been decided by the International Court of Justice in the *Anglo-Iranian Oil Co* case.[429]

15. The draft articles also include an important statement of the *ejusdem generis* principle in its application to MFN clauses. In doing this, the Commission had relied extensively on the practice and jurisprudence under GATT of the notion of "like products." The Commission's treatment of the *ejusdem generis* principle is in two parts. First, article 9(1) provides:

> "Under a most-favoured-nation clause, the beneficiary State acquires, for itself or for those persons or things in a determined relationship with it, only those rights that fall within the limits of the subject-matter of the clause."

Second, article 10(1) provides:

> "Under a most-favoured-nation clause the beneficiary State acquires a right to most-favoured-nation treatment only if the granting State extends to a third State benefits within the subject matter of the clause."

16. Articles 9 and 10 also make clear that where the benefit is for persons or things within a determined relationship with the beneficiary State, they must belong to the same category and have the same relationship with the beneficiary State as persons or things within a determined relationship with the third State.[430]

17. The 1978 draft articles also dealt with the operation of MFN clauses that were conditional on the receipt of compensation or the provision of reciprocal benefits. In addition, it provided specific rules relating to MFN treatment and developing States, frontier traffic, and landlocked States.

18. The provisions relating to developing countries turned out to be one of the reasons why the work of the Commission remained as draft articles. The provisions were seen either as going beyond what was accepted in customary international law[431] or being out of touch with developments that were occurring elsewhere, particularly in the context of the GATT.[432] Several States thought the draft articles did not do enough to protect the interests of developing

[427] This difficulty was pointed out by the comment of Luxembourg on the draft articles on first reading as follows: "Questions arise concerning the scope of the formula … in which reference is made to 'persons' or 'things' in a 'determined relationship' with a given State. To what persons does it refer? While the situation may be clear enough in the case of physical persons, it is much less so in the case of economic enterprises, whether or not corporate bodies. Does the reference to 'things' apply only to material objects or also to intangible goods such as the performance of services or commercial, industrial or intellectual property rights? Finally, what should be understood by the words 'determined relationship' with a State, especially in the case of economic enterprises or intangible goods?" *Ibid.,* p. 167.

[428] *Ibid.*, pp. 24-25 (draft arts. 7 and 8).

[429] *Anglo-Iranian Oil Co. case (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952,* pp.109-110.

[430] *Yearbook…1978*, vol. II, Part Two, p. 27 (see especially draft art.10(2)).

[431] A/C.6/33/SR.37 at para. 52 (Canada).

[432] A/C.6/33/SR. 46 at para. 2 (Denmark); A/C.6/33/SR. 37 at para. 11 (United Kingdom)

countries.[433] Others thought that draft article 24, on arrangements between developing States, was too restrictive[434] or needed more clarification.[435] Equally, the failure of the draft articles to take account of the complexities of the relationship between MFN treatment under bilateral agreements and MFN treatment under multilateral agreements led to discontent with the draft articles.[436] In particular, many States were reluctant to see the draft articles developed into a binding convention without a specific provision exempting custom unions.[437] Some States voiced concerns that the draft articles would prevent States "from embarking upon any process of regional integration."[438]

3. The decision of the General Assembly on the 1978 draft articles

19. After inviting governments to comment on the draft articles from 1978 to 1988, the General Assembly concluded consideration of the subject by deciding,

> "to bring the draft articles on most-favoured-nation clauses, as contained in the Report of the Commission on the work of its thirtieth session, to the attention of Member States and interested intergovernmental organizations for their consideration in such cases and to the extent as they deemed appropriate."[439]

C. Subsequent developments

20. The circumstances that existed when the Commission dealt with the MFN clause in its reports and the 1978 draft articles have changed significantly. There has been a narrowing of the use of MFN treatment to the economic field, but at the same time a broadening of the scope of MFN treatment within that field. The Special Rapporteurs for the 1978 draft articles had dealt with a wide range of areas where MFN clauses operated, including navigation rights and diplomatic immunities. Today, the MFN principle operates primarily in the realm of international economic law, in particular in respect of trade and investment. In certain cases

[433] A/C.6/33/SR.37 at para. 24 (Liberia); A/C.6/SR.41 at para. 43 (Ecuador); A/C.6/SR.43 at para. 23 (Ghana); A/C.6/SR.45 at paras. 21-26 (Swaziland). The European Economic Community thought the draft articles should have dealt explicitly with relations between States of differing economic status: A/C.6/33/SR.32 at paras. 6-7, 16-17 (EEC). See also A/C.6/SR.39 at para. 24 (Belgium).

[434] A/C.6/33/SR.32 at para. 20 (Jamaica); A/C.6/SR.42 at para. 30 (Bangladesh).

[435] A/C.6/33/SR.37 at para. 42 (Chile); A/C.6/SR.43 at para. 39 (Guyana). Several States called for better legal definition of "developed" and "developing" States: A/C.6/SR.39 at para. 27 (Belgium); A/C.6/SR.40 at para. 5 (United States of America).

[436] A/C.6/33/SR. 33 at para. 28 (Federal Republic of Germany); A/C.6/33/SR.37 at para. 33 (Romania); A/C.6/SR.40 at para. 63 (Syria); A/C.6/SR.41 at para. 60 (Libyan Arab Jamahiriya). Italy was disappointed that scope of the draft articles did not include supra-national bodies: A/C.6/SR.44 at para. 9 (Italy).

[437] A/C.6/33/SR. 31 at para. 5 (Netherlands); A/C.6/33/SR. 33 at para. 2 (Denmark); A/C.6/33/SR. 36 at paras. 2-3 (Sweden); A/C.6/33/SR. 37 at para. 2 (Austria); A/C.6/33/SR. 37 at para. 10 (United Kingdom); A/C.6/SR.39 at para. 10 (Greece); A/C.6/SR.39 at para. 25 (Belgium); A/C.6/SR.39 at para. 48 (Colombia); A/C.6/SR.40 at para. 52 (Zambia); A/C.6/SR.41 at para. 11 (Turkey); A/C.6/SR.42 at para. 6 (Ireland); A/C.6/SR.42 at para. 39 (Nigeria); A/C.6/SR.42 at para. 43 (Peru); A/C.6/SR.43 at para. 11 (Venezuela); A/C.6/SR.43 at para. 30 (Uruguay); A/C.6/SR.44 at para. 13 (Italy); A/C.6/SR.44 at para. 20 (Egypt); A/C.6/SR.45 at para. 27 (Swaziland); A/C.6/33/SR. 46 at para. 2 (summary by International Law Commission Chairman).

[438] A/C.6/33/SR.32 at paras. 8-12 (European Economic Community). See also A/C.6/33/SR. 31 at para. 4 (Netherlands): "The most glaring deficiency of the final draft was that it still largely ignored the modern development of regional economic co-operation and its impact on the application of the most favoured nation clause."

[439] General Assembly, Decision 46/416 of 9 December 1991.

MFN treatment provided for on the basis of bilateral treaties has been superseded by multilateral conventions providing obligations of non-discrimination more broadly.[440]

21. There are other areas in which non-discrimination clauses that resemble MFN provisions are found, including headquarters agreements and tax treaties, but their use appears to be infrequent and has not given rise to controversy.[441] By contrast, in the economic field, MFN treatment has expanded in range and in its frequency of use. The GATT, which enshrined MFN treatment as a core principle of the multilateral trading system, has now been subsumed into the WTO where MFN treatment has been applied to both trade in services and trade-related aspects of intellectual property. Moreover, MFN treatment has become a core principle of bilateral investment treaties, a form of treaty that had little practical existence in the days when the 1978 draft articles were being prepared. Even though the first BIT was concluded in the late 1950s, the end of the Cold War witnessed a proliferation of such agreements, as well as frequent recourse to dispute settlement provisions contained therein.[442]

22. Indeed, the dispute settlement processes of the WTO, as well as those that exist for the resolution of investment disputes have led to a body of law on the interpretation of MFN provisions, particularly in the trade and investment contexts. GATT article I, which embodies the MFN clause, has been invoked in WTO dispute settlement and interpreted by the WTO Appellate Body. MFN in the field of trade in services has also been the subject of dispute settlement. In addition, there is a significant body of cases where tribunals have sought to interpret the scope and application of MFN provisions in bilateral investment treaties with conflicting and contradictory outcomes.

23. In short, the context in which MFN operates today is quite different from that in which MFN provisions operated when the Commission earlier considered the topic. On this basis, the Commission considered that there was some value in revisiting the topic.

D. The analysis of MFN provisions by other bodies

24. The Study Group was aware that both the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Cooperation and Development (OECD) had produced a significant amount of work on MFN clauses.

1. UNCTAD

25. UNCTAD's involvement in the policy of international development is longstanding, in particular through the dissemination of technical information on investment matters. It has been responsible for the development of two series of publications: one on "Issues in International Investment Agreements" and the other entitled "Series on International Investment Policies for Development." More recently it has published a series entitled "International Investment Agreements Issues Notes," which includes an annual publication on "Recent Developments in Investor-State Dispute Settlement (ISDS)." UNCTAD's compendia on international investment

[440] Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961, United Nations, *Treaty Series*, vol. 500, p. 95 and Vienna Convention on Consular Relations done at Vienna on 24 April 1963, United Nations, *Treaty Series*, vol. 596, p. 261.

[441] Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, done at Lake Success on 26 June 1947, United Nations, *Treaty Series*, vol. 11, No. 147, p. 11 at art V §15(4); Agreement Between the Government of Australia and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, done at Mexico City on 9 September 2002, Australian Treaty Series vol. 4 (2004), available at <http://www.austlii.edu.au/au/other/dfat/treaties/2004/4.html>.

[442] Stephan W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law", *European Journal of International Law*, vol. 22 (2011), pp. 875–908.

agreements – *International Investment Instruments: A Compendium*,[443] and *Investment Policy Hub*[444] – are invaluable sources for locating international investment agreements.

26. MFN issues are dealt with as part of a broader discussion of investment agreements in a variety of other UNCTAD publications. In particular, the annual review of ISDS (investor-state dispute settlement) by UNCTAD in its Issues Notes series provides a summary of the decisions of investment tribunals for the past year. Included in those summaries are decisions dealing with the interpretation of MFN provisions. Decisions are summarized and differences between them and those of previous years noted, but the report does not analyze the interpretative approaches of investment tribunals.

27. UNCTAD's work on MFN provides important background and context for a consideration of MFN provisions. It has tended to concentrate on the broad policy issues applicable to MFN provisions rather than on questions of customary international law and treaty interpretation that are the focus of the work of the Study Group.

2. OECD

28. The primary role of the OECD in the field of investment has been the drafting of instruments to facilitate investment to which members may become party. These instruments contain obligations of non-discrimination, including those expressed in the form of MFN clauses.

29. The OECD Code of Liberalisation of Capital Movements, which covers direct investment and establishment, and the OECD Code of Liberalisation of Invisible Operations, which covers services, both contain an obligation of non-discrimination. Although not worded in traditional MFN language, this obligation is regarded by OECD as a functional equivalent of an MFN provision. Common article 9 of the Codes provides:

> "A Member shall not discriminate between other Members in authorising the conclusion and execution of the transactions and transfers which are listed in Annex A and which are subject to any degree of liberalisation."

30. In its guide to the Codes, OECD has written:[445]

> "OECD members are expected to grant the benefit of open markets to residents of all other member countries alike, without discrimination. When restrictions exist, they must be applied to everybody in the same way. …. The Codes do not permit the listing of reservations to the non-discrimination, or MFN, principle."

31. The Codes contain significant exceptions to the application of MFN treatment, including for those members who are part of a customs union or special monetary system, and more generally in respect of the maintenance of public order or the protection by the member of public health, morals and safety, the protection of the member's essential security interests, or the fulfillment of its obligations relating to international peace and security.[446]

32. OECD was also responsible for the launching of negotiations for a Multilateral Agreement on Investment (MAI). Included in that agreement was an MFN provision which referred to "treatment no less favourable" and applied to "the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, sale or other disposition of

[443] UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD/DITE/4 vol. XIII, available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=410>. Volumes VI, VII, VIII, IX and X are also available in electronic form.

[444] UNCTAD, "Investment Policy Hub" website located at <http://investmentpolicyhub.unctad.org/IIA >.

[445] OECD, *OECD Codes of Liberalisation: Users Guide 2008* (online: OECD, 2007) at p. 11, available at <http://www.oecd.org/investment/investment-policy/38072327.pdf>.

[446] *Ibid*., at art. 3.

investments."[447] At the time negotiations were abandoned, there was disagreement over whether the MFN clause should apply to investments within the territory of the State granting MFN treatment and whether the term "in like circumstances" should qualify the beneficiaries entitled to receive MFN treatment.

33. The MAI draft also contained a number of exceptions to the granting of MFN treatment, including security interests, obligations under the Charter of the United Nations, and taxation. There were also a number of controversial exceptions that were never resolved, including public debt rescheduling, transactions in pursuit of monetary and economic policies, and regional economic integration agreements.[448]

Part II – Contemporary relevance of MFN clauses and issues relating to their interpretation

34. This Part deals with the nature of MFN clauses and how they are currently being utilized in treaties and applied. It also examines interpretative questions that have arisen regarding MFN clauses, particularly in the context of international investment agreements.

A. Key Elements of MFN

35. As is evident from the 1978 draft articles, MFN provisions in bilateral or multilateral treaties[449] are composed of the following key elements:

- First, under such a provision each State agrees to grant a particular level of treatment to the other State or States, and to persons and entities in a defined relationship with that State or those States.[450]
- Second, the level of treatment provided by an MFN provision is determined by the treatment given by the State granting MFN to third States ("no less favourable").[451]
- Third, an MFN commitment applies only to treatment that is in the same category as the treatment granted to the third State ("*ejusdem generis*").[452]
- Fourth, the persons or entities entitled to the benefit of MFN treatment are limited to those in the same category as the persons or entities of the third State that are entitled to the treatment being claimed.[453]

36. In the application of MFN provisions, it is the second and third of these elements that create the greatest difficulty. The question of what constitutes no less favourable treatment, and the question of whether the treatment claimed is of the same category as the treatment granted to third States, have given rise to disputes under the GATT and the WTO. And, as will be seen, the question whether the treatment claimed is of the same category as the treatment granted to third States has been at the heart of current controversies in the investment field.

[447] OECD Negotiating Group on the Multilateral Agreement on Investment, The Multilateral Agreement On Investment Draft Consolidated Text, 22 April 1998, OECD document DAFFE/MAI(98)7/REV1.
[448] *Ibid*., p. 13.
[449] The Commission did not rule out the possibility that an MFN provision could be found elsewhere than in a treaty. *Yearbook…1978*, p. 16 (draft article 1).
[450] *Ibid.*, p. 21 (draft art. 5).
[451] *Ibid.*
[452] *Ibid*., p. 27 (draft art. 9).
[453] *Ibid.* (draft art.10(2)).

1. The rationale for MFN treatment

37. MFN treatment is essentially a means of providing for non-discrimination between one State and other States and therefore can be seen as a reflection of the principle of sovereign equality. However, its origins suggest that it was founded on the more pragmatic desire to prevent competitive advantage in the economic sphere. As the Special Rapporteur for the 1978 draft articles pointed out in his first report,[454] traders in medieval times who could not gain a monopoly in foreign markets sought to be treated no worse than their competitors. Such treatment was then embodied in agreements between sovereign powers – treaties of friendship, commerce and navigation – and went beyond trade to ensure that a sovereign's subjects in a foreign State were treated as well as the subjects of other sovereigns.

38. The prevention of discrimination is also linked to the economic concept of comparative advantage, which lies at the foundation of notions of free trade and economic liberalism. Under the theory of comparative advantage, countries should produce what they are most efficient at producing. Trade in efficiently produced goods, so the theory goes, benefits consumers and maximizes welfare.[455] Efficiency is lost, however, when country A discriminates against the goods of country B in favour of similar goods of country C. MFN prevents such discrimination by ensuring that country A provide treatment to country B that is no less favourable than the treatment to country C. For this reason, MFN treatment has been seen as the cornerstone of GATT and the WTO.[456]

39. The debate between the benefits of non-discrimination and the benefits of preference, particularly in relation to developing countries, has been a long one, and in many respects still remains unresolved in the field of trade.[457]

40. The relevance of the economic rationale for MFN treatment beyond the field of trade in goods to trade in services, investment, and other areas is also a matter of controversy. It has been argued that whereas in the field of trade, non-discrimination protects competitive opportunities (the comparative advantage rationale), in the field of investment the purpose of non-discrimination is to protect investors' rights.[458] Nonetheless, regardless of the specific rationale for non-discrimination outside the field of trade in goods, agreements relating to investment and to services continue to include MFN treatment (and national treatment) provisions. Having noted these differences in view, the Study Group did not see any need to further consider the question of the economic rationale for MFN provisions.

B. Contemporary practice regarding MFN clauses

1. MFN clauses in GATT and the WTO

41. MFN treatment has always been regarded as the central obligation of the multilateral trading system. Set out in its most comprehensive form in GATT article 1.1, an MFN

[454] *Yearbook…1968*, vol. II, p. 165, document A/CN.4/L.127.

[455] John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd edition (Cambridge: MIT Press, 1997), at Chapter 2.

[456] WTO Appellate Body Report, *Canada – Certain Measures Affecting The Automotive Industry*, WTO document WT/DS139/AB/R (31 May 2000). See also WTO Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO document WT/DS246/AB/R (adopted 20 April 2004), at para. 101.

[457] *The Future of the WTO: Addressing Institutional Challenges in the new Millennium*, Report of the Consultative Board to the Director-General Supachai Panitchpakdi (Geneva: WTO, 2004) at paras. 88-102 ("Sutherland Report").

[458] Nicholas DiMascio, Joost Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?", *American Journal of International Law*, vol. 102 (2008), pp. 48-89.

obligation is also found directly and indirectly in other provisions of the GATT.[459] There were two key aspects to MFN treatment as incorporated in the GATT. First, it operated multilaterally and "advantages, favours, privileges and immunities" granted to one contracting party had to be granted to all contracting parties. Second, it was to be granted unconditionally.

42. The centrality of MFN treatment to GATT lay in the fact that it avoided discrimination in the application of tariffs and other treatment accorded to goods as they crossed borders. Historically tariffs were negotiated bilaterally or among groups of countries and then applied across the board to all contracting parties by virtue of the MFN provision. This was the way in which equality of competitive opportunities between traders was to be preserved.

43. However, within the WTO system, MFN treatment expanded from its application to trade in goods to the new regime for trade in services.[460] It was included in new obligations under the WTO concerning trade-related aspects of intellectual property (TRIPS). Thus, MFN treatment is pervasive throughout the whole of the WTO system.

44. The Study Group reviewed the way in which MFN clauses had been applied in both the GATT and the WTO. From that review certain general conclusions could be drawn about the scope and application of MFN treatment within the WTO system.

45. First, notwithstanding the fact that MFN provisions in the WTO are worded differently, the approach of the Appellate Body has been to treat them as having the same meaning.[461] The textual interpretation of the words has less importance than the underlying concept of MFN treatment.

46. Second, the Appellate Body has interpreted MFN treatment under GATT article I as having the broadest possible application. As the Appellate Body said, "all" advantages, favours, and privileges really means "all."[462] The specific issue of whether MFN treatment applies to both substantive and procedural rights has not been addressed by the Appellate Body.

47. Third, although MFN treatment was meant to be unconditional, all of the WTO agreements contain exceptions to the application of MFN treatment so that in practice its application is more restricted than it appears. Exceptions for customs unions and free trade areas,[463] for safeguards and other trade remedies, as well as general exceptions and provisions for "special and differential treatment" all limit the actual scope of MFN treatment under the WTO agreements. Even though the Appellate Body has often taken a restrictive approach to the interpretation of exceptions,[464] their range and coverage nonetheless frequently limits the range and application of MFN treatment under WTO agreements.

48. The particular nature of the WTO system, with its own set of agreements and a dispute settlement process to interpret and apply these agreements, means that there is limited direct relevance of the interpretation of MFN provisions under the WTO for MFN clauses in other agreements. The interpretation of MFN treatment can continue within the WTO system regardless of how MFN clauses are treated in other contexts.

49. Nonetheless, MFN treatment within the WTO system is not completely contained within that system. It may apply beyond the scope of the WTO agreements. Prior to the WTO, the

[459] General Agreement on Tariffs and Trade 1994, 15 April 1994, United Nations, *Treaty Series*, vol. 1867, p. 187 at arts. II; III(4); IV; V(2), (5) and (6); IX(1), XIII(1); XVII(1); and XX(j).

[460] General Agreement on Trade in Services, 15 April 1994, United Nations, *Treaty Series* vol.1869, p. 183 at Article II.

[461] WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 25 September 1997) at para. 231.

[462] *Canada – Certain Measures Affecting The Automotive Industry*, WT/DS139/AB/R (adopted 19 June 2000) at para. 79.

[463] GATT, at art. XXIV. Customs unions and free trade areas are becoming of even greater importance with the proliferation of regional trade agreements.

[464] See for example: WTO Appellate Body Report, *United States - Import Prohibition Of Certain Shrimp And Shrimp Products*, WTO document WT/DS58/AB/R (12 October 1998).

question had arisen whether a GATT Contracting Party could by virtue of an MFN provision claim the benefits provided under a Tokyo Round "Code" to which it was not a party. That matter was never resolved. A contemporary question relates to whether a WTO Member that is not a party to one of the "Plurilateral Agreements" which are related to but not part of the WTO Agreements, can use the MFN provision to claim benefits under the Plurilateral Agreements even though it is not a party to that agreement. Again, this matter has yet to be resolved.

50. A related question arises under the MFN provision in GATS. Trade in services under GATS includes the provision of a service by a supplier of one Member through commercial presence of natural persons in the territory of another Member.[465] Article II of GATS provides:

> "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."

51. Measures affecting service suppliers that arise under bilateral investment treaties with third States potentially fall within the scope of article II. In other words, the question is whether a WTO Member could, by virtue of GATS article II, claim the benefit of the provisions of a bilateral investment treaty between another WTO Member and a third State to the extent that the measures under that treaty provide more favourable treatment to service suppliers of that third State. The Study Group has found no practice or jurisprudence on this.

52. Notwithstanding the fact that there are outstanding issues in relation to MFN treatment under the WTO that may become contentious in the future, the Study Group did not consider that it could add anything by pursuing those issues at the present time. The WTO has its own mechanism for resolving disputes and the WTO agreements are interpreted on the basis of articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).[466] The existence of an appellate structure ensures that panel interpretations of the variety of MFN provisions in the agreements can be rethought and if necessary overturned.

2. MFN in other trade agreements

53. Regional and bilateral trade agreements[467] generally do not include MFN provisions in relation to trade in goods. Such agreements already provide preferential treatment to all the parties in respect of tariff treatment, so MFN treatment has little relevance. Instead, national treatment is important. However, some regional agreements contain a form of MFN provision in respect of trade in goods, in that they provide that if the MFN customs duty rate is lowered then that rate should be provided to the other party once it falls below the regional trade agreement agreed rate.[468]

54. By contrast, regional or bilateral economic agreements that go beyond trade provide for MFN treatment in respect of services and investment.[469] In this respect, they are no different than the WTO in respect of services or bilateral investment agreements. In the case of such agreements, the approach to interpretation of MFN treatment would be no different than that

[465] GATS, art.1(2)(d).

[466] Done at Vienna on 23 May 1969, United Nations, *Treaty Series*, vol. 189, p. 150.

[467] The term "regional agreements" also includes agreements referred to as regional economic integration agreements, association agreements and customs unions.

[468] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *Official Journal of the European Union* L127 vol. 54 (14 May 2011), p. 9 at art. 2.5; Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, *Official Journal of the European Union* L352 vol. 45 (30 December 2002), p. 19 at art. 60(4).

[469] North American Free Trade Agreement, *International Legal Materials* vol. 32 (1993), pp. 289 and 605 at Chap.11, art.1103 (investment), art.1203 (services), and art.1406 (financial services).

applicable to bilateral investment agreements. However, so far there seems to be no judicial commentary on these provisions, and they have generally escaped academic analysis.

3. MFN in investment treaties

55. Obligations under investment agreements to provide MFN treatment are longstanding. They were found in the earlier treaties of friendship, commerce and navigation and have been continued in modern bilateral investment treaties, and regional trade agreements that include provisions on investment. MFN treatment and national treatment are thus included in bilateral investment treaties as if, as in the GATT, they are cornerstone obligations.

56. While MFN clauses in investment agreements are worded in a variety of ways, they generally mirror the "no less favourable treatment" language of GATT article II. For example, the agreement between Austria and the Czech and Slovak Republics of 15 October 1990 provides:

> "Each Contracting Party shall accord investors of the other Contracting Party treatment no less favourable than that accorded to its own investors or investors of a third State and their investments."[470]

57. In some cases an MFN clause includes both an obligation to provide MFN treatment and an obligation to provide national treatment. For example, the Argentina-United Kingdom agreement of 11 December 1990 provides:

> "Neither Contracting Party shall in its territory subject investments or returns of investors or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or companies or to investments or returns of nationals or companies of any third State."[471]

58. In other instances the obligation to provide MFN treatment is linked to the obligation to provide fair and equitable treatment. For example, the China-Peru agreement of 9 June 1994 provides:

> "Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.
>
> The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State."[472]

59. Notwithstanding the common obligation of MFN treatment in bilateral investment treaties, the way in which that obligation is expressed varies. In this regard, six types of obligation can be identified although some agreements may mix the different types of obligation within a single MFN clause.

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[470] Agreement between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments, done in Vienna on 15 October 1990, United Nations, *Treaty Series*, vol. 1653, p. 127 at art.3(1).

[471] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and protection of investments, done in London on 11 December 1990, at art.3(1), available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/126>.

[472] Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China concerning the encouragement and reciprocal protection of investments, done in Beijing on 9 June 1994, at arts.3(1), 3(2), available at <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/954>.

60. The first type is where the MFN obligation relates simply to "treatment" accorded to the investor or the investments. The Austria – Czech and Slovak Republics agreement is an example of this.

61. The second type of obligation is where the scope of the treatment to be provided has been broadened by referring to "all" treatment. One example of this is the Argentina-Spain agreement, which specifies that the MFN provision applies "[i]n all matters governed by this Agreement."[473]

62. The third type of obligation is where the term "treatment" is related to specific aspects of the investment process, such as "management," "maintenance," "use," and "disposal" of the investment to which MFN treatment applies.[474] In some instances agreements provide for MFN treatment in respect of the "establishment" of investment, thus providing protection for both the pre-investment period as well as the post-investment period.[475]

63. The fourth type consists of those cases where MFN treatment is related to specific obligations under the treaty, such as the obligation to provide fair and equitable treatment.

64. The fifth type of obligation is where MFN treatment is to be provided only to those investors or investments that are "in like circumstances"[476] or "in similar situations"[477] to investors or investments with which a comparison is being made.

65. A sixth type consists of those agreements where a territorial limitation appears to have been introduced. For example, the Italy-Jordan agreement of 21 July 1996 provides that the contracting parties agree to provide MFN treatment "within the bounds of their own territory."[478]

66. MFN provisions in investment agreements usually provide as well for exceptions where the obligation to provide MFN treatment does not apply. The most common exceptions relate to taxation, government procurement, or benefits that one party obtains through being party to a customs union.[479]

C. Interpretative issues relating to MFN provisions in investment agreements

67. It is widely accepted by investment dispute settlement tribunals that MFN clauses, as treaty provisions, must be interpreted in accordance with the rules of treaty interpretation embodied in articles 31 and 32 of the VCLT. However, controversies over the interpretation of

[473] Agreement on the reciprocal promotion and protection of investments, done at Buenos Aries on 3 October 1991, United Nations, *Treaty Series,* vol. 1699, p. 187.

[474] NAFTA provides for MFN treatment in respect of "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments." NAFTA, art.1103.

[475] *Ibid.*

[476] *Ibid*.

[477] Agreement between the Republic of Turkey and Turkmenistan concerning the reciprocal promotion and protection of investments, done at Ashgabat on 2 May 1992, at art. II, available at <http://investorstatelawguide.com/documents/documents/BIT-0335%20-%20Turkey%20-%20Turkmenistan%20(1992)%20[English].pdf>.

[478] Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the promotion and protection of investments, done at Amman on 21 July 1996, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1681>.

[479] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and protection of investments, done in London on 11 December 1990, at article 7, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/126>. See OECD, "Most Favoured Nation Treatment in International Law" *OECD Working Papers on International Investment,* vol. 2 (2004), p. 5.

MFN provisions sometimes reflect an underlying difference in the application of the VCLT provisions.[480]

68. Notwithstanding the variations in the wording of MFN clauses, there are interpretative issues that are common to all such clauses, whether in the field of trade, investment, or services. There are three aspects of MFN provisions that have given rise to interpretative issues, which will be dealt with below in turn: defining the beneficiary of an MFN clause, defining the necessary treatment, and defining the scope of the clause. Of these three major interpretative questions, only the scope of the "treatment" to be provided under an MFN provision has been subject to significant discussion and dispute before investment tribunals.

1. Who is entitled to the benefit of an MFN provision?

69. The first interpretative issue is that of defining the beneficiaries of an MFN clause. In 1978, the Commission described entitlement to the benefit of an MFN provision as accruing "to the beneficiary State or to persons or things in a determined relationship with that State." In investment agreements, the obligation is generally specified as providing MFN treatment to the "investor" or its "investment." Some agreements limit the benefit of an MFN provision to the investment.[481] However, while some investment agreements say no more than that, others qualify the beneficiary as having to be an investor or investment that is "in like circumstances" or in a "similar situation" to the comparator.

70. This has led to considerable controversy over what constitutes an "investment," in particular whether an investment must make a contribution to the host State's economic development.[482] However, the definition of investment is a matter relevant to the investment agreement as a whole and does not raise any systemic issues about MFN provisions or about their interpretation. Accordingly, the Study Group did not see any need to consider this matter further.

71. The term "in like circumstances" is found in the investment chapter of the North American Free Trade Agreement (NAFTA), but is not included in many other agreements. The words seem to place some limitation upon which investors or investments can claim the benefit of an MFN provision – suggesting perhaps that only those investors or investments that are in "like circumstances" with those of the comparator treaty can do so.

72. The question arises whether in fact the inclusion of the qualification of "in like circumstances" adds anything to an MFN clause. Under the *ejusdem generis* principle a claim to MFN can in any event only be applied in respect of the same subject matter and in respect of those in the same relationship with the comparator. This is the effect of 1978 draft articles 9 and 10.

73. In the MAI negotiations, the parties were divided precisely on this point, and thus there was never agreement on whether to include the words "in like circumstances" in the negotiating text. The practical importance of this issue is whether interpretations of agreements that contain the words "in like circumstances" are relevant to the interpretation of agreements that do not contain such terminology. As noted below, there are dangers in adopting interpretations of one investment agreement as applicable automatically to other agreements, and this is even more so where the wording of the two agreements is different.

[480] See paras. 174-193 *infra*.

[481] The Energy Charter Treaty (Annex 1 To The Final Act Of The European Energy Charter Conference), done at Lisbon on 17 December 1994, United Nations, *Treaty Series*, vol. 2080, p. 95 at art.10(7).

[482] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/4, para. 52; and more recently, *Standard Chartered Bank v. United Republic of Tanzania*, Award, ICSID Case No. ARB/10/12, November 2, 2012.

2. What constitutes treatment that is "no less favourable"?

74. The second interpretative issue is that of determining what constitutes treatment that is "no less favourable." The Commission in 1978 had little to say about this matter, apart from explaining why the term "no less favourable" was used rather than the term "equal" and that treatment could be no less favourable if the comparator does not actually receive the treatment but nonetheless is entitled to receive it.[483] To some extent, this question is related to the third issue, determining the scope of treatment.

75. One view is that the rationale for granting "no less favourable" treatment is the desire of the beneficiary State to ensure that there is equality of competitive opportunities between its own nationals and those of third States.[484] This is the rationale for providing MFN in respect of trade in goods under GATT and the WTO, and the same rationale is fundamental for investors and their investments. An alternative view is that the objective of MFN and national treatment is to recognize and give effect to "rights" of investors."[485] Even so, the purpose of a "right" in the context of MFN and national treatment is to ensure that an investor has equality of competitive opportunities with other foreign investors or with nationals as the case may be.

76. Where the "no less favourable" provision provides a link with "national treatment" provisions, the granting State agrees to provide treatment "no less favourable" than that which it provides to its own nationals. Such provision of national treatment has the same *ejusdem generis* problem of determining sufficient similarity between subject matters. Equally, national treatment provisions, like MFN provisions, often use the term "in like circumstances" or "in similar situations" to define the scope of the entitlement of a beneficiary of a national treatment provision. Thus, both clauses give rise to similar interpretative questions.

77. The 1978 draft articles had little to say about the link between MFN and national treatment. It provided that the two could stand together in one instrument without affecting MFN treatment.[486] It also provided that MFN treatment applied even if the treatment granted to the third State was granted as national treatment. In the view of the Study Group, interpretations of phrases such as "in like circumstances" or "in similar situations" in the context of national treatment can provide important guidance for the interpretation of those terms in the context of MFN clauses.

78. The meaning of "no less favourable" has not been the subject of much controversy in investment disputes involving MFN treatment. In the MAI negotiations there was some suggestion that the term "equal to" should be used as the standard for treatment under the MFN provision instead of "no less favourable" treatment. Although the matter was never finally resolved, the counterargument was that an MFN provision is not intended to limit the granting State in what it can provide. It may provide better than "equal" treatment if it wishes, although that may have implications for its other MFN agreements. "No less favourable" provides a floor for the treatment to be provided.

3. What is the scope of the treatment to be provided under an MFN clause?

79. The final interpretative issue is the scope of the right being accorded under an MFN clause. In other words, what does "treatment" encompass? This question was identified by the Commission in 1978 in article 9 of the draft articles when it provided that an MFN clause

[483] See commentary to draft art. 5, *Yearbook…1978*, vol. II (Part Two), p. 21.

[484] Todd Weiler, *The Interpretation Of International Investment Law: Equality, Discrimination, and Minimum Standards Of Treatment In Historical Context* (Leiden: Martinus Nijhoff Publishers, 2013), pp. 415-416.

[485] DiMascio and Pauwelyn.

[486] *Yearbook…1978*, vol. II (Part Two), p. 51 (draft art.19).

applies to "only those rights that fall within the subject matter of the clause."[487] This, as the Commission pointed out in its commentary, is known as the *ejusdem generis* rule.[488]

80. The question of the scope of the treatment to be provided under an MFN provision has become one of the most vexed interpretative issues under international investment agreements. The problem concerns the applicability of an MFN clause to procedural provisions, as distinct from the substantive provisions of a treaty. It also involves the larger question of whether any rights contained in a treaty with a third State, which are more beneficial to an investor, could be relied upon by such an investor by virtue of the MFN clause.

81. MFN clauses in a basic treaty have been invoked to expand the scope of the treaty's dispute settlement provisions in several ways. These include: (a) to invoke a dispute settlement process not available under the basic treaty; (b) to broaden the jurisdictional scope where the basic treaty restricted the ambit of the dispute settlement clause to a specific category of disputes, such as disputes relating to compensation for expropriation; and (c) to override the applicability of a provision requiring the submission of a dispute to a domestic court for a "waiting period" of 18 months, prior to submission to international arbitration. It is in this third circumstance that MFN has been most commonly invoked, thus, particular attention will be given to this it.

(a) MFN and procedural matters: origins of the issue

82. The origins of the use of MFN in respect of access to procedural matters is often traced back to the 1956 arbitral award in the *Ambatielos* claim[489] where it was held that the "administration of justice" was an important part of the rights of traders and thus by virtue of the MFN clause should be treated as included within the phrase "all matters relating to commerce and navigation."[490]

83. Almost 45 years later the matter came to the fore again in *Maffezini v. The Kingdom of Spain*[491] where the tribunal accepted the claimant's argument that it could invoke the MFN clause in the 1991 Argentina-Spain Bilateral Investment Treaty (BIT), in order to ignore the requirement of an 18-month waiting period before bringing a claim under the BIT. The claimant relied instead on the 1991 Spain-Chile BIT, which did not include such a requirement and allowed an investor to opt for international arbitration after six months.[492] The MFN clause in the Argentina-Spain BIT provided:

> "In all matters governed by this Agreement, this treatment shall be not less favourable than that extended by each Party to the investments made in its territory by investors of a third country."[493]

84. In upholding the claimant's argument, the tribunal took into account the broad terms of the MFN clause, which applied "in all matters governed by this Agreement." It placed emphasis on the need to identify the intention of the contracting parties, the importance of assessing the past practice of States concerning the inclusion of the MFN clause in other BITs (the assessment of which favoured the claimant's argument), and the significance of taking into account public policy considerations.

[487] *Ibid*., p. 27 (text of draft article 9).
[488] *Ibid*. (commentary to draft arts. 9 and 10).
[489] *The Ambatielios Claim (Greece v. United Kingdom of Great Britain and Northern Ireland), United Nations Reports of International Arbitral Awards*, vol. XII, p. 83.
[490] *Ibid.*, p. 107.
[491] *Emilio Agustin Maffezini v. Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB 97/7 (25 January 2000), *ICSID Reports*, vol. 5, p. 396.
[492] *Ibid.*, para. 39.
[493] Agreement on the reciprocal promotion and protection of investments, done at Buenos Aries on 3 October 1991, United Nations, *Treaty Series*, vol. 1699, p. 187 at art. IV.

85. The tribunal relied in particular on the *Ambatielos* claim[494] where the Commission of Arbitration had confirmed the relevance of the *ejusdem generis* principle. The Commission stated that an MFN clause can only attract matters belonging to the same category of subject matter and that "the question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty."[495]

86. In respect of the *ejusdem generis* principle, the *Maffezini* tribunal took the view that dispute settlement arrangements, in the current economic context, are inextricably related to the protection of foreign investors, and that dispute settlement is an extremely important device which protects investors. Therefore, such arrangements were not to be considered as mere procedural devices but arrangements designed to better protect the rights of investors by recourse to international arbitration.

87. From this, the tribunal concluded that,

> "… if a third party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the ejusdem generis principle"[496]

88. This application of the MFN clause to dispute settlement arrangements would, in the view of the tribunal, result in the "harmonization and enlargement of the scope of such arrangements."[497]However, the tribunal was conscious of the fact that its interpretation of the MFN clause was a broad one, and could give rise, *inter alia*, to "disruptive treaty shopping."[498] It noted that,

> "As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight."[499]

89. Thereafter, the tribunal went on to set out four situations in which, in its view, an MFN provision could not be invoked:

- where one Contracting Party had conditioned its consent to arbitration on the exhaustion of local remedies, because such a condition reflects a "fundamental rule of international law";
- where the parties had agreed to a dispute settlement arrangement which includes a so-called "fork in the road" provision, because to replace such a provision would upset the "finality of arrangements" that countries consider important as matters of public policy;
- where the agreement provides for a particular arbitration forum, such as the International Centre for Settlement of Investment Disputes (ICSID), and a party wishes to change to a different arbitration forum; and
- where the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure (e.g. NAFTA), because these very specific provisions reflect the precise will of the contracting parties.[500]

[494] *Maffezini*, para 49.
[495] *Ambatielios*, p. 107.
[496] *Maffezini*, para. 56.
[497] *Ibid.*, para. 62.
[498] *Ibid.*, para. 63.
[499] *Ibid.*, para. 62.
[500] *Ibid.*, at para. 63.

90. The tribunal also left open the possibility that "other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals."[501]

(b) The subsequent interpretation by investment tribunals of MFN clauses in relation to procedural matters

91. Subsequent decisions of investment tribunals have been divided on whether to follow *Maffezini*. It has been widely recognized by investment tribunals, both explicitly and implicitly, that the question of the scope of MFN provisions in any given bilateral investment treaty is a matter of interpretation of that particular treaty.[502] Investment tribunals frequent cite articles 31 and 32 of the VCLT and principles such as *expressio unius exclusio alterius*. Tribunals assert that they are seeking to ascertain the intention of the parties. Yet there is no systematic approach to interpretation and different factors, sometimes unrelated to the words used in the treaties before them, appear to have been given weight.

92. The Study Group sought to identify factors that have appeared to influence investment tribunals in interpreting MFN clauses and to determine whether there were particular trends. In doing so, the Study Group was conscious of the need to reinforce respect for the rules of interpretation set out in the VCLT, which are applicable to all treaties. The most prominent factors that have influenced investment tribunals in their decisions regarding MFN application to procedural matters are set out below.

(i) The distinction between substantive and procedural obligations

93. A frequent starting point is for tribunals to determine whether, in principle, an MFN clause could relate to both procedural and substantive provisions of the treaty. In *Maffezini* the question posed was:

> "whether the provisions on dispute settlement contained in a third-party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favored nation clause applies under basic treaties on commerce, navigation or investments and, hence, whether they can be regarded as a subject matter covered by the clause."[503]

94. As noted above, the tribunal concluded that MFN treatment could be extended to procedural provisions subject to certain "public policy" considerations.[504] In reaching that decision, the tribunal invoked the decision of the Commission of Arbitration in *Ambatielos* and said, "there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce."[505]

95. Key to the decision in *Maffezini* is the conclusion that dispute settlement provisions are, in principle, part of the protection for investors and investments provided under bilateral investment agreements. Hence dispute settlement provisions by definition are almost always capable of being incorporated into an investment agreement by virtue of an MFN provision. Under an investment agreement, to use the language of article 9 of the 1978 draft articles, dispute settlement falls "within the limits of the subject matter" of an MFN clause.

96. The conclusion that procedural matters, specifically dispute settlement provisions, are by their very nature of the same category as substantive protections for foreign investors has been

[501] *Ibid.*

[502] *Salini*; *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/02/8 (3 August 2004) (Argentina-Germany BIT), available at <http://www.italaw.com/sites/default/files/case-documents/ita0788.pdf>.

[503] *Maffezini*, para. 46.

[504] *Ibid.*,para. 56.

[505] *Ibid.*, para. 54.

an important part of the reasoning in some subsequent decisions of investment tribunals. In *Siemens*, the tribunal stated that dispute settlement "is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause."[506] The tribunal in *AWG* said that it could find "no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty."[507]

97. Nevertheless, some tribunals have queried whether dispute settlement provisions are inherently covered by MFN clauses. The *Salini* tribunal doubted that the *Ambatielos* decision was an authority for such a proposition,[508] citing the views of the dissenting judges in the prior International Court of Justice decision to the effect that "commerce and navigation" did not include the "administration of justice."[509] The *Salini* tribunal further pointed out that, in any event, when the Commission of Arbitration in *Ambatielos* referred to the "administration of justice," it was referring not to procedural provisions or dispute settlement, but rather to substantive provisions under other investment treaties relating to the treatment of nationals in accordance with justice and equity.[510]

98. The *Telenor* tribunal was more emphatic about the exclusion of procedural provisions from the application of an MFN clause, stating:

> "In the absence of language or context to express the contrary, the ordinary meaning of 'investments shall be accorded treatment no less favourable that that accorded to investments made by investors of any third state' is that investor's *substantive* rights in respect of the investment are to be treated no less favourably under a BIT between the host state and a third state, and there is no warrant for interpreting the above phrase to include procedural rights as well."[511]

99. The view that MFN clauses in investment treaties can, in theory, apply to both procedural and substantive matters does not mean that they will always be so applied.[512] However, in a number of cases tribunals have interpreted MFN provisions to encompass dispute settlement procedures on the basis that in principle MFN clauses do apply to both.

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[506] *Siemens*, para. 102.

[507] *AWG Group Ltd. v. The Argentine Republic*, Decision on Jurisdiction, UNCITRAL (3 August 2006), para. 59 (Argentina-UK BIT) available at <http://www.italaw.com/cases/106>. See also *National Grid, plc v. The Argentine Republic*, Decision on Jurisdiction, UNCITRAL (20 June 2006), para. 89 (Argentina-UK BIT) available at <http://www.italaw.com/cases/732>; *Gas Natural SDG, S.A. v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/10 (17 June 2005), para. 29 (Argentina-Spain BIT) available at <http://www.italaw.com/documents/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf>; *RosInvest Co. UK Ltd. v. The Russian Federation*, Award on Jurisdiction, SCC Case No. V079/2005 (1 October 2007), paras. 131-132 (UK-USSR BIT) available at <http://www.italaw.com/sites/default/files/case-documents/ita0719.pdf>;; *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, Award on Preliminary Objections, SCC No. 24/2007 (20 March 2009), para. 100 (Spain/Russia BIT) available at <http://www.italaw.com/sites/default/files/case-documents/ita1075.pdf>; *Austrian Airlines v. The Slovak Republic, final award*, UNCITRAL (9 October 2009), para. 124 (Austria-Czech/Slovak Republic BIT) available at <http://www.italaw.com/cases/103>.

[508] *Salini*, para. 112; see also *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004 (21 April 2006), para. 175 (Belgium/Luxembourg-USSR BIT).

[509] *Salini*, para. 106. *Ambatielos (Greece* v. *United Kingdom), Merits: Obligation to Arbitrate, Judgment, I.C.J. Reports 1953*, p. 10.

[510] *Ibid.*, at paras. 111-112.

[511] Emphasis in original. *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15 (13 September 2006), para. 92 (Norway-Hungary BIT).

[512] *Renta*, para. 100; *Austrian Airlines*; *ICS Inspection and Control Services Limited (United Kingdom) v. Republic of Argentina*, Award on Jurisdiction, UNCITRAL, PCA Case No. 2010-9 (10 February 2012), (UK/Argentina BIT).

(ii) The interpretation of MFN provisions as a jurisdictional matter

100. A number of tribunals have been influenced by the view that an MFN provision cannot be applied to dispute settlement provisions if they relate to the jurisdiction of the tribunal. This has led to a divergence of views amongst tribunals in respect of two different issues. The first issue is whether jurisdictional matters require a stricter approach to interpretation. The second issue is whether the applicability of MFN to dispute settlement provisions concerns the jurisdiction of a tribunal.

1. Standard for interpreting jurisdictional matters

101. In *Plama*, the tribunal treated the question of the scope of an MFN clause as one of agreement to arbitrate, stating that "[i]t is a well established principle, both in domestic and international law, that such an agreement should be clear and unambiguous."[513] As a result, "the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed."[514] Therefore, the party seeking to apply an MFN clause to a question of jurisdiction bears the burden of proving such application was clearly intended – a high threshold to meet. This view was endorsed fully by the tribunal in *Telenor*[515] and is echoed in *Wintershall*.[516]

102. However, this approach has been met with considerable opposition. It was rejected in *Austrian Airlines*, and in *Suez*, where the tribunal said "dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal."[517] Jurisdictional clauses, the tribunal said, must be interpreted as any other provision of a treaty, on the basis of the rules of interpretation set out in articles 31 and 32 of the VCLT.[518]

103. The view that because the application of MFN to dispute settlement matters is a question of jurisdiction there is a higher burden on a party seeking to invoke an MFN provision has found little support in the decisions of more recent investment tribunals, although it has been endorsed by at least some commentators.[519] Those opposing the approach have also claimed that it is inconsistent with general international law on the interpretation of jurisdictional provisions. However, the *ICS* tribunal has suggested that the *Plama* tribunal was not establishing a jurisdictional rule; it was simply pointing out that consent to jurisdiction could not be assumed.[520]

2. Dispute settlement and jurisdiction

[513] *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24 (8 February 2005), para. 198 (Cyprus-Bulgaria BIT).

[514] *Ibid.*, at para. 204.

[515] *Telenor*, para. 91.

[516] *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, ICSID Case No. ARB/04/14 (8 December 2008), para. 167 (Argentina-Germany BIT). The tribunal took the view that procedural provisions could not be included within the scope of an MFN provision unless "the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted: which is not so in the present case."

[517] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/17 (16 May 2006), para. 64 (France-Argentina and Spain-Argentina BITs).

[518] *Austrian Airlines*, para. 95. The tribunal also placed reliance on the statement in the separate opinion of Judge Higgins in the *Oil Platforms* case that there is no support in the jurisprudence of the PCIJ or the ICJ for a restrictive approach to the interpretation of compromissory clauses, and in fact no policy of being either liberal or strict in their interpretation: *Oil Platforms (Islamic Republic of Iran v. United States of America) Preliminary Objections*, Judgment of 12 December 1996, Separate Opinion by Judge Higgins, *I.C.J. Reports 1996*, p. 857 at para. 35, cited in *Austrian Airlines* at para. 120.

[519] Campbell MacLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press. 2008), para. 7.168.

[520] *ICS v. Argentina*, paras. 281-2.

104. Tribunals more recently have given renewed attention to the question of whether the application of MFN clauses to dispute settlement provisions affects the jurisdiction of a tribunal. Substantive rights and procedural rights are different in international law, it is argued, because unlike domestic law a substantive right does not automatically carry with it a procedural right to compel enforcement.[521] The fact that a State is bound by a substantive obligation does not mean that it can be compelled to have that obligation adjudicated. The right to compel adjudication requires an additional acceptance of the jurisdiction of the adjudicating tribunal.[522]

105. Under this view, in order to enforce substantive rights under the BIT, a claimant has to meet the requirements *ratione materiae*, *ratione personae* and *ratione temporis* for the exercise of jurisdiction by a dispute settlement tribunal. For, example, an individual that does not meet the criteria under a BIT to be an investor cannot become an investor by invoking an MFN provision.[523] Just as MFN cannot be used to change the conditions for the exercise of substantive rights, MFN cannot be used to change the conditions for the exercise of procedural or jurisdictional rights. An investor who has not met the requirements for commencing a claim against the respondent State cannot avoid those requirements by invoking the procedural provisions of another BIT.

106. The matter has also been put in terms of consent to arbitration.[524] A tribunal's jurisdiction is formed by the conditions set out in the relevant investment agreement stipulating the basis on which the respondent State has consented to the exercise of jurisdiction by the tribunal. Compliance by the claimant investor with those conditions is essential for a tribunal to exercise jurisdiction over the dispute. Unless a respondent State waives the application of the conditions of its consent to the exercise of jurisdiction, a tribunal has no jurisdiction to hear a claim even though the claimant is an investor within the meaning of the BIT in question. On that basis MFN cannot be used to change the basis for exercising jurisdiction.

107. Support for the view that the matter is one of jurisdiction has come from the decision of the tribunal in *ICS v. Argentina*, which relies in part on the statement of the International Court of Justice in *Democratic Republic of Congo v. Rwanda*,[525] that when

> "consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application."[526]

108. The *ICS* tribunal concluded that the 18-month litigation requirement in the BIT was a prerequisite to Argentina's acceptance of a claim being brought before the tribunal and that "failure to respect the pre-condition to the Respondent's consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute."[527]

109. In deciding whether the 18-month litigation requirement was a matter relating to jurisdiction, the *ICS* tribunal looked at the meaning of the word "treatment" in article 3(2) of the UK-Argentine BIT. It accepted that "treatment" can have a broad meaning and that there is no inherent limitation to substantive matters. However, applying what it referred to as the

[521] *Impregilo S.p.A. v. Argentine Republic*, Concurring and Dissenting Opinion of Professor Brigitte Stern, ICSID Case No. ARB/07/17 (21 June 2011).

[522] *Ibid.*

[523] Indeed, this position seems to have been accepted by the tribunal in *HICEE B.V. v. The Slovak Republic*, Partial Award, UNCITRAL, PCA Case No. 2009-11 (23 May 2011), para. 149 (Netherlands/Czech and Slovak Republic BIT).

[524] Dissenting Opinion of arbitrator Christopher Thomas in *Hochtief AG v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31 (24 October 2011), (Germany/Argentina BIT).

[525] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Judgment, I.C.J. Reports 2006*, p. 6 at para. 88.

[526] *ICS v. Argentina*, para. 258.

[527] *Ibid.*, at para. 362.

principle of "contemporaneity in treaty interpretation,"[528] the tribunal considered what the parties would have understood by the term at the time of the conclusion of the BIT. In the light of the jurisprudence of the time, and the World Bank draft guidelines on the treatment of foreign direct investment, the tribunal concluded that the parties were most likely to have considered that the term "treatment" related only to substantive obligations.

110. The *ICS* tribunal also pointed to: (a) the limitation of MFN treatment under the BIT to the "management, maintenance, use, enjoyment or disposal" of investments; (b) the limitation of the MFN provision to treatment by the host State "within its territory"; (c) the fact that exceptions to MFN treatment under the BIT relate to substantive matters only; and (d) the potential pointlessness (lack of *effet utile*) of including an 18-month litigation requirement in a treaty when the contracting party had already concluded treaties with no such requirement and thus the 18-month litigation requirement would have been rendered nugatory from the outset by the application of an MFN provision. All of these factors, the tribunal concluded, indicated that the parties could not have had the intention when concluding the UK-Argentina BIT to include international dispute settlement provisions within the realm of the application of the MFN clause.[529]

111. The approach taken in *ICS* was reiterated in *Daimler Financial Services AG v. Argentine Republic*[530] where the tribunal concluded that the 18-month delay requirement was a condition precedent to the exercise of jurisdiction. Accordingly, it could not be modified by the application of MFN. A similar result was reached in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*,[531] where the tribunal took the view that the respondent State's consent to arbitration was conditioned on the fulfillment of the conditions stated in the BIT, including an 18-month delay requirement. Since failure to comply with such a provision had the effect of denying jurisdiction, the matter could not be cured by the application of an MFN provision. Similarly, in *ST-AB GmbH (Germany) v. Republic of Bulgaria*,[532] non-compliance with the 18-month delay requirement was also found to deprive the tribunal of jurisdiction.

112. However, the tribunal in *Hochtief* took the view that an 18-month domestic litigation requirement is not a matter of jurisdiction.[533] Rather, it is a matter of admissibility – something that could be raised as an objection by a party to the dispute, but need not be. The tribunal distinguished between a provision affecting a right to bring a claim (jurisdiction) and a provision affecting the way in which a claim has to be brought (admissibility). Thus, the fact that the claimant had ignored the 18-month litigation requirement under the Germany-Argentina BIT and relied instead on the dispute settlement provisions of the Argentina-Chile BIT did not affect its jurisdiction.[534]

113. In *Teinver*[535] the tribunal upheld the application of an MFN provision to both an 18-month delay requirement and a 6-month negotiating period. The tribunal considered these provisions as relevant to admissibility and not to jurisdiction. However, it appeared to be done

[528] *Ibid.*, at para. 289.

[529] *Ibid*., at para. 326. The tribunal accepted that domestic dispute settlement was covered by the MFN provision since it took place within the territory of the host State.

[530] *Daimler Financial Services AG v. Argentine Republic,* Award, ICSID Case No. ARB/05/1, 22 August 2012. The decision was by majority with one arbitrator dissenting.

[531] *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, ICSID Case No. ARB/10/1, 2 July 2013, available at < http://www.italaw.com/sites/default/files/case-documents/italaw1515_0.pdf>.

[532] *ST-AD GmbH v. Republic of Bulgaria*, Award on Jurisdiction, UNCITRAL PCA Case No. 2011-06, 18 July 2013.

[533] *Hochtief* (majority opinion).

[534] *Ibid*.

[535] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/09/01, December 21, 2012.

on the basis of an UNCTAD report on MFN clauses,[536] which called cases relating to the 18-month litigation requirement as admissibility cases and other cases where an MFN clause was invoked in relation to dispute settlement as "scope of jurisdiction" cases. But there is no explanation in the UNCTAD report as to why it treats cases relating to the 18-month litigation requirement as concerning admissibility rather than as concerning jurisdiction.

114. The cases that have not allowed the 18-month requirement to be set aside share a common approach. There has to be evidence that the MFN provision was designed to apply to change the jurisdictional limitations on the tribunal because the host State's consent was predicated on compliance with those limitations. Indeed, the implicit effect is to require "clear and unambiguous" evidence of intent to alter the jurisdiction of a tribunal, reinstating the *Plama* approach, although for different reasons.

(iii) The specific intent of other treaty provisions

115. In some cases, when interpreting MFN provisions, tribunals have taken into account the fact that the benefit sought to be obtained from the other treaty has already been covered, in a different and more specific way, in the basic treaty itself. In a sense, this is at the very core of what MFN is about: it seeks to provide something better than what the beneficiary would otherwise receive under the basic treaty. On that basis, it would seem inevitable that if the basic treaty provides for a certain kind of treatment, the consequence of the application of an MFN clause is that the treaty provision in the basic treaty would be overridden.

116. In *RosInvest,* the tribunal took the view that the fact that the operation of the MFN provision would broaden the scope of the jurisdiction of the tribunal was "a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty."[537]

117. However, the contrary view has also been taken. In the *CME* case, the dissenting arbitrator, Ian Brownlie, was not prepared to use an MFN clause to import into the treaty an alternative formula for compensation, for this would render nugatory the express provision in the treaty for compensation.[538] In *Austrian Airlines* the tribunal considered that the particular provisions of the treaty relating to jurisdiction were themselves a clear indication that the parties did not intend to allow the jurisdiction of the tribunal to be expanded by means of an MFN provision. In the view of the tribunal, the specific intent of those provisions was not to be overridden by the general intent of the MFN provision.[539] The tribunal reinforced this conclusion by looking at the negotiating history of the Austria-Slovakia BIT where a wider formulation of the tribunal's jurisdiction had been rejected. In *Berschader,* the tribunal looked at other provisions of the treaty in order to show that there were some provisions to which the MFN clause could not apply, and thus the expression "all matters covered by the present Treaty" could not be taken literally.[540]

118. In *Austrian Airlines* the tribunal also considered the MFN provision in the context of the other provisions of the treaty, placing emphasis on the fact that the treaty itself provided specifically for a limited scope to arbitration. In the view of the tribunal, given that there was in the treaty a "manifest and specific intent" to limit arbitration to disputes over the amount of

[536] UNCTAD Series on International Investment Agreements vol. II, *Most Favoured-Nation Treatment,* 24 January 2011, document UNCTAD/DIAE/IA/2010/1, at pp. 66-67.

[537] *RosInvest,* para. 131. In *Renta,* para. 92, the tribunal stated "the extension of commitments is in the very nature of MFN clauses."

[538] *CME Czech Republic B.V. v. The Czech Republic,* Separate Opinion on the Issues at the Quantum phases, UNCITRAL (14 March 2003), para. 11 (Netherlands-Czech Republic BIT) available at <http://italaw.com/cases/documents/282>.

[539] *Austrian Airlines,* para. 137.

[540] *Berschader,* para. 192.

compensation as opposed to disputes over the principle of compensation, "it would be paradoxical to invalidate that specific intent by reference to the general, unspecific intent expressed in the MFN clause."[541] The *Tza Yap Shum* tribunal also took the view that the general intent of an MFN provision must give way to the specific intent as set out in a particular provision in the basic treaty.[542]

(iv) The practice of the parties

119. The other treaty-making practice of the parties to the BIT, in respect of which an MFN claim has been made, has been referred to by some tribunals as a means to ascertain the intention of the parties regarding the scope of the MFN clause. In *Maffezini* the tribunal reviewed the BIT treaty-making practice of Spain, noting that Spanish practice was to allow disputes to be brought without the 18-month requirement imposed in the Argentina-Spain BIT. The tribunal also noted that the Argentina-Spain BIT was the only Spanish BIT that used the broad language "in all matters governed by this Agreement" in its MFN clause.[543] However, the tribunal did not make clear either the legal relevance of this subsequent practice of the parties or the interpretational justification for referring to it.

120. In *Telenor*,[544] the tribunal regarded the practice of the parties as relevant in a somewhat different way. The fact that Hungary had concluded other BITs that did not limit the scope of arbitration led the tribunal to conclude that a limited scope for arbitration in the BIT between Hungary and Norway was indeed intended. Thus the MFN clause could not be used to expand the scope of arbitration.

121. In *Austrian Airlines*, the tribunal relied on the other treaty practice of Slovakia to confirm its conclusion.[545] In contrast, the tribunal in *Renta* declined to consider the practice of Russia in its other BITs, noting that since its decision was based on the text of the BIT before it, practice under other BITs could not supplant that text.[546]

122. It is not clear on what legal basis tribunals justify making reference to the subsequent practice of one State alone. Is it a Vienna Convention-based aid to interpretation or is it an independent form of verification of some implicit intent of the parties, or at least of the party against which the claim is being made? In *Plama* the tribunal stated: "It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into."[547] However, the tribunal does not indicate the basis on which it considered that treaties concluded by a State with a third party are relevant to the interpretation of a treaty between that State and another State, although it may have been relying implicitly on article 32 of the VCLT.

(v) The relevant time for determining the intention of the parties

123. Most tribunals have not considered the time at which the intention of the parties to a BIT should be ascertained. However, in *ICS* the tribunal addressed the issue specifically, indicating that the relevant time was at the conclusion of the treaty and interpreted the term "treatment" on the basis of its meaning at that time.[548] According to the tribunal, the principle of

[541] *Austrian Airlines*, para. 135.
[542] *Señor Tza Yap Shum v. The Republic of Peru*, Decision on Jurisdiction and Competence (Spanish), ICSID Case No. ARB/07/6 (19 June 2009) at para. 220 (Peru-China BIT).
[543] *Maffezini*, para. 57.
[544] *Telenor*, paras 96-97.
[545] *Austrian Airlines*, para. 134.
[546] *Renta*, para. 120.
[547] *Plama*, para. 195.
[548] *ICS v. Argentina*, para. 289.

"contemporaneity" in treaty interpretation must be applied. Although no tribunal has explicitly disagreed with this position, tribunals prior to *ICS* had not looked explicitly at the meaning of an MFN clause at the date the treaty was concluded. They had looked at preparatory work but in the absence of any indication in the *travaux préparatoires* the MFN clause was interpreted without any reference to whether it was being given a contemporaneous or a present-day meaning.

(vi) The content of the provision to be changed by invoking by an MFN provision

124. The question arises whether the content of the provision in the basic treaty that is to be affected has had an influence on the willingness of tribunals to allow an MFN clause to be invoked. In this regard, it is noteworthy that of the 18 cases so far where an MFN provision has been invoked successfully, 12 have related to the same provision, an obligation to submit a claim to the domestic courts and to litigate for 18 months before invoking dispute settlement under the BIT. In each case, the effect of the MFN provision was to relieve the claimant from the obligation to litigate domestically for that 18-month period. These cases involved BITs entered into by Argentina with Germany, Spain, and the United Kingdom. Although the substantive effect of the 18-month litigation requirement was the same, the MFN provisions invoked were not worded in the same way.

125. The view that the nature of the provision in the basic treaty might have influenced the outcome was hinted at in *Plama*, where the tribunal (not dealing with an 18-month domestic litigation requirement) said that the decision in *Maffezini* was "understandable" since it was attempting to neutralize a provision that was "nonsensical from a practical point of view."[549]

126. In *Abaclat v. Argentina,*[550] the tribunal took the view that delaying the right of an investor to bring a claim for 18 months was inconsistent with the express objective of the BIT of providing expeditious dispute settlement and therefore could be ignored by the claimant. This view was rejected, however, by the tribunal in *ICS v. Argentina*. A tribunal, the *ICS* tribunal said, cannot "create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question."[551]

127. Attempts to use MFN to add other kinds of dispute settlement provisions, going beyond an 18-month litigation delay, have generally been unsuccessful. In *Salini*, an MFN provision was invoked to change the dispute settlement procedure for contract disputes. In *Plama*, an MFN provision was invoked to change the dispute settlement process from *ad hoc* arbitration to ICSID dispute settlement. These, then, were efforts to change one form of arbitration for another, yet both tribunals rejected them.

128. Conversely, one tribunal has allowed a claimant to invoke MFN to substitute one form of dispute settlement for another. In *Garanti Kos LLP* v. *Turkmenistan*,[552] the tribunal decided that where resort to ICSID arbitration under the UK-Turkmenistan BIT was available only with

[549] *Plama*, para. 224. However, it is not clear why the 18-month domestic litigation provision was regarded as nonsensical. It provided an opportunity for the matter to be resolved in the domestic courts – a limited form of exhaustion of local remedies requirement with a guarantee that the investor could not be delayed beyond 18 months.

[550] The majority in *Abaclat* did not deal with an MFN claim. However, the tribunal did deal with the 18-month litigation requirement under the heading of "Admissibility of the Claim." *Abaclat and Others v. Argentine Republic (Case formerly known as Giovanna a Beccara and Others)*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5 (4 August 2011), (Italy-Argentina BIT). The contrary view was expressed in the dissent of arbitrator Georges Abi-Saab, at paras 31-33.

[551] Furthermore, the *ICS* tribunal said, there was no proof before it that could lead it to the conclusion that the Argentine courts would be ineffective in dealing with the matter. *ICS v. Argentina*, paras. 267-269. See also the dissenting opinion of arbitrator J. Christopher Thomas in *Hochtief*.

[552] *Garanti Kos LLP* v. *Turkmenistan*, Decision on the Objection to Jurisdiction, 3 July 2013, ICSID Case No. ARB/11/20, the decision was by majority. Arbitrator Laurence Boisson de Chazournes attached a dissenting view.

the consent of the Respondent, which it had not given, consent to ICSID arbitration could be found under other BITs entered into by Turkmenistan and imported into the UK-Turkmenistan BIT through the application of MFN. As a result, arbitration under the UNCITRAL rules, which was the fall-back position under UK-Turkmenistan BIT in the absence of agreement on another form of dispute settlement, was, by way of MFN, supplanted by ICSID arbitration.

129. However, even if the cases involving the 18-month domestic litigation requirement can be explained in part by a view that that the particular requirement was somewhat trivial, in fact the reasoning of the tribunals is not based on the relative importance of a provision with an 18-month domestic litigation requirement. As pointed out above, in many instances the reasoning was based on the assumption that MFN clauses in BITs by their very nature cover dispute settlement.

130. Other cases that have allowed MFN to be used to obtain the benefit of the provisions of third party treaties relate to substantive rather than procedural issues. In *RosInvest*, the tribunal considered that on the basis of the MFN clause in the UK-USSR BIT it had jurisdiction over the legality of an alleged expropriation and not just over the narrower question of matters relating to compensation, which is what the UK-USSR BIT had provided for.

131. However, two tribunals have rejected such a use of MFN clauses. In *Renta* the majority of the tribunal was not prepared to interpret the MFN provision in the Spain-Russia agreement to allow claims beyond compensation for expropriation because in its view the MFN provision in question applied only to the granting of fair and equitable treatment.[553] The *Austrian Airlines* tribunal equally found, on the basis of the interpretation of the MFN clause, that it could not be expanded beyond the express grant of jurisdiction to deal with matters relating to compensation in the event of expropriation.[554]

132. In *MTD* the tribunal was prepared to broaden the scope of fair and equitable treatment under the Chile-Malaysia BIT by reference to fair and equitable treatment in the Chile-Denmark and Chile-Croatia BITs. However, it appeared that neither party challenged the ability of the tribunal to do this, although they did not agree on all of the implications of its having done so.[555]

133. Equally in *Telsim*,[556] the parties appeared to be in agreement that, as a result of the MFN provision, fair and equitable treatment under the Turkey-Kazakhstan BIT was to be interpreted in the light of the meaning of fair and equitable treatment found in other BITs to which Kazakhstan was a party. Further, in *Bayindir*,[557] there was no objection to the general principle that, as a result of the MFN clause, the content of "fair and equitable treatment" in the Turkey-Pakistan BIT had to be determined in the light of fair and equitable treatment provisions of other BITs entered into by Pakistan.

134. Only in one case did a tribunal make a substantive addition to the obligations of the parties on the basis of an MFN provision in the face of an objection by one party. In *CME*, a majority of the tribunal concluded that the term "just compensation" in the Netherlands-Czech Republic BIT should be interpreted to mean "fair market value", in part because it was

[553] *Renta*, paras 105-119.

[554] *Austrian Airlines*, paras 138-139.

[555] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award, ICSID Case No. ARB/01/7, 25 May 2004, available at <http:/www.italaw.com/documents/MTD-Award_000.pdf>.

[556] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, Award, ICSID Case No. ARB/05/16 (29 July 2008), at paras. 581-587, 591-605 (Turkey-Kazakhstan BIT), available at < http://www.italaw.com/sites/default/files/case-documents/ita0728.pdf>.

[557] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ICSID Case No. ARB/03/29 (27 August 2009), at para. 153 (Turkey-Pakistan BIT), available at <http://www.italaw.com/documents/Bayandiraward.pdf>.

prepared on the basis of the MFN provision to incorporate the concept of "fair market value" from the US-Czech Republic BIT.[558]

(vii) Consistency in decision-making

135. While tribunals have noted that there is no formal precedential value in decisions of other tribunals, the desire for consistency clearly has had an influence on decision-making. Few tribunals have stated this as explicitly as the majority in *Impregilo*:

> "Nevertheless, in cases where the MFN clause has referred to 'all matters' or 'any matter' regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules. On this basis, the majority of the Tribunal reaches the conclusion that *Impregilo* is entitled to rely, in this respect, on the dispute settlement rules in the Argentina-US BIT."[559]

136. In effect, the majority was of the view that, at least with respect to broadly worded MFN clauses and a requirement of commencing an action and litigating for 18 months, the question of the applicability of an MFN clause had been resolved.

(viii) The definition of treatment "no less favourable"

137. The difficulty of determining which treatment is less favourable is illustrated where MFN is used to replace one form of dispute settlement with another. Some tribunals have questioned whether the correct comparison is being made when third party treaty provisions are being compared with basic treaty provisions.[560] If the basic treaty contains an 18-month litigation requirement, while the third party treaty has no 18-month litigation requirement but includes a fork in the road provision, is it correct that the third party treaty provides more favourable treatment? On the one hand, there is an 18-month delay before invoking the dispute settlement provisions of the BIT under the basic treaty, but the investor gets access to both domestic and international processes. On the other hand, the investor under the third party treaty gets access to international dispute settlement earlier but loses having both international and domestic dispute settlement available. Which treatment is the more favourable?

138. The *ICS* tribunal took the view that an investor relying on an MFN provision to avoid the 18-month litigation requirement would be subject to the fork in the road provision of the third party treaty.[561] The *Garanti Kos* tribunal took the view that it was difficult to say that ICSID arbitration was objectively more favourable than UNCITRAL arbitration, but that they were "indisputably different."[562] In the end the tribunal concluded that choice was better than no choice and allowed the claimant to import ICSID arbitration on the basis of the MFN provision in the basic treaty.[563]

139. The question of whether the provision in the third party treaty sought to be relied on is in fact more favourable than the provision in the basic treaty that is sought to be avoided was not considered in any detail in the earlier decisions of investment tribunals. Generally it has been assumed that not having to litigate in domestic courts for 18 months is more favourable than having to wait and litigate. However, this might be questioned unless negative assumptions are made about the domestic courts in question.

[558] *CME*, para. 500.
[559] *Impregilo*, para. 108.
[560] *Ibid.*; see also *Hochtief.*
[561] *ICS v. Argentina*, paras. 318-325.
[562] *Garanti Kos*, para. 92.
[563] *Ibid*, paras 94-97.

(ix) The existence of policy exceptions

140. The *Maffezini* tribunal, seemingly concerned about the far-reaching implications of its decision, set out certain "public policy" exceptions where an MFN provision could not apply to procedural matters.[564] While subsequent tribunals have endorsed the idea that some public policy exceptions are necessary, they have not invoked these exceptions as a justification for their decision, even though in some instances they might have been applicable. For example, in the *Garanti Kos* case the tribunal substituted ICSID arbitration for UNCITRAL arbitration, something that the *Maffezini* policy exceptions prohibited. The Study Group noted the divergence in the reasons given for allowing or rejecting the use of an MFN clause as a basis for varying the dispute settlement provisions of bilateral investment agreements and observed that different approaches were sometimes based on differences in assumptions rather then on a direct contradiction in reasoning.

Part III. Considerations in interpreting MFN clauses

A. Policy considerations relating to the interpretation of investment agreements

1. Asymmetry in BIT negotiations

141. In the past, investment agreements were largely between developed and developing countries with an assumption of asymmetry and inequality of bargaining power.[565] Today, many bilateral investment agreements are between developed countries or developing countries themselves where the same point cannot be made.

142. A more substantive comment can be made about the process of negotiation of investment agreements. Some countries have their own model bilateral investment agreement, and negotiations with other countries are generally based on that model agreement. Thus, instead of negotiations starting with a clean slate, negotiations entail accepting or modifying the model form of agreement already prepared by one party. Thus, the most that can result from these negotiations are modifications in the wording of particular provisions, rather than a completely new agreement.

143. This notwithstanding, in fact investment agreements resemble each other in many key respects, regardless of the parties and regardless of the model agreement that is being followed. And this is not surprising. Modern investment agreements are founded on certain core provisions: MFN, National Treatment, Fair and Equitable Treatment, prohibition of expropriation unless certain conditions are fulfilled and provisions for dispute settlement, generally including investor-state dispute settlement. Whether there has been asymmetry in the negotiations or not, a similar result seems to be reached.

144. After considering this question of asymmetry, the Study Group took the view that while this was a factor that contributed to a broader understanding of the field of international investment law, it was not a factor that was relevant to the interpretation of individual investment agreements.

2. The specificity of each treaty

[564] See paras. 88-90.

[565] Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BIT's Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" *Harvard International Law Journal*, vol. 46 (2005), p.67 at 78.

145. Several States have stated that MFN provisions are specific to each treaty [566] and therefore that such provisions are ill suited to the adoption of a uniform approach.[567] There is no doubt that MFN provisions relating to investment are largely contained in separate bilateral investment agreements, and that each agreement has worded its MFN provision in a particular way.

146. At the same time, MFN provisions, regardless of their negotiating history, or the agreement in which they are contained, have a common objective. In 1978, in draft article 4 the Commission defined an MFN clause, as "a treaty provision whereby a State undertakes an obligation to another State to afford most favoured nation treatment in an agreed sphere of relations." In draft article 5, the Commission defined MFN treatment as "treatment accorded by the granting State to the beneficiary State…not less favourable than treatment extended by the granting State to a third State." In other words, regardless of the specific wording, if a clause in a treaty accords no less favourable treatment than that granted to third States, it is an MFN clause. It has the same character as any other MFN clause and shares the same overall objective.

147. However, the way in which that overall objective is achieved lies in the actual wording that is used to express the MFN obligation, its scope, its coverage, and its beneficiaries. Thus, the key question of *ejusdem generis* – what is the scope of the treatment that can be claimed – has to be determined on a case-by-case basis.

148. Nonetheless, the Study Group considered that the common objective of all MFN provisions, and the similarity in the language used across many investment agreements means that the interpretation of an MFN provision in one investment agreement may well provide guidance for the interpretation of an MFN provision in another agreement. Investment tribunals have indeed considered provisions under agreements other than the agreement before them in seeking to interpret an MFN provision.

149. However, the interpretation of any particular MFN provision must be in accordance with articles 31-32 of the VCLT. Thus, while guidance can be sought from the meaning of MFN treatment in other agreements each MFN provision must be interpreted on the basis of its own wording and the surrounding context of the agreement it is found in. As a result, there is no basis for concluding that there will be a single interpretation of an MFN provision applicable across all investment agreements.

B. Investment dispute settlement arbitration as "mixed arbitration"

150. In 1978, the Commission envisaged that the beneficiary of an MFN provision could not only be the State that was party to the agreement containing that provision, but could also be "persons and things in a determined relationship with that State." [568] Under investment agreements States generally offer MFN treatment not just to the other State, but also to investors or investments of that other State. The Commission at that time declined to consider further the implications of the beneficiary being a person, taking the view that since the draft articles of the VCLT did not deal with the application of treaties to individuals, it would not pursue that question.

151. In practical terms, however, at the time the 1978 draft articles were elaborated there was very little practice to consider in relation to individuals as beneficiaries. Enforcement of the

[566] A/C.6/65/SR.25, at paras. 75-76 (Portugal); A/C.6/66/SR.27 at para. 49 (Iran (Islamic Republic of)); A/C.6/66/SR.27, at para. 78 (Portugal); A/C.6/66/SR.28 (United Kingdom); A/C.6/67/SR.23 (Iran (Islamic Republic of)).

[567] A/C.6/65/SR.26, at para. 17 (United States of America); A/C.6/66/SR.27, at para. 94 (United States of America).

[568] *Yearbook…1978*, vol. II (Part Two), p. 21 (draft art. 5).

obligation to provide MFN treatment against the granting State lay with the beneficiary State. Failure to provide MFN treatment would be a treaty breach and, provided there was a forum in which to do so, a state-to-state claim could be brought. There was no international forum for access by an investor against a foreign State, although an investor might well have pursued a claim in the domestic courts of that State if the treaty obligations had been made part of domestic law, or where there was an independent right of action under domestic law. In such situations, a claim brought against the granting State in its domestic court would be based on a right derived not from the treaty but from the granting State's domestic law.

152. The advent of investor-state dispute settlement has brought about a major change in this respect, allowing the investor to bring a claim independently of its State, directly against the granting State, in a dispute settlement mechanism created by the parties in the investment agreement. The result has been that investor-state dispute settlement tribunals have produced a substantial jurisprudence on the interpretation of investment agreements and in particular of MFN clauses.

153. However, the mixed nature of investor-state arbitration poses particular challenges in the interpretation of investment agreements. The agreement is between States and thus is a treaty. But the forum in which it is being interpreted bears some analogy with commercial arbitration, which historically is a private rather than a public law institution. Thus, whether an interpreter views the agreement as an international law instrument rather than as a contractual arrangement may have an impact on the way in which an MFN provision will be interpreted.

154. Questions can be raised about the status of tribunals involved in "mixed" arbitration and of the product of their work.[569] These tribunals are "mixed" in the sense that the parties to the dispute are not of equal status under international law. In the days of concession agreements, the agreement itself was between a public international law entity, the State, and a private law entity, the person or company with whom the agreement was entered into. An initial concern in this regard was whether such agreements, where only one party was a subject of international law, were subject to international law or domestic law, and the concepts of transnational law and quasi-international law were debated.

155. Investment agreements avoid this problem because they are clearly treaties. Nonetheless, a dispute under an investor-state dispute settlement provision remains a dispute between parties of different status under international law. Thus, it has been said that an arbitrator in a mixed arbitration dealing with a claim by a private litigant, in what might otherwise be seen as a domestic claim, has a mission and function not dissimilar from that of a domestic judge.[570] In that sense, investor-state dispute settlement might be seen as an alternative to domestic litigation, a point that is reinforced by the common "fork in the road" provisions in investment agreements where a claimant investor is required at a certain point to choose between domestic litigation or investor-state dispute settlement.

156. However, a tribunal hearing such a dispute, which is a tribunal established under a mechanism agreed to by States, has to interpret and apply the provisions of a treaty. It is not usually applying provisions of domestic law although in some cases the treaty may call for the application of domestic law. Moreover, if the tribunal is established under ICSID it is specifically mandated to apply "such rules of international law as may be applicable."[571]

157. The Study Group concluded that the "mixed" nature of investor-state dispute settlement arbitration does not justify a different approach to the application of the rules on treaty interpretation when MFN provisions are being considered. The investment agreement is a treaty whose provisions have been agreed to by States. The individual investor had no role in

[570] On the overlap between public and private aspects of international arbitration, see: Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007), chap. 3.

[571] Convention on the settlement of investment disputes between States and nationals of other States, done at Washington on 18 March 1965, United Nations *Treaty Series*, vol. 575, p. 159 at art.42.

the creation of the treaty obligations; it simply has a right to bring a claim under the treaty. As a treaty it must be interpreted according to the accepted rules of international law governing treaty interpretation.

C. The contemporary relevance of the 1978 draft articles to the interpretation of MFN provisions

158. As the Study Group noted earlier, the 1978 draft articles contemplated that the beneficiary of an MFN provision might be an individual or an entity "in a determined relationship" with the beneficiary State. But it did not consider the implications of this since it regarded the rights of individuals to be outside its mandate. Nonetheless, the draft articles are frequently referred to by investor-State dispute settlement tribunals as setting out the basic law on MFN provisions, in particular in relation to the *ejusdem generis* principle.

159. The Study Group noted, however, that while the 1978 draft articles provide the core law on the definition and meaning of MFN clauses and MFN treatment, and lay down basic principles, they do not provide guidance on specific questions of interpretation that can arise under the terms actually used in a particular treaty. The issue whether a procedural provision relating to dispute settlement can be modified on the basis of an MFN provision is not answered, at least not directly, by the 1978 draft articles.

160. The Study Group considers that, having never been challenged and having been frequently applied, the core provisions of the 1978 draft articles[572] remain as an important source of international law when considering the definition, scope and application of MFN clauses.

Part IV - Guidance on the interpretation of MFN clauses

161. This Part sets out a framework for the proper application of the rules and principles of treaty interpretation to MFN clauses. The Study Group concluded from its earlier analysis that there are three central questions regarding the way in which tribunals have approached the interpretation of MFN clauses in relation to the dispute settlement provisions. First, are MFN provisions in principle capable of applying to the dispute settlement provisions of BITs? Second, is the jurisdiction of a tribunal affected by conditions in BITs regarding which dispute settlement provisions may be invoked by investors? Third, in determining whether an MFN provision in a BIT applies to the conditions for invoking dispute settlement, what factors are relevant in the interpretative process? These issues are taken up in turn in the sections below.

A. MFN provisions are capable in principle of applying to the dispute settlement provisions of BITs

162. Although controversial in some of the earlier decisions of tribunals, there is little doubt that in principle MFN provisions are capable of applying to the dispute settlement provisions of BITs. This is so notwithstanding the fact that the proposition may have been based initially on a misinterpretation of what the Commission of Arbitration in *Ambatielos* meant when it referred to "the administration of justice" being within the scope of an MFN provision that referred to "all matters relating to commerce and navigation." The Commission there was referring to access to the courts of the United Kingdom for enforcing substantive rights and not to a right to alter the conditions under which dispute settlement may be invoked. But that seems of little import now. The point is essentially one of party autonomy; the parties to a BIT can, if they

[572] See especially arts 1-14, *Yearbook…1978*, vol. II (Part Two), pp. 16-39.

wish, include the conditions for access to dispute settlement within the scope of coverage of an MFN provision. The question in each case is whether they have done so.

163. In this sense, the question is truly one of treaty interpretation that can be answered only in respect of each particular case. Where the parties have explicitly included the conditions for access to dispute settlement within the framework of their MFN provision,[573] then no difficulty arises. Equally, where the parties have explicitly excluded the application of MFN to the conditions for access to dispute settlement, no difficulty arises. But the vast majority of MFN provisions in existing BITs are not explicit on this point and thus the question of how such provisions are to be interpreted will arise in each case. At the very minimum, however, it can be said that there is no need for tribunals interpreting MFN provisions in BITs to engage in any enquiry into whether such provisions may in principle be applicable to dispute settlement provisions.

B. Conditions relating to dispute settlement and a tribunal's jurisdiction

164. Accepting, however, that the issue is one of interpretation, the question arises whether there is anything in the character of either MFN provisions or provisions relating to the conditions for investor access to dispute settlement that might be relevant to the interpretative process. In this regard, the question of whether such matters go to the jurisdiction of a tribunal retains relevance. There are certain parameters (*ratione materiae, ratione personae, ratione temporis* etc) within which an MFN provision must operate,[574] and thus the question becomes whether the conditions relating to access to dispute settlement are themselves a relevant parameter.

165. The interpretation and application of an MFN provision cannot be completely open-ended. As draft article 14 of the 1978 draft articles provides:

> "The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or persons or things in a determined relationship with that State is subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause or otherwise agreed between the granting State and the beneficiary State."

166. There is no doubt that if a State has consented in a BIT to recognize certain categories of persons as investors, an MFN provision cannot be invoked to change those categories.[575] A tribunal set up under the BIT simply has no jurisdiction to adjudicate on rights in respect of an entity that does not constitute an investor. The question is whether a limitation on access to dispute settlement, such as an 18-month domestic litigation requirement, is a similar jurisdictional limitation applicable to qualified investors.

167. An answer to this depends, in part, on whether this is a matter of jurisdiction or a matter of admissibility. The distinction between jurisdiction and admissibility is not always clear and the terms are sometimes used interchangeably.[576] However, the distinction between objections that are directed at the tribunal and objections that are directed at the claim is said to be the basis of the distinction.[577]

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[573] United Kingdom Model BIT, 2008, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847>.

[574] See also para 105 above.

[575] See *HICEE*, para.149.

[576] See generally: Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, 4th ed (Leiden: Martinus Nijhoff Publishers, 2006) at pp. 505-586.

[577] Jan Paulsson, "Jurisdiction and Admissibility" in Gerald Aksen, Karl-Heinz Böckstiegel, Michael J. Mustill, Paolo Michele Patocchi, and Anne Marie Whitesell (eds), *Global Reflections on International*

168. On this basis, one might argue that the 18-month litigation requirement being a condition that determines whether a claim can be brought at all by the investor goes to the jurisdiction of the tribunal – it is not a matter of the particular claim that is being made by the investor; no claim can be made by that investor unless the 18-month litigation requirement has been met.

169. In the Study Group's view, these competing approaches reflect what was earlier mentioned – a difference between those who regard investment agreements as public international law instruments, and those who regard investor-state dispute settlement as being more of a private law nature akin to contractual arrangements. In the case of the former, jurisdiction and consent to arbitrate are matters of keen State interest, whereas in the case of the latter the question is simply one of the meaning of the term "treatment" or other such language which stipulates the entitlement of the beneficiary.

170. The practical consequence of these different approaches is that those who focus on the public international law aspect of investment agreements are inclined to see an 18-month litigation requirement as akin to an exhaustion of local remedies rule. Those who see such agreements more in private or commercial arbitration terms are likely to see it as a delaying provision which has the effect of postponing an investor's right to bring a claim, and hence contrary to the overall objective of a BIT of creating favourable conditions for investment.

171. The common feature of the "jurisdictional" approaches is that unless clearly worded, or there are particular contextual circumstances, an MFN provision cannot alter the conditions of access to dispute settlement. It is always a matter of treaty interpretation, but treaty interpretation that starts from an initial assumption that an MFN provision does not automatically apply to the dispute settlement provisions of a BIT. And this stands in contrast to the starting assumptions of a number of tribunals that MFN provisions on their face apply to dispute settlement, because dispute settlement is part of the protections provided in a BIT. Under that approach, MFN applies to dispute settlement unless it can be shown that the parties to the BIT did not intend that it would so apply.

172. The Study Group has taken the view that this partly conceptual debate about the nature of investment agreements and the assumptions that it leads to about interpretation of those agreements is not something on which a definitive solution can be offered. Investment agreements have elements of both a public and a private nature. The inability to have a formal definitive answer is the consequence of having the matter dealt with through a "mixed" arbitration with "*ad hoc*" arbitrators. In a "closed" system, such as the WTO, an appellate tribunal could resolve the matter and, right or wrong, it would be the answer for all cases within the system. That opportunity is not available in the case of investor-state dispute settlement. Nor, in the view of the Study Group, is it appropriate for the Commission to play such a role.

173. However, the Study Group observes that conclusions about the applicability of MFN clauses to dispute settlement provisions should be based on the interpretation and analysis of the provisions in question and not on assumptions about the nature of investment agreements or of the rights that are granted under them.

C. Relevant factors in determining whether an MFN provision applies to the conditions for invoking dispute settlement

174. Since BITs are international agreements, the rules of treaty interpretation set out in articles 31-32 of the VCLT are applicable to their interpretation.[578] The general rule of treaty interpretation is set out in article 31 of the VCLT, paragraph (1) of which provides that treaties "shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the

Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner (Paris: ICC Publishing, 2005) p. 601 at p. 616.

[578] These provisions on interpretation are generally taken to reflect customary international law.

treaty in their context and in the light of its object and purpose."[579] It has been said that this formula was "clearly based on the view that the text of the treaty must be presumed to be the authentic expression of the intention of the parties."[580]

175. It is a common position taken in decisions of investment tribunals that the VCLT rules provide the correct legal framework for interpreting MFN provisions. Yet within this common framework there are divergences of approach. Earlier the Study Group identified various factors that have appeared to influence tribunals in interpreting MFN provisions. In the following paragraphs the Study Group reviews some of these factors.

1. The principle of contemporaneity

176. The principle of contemporaneity, relied on explicitly by the tribunals in *ICS* and *Daimler*, and implicitly in the decisions of some other tribunals,[581] is not found specifically in the VCLT rules. Yet, it has been adverted to directly and indirectly by the International Court of Justice and by international tribunals. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court referred to the "primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion."[582] The Eritrea-Ethiopia Boundary Commission also endorsed what it referred to as "the doctrine of 'contemporaneity'."[583]

177. At the same time, in *Dispute regarding navigational and related rights (Costa Rica v. Nicaragua)* the International Court of Justice has stated, that "[t]his does not however signify that, where a term's meaning is no longer the same as it was at the date of the conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for the purpose of applying it."[584] According to the Court this is true, in particular, in "situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law".[585]

178. In the view of the Study Group, whether an evolutionary (evolutive) interpretation is appropriate in any given case will depend on a number of factors, including the intention of the parties that the term in question was to be interpreted in an evolutionary (evolutive) way, [586] the subsequent practice of the parties, and the way they themselves have interpreted and applied their agreement. The approach of the *ICS* tribunal in seeking to ascertain the meaning of "treatment" to which the MFN provision applied, by looking at how the term would have been understood at the time the UK-Argentina BIT was entered into, provides important guidance for interpretation but it cannot be regarded as necessarily definitive.

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[579] *Yearbook ….1966*, vol. II p. 220, at para. 11..

[580] Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed (Manchester: Manchester University Press, 1984) at p. 115.

[581] *Plama*, para. 197.

[582] *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports* 1971, p.16 at p. 30, para. 53.

[583] *Decision Regarding the Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, (13 April 2002) UNRIAA vol. XXV, pp. 83-195 at para. 3.5.

[584] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 242, para. 64.

[585] *Ibid*.

[586] International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, doc. A/CN.4/L.813, at draft conclusion 3. See also the continuance of this document in: International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, doc. A/CN.4/L.833. See also *Official Records of the General Assembly, Sixty-eighth Session, Supplement 10* (A/68/10), chap. IV.

2. The relevance of preparatory work

179. In a sense, reference to preparatory work is an application of the contemporaneity principle, since it is an effort to determine the intent of the parties at the time of the conclusion of the agreement.[587] Recourse to preparatory work is not frequent in the decisions of tribunals interpreting MFN provisions, perhaps because such material is often not readily available.[588] However, in *Austrian Airlines*, the tribunal looked at successive drafts of clauses of the treaty, which indicated a successive narrowing of the scope of the arbitration provisions, in order to confirm a conclusion that the parties intended to limit arbitration under that agreement to certain specified matters.[589] The Study Group considered that this provides an important illustration of the relevance of preparatory work.

3. The treaty practice of the parties

180. Contemporary or subsequent practice of the parties is clearly relevant to the interpretation of the provisions of a treaty. However, under VCLT article 31(2) and (3) relevant practice is limited to: agreements relating to the treaty entered into by all of the parties; instruments relating to the treaty concluded by one party and accepted by the others; subsequent agreements between the parties; and subsequent practice that establishes the agreement of the parties.[590] Thus, to the extent that investment tribunals rely on such material they are clearly acting in accordance with relevant interpretative material.

181. However, most BITs stand alone as agreements between two States unaccompanied by contemporaneous or subsequent agreements or practice between the parties to the BIT.[591] Thus, what tribunals often refer to are agreements by one of the parties to the BIT with third States.[592] One tribunal has taken the view that treaties with third States were not relevant because it was the text of the BIT before it that had to be interpreted.[593]

182. The actions of one State party to a BIT that do not involve the other State party might have some contextual relevance by demonstrating the attitude of one of the parties to the treaty. However, such actions do not fall under article 31(3)(b) of the Vienna Convention, which considers the common intent of the parties but may be taken into account under article 32.[594]

183. The question, however, is whether there is any other basis on which the treaty-making practice of one party alone can be relevant. In *ICS* the tribunal took the view that the treaty making practice of one party alone was not relevant. However, it did regard as relevant the fact that a State had continued to include an 18-month requirement in subsequent BITs. The tribunal

[587] VCLT art. 32 provides, "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty…."

[588] The tribunal in *Plama*, para. 196, noted that the parties had failed to produce any *travaux preparatoires*.

[589] *Austrian Airlines*, para. 137.

[590] International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, doc.A/CN.4/L.813 [part 1], and A/CN.4/L.833 [part 2]. See especially draft conclusion 7. See also *Official Records of the General Assembly, Sixty-ninth Session, Supplement 10* (A/69/10), chap. VII.

[591] Under NAFTA however, the parties do have the power under the treaty to issue "authoritative interpretations" which are then binding on tribunals. See NAFTA, at art.1131(2).

[592] In *Plama* the tribunal said: "It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into." *Plama*, para. 195.

[593] *Renta*.

[594] See in particular, International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, see draft conclusions 1 (4) and 4 (3), including the accompanying commentaries, *Official Records of the General Assembly, Sixty-eighth session, Supplement 10* (A/68/10), paras. 38 and 39.

considered that the State was unlikely to be insisting on the conclusion of a provision that it knew would be devoid of any *effet utile* because of the inclusion of an MFN provision.[595] This illustrates the potential, albeit limited, relevance of the practice of one party.

4. The meaning of context

184. The term "in their context" in article 31 is capable of having a broad meaning. It includes, by virtue of article 31(2) the terms of the treaty itself, the preamble and annexes, as well as agreements between the parties relating to the treaty in connection with its conclusion, and instruments relating to the treaty made by one party and accepted by the other party as an instrument related to the treaty.

185. Two particular questions relating to context arise out of the decisions of investment tribunals. First, can a specific provision in a BIT be overridden by a more generally worded MFN provision? Second, what is the relevance of the fact that a BIT lists specific exclusions to the application of the MFN principle? Does that exclude other, non-listed exceptions to MFN treatment?

(a) The balance between specific and general provisions

186. In some decisions arbitrators have sought to weigh the specific provision of a treaty, dealing with the circumstances under which an investor can invoke investor-state arbitration, with the general provision of an MFN clause. The conclusion drawn is that a specific statement concerning treatment afforded under a treaty, such as a condition that has to be met before invoking dispute settlement, cannot be overridden by a general statement applicable to "all treatment" as found in an MFN provision. As the Commission noted in its report on fragmentation, the principle *lex specialis derogat legi generali* is generally accepted as a principle of treaty interpretation.[596] However, its relevance in the context of the interpretation of an MFN provision may be limited.

187. By its very nature, an MFN clause promises something better than what is provided in the treaty, so that the mere fact that there is a specific provision in the basic treaty itself cannot be conclusive on whether an MFN provision can provide better treatment than what is already provided for in the basic treaty. Of course, if there is independent interpretative evidence in the treaty to show that the parties intended the MFN provision not to apply to the specific provision in question, then that is a different matter. But, in the view of the Study Group, a presumption that the specific overrides the general is simply inconclusive in the interpretation of an MFN provision.

(b) The expressio unius principle

188. The principle *expressio unius est exclusio alterius* has often been cited, particularly in relation to express exclusions from the application of an MFN provision. The argument goes that where the BIT contains express exceptions to the application of an MFN provision, those exceptions exclude other non-designated exceptions.[597] Thus, failure to include any reference to dispute settlement provisions amongst those matters excluded from the application of an MFN provision implies that the MFN provision covers dispute settlement. However, as noted by some authors, the *expressio unius* principle is at best a presumption and should not be treated as

[595] *ICS v. Argentina*, paras. 314-315.

[596] Conclusions of the work of the Study Group on the Fragmentation of international law: Difficulties arising from the diversification and expansion of international law, *Yearbook… 2006*, vol. II, Part Two, at conclusion 5.

[597] See Separate Opinion of Charles N. Brower in *Austrian Airlines*.

a definitive answer to the question.[598] It is a factor to consider and nothing more. Further, as the tribunal in *ICS* pointed out, it may lead to the opposite conclusion. If only exceptions relating to substantive treatment are listed, that may imply that the parties did not believe MFN to be relevant to procedural or dispute settlement matters.[599] Accordingly, the Study Group took the view that while the *expressio unius* principle is a factor to be taken into account, it cannot be regarded as a decisive factor,

5. The relevance of the content of the provision sought to be replaced

189. The 18-month litigation requirement has been seen by some tribunals as imposing an unnecessary hurdle for an investor seeking to enforce its rights through the invocation of the dispute settlement provision of a BIT and contrary to the general objective of a BIT in promoting and facilitating investment. However, as other tribunals have pointed out, such a provision is a variation of an exhaustion of local remedies rule and has its own rationale. To the extent that investment tribunals have been influenced in the interpretation of an MFN provision by the content of the provision in the basic treaty that is being affected by the application of MFN, the Study Group has difficulty in seeing how such a consideration can be justified under the rules on treaty interpretation.

190. The policy decision whether to include a particular provision in their BIT is for the parties and not something that can be second-guessed by dispute settlement tribunals. The function of the tribunal is to ascertain the meaning and the intent of the parties, not to query their policy choices. On that basis, the content of a provision that is being bypassed by application of the MFN provision is, in the view of the Study Group, irrelevant as far as treaty interpretation is concerned.

6. The interpretation of the provision sought to be included

191. The central question of the scope or extent of the benefit that can be obtained from the third party treaty by operation of an MFN clause raises the application of the *ejusdem generis* principle. It is clear that if the subject matter of the MFN provision in the basic treaty is limited to substantive matters, then the provision cannot be used to obtain the benefit of procedural rights under the third party treaty. The more difficult question is whether the beneficiary of an MFN provision that does relate to procedural provisions may pick and choose which procedural benefits can be relied on.

192. In this regard, while the 1978 draft articles provide a general answer, they are not specific enough to assist in resolving the actual problem that arises in the investment treaty context. Draft articles 9 and 10 refer to the beneficiary State being entitled to rights or treatment "within the limits of the subject-matter of the clause." The commentary goes on to suggest that the phrase "within the limits of the subject-matter of the clause" contains an implicit reference to a concept of likeness.[600] However, investment tribunals have yet to develop any jurisprudence on the notion of likeness. There is no common understanding, to take the earlier example, on whether an 18-month litigation requirement with no fork in the road provision is more or less favourable than direct access to investor-state arbitration with a fork in the road stipulation attached.

193. In the Study Group's view the question of what constitutes less favourable treatment can only be answered on a case-by-case analysis. At the very least it is a matter that has to be addressed in any interpretation or application of an MFN provision.

[598] Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed (Cambridge: Cambridge University Press, 2007), pp. 248-249.
[599] *ICS v. Argentina*, paras. 315-317.
[600] *Yearbook…1978*, vol. II (Part Two), pp. 33 at paras. 25-26.

D. Consequences of various model MFN clauses

194. Although at the outset of its work the Study Group considered the possibility of drafting model MFN clauses itself, it came to the conclusion that this would not be a useful exercise. There is a vast number of MFN clauses already included by States in their investment agreements that can provide models for future agreements. What is more important is to understand the consequences that may attach to particular wording.

1. Clauses in agreements existing at the time of the *Maffezini* decision

195. Aside from the different interpretative approaches already identified, there appears to be a certain commonality in the interpretation of certain types of wording in MFN clauses.

196. First, where the MFN clause provides simply for "treatment no less favourable" without any qualification that arguably expands the scope of the treatment to be accorded, tribunals have invariably refused to interpret such a provision as including dispute settlement.

197. Second, where the MFN clause contains clauses that refer to "all treatment" or "all matters" governed by the treaty, tribunals have tended to accord a broad interpretation to these clauses, and to find that they apply to dispute resolution provisions. In only one case has a broadly worded clause not been treated as applying to dispute settlement.[601]

198. Third, where the MFN clause qualifies the treatment to be received by reference to "use", "management", "maintenance", "enjoyment", "disposal", and "utilization", a majority of tribunals have found that such clauses are broad enough to include dispute resolution provisions.

199. Fourth, in the two cases which link MFN directly to fair and equitable treatment, neither tribunal concluded that the clause covers dispute settlement provisions.

200. Fifth, in the cases where a territorial limitation has been placed on an MFN clause, the result has been mixed. Some cases have concluded that the territorial limitation is irrelevant to deciding whether dispute resolution provisions are concerned,[602] while others have held that a territorial limitation clause prevents the inclusion of international dispute settlement provisions within an MFN clause.[603]

201. Sixth, in no case where MFN clauses limit their application to investors or investments "in like circumstances" or "in similar situations" has a tribunal treated as relevant the question of whether the clause applies to dispute settlement provisions.

202. Such an analysis indicates past practice, and does not constitute a statement about how cases will be decided in the future. Since investment tribunals are *ad hoc* bodies and since the exact provisions and context of MFN clauses vary, it is impossible to tell in advance how the members of tribunals will decide, even if some or all of the individuals have already decided cases involving MFN provisions. However, where MFN clauses are capable of a broader interpretation, it appears that tribunals are more inclined to treat them as applying to dispute settlement provisions. In the Study Group's view, this provides preliminary guidance to States on how particular wording might be treated by tribunals.

2. Clauses in agreements entered into since the *Maffezini* decision

203. Since the *Maffezini* decision, there have been a number of investment agreements entered into which include MFN provisions. Generally, they fall into three categories.

[601] *Berchsader*.
[602] *Maffezini*, para. 61; *Hotchief*, paras. 107-111 (majority).
[603] *ICS v. Argentina*, paras. 296, 305-308; *Daimler*, paras. 225-231, 236 (majority).

204. First, there are agreements that expressly exclude the application of *Maffezini.* This may be done by express reference to the decision,[604] or by providing that dispute settlement provisions do not fall within the scope of the MFN provision.[605] It generally does not seem to be done by including it in the list of the exceptions to the application of MFN treatment.

205. Second, there are agreements that expressly include dispute settlement provisions within the scope of the MFN clause.[606]

206. Third, there are those agreements that make no mention of whether dispute settlement provisions are included within the scope of the MFN clause. Some define the scope of application of the MFN clause as applying "to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory." However, as noted earlier, such a provision has been interpreted by some tribunals as not including dispute settlement and by other tribunals as including them.

207. The Study Group has noted that the issue of MFN and dispute settlement provisions has not motivated States to clarify the language of existing agreements to exclude dispute settlement, nor to negotiate new agreements that exclude its application. In fact most new agreements tend to ignore the issue. There are at least three possible explanations for this.

208. First, renegotiating existing agreements is a long and complex process and States may not place a high priority on this in their treaty-making agenda or may be concerned with reopening other issues in the treaty.

209. Second, States may be concerned that changing the wording of their new agreements to prevent the application of MFN treatment to dispute settlement will be taken by tribunals as an indication that their existing agreements do cover dispute settlement.

210. Third, States may take the view that in practice, as indicated above, MFN provisions have been applied to dispute settlement only in the case of broadly-worded MFN clauses and that their MFN provisions are not broadly-worded.

211. In any event, the Study Group concluded that the guidance provided here of wording that may be interpreted as incorporating dispute settlement provisions within the scope of MFN, and examples of agreements where governments have explicitly excluded it, might be of assistance to States in considering how their investment agreements might be interpreted and what they might take into account in negotiating new agreements.

Part V - Summary of Conclusions

212. MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, they do not provide answers to all the interpretative issues that can arise with MFN clauses.

213. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT.

[604] Draft Central American free trade agreement (28 January 2004), available at <http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/CAFTAind_e.asp>.

[605] Agreement between the Republic of Colombia and the Swiss Confederation on the promotion and reciprocal protection of investments, done in Berne on 17 May 2006, available at <http://investmentpolicyhub.unctad.org/IIA/country/45/treaty/1008>.

[606] Agreement between Japan and the United Mexican States for the strengthening of the economic partnership, done at Mexico City on 17 September 2004, available at <http://www.sice.oas.org/Trade/MEX_JPN_e/agreement.pdf>; The United Kingdom has not changed its Model BIT, which applies MFN to dispute settlement.

214. The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. That is, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself.

215. The application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, brought a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. Nonetheless, the matter remains one of treaty interpretation.

216. Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

217. The interpretative techniques reviewed by the Study Group in this report are designed to assist in the interpretation and application of MFN provisions.