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United Nations

Report of the International Law Commission

Sixty-fifth session
(6 May–7 June and 8 July–9 August 2013)

General Assembly
Official Records
Sixty-eighth session
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Note

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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 2013.*

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Summary of Contents

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Chapter I
Introduction

1. The International Law Commission held the first part of its sixty-fifth session from 6 May to 7 June 2013 and the second part from 8 July to 9 August 2013 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Lucius Caflisch, Chairman of the sixty-fourth 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. Kirill Gevorgian (Russian Federation)

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. 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)

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)[1]

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 6 May 2013, the Commission elected Mr. Marcelo Vázquez-Bermúdez to fill the casual vacancy occasioned by the resignation of Mr. Stephen C. Vasciannie.

C. Officers and the Enlarged Bureau

4. At its 3159th meeting, on 6 May 2013, the Commission elected the following officers:

Chairman:	Mr. Bernd H. Niehaus (Costa Rica)
First Vice-Chairman:	Mr. Pavel Šturma (Czech Republic)
Second Vice-Chairman:	Mr. Narinder Singh (India)
Chairman of the Drafting Committee:	Mr. Dire D. Tladi (South Africa)
Rapporteur:	Mr. Mathias Forteau (France)

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. P. Šturma (Chairman), Mr. L. Caflisch, Mr. P. Comissário Afonso, Mr. A. El-Murtadi Suleiman Gouider, Ms. C. Escobar Hernández, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. D.D. Tladi, Mr. E. Valencia-Ospina, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. M. Forteau (*ex officio*).

D. Drafting Committee

7. At its 3163rd, 3170th and 3180th meetings, on 14 and 24 May and 16 July 2013, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

[1] See para. 3 below.

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

[3] Ms. C. Escobar Hernández, Mr. J.M. Gómez-Robledo, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. G. Nolte, Mr. E. Valencia-Ospina and Mr. M. Wood.

(a) *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*: Mr. D.D. Tladi (Chairman), Mr. G. Nolte (Special Rapporteur), Ms. C. Escobar Hernández, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. S. Murase, Mr. S.D. Murphy, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. P. Šturma, Mr. E. Valencia-Ospina, Mr. M. Vázquez-Bermúdez, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. M. Forteau (*ex officio*);

(b) *Immunity of State officials from foreign criminal jurisdiction*: Mr. D.D. Tladi (Chairman), Ms. Concepción Escobar Hernández (Special Rapporteur), Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. K. Kittichaisaree, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. P. Šturma, Mr. E. Valencia-Ospina, Mr. M. Vázquez-Bermúdez, Mr. A.K. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. M. Forteau (*ex officio*);

(c) *Protection of persons in the event of disasters*: Mr. D.D. Tladi (Chairman), Mr. E. Valencia-Ospina (Special Rapporteur), Mr. J.M. Gómez-Robledo, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. K. Kittichaisaree, Mr. S. Murase, Mr. S.D. Murphy, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. M. Vázquez-Bermúdez, Mr. M. Wood, and Mr. M. Forteau (*ex officio*).

8. The Drafting Committee held a total of 20 meetings on the three topics indicated above.

E. Working Groups and Study Group

9. At its 3161st and 3169th meetings, on 8 and 23 May 2013, the Commission reconstituted the following Working Group and Study Group:

(a) *Open-ended Working Group on The Obligation to extradite or prosecute* (aut dedere aut judicare): Mr. K. Kittichaisaree (Chairman).

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

10. The Planning Group reconstituted the following Working Group:

Working Group on the Long-term Programme of work for the quinquennium: Mr. D. McRae (Chairman), Mr. L. Caflisch, Ms. C. Escobar Hernández, Mr. K. Gevorgian, Mr. J.M. Gómez-Robledo, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, 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. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. M. Forteau (*ex officio*).

F. Secretariat

11. Ms. Patricia O'Brien, Under-Secretary-General, the 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. Mr. Trevor Chimimba and Mr. Arnold Pronto, Senior Legal Officers, served as Senior Assistant Secretaries. Mr. Gionata Buzzini, Ms. Hanna Dreifeldt-Lainé, Legal Officers, and Mr. Noah Bialostozky, Associate Legal Officer, served as Assistant Secretaries to the Commission.

G. Agenda

12. At its 3159th meeting, on 6 May 2013, the Commission adopted an agenda for its sixty-fifth session. The agenda, as modified in light of the decision taken by the Commission at its 3171st meeting,[4] on 28 May, consisted of the following items:

1. Organization of the work of the session.
2. Filling of a casual vacancy.
3. The obligation to extradite or prosecute (*aut dedere aut judicare*).
4. Protection of persons in the event of disasters.
5. Immunity of State officials from foreign criminal jurisdiction.
6. Subsequent agreements and subsequent practice in relation to the interpretation of treaties.
7. Provisional application of treaties.
8. Formation and evidence of customary international law.[5]
9. Protection of the environment in relation to armed conflicts.
10. The Most-Favoured-Nation clause.
11. Programme, procedures and working methods of the Commission and its documentation.
12. Date and place of the sixty-sixth session.
13. Cooperation with other bodies.
14. Other business.

[4] See below, chap. XII, sect. A.1.

[5] The Commission decided at its 3186th meeting, on 25 July 2013, to change the title of the topic to "Identification of customary international law". See chap. VII, sect. B.

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

13. With regard to the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**", the Commission had before it the first report of the Special Rapporteur (A/CN.4/660), which, *inter alia*, contained four draft conclusions relating to the general rule and means of treaty interpretation; subsequent agreements and subsequent practice as means of interpretation; the definition of subsequent agreement and subsequent practice as means of treaty interpretation; and attribution of a treaty related practice to a State. Following the debate in plenary, the Commission decided to refer the four draft conclusions to the Drafting Committee. Upon consideration of the report of the Drafting Committee, Commission provisionally adopted five draft conclusions, together with commentaries thereto (chap. IV).

14. Concerning the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/661), in which, *inter alia*, six draft articles were presented, following an analysis of: (a) the scope of the topic and of the draft articles; (b) the concepts of immunity and jurisdiction; (c) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (d) identified the basic norms comprising the regime of immunity *ratione personae*. Following the debate in plenary, the Commission decided to refer the six draft articles to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted three draft articles, together with commentaries thereto (chap. V).

15. As regards the topic "**Protection of persons in the event of disasters**", the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/662), dealing with aspects of prevention in the context of the protection of persons in the event of disasters, including disaster risk reduction, prevention as a principle of international law, and international cooperation on prevention. Following the debate in plenary, the Commission decided to refer the two draft articles, proposed by the Special Rapporteur, to the Drafting Committee.

16. The Commission provisionally adopted seven draft articles, together with commentaries, namely draft articles 5 *bis* and 12 to 15, of which it had taken note of at its sixty-fourth session (2012), dealing with forms of cooperation, offers of assistance, conditions on the provision of external assistance, facilitation of external assistance, and termination of external assistance, respectively, as well as draft article 5 *ter* and 16, concerning cooperation for disaster risk reduction and the duty to reduce the risk of disasters, respectively (chap. VI).

17. In relation to the topic "**Formation and evidence of customary international law**", the Commission had before it the first report of the Special Rapporteur (A/CN.4/663), which, *inter alia*, presented an overview of the previous work of the Commission relevant to the topic, views expressed by delegates in the Sixth Committee of the General Assembly, the scope of the topic, the range of materials to be consulted, and issues relating to customary international law as a source of international law. The Commission also had before it a memorandum by the Secretariat addressing elements in the previous work of the Commission that could be particularly relevant to the topic (A/CN.4/659). The debate in plenary addressed, among other issues, the scope and methodology of the topic, the range of materials to be consulted and the future plan of work. The Special Rapporteur also held informal consultations on the title of the topic, the consideration of *jus cogens* within the

scope of the topic and the need for additional information on State practice. The Commission decided to change the title of the topic to "Identification of customary international law" (chap. VII).

18. As regards the topic "**Provisional application of treaties**", 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 which traced the negotiating history of article 25 both in the Commission and at the Vienna Conference on the Law of Treaties (A/CN.4/658). The debate revolved around the purpose of the provisional application of treaties, and the elaboration of specific issues to be considered in the future reports of the Special Rapporteur (chap. VIII).

19. The Commission decided to include the topic "**Protection of the environment in relation to armed conflict**" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur (chap. XII, sect. A.1). The Special Rapporteur presented the Commission with a series of informal working papers with a view to initiating an informal dialogue with members of the Commission on a number of issues that could be relevant for the development and consideration of the work on the topic. Issues addressed in the informal consultations included, *inter alia*, scope and methodology, the possible outcome of the Commission's work, as well as a number of substantive issues relating to the topic (chap. IX).

20. In connection with the topic "**The obligation to extradite or prosecute (*aut dedere aut judicare*)**", the Commission re-constituted the Working Group on the topic, which continued the evaluation of work on the topic, particularly in the light of the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, of 20 July 2012. The Commission took note of the report of the Working Group, which is annexed to the present report (chap. X and annex A).

21. Concerning the topic "**The Most-Favoured-Nation clause**", the Commission re-constituted the Study Group on the topic, which, *inter alia*, continued to examine the various factors that seemed to influence investment tribunals in interpreting MFN clauses, on the basis, *inter alia*, of contemporary practice and jurisprudence, in particular *Daimler Financial Services AG v. Argentine Republic*[6] and *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*[7] (chap. XI).

22. 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 "**Protection of the atmosphere**" in its programme of work, and to appoint Mr. Shinya Murase as Special Rapporteur for the topic (chap. XII, sect. A.1). The Commission also decided to include in its long-term programme of work the topic "**Crimes against humanity**" (chap. XII, sect. A.2 and annex B).

23. The Commission continued traditional exchanges of information with the International Court of Justice, the Asian-African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe, and the Inter-American Juridical Committee. The Commission also had an exchange of information with the African Union Commission on International Law. Members of the Commission also held informal meetings with other bodies and associations on matters of mutual interest (chap. XII, sect. C).

[6] ICSID Case No. ARB/05/1 dispatched to the parties on 22 August 2012.
[7] ICSID Case No. ARB/10/1 dispatched to the parties on 2 July 2013.

24. The Commission decided that its sixty-sixth session be held in Geneva from 5 May to 6 June and 7 July to 8 August 2014 (chap. XII, sect. B).

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

A. Immunity of State officials from foreign criminal jurisdiction

25. The Commission requests States to provide information, by 31 January 2014, on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction.

B. Formation and evidence of customary international law

26. The Commission requests States to provide information, by 31 January 2014, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in:

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

(b) decisions of national, regional and subregional courts.

C. Provisional application of treaties

27. The Commission requests States to provide information, by 31 January 2014, on their practice concerning the provisional application of treaties, 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.

D. Protection of the environment in relation to armed conflicts

28. The Commission would like to have information from States 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, particularly 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 arising from situations of armed conflict.

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

A. Introduction

29. 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.[8] 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.[9]

30. 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;[10] the jurisprudence under special regimes relating to subsequent agreements and subsequent practice;[11] and subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[12]

31. 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.[13] 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.[14] 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.[15]

32. At the sixty-fourth session (2012), the Commission, on the basis of a recommendation of the Study Group,[16] also 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

[8] 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.

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

[10] *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.

[11] *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.

[12] *Ibid.*, *Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 232–234.

[13] For the text of the preliminary conclusions by the Chairman of the Study Group, see *ibid*., *Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 344.

[14] For the text of the preliminary conclusions by the Chairman of the Study Group, see *ibid.*, *Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 240.

[15] *Ibid.*, paras. 235–239.

[16] *Ibid.*, paras. 226 and 239.

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".[17]

B. Consideration of the topic at the present session

33. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/660), which it considered at its 3159th to 3163rd meetings, from 6 to 8 and on 10 and 14 May 2013.

34. In his first report, the Special Rapporteur, after addressing the scope, aim and possible outcome of the work on this topic (section II), considered the general rule and means of treaty interpretation (section III); subsequent agreements and subsequent practice as means of interpretation (section IV); the definition of subsequent agreement and subsequent practice as means of treaty interpretation (section V); and attribution of a treaty related practice to a State (section VI). The report also contained some indications as to the future programme of work (section VII). The Special Rapporteur proposed a draft conclusion corresponding with each of the four issues addressed in sections III to VI.[18]

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

[18] The four draft conclusions proposed by the Special Rapporteur read as follows:

Draft conclusion 1
General rule and means of treaty interpretation

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

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

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

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

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

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

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

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

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

35. At its 3163rd meeting, on 14 May 2013, the Commission referred draft conclusions 1 to 4, as contained in the Special Rapporteur's first report, to the Drafting Committee.

36. At its 3172nd meetings, on 31 May 2013, the Commission considered the report of the Drafting Committee and provisionally adopted five draft conclusions (see section C.1 below).

37. At its 3191st to 3193rd meetings, on 5 and 6 August 2013, the Commission adopted the commentaries to the draft conclusions provisionally adopted at the current 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, as provisionally adopted by the Commission at its sixty-fifth session

1. Text of the draft conclusions

38. The text of the draft conclusions provisionally adopted so far by the Commission is reproduced below.

Conclusion 1
General rule and means of treaty interpretation

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.

Draft conclusion 4
Possible authors and attribution of subsequent practice

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

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

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.

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its sixty-fifth session

39. The text of the draft conclusions, together with commentaries, provisionally adopted by the Commission at the sixty-fifth session, is reproduced below.

Introduction

(1) The following draft conclusions are based on the Vienna Convention on the Law of Treaties ("Vienna Convention"),[19] which constitutes the framework for the work on the

[19] Vienna Convention on the Law of Treaties, 1969, United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331 ("Vienna Convention").

topic "Subsequent agreements and subsequent practice in relation to treaty interpretation". The Commission considers that the relevant rules of the Vienna Convention today enjoy general acceptance.[20]

(2) The first five draft conclusions are general in nature. Other aspects of the topic, in particular more specific points, will be addressed at a later stage of the work.

Conclusion 1
General rule and means of treaty interpretation

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.

Commentary

(1) Draft conclusion 1 situates subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the Vienna Convention. The title "General Rule and Means of Treaty Interpretation" signals two points. First, article 31 of the Vienna Convention, as a whole, is *the* "general rule" of treaty interpretation.[21] Second, articles 31 and 32 of the Vienna Convention together list a number of "means of interpretation" which must (article 31) or may (article 32) be taken into account in the interpretation of treaties.[22]

(2) Paragraph 1 of draft conclusion 1 emphasizes the interrelationship between articles 31 and 32 of the Vienna Convention, as well as the fact that these provisions, together, reflect customary international law. The reference to both articles 31 and 32 clarifies from the start the general context in which subsequent agreements and subsequent practice are addressed in the draft conclusions.

[20] See below draft conclusion 1, para. 1 and accompanying commentary.

[21] Title of article 31 of the Vienna Convention, *ibid*.

[22] "First Report on Subsequent Agreement and Subsequent Practice in relation to Treaty Interpretation", A/CN.4/660, 19 March 2013 ("First Report"), p. 6, para. 8; M.E. Villiger, "The 1969 Vienna Convention on the Law of Treaties: 40 Years After", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 344 (2009), p. 9, at pp. 118–119, 126–128.

(3) Whereas article 31 sets forth the general rule and article 32 deals with supplementary means of interpretation, both rules[23] must be read together as they constitute an integrated framework for the interpretation of treaties. Article 32 includes a threshold between the primary means of interpretation according to article 31,[24] all of which are to be taken into account in the process of interpretation, and "supplementary means of interpretation" to which recourse may be had when the interpretation according to article 31 leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

(4) The second sentence of paragraph 1 of draft conclusion 1 confirms that the rules enshrined in articles 31 and 32 of the Vienna Convention reflect customary international law.[25] International courts and tribunals have acknowledged the customary character of these rules. This is true, in particular, for the International Court of Justice,[26] the International Tribunal for the Law of the Sea ("ITLOS"),[27] inter-State arbitrations[28] the Appellate Body of the World Trade Organization ("WTO"),[29] the European Court of

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[23] On the meaning of the term "rules" in this context: *Yearbook ... 1966*, vol. II, pp. 218–219; R. Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), pp. 36–38.

[24] *Yearbook ... 1966*, vol. II, p. 223, para. (19); Waldock, Third Report on the Law of Treaties, *Yearbook ... 1964*, vol. II, pp. 58–59, para. (21); M.K. Yasseen, "L'Interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités", *Recueil des cours*, vol. 151 (1976), p. 1, at p. 78; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), pp. 141–142; M.E. Villiger, *supra* note 22, pp. 127–128.

[25] Y. le Bouthillier, "Commentary on Article 32 of the Vienna Convention" in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, 2011), p. 841, at pp. 843–846, paras. 4–8; P. Daillier, M. Forteau, A. Pellet, *Droit International Public*, 8th edition (L.G.D.J., 2009), at pp. 285–286; Gardiner, *supra* note 23, at pp. 12–19; M.E. Villiger, *supra* note 22, pp. 132–133.

[26] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 46, para. 65 (Vienna Convention, art. 31); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 237, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 109–110, para. 160; *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at p. 48, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at p. 645, para. 37; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 501, para. 99 (Vienna Convention, art. 31); *Kasikili/Sedudu Island (Botswana v. Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1059, para. 18 (Vienna Convention, art. 31); *Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, I.C.J. Reports 1994*, p. 6, at pp. 21–22, para. 41 (Vienna Convention, art. 31, and without expressly mentioning article 32 of the Vienna Convention but referring to the supplementary means of interpretation).

[27] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at para. 57.

[28] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands), Award, 24 May 2005*, United Nations, *Reports of International Arbitral Awards*, vol. XXVII, p. 35, at para. 45 (Vienna Convention, arts. 31–32).

[29] Article 3 paragraph 2 of the WTO Dispute Settlement Understanding ("DSU") provides that "(…) it serves to (…) to clarify the existing provisions of [the WTO-covered] agreements in accordance with customary rules of interpretation of public international law", but does not specifically refer to articles 31 and 32 of the Vienna Convention. However, the Appellate Body consistently has recognized that articles 31 and 32 reflect rules of customary international law, and has resorted to them by reference to article 3.2 of the DSU. See, e.g., WTO Appellate Body Report, *US-Gasoline,* WT/DS2/AB/R, adopted 29 April 1996, Section B 1 (Vienna Convention, art. 31(1)); WTO Appellate Body Report, *Japan-Alcoholic Beverages II,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4

Human Rights,[30] the Inter-American Court of Human Rights,[31] the Court of Justice of the European Union,[32] and tribunals established by the International Centre for Settlement of Investment Disputes ("ICSID") under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[33] Hence, the rules contained in articles 31 and 32 apply as treaty law in relation to those States which are parties to the Vienna Convention for treaties which fall within the scope of the Convention, and as customary international law between all States.

(5) The Commission also considered referring to article 33 of the Vienna Convention in draft conclusion 1 and whether this provision also reflected customary international law. Article 33 may be relevant for draft conclusions on the topic of "Subsequent agreements and subsequent practice in relation to treaty interpretation". A "subsequent agreement" under article 31 (3) (a), for example, could be formulated in two or more languages, and there could be questions regarding the relationship of any subsequent agreement to different language versions of the treaty itself. The Commission nevertheless decided not to address such questions for the time being, but left open the possibility to do so should this issue come up in the future work on the topic.

(6) The Commission, in particular, considered whether the rules set forth in article 33 reflected customary international law. Some members thought that all the rules in article 33 reflected customary international law, while others wanted to leave open the possibility that only some, but not all, rules set forth in this provision qualified as such. The jurisprudence of international courts and tribunals has not yet fully addressed the question. The International Court of Justice and the WTO Appellate Body have considered parts of article 33 to reflect rules of customary international law: In *LaGrand*, the Court recognized that paragraph 4 of article 33 reflects customary international law.[34] It is less clear whether the International Court of Justice in the *Kasikili/Sedudu Island* case considered that paragraph 3 of article 33 reflected a customary rule.[35] The WTO Appellate Body has held that the rules in paragraphs 3 and 4 reflect customary law.[36] The Arbitral Tribunal in the *Young Loan*

October 1996, Section D (Vienna Convention, arts. 31–32); "Second Report for the ILC Study Group on Treaties over Time" in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford University Press, 2013), p. 213, at p. 215.

[30] *Golder v. United Kingdom*, Judgment, 21 February 1975, Application No. 4451/70, ECHR Series A No. 18, para. 29; *Witold Litwa v. Poland*, Judgment, 4 April 2000, Application No. 26629/95, ECHR 2000-III, para. 58 (Vienna Convention, art. 31); *Demir and Baykara v. Turkey* [GC], Judgment (Merits and Just Satisfaction), 12 November 2008, Application No. 34503/97, ECHR 1345, para. 65 (by implication Vienna Convention, arts. 31–33).

[31] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion, 24 September 1982, OC-2/82, Inter-Am. Ct. H.R. Series A No. 2, para. 19 (by implication Vienna Convention, arts. 31–32); *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago*, Judgments (Merits, Reparations and Costs, Judgment), 21 June 2002, Inter-Am. Ct. H.R. Series C No. 94, para. 19 (Vienna Convention, art. 31 (1)).

[32] *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Judgment, 25 February 2010, Case C-386/08, ECR I-01289, paras. 41–43 (Vienna Convention, art. 31).

[33] *National Grid plc v. The Argentine Republic*, Decision on Jurisdiction (UNCITRAL), 20 June 2006, para. 51 (Vienna Convention, arts. 31–32); *Canfor Corporation v. United States of America, Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America, and Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, para. 59 (Vienna Convention, arts. 31–32).

[34] *LaGrand, I.C.J. Reports 2001*, p. 466, at p. 502, para. 101.

[35] *Kasikili/Sedudu Island, I.C.J. Reports 1999*, p. 1045, at p. 1062, para. 25; the Court may have applied this provision only because the parties had not disagreed about its application.

[36] WTO Appellate Body Report, *US – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 19 January 2004, para. 61 (Vienna Convention,

Arbitration found that paragraph 1 "incorporated" a "principle".[37] The ITLOS and the European Court of Human Rights have gone one step further and stated that article 33 as a whole reflects customary law.[38] Thus, there are significant indications in the case law that article 33, in its entirety, indeed reflects customary international law.

(7) Paragraph 2 of draft conclusion 1 reproduces the text of article 31 (1) given its importance for the topic. Article 31 (1) is the point of departure for any treaty interpretation according to the general rule contained in article 31 as a whole. This is intended to contribute to ensuring the balance in the process of interpretation between an assessment of the terms of the treaty in their context and in the light of its object and purpose, on the one hand, and the considerations regarding subsequent agreements and subsequent practice in the following draft conclusions. The reiteration of article 31 (1) as a separate paragraph is not, however, meant to suggest that this paragraph, and the means of interpretation mentioned therein, possess a primacy in substance within the context of article 31 itself. All means of interpretation in article 31 are part of a single integrated rule.[39]

(8) Paragraph 3 reproduces the language of articles 31 (3) (a) and (b) of the Vienna Convention, in order to situate subsequent agreements and subsequent practice, as the main focus of the topic, within the general legal framework of treaty interpretation. Accordingly, the chapeau of article 31 (3) "there shall be taken into account, together with the context" is maintained in order to emphasise that the assessment of the means of interpretation mentioned in paragraph 3 (a) and (b) of article 31 are an integral part of the general rule of interpretation set forth in article 31.[40]

(9) Paragraph 4 clarifies that subsequent practice in the application of the treaty, which does not meet all criteria of article 31 (3) (b), nevertheless falls within the scope of article 32. Article 32 includes a non-exhaustive list of supplementary means of interpretation.[41] Paragraph 4 borrows the language "recourse may be had" from article 32 to maintain the distinction between the mandatory character of the *taking into account* of the means of interpretation, which are referred to in article 31, and the discretionary nature of the use of the supplementary means of interpretation under article 32.

(10) In particular, subsequent practice in the application of the treaty, which does not establish the agreement of all parties to the treaty, but only of one or more parties, may be

art. 33 (3)); WTO Appellate Body Report, *US – Subsidies on Upland Cotton*, WT/DS267/AB/R, 3 March 2005, para. 424, where the Appellate Body applied and expressly referred to article 33 (3) of the Vienna Convention without suggesting its customary status; WTO Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, 23 September 2002, para. 271 (Vienna Convention, art. 33 (4)).

[37] *Young Loan Arbitration on German External Debts (Belgium, France, Switzerland, United Kingdom and United States v. Germany)*, 16 May 1980, UNRIAA, vol. XIX, p. 67; ILR, vol. 59 (1980), p. 494, at para. 17.

[38] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, ITLOS Reports 2011*, p. 10, at para. 57; *Golder v. United Kingdom*, Judgment, 21 February 1975, Application No. 4451/70, ECHR Series A No. 18, para. 29; *Witold Litwa v. Poland*, Judgment, 4 April 2000, Application No. 26629/95, ECHR 2000-III, para. 59; *Demir and Baykara v. Turkey* [GC], Judgment (Merits and Just Satisfaction), 12 November 2008, Application No. 34503/97, ECHR 1345, para. 65 (Vienna Convention, arts. 31–33).

[39] *Yearbook ... 1966*, vol. II, pp. 219–220, para. (8). See, in detail, below para. (12) of the commentary to draft conclusion 1, para. 5.

[40] *Yearbook ... 1966*, vol. II, p. 220, para. (8); "Introductory Report for the ILC Study Group on Treaties over time" in Nolte, *supra* note 29, p. 169 at p. 177.

[41] Yasseen, *supra* note 24, at p. 79.

used as a supplementary means of interpretation. This was stated by the Commission,[42] and has since been recognized by international courts and tribunals,[43] and in the literature[44] (see in more detail paras. (22) to (36) of the commentary to draft conclusion 4).

(11) The Commission did not, however, consider that subsequent practice, which is not "in the application of the treaty", should be dealt with, in the present draft conclusions, as a supplementary means of interpretation. Such practice may, however, under certain circumstances be a relevant supplementary means of interpretation as well.[45] But such practice is beyond what the Commission now addresses under the present topic, except insofar as it may contribute to "assessing" relevant subsequent practice in the application of a treaty (see draft conclusion 5 and accompanying commentary). Thus, paragraph 4 of draft conclusion 1 requires that any subsequent practice be "in the application of the treaty", as does paragraph 3 of draft conclusion 4, which defines "other 'subsequent practice'".

(12) The Commission considered it important to complete draft conclusion 1 by emphasising in paragraph 5[46] that, notwithstanding the structure of draft conclusion 1, moving from the general to the more specific, the process of interpretation is a "single combined operation", which requires that "appropriate emphasis" is placed on various means of interpretation.[47] The expression "single combined operation" is drawn from the Commission's commentary to the 1966 draft articles on the Law of Treaties.[48] There the

[42] *Yearbook ... 1964*, vol. II, pp. 203–204, para. (13).

[43] *Kasikili/Sedudu Island, I.C.J. Reports 1999*, p. 1045, at p. 1096, paras. 79–80; *Loizidou v. Turkey*, Judgment (Preliminary Objections), 23 March 1995, Application No. 15318/89, ECHR Series A No. 310, paras. 79–81; *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago*, Judgments (Merits, Reparations and Costs, Judgment), 21 June 2002, Inter-Am. Ct. H.R. Series C No. 94, para. 92; *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 274, at para. 50; WTO Appellate Body Report, *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, 5 June 1998, para. 90; see also WTO Appellate Body Report, *US – COOL*, WT/DS384/AB/R and WT/DS386/AB/R, 29 June 2012, para. 452.

[44] Yasseen, *supra* note 24, at p. 52 ("[…] la Convention de Vienne ne retient pas comme élément de la règle générale d' interprétation la pratique ultérieure en général, mais une pratique ultérieur spécifique, à savoir *une pratique ultérieur non seulement concordant, mais également commune à toutes les parties*. […] *Ce qui reste de la pratique ultérieure peut être un moyen complémentaire d'interprétation, selon l'article 32 de la Convention de Vienne*.") (emphasis added); Sinclair, *supra* note 24, at p. 138: "(…) paragraph 3(b) of Article 31 of the Convention [covers] only a specific form of subsequent practice – that is to say, *concordant subsequent practice common to all the parties*. *Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation with the meaning of Article 32 of the Convention*" (emphasis added); S. Torres Bernárdez, "Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties" in G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann, K. Zemanek, (eds.), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern, in honour of his 80th birthday* (Kluwer Law International, 1998), p. 721, at p. 726; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), pp. 431–432.

[45] L. Boisson de Chazournes, "Subsequent Practice, Practices, and "Family Resemblance": Towards Embedding Subsequent Practice in its Operative Milieu" in Nolte, *supra* note 29, p. 53, at pp. 59–62.

[46] First Report, para. 64; Introductory Report for the ILC Study Group on Treaties over time, in Nolte, *supra* note 29, p. 169, at pp. 171 and 177.

[47] On the different function of subsequent agreements and subsequent practice in relation to other means of interpretation, see First Report, paras. 42–57; Introductory Report for the ILC Study Group on Treaties over Time, in Nolte, *supra* note 29, p. 169, at p. 183.

[48] *Yearbook ... 1966*, vol. II, pp. 219–220, para. (8).

Commission also stated that it intended "to emphasize that the process of interpretation is a unity".[49]

(13) Paragraph 5 of draft conclusion 1 also explains that appropriate emphasis must be placed, in the course of the process of interpretation as a "single combined operation", on the various means of interpretation, which are referred to in articles 31 and 32. The Commission did not, however, consider it necessary to include a reference, by way of example, to one or more specific means of interpretation in the text of Paragraph 5 of draft conclusion 1.[50] This avoids a possible misunderstanding that any one of the different means of interpretation has priority over others, regardless of the specific treaty provision or the case concerned.

(14) Paragraph 5 uses the term "means of interpretation". This term captures not only the "supplementary means of interpretation", which are referred to in article 32, but also the elements mentioned in article 31.[51] Whereas the Commission, in its commentary on the draft articles on the Law of Treaties, sometimes used the terms "means of interpretation" and "elements of interpretation" interchangeably, for the purpose of the present topic the Commission retained the term "means of interpretation" because it also describes their function in the process of interpretation as a tool or an instrument.[52] The term "means" does not set apart from each other the different elements, which are mentioned in articles 31 and 32. It rather indicates that these means each have a function in the process of interpretation, which is a "single", and at the same time a "combined" operation.[53] Just as courts typically begin their reasoning by looking at the terms of the treaty, and then continue, in an interactive process,[54] to analyse those terms in their context and in the light of the object and purpose of the treaty,[55] the precise relevance of different means of interpretation must first be identified in any case of treaty interpretation before they can be "thrown into the crucible"[56] in order to arrive at a proper interpretation, by giving them appropriate weight in relation to each other.

(15) The obligation to place "appropriate emphasis on the various means of interpretation" may, in the course of the interpretation of a treaty in specific cases, result in a different emphasis on the various means of interpretation depending on the treaty or on the treaty provisions concerned.[57] This is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation.

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[49] *Ibid*.

[50] This had been proposed by the Special Rapporteur, see First Report, para. 28 ("(1) General rule and means of treaty interpretation – (…) The interpretation of a treaty in a specific case may result in a different emphasis on the various means of interpretation contained in Articles 31 and 32 VCLT, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned." See also analysis in First Report, paras. 8–27.

[51] See also commentary to draft conclusion 1, para. 1; Villiger, *supra* note 22, p. 129; Daillier *et al.*, *supra* note 25, at pp. 284–289.

[52] Provisional Summary Record of the 3172nd meeting, A/CN.4/SR.3172, p. 4.

[53] *Yearbook ... 1966*, vol. II, pp. 219–220, para. (8).

[54] *Ibid*.

[55] *Yearbook ... 1966*, Vol. II, p. 219, para. (6); Yasseen, *supra* note 24, at p. 58; Sinclair, *supra* note 24, at p. 130; J. Klabbers, 'Treaties, Object and Purpose', *Max Planck Encyclopedia on Public International Law* (http://www.mpepil.com), para. 7; Villiger, *Commentary*, *supra* note 44, at p. 427, para. 11; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 69, at p. 89, paras. 45–46; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, Decision of 30 June 1977, UNRIAA, vol. XVIII, p. 3, at pp. 32–35, para. 39.

[56] *Ibid*.

[57] First Report, draft conclusion 1, para. (2), at para. 28, and, generally, paras. 10–27.

What guides the interpretation is the evaluation by the interpreter, which consists in identifying the relevance of different means of interpretation in a specific case and in determining their interaction with the other means of interpretation in this case by placing a proper emphasis on them in good faith, as required by the rule to be applied. This evaluation should include, if possible and practicable, consideration of relevant prior assessments and decisions in the same and possibly also in other relevant areas.[58]

(16) The Commission debated whether it would be appropriate to refer, in draft conclusion 1, to the "nature" of the treaty as a factor which would typically be relevant to determining whether more or less weight should be given to certain means of interpretation.[59] Some members considered that the subject-matter of a treaty (e.g. whether provisions concern purely economic matters or rather address the human rights of individuals; and whether the rules of a treaty are more technical or more value-oriented) as well as its basic structure and function (e.g. whether provisions are more reciprocal in nature or more intended to protect a common good) may affect its interpretation. They indicated that the jurisprudence of different international courts and tribunals suggested that this is the case.[60] It was also mentioned that the concept of the "nature" of a treaty is not alien to the Vienna Convention (see e.g. article 56 (1) (a))[61] and that the concept of the "nature" of the treaty and/or of treaty provisions had been included in other work of the Commission, in particular on the topic of the Effects of Armed Conflicts on Treaties.[62] Other members, however, considered that the draft conclusion should not refer to the "nature" of the treaty in order to preserve the unity of the interpretation process and to avoid any categorization of treaties. The point was also made that the notion of the "nature of the treaty" was unclear and that it would be difficult to distinguish it from the object and

[58] The First Report, *ibid.*, refers to the jurisprudence of different international courts and tribunals as examples of how the weight of a means in an interpretation exercise is to be determined in specific cases, and demonstrates how 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.

[59] See First Report, *ibid.*, draft conclusion 1, para. (2), and analysis at paras. 8–28.

[60] WTO Panels and the Appellate Body, for example, seem to emphasize more the terms of the respective WTO covered Agreement (e.g., WTO Appellate Body, *Brazil – Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, 21 July 2000, para. 45), whereas the European Court of Human Rights and the Inter-American Court of Human Rights highlight the character of the Convention as a human rights treaty (e.g. *Mamatkulov and Askarov v. Turkey* [GC], Judgment, 4 February 2005, Applications nos. 46827/99 and 46951/99, ECHR 2005-I, para. 111; *The Right to Information on Consular Assistance In the Framework of the Guarantees of the due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, Inter-Am. Ct. H.R. Series A No. 16, para. 58); see also *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add. 1), p. 281–282, and Second Report for the ILC Study Group on Treaties over Time, in Nolte, *supra* note 29, p. 213, at pp. 216, 244–246, 249–262, 270–275.

[61] M. Forteau, "Les Techniques Interpretatives de la Cour Internationale de Justice", Revue générale de droit international public, vol. 115 (2011), p. 399, at pp. 406–407, 416; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (Separate opinion of Judge Dillard), I.C.J. Reports 1971*, p. 16, at pp. 138, p. 154, fn. 1.

[62] Articles on the Effects of Armed Conflicts on Treaties (art. 6 (a)), General Assembly Resolution 66/99, annex; see also Guide to Practice on Reservations to Treaties, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1); guideline 4.2.5 refers to the nature of obligations of the treaty, rather than the nature of the treaty as such.

purpose of the treaty.[63] The Commission ultimately decided to leave the question open and to make no reference in draft conclusion 1 to the nature of the treaty for the time being.

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.

Commentary

(1) By characterizing subsequent agreements and subsequent practice under article 31 (3) (a) and (b) of the Vienna Convention as "authentic means of interpretation" the Commission indicates the reason why those means are significant for the interpretation of treaties.[64] The Commission thereby follows its 1966 commentary on the draft articles on the law of treaties which described subsequent agreements and subsequent practice under articles 31 (3) (a) and (b) as "authentic means of interpretation" and which underlined that:

> "The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[65]

(2) Subsequent agreements and subsequent practice under article 31 (3) (a) and (b) are, however, not the only "authentic means of interpretation". Analyzing the ordinary meaning of the text of a treaty, in particular, is also such a means. As the Commission has explained

> "(...) the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, (...) making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty."[66]

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[63] According to the commentary to guideline 4.2.5 of the Guide to Practice on Reservations to Treaties it is difficult to distinguish between the nature of treaty obligations and the object and purpose of the treaty. Guide to Practice on Reservations to Treaties, commentary to guideline 4.2.5, para. (3), in *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1). On the other hand, article 6 of the Articles on the Effects of Armed Conflicts on Treaties suggests "a series of factors pertaining to the nature of the treaty, particularly its subject matter, its object and purpose, its content and the number of the parties to the treaty", *ibid.*, commentary to article 6, para. (3).

[64] See R. Jennings, A. Watts (eds.), *Oppenheim's International Law* (Longman, 9th ed., 1992), vol. 1, p. 1268, para. 630; G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Certain other Treaty Points" British Yearbook of International Law 1957, vol. 33, p. 203, at pp. 223–225; WTO Panel Report, *US – Large Civil Aircraft (2nd complaint)*, WT/DS353/R, 31 March 2011, para. 7.953.

[65] *Yearbook ... 1966*, vol. II, pp. 221–222, para. (15).

[66] *Yearbook ... 1964*, vol. II, pp. 204–205, para. (15); see also *ibid.*, pp. 203–204, para. (13): "Paragraph 3 specifies as *further* authentic elements of interpretation: (a) agreements between the parties regarding the interpretation of the treaty, and (b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation." (emphasis added); on the other hand, Waldock explained that *travaux préparatoires* are not, as such, an authentic means of interpretation, see *ibid*., pp. 58–59, para. (21).

The term "authentic" thus refers to different forms of "objective evidence", or "proof" of conduct of the parties which reflects the "common understanding of the parties" as to the meaning of the treaty.

(3) By describing subsequent agreements and subsequent practice under article 31 (3) (a) and (b) as "authentic" means of interpretation the Commission recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty. The Vienna Convention thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems.

(4) The character of subsequent agreements and subsequent practice of the parties under article 31 (3) (a) and (b) as "authentic means of interpretation" does not, however, imply that these means necessarily possess a conclusive, or legally binding, effect. According to the chapeau of article 31 (3), subsequent agreements and subsequent practice shall, after all, only "be taken into account" in the interpretation of a treaty, which consists of a "single combined operation" with no hierarchy among the means of interpretation which are referred to in article 31.[67] For this reason, and contrary to a view of some commentators,[68] subsequent agreements and subsequent practice which establish the agreement of the parties regarding the interpretation of a treaty are not necessarily conclusive, or legally binding.[69] Thus, when the Commission characterized a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[70] it did not go quite as far as saying that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation.

(5) This does not exclude that the parties to a treaty, if they wish, may reach a binding agreement regarding the interpretation of a treaty. The Special Rapporteur on the law of treaties, Sir Humphrey Waldock, stated in his Third Report on the Law of Treaties that it may be difficult to distinguish subsequent practice of the parties under what became article 31 (3) (a) and (b) — which is only to be taken into account, among other means, in the process of interpretation — and a later agreement which the parties consider to be binding:

> "Subsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty, *at any rate* when it

[67] *Yearbook ... 1966*, vol. II, pp. 219–220, paras. (8) and (9).

[68] M.E. Villiger, "The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission" in E. Cannizaro (ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011), p. 105, at p. 111; Gardiner, *supra* note 23, at p. 32; O. Dörr, "Commentary on Article 31 of the Vienna Convention" in O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (Springer, 2012), p. 521, at pp. 553–554, paras. 72–75; K. Skubiszewski, "Remarks on the Interpretation of the United Nations Charter" in R. Bernhardt *et al*. (eds.), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte – Festschrift für Hermann Mosler* (Springer, 1983), p. 891, at p. 898.

[69] H. Fox, "Article 31 (3) (a) and (b) of the Vienna Convention and the Kasikili Sedudu Island Case" in M. Fitzmaurice, O. Elias, P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers, 2010), p. 59, at pp. 61–62; A. Chanaki, *L'adaptation des traités dans le temps* (Bruylant, 2013), pp. 313–315; M. Benatar, "From Probative Value to Authentic Interpretation: The Legal Effect of Interpretative Declarations", *Revue belge de droit international*, vol. 44 (2011), p. 170, at pp. 194–195; cautious: J.M. Sorel, B. Eveno, "Commentary on Article 31 of the Vienna Convention" in O. Corten, P. Klein (eds.), *The Vienna Convention on the Law of Treaties – A Commentary* (Oxford University Press, 2011), vol. I, p. 804, at p. 826, paras. 42 and 43; see also "Third Report for the ILC Study Group on Treaties over Time" in Nolte, *supra* note 29, p. 307, at p. 375, para. 16.4.3.

[70] *Yearbook ... 1966*, vol. II, p. 221, para. (14).

> indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement."[71] (emphasis added)

Whereas Waldock's original view that (simple) agreed subsequent practice "would appear to be decisive of the meaning" was ultimately not adopted in the Vienna Convention, subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when "the parties consider the interpretation to be binding upon them". It is, however, always possible that provisions of domestic law prohibit the government of a State from arriving at a binding agreement in such cases without satisfying certain — mostly procedural — requirements under its constitution.[72]

(6) The possibility of arriving at a binding subsequent interpretative agreement by the parties is particularly clear in cases in which the treaty itself so provides. Article 1131 (2) NAFTA, for example, provides that "[a]n interpretation by the [inter-governmental] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section." The existence of such a special procedure or an agreement regarding the authoritative interpretation of a treaty which the parties consider binding may or may not preclude additional recourse to subsequent agreements or subsequent practice under article 31 (3) (a) and (b).[73]

(7) The Commission has continued to use the term "authentic means of interpretation" in order to describe the not necessarily conclusive, but to a more or less authoritative, character of subsequent agreements and subsequent practice under article 31 (3) (a) and (b). The Commission has not employed the terms "authentic interpretation" or "authoritative interpretation" in draft conclusion 2 since these concepts are often understood to mean a necessarily conclusive, or binding, agreement between the parties regarding the interpretation of a treaty.[74]

(8) The term "authentic means of interpretation" encompasses a factual and a legal element. The factual element is indicated by the expression "objective evidence", whereas the legal element is contained in the concept of "understanding of the parties". Accordingly, the Commission characterized a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[75] and subsequently stated that subsequent practice "similarly (…)

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[71] Waldock, Third Report on the Law of Treaties, *Yearbook ... 1964*, vol. II, p. 60, para. (25).

[72] This issue will be addressed at a later stage of the work on the topic.

[73] This question will be explored in more detail at a later stage of the work on the topic; see also Agreement Establishing the World Trade Organization, 1994, United Nations, *Treaty Series*, vol. 1867, No. 31874, p. 3, art. IX, para. 2, and WTO Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, para. 273; WTO Appellate Body Report, *EC – Bananas III*, Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008, paras. 383 and 390.

[74] See e.g. *Methanex Corporation v. United States of America*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Final Award on Jurisdiction and Merits, 9 August 2005, Part II, Chapter H, para. 23 (with reference to Jennings & Watts (eds.), *supra* note 64, p. 1268, para. 630); Gardiner, *supra* note 23, at p. 32; U. Linderfalk, *On the Interpretation of Treaties* (Springer, 2007), p. 153; Skubiszewski, *supra* note 68, at p. 898; G. Haraszti, *Some Fundamental Problems of the Law of Treaties* (Akadémiai Kiadó, 1973), p. 43; see also Second Report for the ILC Study Group on Treaties over Time, in Nolte, *supra* note 29, p. 213, at p. 242, para. 4.5.

[75] *Yearbook ... 1966*, vol. II, p. 221, para. (14).

constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".[76] Given the character of treaties as embodiments of the common will of their parties, "objective evidence" of the "understanding of the parties" possesses considerable authority as a means of interpretation.[77]

(9) The distinction between any "subsequent agreement" (article 31 (3) (a)) and "subsequent practice (...) which establishes the agreement of the parties" (article 31 (3) (b)) does not denote a difference concerning their authentic character.[78] The Commission rather considers that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a "subsequent practice" only has this effect if it "shows the common understanding of the parties as to the meaning of the terms".[79] Thus, the difference between a "subsequent agreement between the parties" and a "subsequent practice (...) which establishes the agreement of the parties" lies in the manner of establishing the agreement of the parties regarding the interpretation of a treaty, with the difference being in the greater ease with which an agreement is established.[80]

(10) Subsequent agreements and subsequent practice as authentic means of treaty interpretation are not to be confused with interpretations of treaties by international courts, tribunals, or treaty bodies in specific cases. Subsequent agreements or subsequent practice under article 31 (3) (a) and (b) are "authentic" means of interpretation because they are expressions of the understanding of the treaty by the States parties themselves. The authority of international courts, tribunals and treaty bodies rather derives from other sources, most often from the treaty which is to be interpreted. Judgments and other pronouncements of international courts, tribunals and treaty bodies, however, may be indirectly relevant for the identification of subsequent agreements and subsequent practice as authentic means of interpretation if they reflect or trigger such subsequent agreements and practice of the parties themselves.[81]

(11) Draft conclusions 1 and 4 distinguish between "subsequent practice" establishing the agreement of the parties under article 31 (3) (b) of the Vienna Convention, on the one hand, and other subsequent practice (in a broad sense) by one or more, but not all parties to the treaty which may be relevant as a supplementary means of interpretation under article 32.[82] Such "other" subsequent interpretative practice which does not establish the agreement of all the parties cannot constitute an "authentic" interpretation of a treaty by all its parties and thus will not possess the same weight for the purpose of interpretation.[83]

(12) The last part of draft conclusion 2 makes it clear that any reliance on subsequent agreements and subsequent practice as authentic means of interpretation should occur as

[76] *Ibid.*, pp. 221–222, para. (15).

[77] Gardiner, *supra* note 23, at pp. 32 and 354–355; Linderfalk, *On the Interpretation of Treaties*, *supra* note 74, at pp. 152–153.

[78] First Report, p. 29.

[79] *Yearbook ... 1966*, vol. II, pp. 221–222, para. (15); W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (Springer, 1983), p. 294.

[80] *Case concerning Kasikili/Sedudu Island, Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1087, para. 63, see also draft conclusion 4 and the accompanying commentary.

[81] This aspect will be addressed in more detail at a later stage of the work on the topic; see e.g. "Third Report for the ILC Study Group on Treaties over Time" in Nolte, *supra* note 29, p. 307, at pp. 381 ff, para. 17.3.1.

[82] See in particular paras. (22) to (36) of the commentary to draft conclusion 4 (3).

[83] See in more detail paras. (9) to (11) and 4 (3), and para. (34) of the commentary to draft conclusion 1, para. (4).

part of the application of the general rule of treaty interpretation reflected in article 31 of the Vienna Convention.

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.

Commentary

(1) Draft conclusion 3 addresses the role which subsequent agreements and subsequent practice may play in the context of the more general question of whether the meaning of a term of a treaty is capable of evolving over time.

(2) In the case of treaties, the question of the so-called intertemporal law[84] has traditionally been put in terms of whether a treaty should be interpreted in the light of the circumstances and the law at the time of its conclusion ("contemporaneous" or "static" interpretation), or in the light of the circumstances and the law at the time of its application ("evolutive", "evolutionary", or "dynamic" interpretation).[85] Arbitrator Max Huber's dictum in the *Island of Palmas* case according to which "a judicial fact must be appreciated in the light of the law contemporary with it"[86] led many international courts and tribunals, as well as many writers, to generally favour contemporaneous interpretation.[87] At the same time, the Tribunal in the *Iron Rhine* case asserted that there was,[88] "general support among the leading writers today for evolutive interpretation of treaties".

(3) The Commission, in its commentary on the draft articles on the law of treaties, considered in 1966 that "to attempt to formulate a rule covering comprehensively the temporal element would present difficulties" and it, therefore, "concluded that it should omit the temporal element".[89] Similarly, the debates within the Commission's Study Group

[84] T.O. Elias, "The Doctrine of Intertemporal Law", *American Journal of International Law*, vol. 74 (1980), pp. 285 ff; D. Greig, *Intertemporality and the Law of Treaties* (British Institute of International and Comparative Law, 2003); M. Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties, Part I", *Hague Yearbook of International Law*, vol. 21 (2008), pp. 101 ff; M. Kotzur, "Intertemporal Law", *Max Planck Encyclopedia of Public International Law* (http://www.mpepil.com); U. Linderfalk, "Doing the Right Thing for the Right Reason: Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties", *International Community Law Review*, vol. 10 (2008), pp. 109 ff; A. Verdross and B. Simma, *Universelles Völkerrecht*, 3rd edition (Duncker & Humblot, 1984), pp. 496 ff, paras. 782 ff.

[85] M. Fitzmaurice, *supra* note 84, pp. 101 ff.

[86] *Island of Palmas case (Netherlands v. USA)*, Award, 4 April 1928, UNRIAA, vol. 2, p. 829, at p. 845.

[87] *Yearbook ... 1966*, vol. II, pp. 220–221, para. (11).

[88] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands)* UNRIAA, vol. XXVII, p. 35, at para. 81; see, for example, A. Aust, *Modern Treaty Law and Practice*, 2nd edition (Cambridge University Press, 2007), pp. 243–244; M. Fitzmaurice, *supra* note 84, at pp. 29–31; G. Di Stefano, "L' interprétation évolutive de la norme internationale", RGDIP, vol. 115 (2011-II), p. 373, at pp. 384 and 389 ff; R. Higgins, "Some Observations on the Inter-Temporal Rule in International Law" in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), p. 173, at pp. 174 ff; Sorel & Boré Eveno, *supra* note 69, at p. 808, para. 8; P.-M. Dupuy, "Evolutionary interpretation of treaties" in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011), p. 123, at pp. 125 ff; M. Kotzur, "Intertemporal Law", *supra* note 84, at para. 14.

[89] *Yearbook ... 1966*, vol. II, p. 222, para. (16); R. Higgins, *supra* note 84.

on Fragmentation led to the conclusion in 2006 that it is difficult to formulate and to agree on a general rule which would give preference either to a "principle of contemporaneous interpretation" or to one which generally recognizes the need to take account of an "evolving meaning" of treaties.[90]

(4) Draft conclusion 3 should not be read as taking any position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general. Draft conclusion 3 rather emphasizes that subsequent agreements and subsequent practice, as any other means of treaty interpretation, can support both a contemporaneous and an evolutive interpretation (or, as it is often called, evolutionary interpretation), where appropriate. The Commission, therefore, concluded that these means of treaty interpretation "may assist in determining *whether or not*" an evolutive interpretation is appropriate with regard to a particular treaty term.

(5) This approach is confirmed by the jurisprudence of international courts and tribunals. The various international courts and tribunals which have engaged in evolutive interpretation — albeit in varying degrees — appear to have followed a case-by-case approach in determining, through recourse to the various means of treaty interpretation which are referred to in articles 31 and 32, whether or not a treaty term should be given a meaning capable of evolving over time.

(6) The International Court of Justice, in particular, is seen as having developed two strands of jurisprudence, one tending towards a more "contemporaneous" and the other towards a more "evolutionary" interpretation, as Judge *ad hoc* Guillaume has pointed out in his Declaration in *Dispute regarding Navigational and Related Rights*.[91] The decisions which favour a more contemporaneous approach mostly concern specific treaty terms ("water-parting";[92] "main channel/Thalweg";[93] names of places;[94] "mouth" of a river[95]). On the other hand, the cases which support an evolutive interpretation seem to relate to more general terms. This is true, in particular, for terms which are "by definition evolutionary", such as "the strenuous conditions of the modern world" or "the well-being and development of such peoples" in article 22 of the Covenant of the League of Nations. The International Court of Justice, in its *Namibia Opinion*, has given those terms an evolving meaning by referring to the evolution of the right of peoples to self-determination after the Second

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[90] Report of the Study Group on the Fragmentation of International Law, 2006, A/CN.4/L.682 and Corr.1, para. 478.

[91] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), I.C.J. Reports 2009*, p. 213, Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 294 ff, paras. 9 ff; see also *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 479); Report of the Study Group on the Fragmentation of International Law, 2006, A/CN.4/L.682 and Corr.1, para. 478; Institut de Droit International, resolution on "Le problème intertemporel en droit international public", *Annuaire de l'Institut de droit international* (1975), pp. 536 ff.

[92] *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, Decision of 21 October 1994, UNRIAA, vol. XXII, p. 3, at p. 43, para. 130; see also, with respect to the term "watershed", *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, *Judgment (Merits), I.C.J. Reports 1962*, p. 6, at pp. 16–22.

[93] *Case concerning Kasikili/Sedudu Island, I.C.J. Reports 1999*, p. 1056, at pp. 1060–1062, paras. 21 and 25.

[94] *Decision regarding delimitation of the border between Eritrea and Ethiopia (Eritrea v. Ethiopia)*, UNRIAA, vol. XXV, p. 83, p. 110, para. 3.5.

[95] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 339, para. 48 and p. 346, para. 59.

World War.[96] The "generic" nature of a particular term in a treaty[97] and the fact that the treaty is designed to be "of continuing duration"[98] may also give rise to an evolving meaning.

(7) Other international judicial bodies sometimes also employ an evolutive approach to interpretation, though displaying different degrees of openness towards such interpretation. The Appellate Body of the World Trade Organization has only occasionally resorted to evolutive interpretation. In a well-known case it has, however, held that "the generic term "natural resources" in article XX (g) is not "static" in its content or reference but is rather "by definition, evolutionary".[99] The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has held that the meaning of certain "obligations to ensure"[100] "may change over time",[101] and has emphasized that the rules of State liability in UNCLOS are apt to follow developments in the law and are "not considered to be static".[102] The European Court of Human Rights has held more generally "that the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions".[103] The Inter-American Court of Human Rights also more generally follows an evolutive approach to interpretation, in particular in connection with its so-called *pro homine* approach.[104] In the *Iron Rhine* case the continued viability and effectiveness of a multi-dimensional cross-border railway arrangement was an important reason for the Tribunal to accept that even rather technical rules may have to be given an evolutive interpretation.[105]

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[96] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53.

[97] *Aegean Sea Continental Shelf case (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, 3, p. 32, para. 77; Report of the Study Group on the Fragmentation of International Law, 2006, A/CN.4/L.682 and Corr.1, para. 478.

[98] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), I.C.J. Reports 2009,* p. 213, at p. 243, para. 66.

[99] WTO Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, 12 October 1998, para. 130.

[100] United Nations Convention on the Law of the Sea, 1982, United Nations, *Treaty Series*, vol. 1833, No. 31383, p. 3, art. 153 (4) and art. 4 (4) in annex III.

[101] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, ITLOS Reports 2011*, p. 10, at para. 117.

[102] *Ibid.*, para. 211.

[103] *Tyrer v. the United Kingdom* (1978), Judgment, Application No. 5856/72, ECHR Series A, No. 26, para. 31.

[104] *The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion, 2 October 1999, OC-16/99, para. 114 ("This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989) and the European Court of Human Rights, in *Tyrer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), *Loizidou v. Turkey* (1995), among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions." (footnotes omitted)).

[105] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands),* UNRIAA, vol. XXVII, p. 35, at para. 80: "in the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway"; see also *Aegean Sea Continental Shelf case (Greece v. Turkey), I.C.J. Reports 1978*, p. 3, at p. 32, para. 77; see *Case concerning the delimitation of the Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*, Award, 31 July 1989, UNRIAA, vol. XX, p. 119, at pp. 151–152, para. 85.

(8) In the final analysis, most international courts and tribunals have not recognized evolutive interpretation as a separate form of interpretation, but instead have arrived at such an evolutive interpretation in application of the various means of interpretation which are mentioned in articles 31 and 32 of the Vienna Convention, by considering certain criteria (in particular those mentioned in paragraph (6) above) on a case-by-case basis. Any evolutive interpretation of the meaning of a term over time must therefore result from the ordinary process of treaty interpretation.[106]

(9) The Commission considers that this state of affairs confirms its original approach to treaty interpretation:

> "(...) the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation (...) making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty."[107]

Accordingly, draft conclusion 3, by using the phrase "presumed intention", refers to the intention of the parties as determined through the application of the various means of interpretation which are recognized in articles 31 and 32. The "presumed intention" is thus not a separately identifiable original will, and the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties, but they are only, as article 32 indicates, a supplementary means of interpretation. And although interpretation must seek to identify the intention of the parties, this must be done by the interpreter on the basis of the means of interpretation which are available at the time of the act of interpretation, and which include subsequent agreements and subsequent practice of parties to the treaty. The interpreter thus has to answer the question whether parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning which is capable of evolving over time.

(10) Draft conclusion 3 does not take a position regarding the question of the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general (see above commentary, at paragraph (4)). The conclusion should, however, be understood as indicating the need for some caution with regard to arriving at a conclusion in a specific case whether to adopt an evolutive approach. For this purpose, draft conclusion 3 points to subsequent agreements and subsequent practice as means of interpretation which may provide useful indications to the interpreter for assessing, as part

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[106] As the Report of the Study Group on Fragmentation has phrased it, "(T)he starting-point must be (...) the fact that deciding (the) issue (of evolutive interpretation) is a matter of interpreting the treaty itself", Report of the Study Group on the Fragmentation of International Law, 2006, A/CN.4/L.682 and Corr.1, para. 478.

[107] *Yearbook ... 1964*, vol. II, pp. 204–205, para. (15); see also *ibid.*, pp. 203–204, para. (13) ("[p]aragraph 3 specifies as further authentic elements of interpretation: (a) agreements between the parties regarding the interpretation of the treaty, and (b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation."); on the other hand, Waldock explained that *travaux préparatoires* are not, as such, an authentic means of interpretation, see *ibid*., pp. 58–59, para. (21).

of the ordinary process of treaty interpretation, whether the meaning of a term is capable of evolving over time.[108]

(11) This approach is based on and confirmed by the jurisprudence of the International Court of Justice and other international courts and tribunals. In the *Namibia Opinion* the International Court of Justice referred to the practice of United Nations Organs and of States in order to specify the conclusions which it derived from the inherently evolutive nature of the right to self-determination.[109] In the *Aegean Sea* case, the Court found it "significant" that what it had identified as the "ordinary, generic sense" of the term "territorial status" was confirmed by the administrative practice of the United Nations and by the behaviour of the party which had invoked the restrictive interpretation in a different context.[110] In any case, the decisions in which International Court of Justice has undertaken an evolutive interpretation have not strayed from the possible meaning of the text and from the presumed intention of the parties to the treaty, as they had also been expressed in their subsequent agreements and subsequent practice.[111]

(12) The judgment of the International Court of Justice in *Dispute regarding Navigational and Related Rights* also illustrates how subsequent agreements and subsequent practice of the parties can assist in determining whether a term has to be given a meaning which is capable of evolving over time. Interpreting the term "*comercio*" in a treaty of 1858, the Court held:

> "On the one hand, the subsequent practice of the parties, within the meaning of article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was (...) to give the terms used (...) a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law."[112]

The Court then found that the term "*comercio*" was a "generic term" of which "the parties necessarily" had "been aware that the meaning (...) was likely to evolve over time" and that "the treaty has been entered into for a very long period", and concluded that "the parties must be presumed (...) to have intended" this term to "have an evolving meaning".[113] Judge Skotnikov, in a Separate Opinion, while disagreeing with this reasoning, ultimately arrived at the same result by accepting that a more recent subsequent practice of Costa Rica related to tourism on the San Juan river "for at least a decade" against which Nicaragua "never protested" but rather "engaged in consistent practice of allowing tourist navigation" and

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[108] See also Gardiner, *supra* note 23, at pp. 253–254; R. Kolb, *Interprétation et Création du Droit International* (Bruylant, 2006), pp. 488–501; J. Arato, "Subsequent practice and evolutive interpretation", *The Law & Practice of International Courts and Tribunals*, vol. 9 (2010), p. 443, at pp. 444–445, 465 ff.

[109] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276, Advisory Opinion, I.C.J. Reports 1971*, p. 16, at pp. 30–31, paras. 49–51.

[110] *Aegean Sea Continental Shelf case (Greece v. Turkey), I.C.J. Reports 1978*, p. 3, at p. 31, para. 74.

[111] See also *Case concerning the delimitation of the Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*, Award, 31 July 1989, UNRIAA, vol. XX, p. 119, at pp. 151–152, para. 85.

[112] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), I.C.J. Reports 2009,* p. 213, at p. 242, para. 64.

[113] *Ibid*., paras. 66–68.

concluded that this "suggests that the parties have established an agreement regarding its interpretation".[114]

(13) The International Tribunal for the Former Yugoslavia has sometimes taken more general forms of State practice into account, including trends in the legislation of States which, in turn, can give rise to a changed interpretation of the scope of crimes or their elements. In *Furundžija*, for example, the Chamber of the ICTY, in search of a definition for the crime of rape as prohibited by article 27 of the Fourth Geneva Convention, article 76 (1) of the first Additional Protocol, and article 4 (2) (e) of the second Additional Protocol,[115] examined the principles of criminal law common to the major legal systems of the world and held

> "that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault."[116]

(14) The "living instrument" approach of the European Court of Human Rights is also based, *inter alia*, on different forms of subsequent practice.[117] While the Court does not generally require "the agreement of the parties regarding its interpretation" in the sense of article 31 (3) (b), the decisions in which it adopts an evolutive approach are regularly supported by an elaborate account of subsequent (state, social, and international legal) practice.[118]

(15) The Inter-American Court of Human Rights, despite its relatively rare mentioning of subsequent practice, frequently refers to broader international developments, an approach which falls somewhere between subsequent practice and other "relevant rules" under article 31 (3) (c).[119] In the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, for example, the Court pointed out that

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[114] *Ibid.*, Separate Opinion of Judge Skotnikov, p. 283, at p. 285, paras. 9–10.

[115] *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, ICTY-95-17/1, paras. 165 ff.

[116] *Ibid*., para. 179; similarly *The Prosecutor v. Alfred Musema*, Trial Chamber I, Judgment, 27 January 2000, ICTR-96-13-A, paras. 220 ff., in particular para. 228.

[117] Second Report for the ILC Study Group on Treaties over Time, in Nolte, *supra* note 29, p. 213, at pp. 246 ff.

[118] *Öcalan v. Turkey*, Judgment (Merits and Just Satisfaction), 12 May 2005, Application No. 46221/99, ECHR 2005-IV, para. 163; *Vo v. France* [GC], Judgment, 8 July 2004, Application No. 53924/00, ECHR 2004-VIII, paras. 4 and 70; *Johnston et al. v. Ireland,* Judgment, 18 December 1986, Application No. 9697/82*,* ECHR Series A No. 112, para. 53; *Bayatyan v. Armenia* [GC], Judgment, 7 July 2011, Application No. 23459/03, para. 63; *Soering v. the United Kingdom*, Judgment, 7 July 1989, Application No. 14038/88, ECHR Series A No. 161, para. 103; *Al-Saadoon and Mufdhi v. the United Kingdom,* Judgment, 4 October 2010, Application No. 61498/08, paras. 119–120; *Demir and Baykara v. Turkey* [GC], Judgment (Merits and Just Satisfaction), 12 November 2008, Application No. 34503/97, ECHR 2008, para. 76.

[119] See e.g. *Velásquez-Rodríguez v. Honduras*, Judgment, Merits, 29 July 1988, Inter-Am. Ct. H.R. Series C No. 4, para. 151; *The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion, 2 October 1999, OC-16/99, paras. 130–133, 137.

> "human rights treaties are live instruments ["instrumentos vivos"] whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."[120]

(16) The Human Rights Committee also on occasion adopts an evolutive approach which is based on developments of State practice. Thus, in *Judge v. Canada*, the Committee abandoned its *Kindler*[121] jurisprudence, elaborating that:

> "The Committee is mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out."[122]

In *Yoon and Choi*, the Committee stressed that the meaning of any right contained in the International Covenant on Civil and Political Rights (ICCPR) evolved over time and concluded that article 18 (3) now provided at least some protection against being forced to act against genuinely-held religious beliefs. The Committee reached this conclusion since "an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service".[123]

(17) Finally, ICSID tribunals have emphasized that subsequent practice can be a particularly important means of interpretation for such provisions which the parties to the treaty intended to evolve in the light of their subsequent treaty practice. In the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, for example, the Tribunal held that:

> "Neither party asserted that the ICSID Convention contains any precise *a priori* definition of "investment". Rather, the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment."[124]

(18) The jurisprudence of international courts, tribunals, and other treaty bodies thus confirms that subsequent agreements and subsequent practice under articles 31 and 32 "may assist in determining" whether or not a "term" shall be given a meaning which is capable of evolving over time. The expression "term" is not limited to specific words (like "commerce", "territorial status", "rape", or "investment"), but may also encompass more inter-related or cross-cutting concepts (such as "by law" (article 9 of the ICCPR) or "necessary" (article 18 of the ICCPR), as they exist, for example, in human rights treaties). Since the "terms" of a treaty are elements of the rules which are contained therein, the rules concerned are covered accordingly.

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[120] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations and Costs), 31 August 2001, Series C No. 79, para. 146; also see *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion, 14 July 1989, OC-10/89, Series A No. 10, para. 38.

[121] *Kindler v. Canada*, Views, 30 July 1993, communication No. 470/1991, CCPR/C/48/D/470/1991.

[122] *Judge v. Canada*, Views, 5 August 2002, communication No. 829/1998, CCPR/C/78/D/829/1998, para. 10.3.

[123] *Yoon and Choi v. the Republic of Korea*, Views, 3 November 2006, communication Nos. 1321/2004 and 1322/2004, CCPR/C/88/D/1321-1322/2004, para. 8.4.

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

Conclusion 4
Definition of subsequent agreement and subsequent practice

1. A "subsequent agreement" as an authentic means of interpretation under article 31 (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 (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.

Commentary

(1) Draft conclusion 4 defines the three different "subsequent" means of treaty interpretation which are mentioned in draft conclusion 1, paragraphs 3 and 4, i.e. "subsequent agreement" under article 31 (3) (a), "subsequent practice" under article 31 (3) (b), and other "subsequent practice" under article 32.

(2) In all three cases the term "subsequent" refers to acts occurring "after the conclusion of a treaty".[125] This point in time is often earlier than the moment when the treaty enters into force (art. 24). Various provisions of the Vienna Convention (e.g. article 18) show that a treaty may be "concluded" before its actual entry into force.[126] For the purposes of the present topic, "conclusion" is whenever the text of the treaty has been established as definite. It is after conclusion, not just after entry into force, of a treaty when subsequent agreements and subsequent practice can occur. Indeed, it is difficult to identify a reason why an agreement or practice which take place between the moment when the text of a treaty has been established as definite and the entry into force of that treaty should not be relevant for the purpose of interpretation.[127]

(3) Article 31 (2) of the Vienna Convention provides that the "context" of the treaty includes certain "agreements" and "instruments"[128] that "are made in connection with the conclusion of the treaty". The phrase "in connection with the conclusion of the treaty" should be understood as including agreements and instruments which are made in a close temporal and contextual relation with the conclusion of the treaty.[129] If they are made after

[125] *Yearbook ... 1966*, vol. II, p. 221, para. (14).

[126] Brierly, Second Report on the Law of Treaties, *Yearbook ... 1951*, vol. II, pp. 70 ff.; *Yearbook ... 1956*, vol. II, p. 112; S. Rosenne, "Treaties, Conclusion and Entry into Force" in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (North Holland Publishing, 2000), p. 933 ("[s]trictly speaking it is the negotiation that is concluded through a treaty"); Villiger, *Commentary*, *supra* note 44, at pp. 78–80, paras. 9–14.

[127] See e.g. Declaration on the European Stability Mechanism, agreed on by the Contracting Parties to the TESM, 27 September 2012.

[128] See *Yearbook ... 1966*, vol. II, p. 221, para. (13); the German Federal Constitutional Court has held that this term may include unilateral declarations if the other party did not object to them, see German Federal Constitutional Court, *BVerfGE*, vol. 40, p. 141, at p. 176; see generally Gardiner, *supra* note 23, at pp. 215–216.

[129] Yasseen, *supra* note 24, at p. 38; Jennings & Watts (eds.), *supra* note 64, p. 1274, para. 632 ("but, on the other hand, too long a lapse of time between the treaty and the additional agreement might prevent it being regarded as made in connection with 'the conclusion of' the treaty").

this period, then such "agreements" and agreed upon "instruments" constitute "subsequent agreements" or subsequent practice under article 31 (3).[130]

(4) *Paragraph 1 of draft conclusion 4* provides the definition of "subsequent agreement" under article 31 (3) (a).

(5) Article 31 (3) (a) uses the term "subsequent agreement" and not the term "subsequent treaty". A "subsequent agreement" is, however, not necessarily less formal than a "treaty". Whereas a treaty within the meaning of the Vienna Convention must be in written form (article 2 (1) (a)), the customary international law on treaties knows no such requirement.[131] The term "agreement" in the Vienna Convention[132] and in customary international law does not imply any particular degree of formality. Article 39 of the Vienna Convention, which lays down the general rule according to which "(a) treaty may be amended by agreement between the parties", has been explained by the Commission to mean that "(a)n amending agreement may take whatever form the parties to the original treaty may choose".[133] In the same way, the Vienna Convention does not envisage any particular formal requirements for agreements and practice under article 31 (3) (a) and (b).[134]

(6) While every treaty is an agreement, not every agreement is a treaty. Indeed, a "subsequent agreement" under article 31 (3) (a) "shall" only "be taken into account" in the interpretation of a treaty. Therefore, it is not necessarily binding. The question under which circumstances a subsequent agreement between the parties is binding, and under which circumstances it is merely a means of interpretation among several others, will be addressed at a later stage of the work on the topic.

(7) The Vienna Convention distinguishes a "subsequent agreement" under article 31 (3) (a) from "any subsequent practice (…) which establishes the agreement of the parties regarding its interpretation" under article 31 (3) (b). This distinction is not always clear and the jurisprudence of international courts and other adjudicative bodies shows a certain reluctance to assert it. In *Libya v. Chad*, the International Court of Justice used the expression "subsequent attitudes", to denote both what it later described as "subsequent agreements" and as subsequent unilateral "attitudes".[135] In the case of *Indonesia v. Malaysia*, the International Court of Justice left the question open whether the use of a

[130] See *Yearbook ... 1966*, vol. II, p. 221, para. (14); see also Villiger, *Commentary*, *supra* note 44, at p. 431, paras. 20–21; see also K.J. Heller, "The Uncertain Legal Status of the Aggression Understandings", *Journal of International Criminal Justice*, vol. 10 (2012), p. 229, at p. 237.

[131] Villiger, *Commentary*, *supra* note 44, at p. 80, para. 15; P. Gautier, "Commentary on Article 2 of the Vienna Convention" in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties – A Commentary*, vol. I (Oxford University Press, 2011), p. 33, at pp. 38–40, paras. 14–18; J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, 1996), pp. 49–50; see also A. Aust, "The Theory and Practice of Informal International Instruments", *International and Comparative Law Quarterly*, vol. 35 (1986), p. 787, at pp. 794 ff.

[132] See articles 2 (1) (a), 3, 24 (2), 39–41, 58, 60.

[133] *Yearbook ... 1966*, vol. II, p. 232; see also Villiger, *Commentary*, *supra* note 44, at p. 513, para. 7; P. Sands, "Commentary on Article 39 of the Vienna Convention" in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties – A Commentary*, vol. II (Oxford University Press, 2011), p. 963, at pp. 971–972, paras. 31–34.

[134] Draft article 27, paragraph (3) (b), which later became article 31, paragraph (3) (b), of the Vienna Convention, contained the word "understanding" which was changed to "agreement" at the Vienna Conference. This change was "merely a drafting matter", see *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna 26 March – 24 May 1968*, A/CONF.39/11, p. 169; Fox, *supra* note 69, at p. 63.

[135] *Territorial Dispute (Libyan Arab Jamahiriya v. Chad), I.C.J. Reports 1994*, p. 6, at pp. 34 ff. paras. 66 ff.

particular map could constitute a subsequent agreement or subsequent practice.[136] WTO Panels and the Appellate Body have also not always distinguished between a subsequent agreement and subsequent practice under article 31 (3) (a) and (b).[137]

(8) The NAFTA Tribunal in *CCFT v. US*,[138] however, has squarely addressed this distinction. In that case the United States asserted that a number of unilateral actions by the three NAFTA parties could, if considered together, constitute a subsequent agreement.[139] In a first step, the Panel did not find that the evidence was sufficient to establish such a subsequent agreement under article 31 (3) (a).[140] In a second step, however, the Tribunal concluded that the very same evidence constituted a relevant subsequent practice which established an agreement between the parties regarding the interpretation:

> "The question remains: is there 'subsequent practice' that establishes the agreement of the NAFTA Parties on this issue within the meaning of Article 31 (3) (b)? The Tribunal concludes that there is. Although there is, to the Tribunal, insufficient evidence on the record to demonstrate a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,' the available evidence cited by the Respondent demonstrates to us that there is nevertheless a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications."[141]

(9) This reasoning suggests that one difference between a "subsequent agreement" and "subsequent practice" under article 31 (3) lies in different forms which embody the "authentic" expression of the will of the parties. Indeed, by distinguishing between "any subsequent agreement" under article 31 (3) (a) and "subsequent practice (...) which

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[136] *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, I.C.J Reports 2002*, p. 625, at p. 656, para. 61; in the *Gabčíkovo-Nagymaros* case, the Court spoke of "subsequent positions" in order to establish that "the explicit terms of the treaty itself were, therefore, in practice acknowledged by the parties to be negotiable", *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J Reports 1997*, p. 7, at p. 77, para. 138, see also *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment (Jurisdiction and Admissibility), I.C.J Reports 1995*, p. 6, at p. 122, para. 28 ("subsequent conduct").

[137] See "Scheduling guidelines" in WTO Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004, and in WTO Appellate Body Report, *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005; to qualify a "1981 Understanding" in WTO Panel Report, *US – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, 8 October 1999; "Tokyo Round SCM Code" in WTO Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, 17 October 1996, and a "waiver" in WTO Appellate Body Report, *EC – Bananas III*, Second Recourse to Article 21.5, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008.

[138] *C.C.F.T. v. United States*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Award on Jurisdiction, 28 January 2008; see also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on the Challenge to the President of the Committee, 3 October 2001, ICSID Case No. ARB/97/36, ICSID Rep. (2004), p. 168, at p. 174, para. 12; P. Merkouris and M. Fitzmaurice, "Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement" in M. Fitzmaurice, O. Elias and P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers, 2010), p. 153, at pp. 217–233.

[139] *C.C.F.T. v. United States*, UNCITRAL Arbitration under NAFTA Chapter Eleven, Award on Jurisdiction, 28 January 2008, paras. 174–177.

[140] *Ibid.*, paras. 184–187.

[141] *Ibid.*, paras. 188–189; in a similar sense: *Aguas del Tunari SA v. Republic of Bolivia* (Netherlands/Bolivia Bilateral Investment Treaty), Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005, *ICSID Review – Foreign Investment Law Journal*, vol. 20 (2005), p. 450, at pp. 528 ff, paras. 251 ff.

establishes the agreement of the parties" under article 31 (3) (b) of the Vienna Convention, the Commission did not intend to denote a difference concerning their possible legal effect.[142] The difference between the two concepts, rather, lies in the fact that a "subsequent agreement between the parties" *ipso facto* has the effect of constituting an authentic means of interpretation of the treaty, whereas a "subsequent practice" only has this effect if its different elements, taken together, show "the common understanding of the parties as to the meaning of the terms".[143]

(10) Subsequent agreements and subsequent practice under article 31 (3) are hence distinguished based on whether an agreement of the parties can be identified *as such*, in a common act, or whether it is necessary to identify an agreement through individual acts which in their combination demonstrate a common position. A "subsequent agreement" under article 31 (3) (a) must therefore be "reached" and presupposes a single common act by the parties by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions.

(11) "Subsequent practice" under article 31 (3) (b), on the other hand, encompasses all (other) relevant forms of subsequent conduct by the parties to a treaty which contribute to the identification of an agreement, or "understanding",[144] of the parties regarding the interpretation of the treaty. It is, however, possible that "practice" and "agreement" coincide in specific cases and cannot be distinguished. This explains why the term "subsequent practice" is sometimes used in a more general sense which encompasses both means of interpretation that are referred to in article 31 (3) (a) and (b).[145]

(12) A group of separate subsequent agreements, each between a limited number of parties, but which, taken together, establish an agreement between all the parties to a treaty regarding its interpretation, is not normally "a" subsequent agreement under article 31 (3) (a). The term "subsequent agreement" under article 31 (3) (a) should, for the sake of clarity, be limited to a single agreement between all the parties. Different later agreements between a limited number of parties which, taken together, establish an agreement between all the parties regarding the interpretation of a treaty constitute subsequent practice under article 31 (3) (b). Different such agreements between a limited number of parties which, even taken together, do *not* establish an agreement between all the parties regarding the interpretation of a treaty, may have interpretative value as a supplementary means of interpretation under article 32 (see below at paragraphs (22) and (23)). Thus, the use of the term "subsequent agreement" is limited to agreements between all the parties to a treaty which are manifested in one single agreement – or in a common act in whatever form that reflects the agreement of all parties.[146]

(13) A subsequent agreement under article 31 (3) (a) must be an agreement "regarding" the interpretation of the treaty or the application of its provisions. The parties must

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[142] *Yearbook ... 1966*, vol. II, pp. 221–222, para. (15).

[143] *Ibid.*; Karl, *supra* note 79, at p. 294.

[144] The word "understanding" had been used by the Commission in the corresponding draft article 27 (3) (b) on the law of treaties (see *supra* note 134).

[145] *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Order (Provisional Measures), I.C.J. Reports 2006*, p. 113, at pp. 127–128, para. 53: in this case, even an explicit subsequent verbal agreement was characterised by one of the parties as "subsequent practice".

[146] See WTO Appellate Body Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012, para. 371. This aspect will be addressed further at a later stage of this topic.

therefore purport, possibly among other aims, to clarify the meaning of a treaty or how it is to be applied.[147]

(14) Whether an agreement is one "regarding" the interpretation or application of a treaty can sometimes be determined by some reference which links the "subsequent agreement" to the treaty concerned. Such reference may also be comprised in a later treaty. In the *Jan Mayen* case between Denmark and Norway, for example, the International Court of Justice appears to have accepted that a "subsequent treaty" between the parties "in the same field" could be used for the purpose of the interpretation of the previous treaty. In that case, however, the Court ultimately declined to use the subsequent treaty for that purpose because it did not in any way "refer" to the previous treaty.[148] In *Dispute Regarding Navigation and Related Rights* between Costa Rica and Nicaragua, Judge Guillaume referred to the actual practice of tourism on the San Juan River in conformity with a Memorandum of Understanding (MoU) between the two States.[149] It was not clear, however, whether this particular MoU was meant by the parties to serve as an interpretation of the boundary treaty under examination.

(15) *Paragraph 2 of draft conclusion 4* does not intend to provide a general definition for any form of subsequent practice that may be relevant for the purpose of the interpretation of treaties. Paragraph 2 is limited to subsequent practice as a means of authentic interpretation which establishes the agreement of all the parties to the treaty, as formulated in article 31 (3) (b). Such subsequent practice (in a narrow sense) is distinguishable from other "subsequent practice" (in a broad sense) by one or more parties which does not establish the agreement of the parties, but which may nevertheless be relevant as a subsidiary means of interpretation according to article 32 of the Vienna Convention.[150]

(16) Subsequent practice under article 31 (3) (b) may consist of any "conduct". The word "conduct" is used in the sense of article 2 of the Commission's articles on the responsibility of States for internationally wrongful acts.[151] It may thus include not only acts, but also omissions, including relevant silence, which contribute to establishing agreement.[152] The question under which circumstances omissions, or silence, can contribute to an agreement of all the parties regarding the interpretation of a treaty will be addressed at a later stage of the work.

(17) Subsequent practice under article 31 (3) (b) must be conduct "in the application of the treaty". This includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or

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[147] *Ibid*., paras. 366–378, in particular 372; Linderfalk, *On the Interpretation of Treaties*, *supra* note 74, at pp. 164 ff.

[148] *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 51, para. 28.

[149] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), I.C.J. Reports 2009*, p. 213, Declaration of Judge *ad hoc* Guillaume, p. 290, at pp. 298–299, para. 16.

[150] On the distinction between the two forms of subsequent practice see below, commentary, paras. (22) and (23).

[151] *Yearbook ... 2001*, vol. II (Part 2) and corrigendum, pp. 34–35, paras. 2–4.

[152] Waldock, Third Report on the Law of Treaties, *Yearbook ... 1964*, vol. II, pp. 61–62, paras. (32)–(33); *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), I.C.J. Reports 1962*, p. 6, p. 23; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment (Jurisdiction and Admissibility), I.C.J. Reports 1984*, p. 392, at p. 410, para. 39; *Dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI, p. 53, at pp. 186–187, paras. 168–169.

judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.

(18) It may be recalled that, in one case, a NAFTA Panel denied that internal legislation can be used as an interpretative aid:

> "Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to Article 27 of the Vienna Convention, which states that 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework."[153]

Whereas article 27 of the Vienna Convention is certainly valid and important, this rule does not signify that national legislation may not be taken into account as an element of subsequent State practice in the application of the treaty. There is a difference between invoking internal law as a justification for a failure to perform a treaty and referring to internal law for the purpose of interpreting a provision of a treaty law. Accordingly, international adjudicatory bodies, in particular the WTO Appellate Body and the European Court of Human Rights, have recognized and regularly distinguish between internal legislation (and other implementing measures at the internal level) which violates treaty obligations, and national legislation and other measures which can serve as a means to interpret the treaty.[154] It should be noted, however, that an element of *bona fides* is implied in any "subsequent practice in the application of the treaty". A manifest misapplication of a treaty, as opposed to a *bona fide* application (even if erroneous), is therefore not an "application of the treaty" in the sense of articles 31 and 32.

(19) The requirement that subsequent practice in the application of a treaty under article 31 (3) (b) must be "regarding its interpretation" has the same meaning as the parallel requirement under article 31 (3 (a) (see above paragraphs (13) and (14)). It may often be difficult to distinguish between subsequent practice which specifically and purposefully relates to a treaty, i.e. is "regarding its interpretation", and other practice "in the application of the treaty". The distinction, however, is important because only conduct that the parties undertake "regarding the interpretation of the treaty" is able to contribute to an "authentic" interpretation, whereas this requirement does not exist for other subsequent practice under article 32.

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[153] NAFTA Arbitral Panel Final Report, *Cross-Border Trucking Services (Mexico v. United States of America)*, No. USA-MEX-98-2008-01, adopted 6 February 2001, para. 224.

[154] For example, WTO Panel Report, *US – Section 110(5) Copyright Act*, WT/DS160/R, 15 June 2000, para. 6.55; WTO Panel Report, *US – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, 1 October 2008, para. 7.173; WTO Appellate Body Report, *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, 11 March 2011, para. 335–336; *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina Bilateral Investment Treaty), Decision on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8, ICSID Rep., vol. 7 (2003), p. 492, para. 47; *V v. the United Kingdom* [GC], Judgment (Merits and Just Satisfaction), 16 December 1999, Application No. 24888/94, ECHR 1999-IX, para. 73; *Kart v. Turkey* [GC], Judgment (Merits and Just Satisfaction), 3 December 2009, Application No. 8917/05, para. 54; *Sigurdur A Sigurjónsson v. Iceland*, Judgment (Merits and Just Satisfaction), 30 June 1993, Application No. 16130/90, ECHR Series A No. 264, para. 35.

(20) The question under which circumstances an "agreement of the parties regarding the interpretation of a treaty" is actually "established", will be addressed at a later stage of the work on the topic.

(21) Article 31 (3) (b) does not explicitly require that the practice must be conduct of the parties to the treaty themselves. It is, however, the parties themselves, acting through their organs,[155] or by way of conduct which is attributable to them, who engage in practice in the application of the treaty which may establish their agreement. The question whether other actors can generate relevant subsequent practice is addressed in draft conclusion 5.[156]

(22) *Paragraph 3 of draft conclusion 4* addresses "other" subsequent practice, i.e. practice other than that referred to in article 31 (3) (b). This paragraph concerns "subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32", as mentioned in paragraph 4 of draft conclusion 1. This form of subsequent practice, which does not require the agreement of all the parties, was originally referred to in the commentary of the Commission as follows:

> "But, in general, the practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty. Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement. For this reason the Commission considered that subsequent practice establishing the common understanding of all the parties regarding the interpretation of a treaty should be included in paragraph 3 [of what became Article 31 (3) of the Vienna Convention] as an authentic means of interpretation alongside interpretative agreements. The practice of individual States in the application of a treaty, on the other hand, may be taken into account only as one of the 'further' means of interpretation mentioned in article 70."[157]

(23) Paragraph 3 of draft conclusion 4 does not enunciate a requirement, as it is contained in article 31 (3) (b), that the relevant practice be "regarding the interpretation" of the treaty. Thus, for the purposes of the third paragraph, any practice in the application of the treaty that may provide indications as to how the treaty should be interpreted may be a relevant supplementary means of interpretation under article 32.

(24) This "other" subsequent practice, since the adoption of the Vienna Convention, has been recognized and applied by international courts and other adjudicatory bodies as a means of interpretation (see below paragraphs (25)–(33)). It should be noted, however, that the WTO Appellate Body, in *Japan – Alcoholic Beverages II*,[158] has formulated a definition of subsequent practice for the purpose of treaty interpretation which seems to suggest that only such "subsequent practice in the application of the treaty" "which establishes the agreement of the parties regarding its interpretation" can at all be relevant for the purpose of treaty interpretation, and not any other form of subsequent practice by one or more parties:

> "Subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to

[155] Karl, *supra* note 79, at pp. 115 ff.

[156] See draft conclusion 5 (2).

[157] *Yearbook ... 1964*, vol. II, p. 204, para. 13; see also *Yearbook ... 1966*, vol. II, pp. 221–222, para. (15).

[158] WTO Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 4 October 1996, and WTO Report of the Panel, WT/DS8/R, WT/DS10/R and WT/DS11/R, 11 July 1996.

> establish a discernable pattern implying the agreement of the parties regarding its interpretation."[159]

However, the jurisprudence of the International Court of Justice and other international courts and tribunals, and ultimately even that of the WTO Dispute Settlement Body itself (see below (32) and (33)), demonstrate that subsequent practice which fulfils all the conditions of article 31 (3) (b) of the Vienna Convention is not the only form of subsequent practice by parties in the application of a treaty which may be relevant for the purpose of treaty interpretation.

(25) In the *Case of Kasikili/Sedudu Island*, for example, the International Court of Justice held that a report by a technical expert which had been commissioned by one of the parties and which had "remained at all times an internal document",[160] while not representing subsequent practice which establishes the agreement of the parties under article 31 (3) (b), could "nevertheless support the conclusions" which the Court had reached by other means of interpretation.[161]

(26) ICSID Tribunals have also used subsequent State practice as a means of interpretation in a broad sense.[162] For example, when addressing the question whether minority shareholders can acquire rights from investment protection treaties and have standing in ICSID procedures, the tribunal in *CMS Gas v. Argentina* held that:

> "State practice further supports the meaning of this changing scenario. (...) Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements (...) among other examples, evidence increasing flexibility in the handling of international claims."[163]

(27) The European Court of Human Rights (ECHR) held in *Loizidou v. Turkey*[164] that its interpretation was "confirmed by the subsequent practice of the Contracting Parties",[165] i.e. "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 (...) of the Convention do not permit territorial or substantive restrictions".[166] More often the ECHR has relied on — not necessarily uniform — subsequent State practice by referring to national legislation and domestic administrative practice, as a means of interpretation. In the case of *Demir and Baykara v. Turkey*,[167] for example, the Court held that "as to the practice of European States, it can be observed that, in the vast majority of them, the right for public servants to bargain collectively with the

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[159] *Ibid.* (WTO Appellate Body Report), section E, p. 13.

[160] *Case concerning Kasikili/Sedudu Island, I.C.J. Reports 1999*, p. 1045, at p. 1078, para. 55.

[161] *Ibid.*, p. 1096, para. 80.

[162] O.K. Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis", *European Journal of International Law*, vol. 19 (2008), p. 301, at p. 345.

[163] *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina Bilateral Investment Treaty), Decision on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8, ICSID Rep., vol. 7 (2003), p. 492, at para. 47.

[164] *Loizidou v. Turkey*, Judgment (Preliminary Objections), 23 March 1995, Application No. 15318/89, ECHR Series A No. 310.

[165] *Ibid.*, para. 79.

[166] *Ibid*., para. 81; it is noteworthy that the Court described "such a State practice" as being "uniform and consistent" despite the fact that it had recognised that two States possibly constituted exceptions (Cyprus and the United Kingdom; "whatever their meaning"), paras. 80 and 82.

[167] *Demir and Baykara v. Turkey* [GC], Judgment (Merits and Just Satisfaction), 12 November 2008, Application No. 34503/97, ECHR 2008.

authorities has been recognised"[168] and that "the remaining exceptions can be justified only by particular circumstances".[169]

(28) The Inter-American Court of Human Rights (IACtHR), when taking subsequent practice of the parties into account, has also not limited its use to cases in which the practice established the agreement of the parties. Thus, in the case of *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago*,[170] the IACtHR held that the mandatory imposition of the death penalty for every form of conduct which resulted in the death of another person was incompatible with article 4 (2) of the American Convention on Human Rights (imposition of the death penalty only for the most serious crimes). In order to support this interpretation, the Court held that it was "useful to consider some examples in this respect, taken from the legislation of those American countries that maintain the death penalty".[171]

(29) The Human Rights Committee under the ICCPR is open to arguments based on subsequent practice in a broad sense when it comes to the justification of interferences with the rights set forth in the Covenant.[172] Interpreting the rather general terms contained in article 19 (3) of the ICCPR (permissible restrictions of the freedom of expression), the Committee observed that "similar restrictions can be found in many jurisdictions",[173] and concluded that the aim pursued by the contested law did not, as such, fall outside the legitimate aims of article 19 (3) of the ICCPR.[174]

(30) ITLOS has on some occasions referred to the subsequent practice of the parties without verifying whether such practice actually established an agreement between the parties regarding the interpretation of the treaty. In *The M/V "SAIGA" (No 2)*,[175] for example, the Tribunal reviewed State practice with regard to the use of force to stop a ship according to UNCLOS.[176] Relying on the "normal practice used to stop a ship", the Tribunal did not specify the respective State practice but rather assumed a certain general standard to exist.[177]

(31) The ICTY, referring to the Genocide Convention, noted in the *Jelisić* Judgment that:

> "the Trial Chamber (...) interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. (...) The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was

[168] *Ibid.*, para. 52.
[169] *Ibid.*, para. 151; similarly *Jorgic v. Germany*, Judgment, 12 July 2007, Application No. 74613/01, ECHR 2007-III, para. 69.
[170] *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago*, Judgment (Merits, Reparations and Costs), 21 June 2002, Inter-Am. Ct. H.R. Series C No. 94.
[171] *Ibid*., para. 12.
[172] *Jong-Cheol v. The Republic of Korea*, Views, 27 July 2005, communication No. 968/2001, CCPR/C/84/D/968/2001.
[173] *Ibid*., para. 8.3.
[174] *Ibid*.; see also *Yoon and Choi v. The Republic of Korea*, Views, 3 November 2006, Communication nos. 1321/2004 and 1322/2004, CCPR/C/88/D/1321-1322/2004, para. 8.4.
[175] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 262, at paras. 155–156.
[176] United Nations Convention on the Law of the Sea, art. 293.
[177] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 262, at paras. 155 and 156; see also *The "Tomimaru" Case (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, para. 72; *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at paras. 45 and 50.

> attached to the Judgments rendered by the Tribunal for Rwanda. (…) The practice of States, notably through their national courts, and the work of international authorities in this field have also been taken into account."[178]

(32) The WTO dispute settlement bodies also occasionally distinguish between "subsequent practice" which satisfies the conditions of article 31 (3) (b) and other forms of subsequent practice in the application of the treaty which they also recognize as being relevant for the purpose of treaty interpretation. In *US – Section 110(5) Copyright Act*[179] (not appealed), for example, the Panel had to determine whether a "minor exceptions doctrine" concerning royalty payments applied.[180] The Panel found evidence in support of the existence of such a doctrine in several Member States' national legislation and noted:

> "We recall that Article 31 (3) of the Vienna Convention provides that together with the context (a) any subsequent agreement, (b) subsequent practice, or (c) any relevant rules of international law applicable between the parties, shall be taken into account for the purposes of interpretation. We note that the parties and third parties have brought to our attention several examples from various countries of limitations in national laws based on the minor exceptions doctrine. In our view, State practice as reflected in the national copyright laws of Berne Union members before and after 1948, 1967 and 1971, as well as of WTO Members before and after the date that the TRIPS Agreement became applicable to them, confirms our conclusion about the minor exceptions doctrine."[181]

And the Panel added the following cautionary footnote:

> "By enunciating these examples of State practice we do not wish to express a view on whether these are sufficient to constitute 'subsequent practice' within the meaning of Article 31 (3) (b) of the Vienna Convention."[182]

(33) In *EC – Computer Equipment*, the Appellate Body criticized the Panel for not having considered decisions by the Harmonized System Committee of the World Customs Organization (WCO) as a relevant subsequent practice:

> "A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions (...) However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant."[183]

Thus, on closer inspection, the WTO dispute settlement bodies also recognize the distinction between "subsequent practice" under article 31 (3) (b), and a broader concept of

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[178] *The Prosecutor v. Goran Jelisić*, Trial Chamber, Judgment, 14 December 1999, IT-95-10-T, para. 61; similarly *Prosecutor v. Radislav Krstić*, Trial Chamber, Judgment, 2 August 2001,IT-98-33-T, para. 541.

[179] WTO Panel Report, *US – Section 110(5) Copyright Act*, WT/DS160/R, 15 June 2000.

[180] See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 9.1.

[181] WTO Panel Report, *US – Section 110 (5) Copyright Act*, WT/DS160/R, 15 June 2000, para. 6.55.

[182] *Ibid.*, footnote 68.

[183] WTO Appellate Body Report, *EC – Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, 5 June 1998, at para. 90. See also I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009), p. 342.

subsequent practice which does not presuppose an agreement between all the parties of the treaty.[184]

(34) In using subsequent practice by one or more, but not all, parties to a treaty as a supplementary means of interpretation under article 32 one must, however, always remain conscious of the fact that "the view of one State does not make international law".[185] In any case, the distinction between agreed subsequent practice under article 31 (3) (b), as an authentic means of interpretation, and other subsequent practice (in a broad sense) under article 32, implies that a greater interpretative value should be attributed to the former.

(35) The distinction between subsequent practice under article 31 (3) (b) and subsequent practice under article 32 also contributes to answering the question whether subsequent practice requires repeated action with some frequency[186] or whether a one-time application of the treaty may be enough.[187] In the WTO framework, the Appellate Body has found:

> "An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."[188]

If, however, the concept of subsequent practice as a means of treaty interpretation is distinguished from a possible agreement between the parties, frequency is not a necessary element of the definition of the concept of "subsequent practice" in the broad sense (under article 32).[189]

(36) Thus, "subsequent practice" in the broad sense (under article 32) covers any application of the treaty by one or more parties. It can take various forms.[190] Such "conduct by one or more parties in the application of the treaty" may, in particular, consist of a direct application of the treaty in question, conduct which is attributable to a State party as an application of the treaty, a statement or a judicial pronouncement regarding its interpretation or application. Such conduct may include official statements concerning the treaty's meaning, protests against non-performance, or tacit acceptance of statements or acts by other parties.[191]

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.

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[184] See also WTO *Appellate* Body Report, *US – COOL*, WT/DS384/AB/R and WT/DS386/AB/R, 29 June 2012, para. 452.

[185] *Sempra Energy International v. Argentine Republic*, Award, 28 September 2007, ICSID Case No. ARB/02/16, para. 385; see also *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award, 22 May 2007, ICSID Case No. ARB/01/3, para. 337; WTO Panel Report, *US – Large Civil Aircraft (2nd complaint)*, WT/DS353/R, 31 March 2011, fn. 2420 in para. 7.953.

[186] Villiger, *Commentary*, *supra* note 44, at p. 431, para. 22.

[187] Linderfalk, *On the Interpretation of Treaties*, *supra* note 74, at p. 166.

[188] WTO Appellate Body Report, *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 4 October 1996, section E, p. 13.

[189] Kolb, *supra* note 108, pp. 506–507.

[190] Aust, *supra* note 88, at p. 239.

[191] Karl, *supra* note 79, at pp. 114f.

Commentary

(1) Draft conclusion 5 addresses the question of possible authors of subsequent practice under articles 31 and 32. The phrase "under articles 31 and 32" makes it clear that this draft conclusion applies both to subsequent practice as an authentic means of interpretation under article 31 (3) (b) and to subsequent practice as a supplementary means of interpretation under article 32 of the Vienna Convention. Paragraph 1 of draft conclusion 5 defines positively whose conduct in the application of the treaty may constitute subsequent practice under articles 31 and 32, whereas paragraph 2 states negatively which conduct does not, but which may nevertheless be relevant when assessing the subsequent practice of parties to a treaty.

(2) *Paragraph 1 of draft conclusion 5*, by using the phrase "any conduct which is attributable to a party to a treaty under international law", borrows language from article 2 (a) of the articles on the responsibility of States for internationally wrongful acts.[192] Accordingly, the term "*any* conduct" encompasses actions and omissions and is not limited to the conduct of State organs of a State, but also covers conduct which is otherwise attributable, under international law, to a party to a treaty. The reference to the articles on the responsibility of States for internationally wrongful acts does not, however, extend to the requirement that the conduct in question be "internationally wrongful" (see below para. (8)).

(3) An example of relevant conduct which does not directly arise from the conduct of the parties, but nevertheless constitutes an example of State practice, has been identified by the International Court of Justice in the *Kasikili/Sedudu* case. There the Court considered that the regular use of an island on the border between Namibia (former South-West Africa) and Botswana (former Bechuanaland) by members of a local tribe, the Masubia, could be regarded as subsequent practice in the sense of article 31 (3) (b) of the Vienna Convention if it

> "was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the Southern Channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware and accepted this as a confirmation of the treaty boundary."[193]

(4) By referring to *any* conduct in the application of the treaty which is attributable to a party to the treaty, however, paragraph 1 does not imply that any such conduct necessarily constitutes, in a given case, subsequent practice for the purpose of treaty interpretation. The use of the phrase "may consist" is intended to reflect this point. This clarification is particularly important in relation to conduct of State organs which might contradict an officially expressed position of the State with respect to a particular matter, and thus contribute to an equivocal conduct by the State.

(5) The Commission debated whether draft conclusion 5 should specifically address the question under which conditions the conduct of lower State organs would be relevant subsequent practice for purposes of treaty interpretation. In this regard, several members of the Commission pointed to the difficulty of distinguishing between lower and higher State organs, particularly given the significant differences in the internal organization of State governance. The point was also made that the relevant criterion was less the position of the

[192] Articles on the Responsibility of States for internationally wrongful acts, with commentaries, *Yearbook ... 2001*, vol. II, (Part 2) and corrigendum, p. 35, para. 4.; the question of the attribution of relevant subsequent conduct to international organizations for the purpose of treaty interpretation will be addressed at a later stage of the work on the topic.

[193] *Case concerning Kasikili/Sedudu Island, I.C.J. Reports 1999*, p. 1045, at p. 1095, para. 74.

organ in the hierarchy of the State than its actual role in interpreting and applying any particular treaty. Given the complexity and variety of scenarios that could be envisaged, the Commission concluded that this matter should not be addressed in the text of draft conclusion 5 itself, but rather in the commentary.

(6) Subsequent practice of States in the application of a treaty may certainly be performed by the high-ranking government officials mentioned in article 7 of the Vienna Convention. Yet, since most treaties typically are not applied by such high officials, international courts and tribunals have recognized that the conduct of lower authorities may also, under certain conditions, constitute relevant subsequent practice in the application of a treaty. Accordingly, the International Court of Justice recognized in the case of *Rights of U.S. Nationals in Morocco* that article 95 of the Act of Algeciras had to be interpreted flexibly in light of the inconsistent practice of local customs authorities.[194] The jurisprudence of arbitral tribunals confirms that relevant subsequent practice may emanate from lower officials. In the *German External Debts* Award, the Arbitral Tribunal considered a letter of the Bank of England to the German Federal Debt Administration as relevant subsequent practice.[195] And in the case of *Tax regime governing pensions paid to retired UNESCO officials residing in France* the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice. Ultimately, however, the Arbitral Tribunal considered some contrary official pronouncements by a higher authority, the French Government, to be decisive.[196]

(7) It thus appears that the practice of lower and local officials may be subsequent practice "in the application of a treaty" if this practice is sufficiently unequivocal and if the government can be expected to be aware of this practice and has not contradicted it within a reasonable time.[197]

(8) The Commission did not consider it necessary to limit the scope of the relevant conduct by adding the phrase "for the purpose of treaty interpretation".[198] This had been proposed by the Special Rapporteur in order to exclude from the scope of the term "subsequent practice" such conduct which may be attributable to a State but which does not serve the purpose of expressing a relevant position of a State regarding the interpretation of a treaty.[199] The Commission, however, considered that the requirement, that any relevant conduct must be "in the application of the treaty", would sufficiently limit the scope of possibly relevant conduct. Since the concept of "application of the treaty" requires conduct in good faith, a manifest misapplication of a treaty falls outside this scope.[200]

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194 *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America), Judgment, I.C.J. Reports 1952*, p. 176, at p. 211.

195 *Case concerning the question whether the re-evaluation of the German Mark in 1961 and 1969 constitutes a case for application of the clause in article 2 (e) of Annex I A of the 1953 Agreement on German External Debts between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the one hand and the Federal Republic of Germany on the other*, Award, 16 May 1980, UNRIAA, vol. XIX, p. 67, at pp. 103–104, para. 31.

196 *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Award, 14 January 2003, UNRIAA, vol. XXV, p. 231, at p. 257, para. 66 and p. 259, para. 74.

197 See Chanaki, *supra* note 69, at pp. 323–328; Gardiner, *supra* note 23, at p. 239; M. Kamto, "La volonté de l'Etat en droit international", *Recueil des cours*, vol. 310 (2004), p. 9, pp. 142–144; Dörr, *supra* note 68, at pp. 555–556, para. 78.

198 See First Report, p. 55, para. 144 (draft conclusion 4, para. 1).

199 *Ibid.*, p. 46, para. 120.

200 See para. (18) of the commentary to draft conclusion 4.

(9) *Paragraph 2 of draft conclusion 5* comprises two sentences. The first sentence indicates that conduct other than that envisaged in paragraph 1, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. The phrase "other conduct" was introduced in order clearly to establish the distinction between the conduct contemplated in paragraph 2 and that contemplated in paragraph 1. At the same time, the Commission considered that conduct not covered by paragraph 1 may be relevant when "assessing" the subsequent practice of parties to a treaty.

(10) "Subsequent practice in the application of a treaty" will be brought about by those who are called to apply the treaty, which are normally the States parties themselves. The general rule has been formulated by the Iran-U.S. Claims Tribunal as follows:

> "It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty. Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be attributed as such to the United States as the other party to the Algiers Declarations."[201]

(11) The first sentence of the second paragraph of draft conclusion 5 is intended to reflect this general rule. It emphasizes the primary role of the States parties to a treaty who are the masters of the treaty and are ultimately responsible for its application. This does not exclude that conduct by non-State actors may also constitute a form of application of the treaty if it can be attributed to a State party.[202]

(12) "Other conduct" in the sense of paragraph 2 of draft conclusion 5 may be that of different actors. Such conduct may, in particular, be practice of parties which is not "in the application of the treaty", or statements by a State, which is not party to a treaty, about the latter's interpretation,[203] or a pronouncement by a treaty monitoring body or a dispute

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[201] Iran-United States Claims Tribunal, Award No. 108-A-16/582/591 FT, *The United States of America, and others* and *The Islamic Republic of Iran, and others*, Iran-USCTR, vol. 5 (1984), p. 57, at p. 71; similarly Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), *The Islamic Republic of Iran v. the United States of America*, Iran-USCTR (2004–2009), vol. 38, p. 77, at pp. 124–125, paras. 127–128; see also Iran-United States Claims Tribunal, Interlocutory Award No. ITL 37-111- FT, *International Schools Services, Inc. (ISS)* and *National Iranian Copper Industries Company (NICICO)*, Iran-USCTR, vol. 5 (1984), p. 338, Dissenting Opinion of President Lagergren, p. 348, at p. 353: "the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case".

[202] See, e.g., Iran-United States Claims Tribunal, Award No. 108-A-16/582/591-FT, *The United States of America, and others* and *The Islamic Republic of Iran and others*, Iran-USCTR, vol. 5 (1984), p. 57, Dissenting Opinion of Parviz Ansari, Iran-USCTR, vol. 9 (1985), p. 97, at p. 99.

[203] See, for example, *Observations of the United States of America on the Human Rights Committee's General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 22 December 2008*, p. 1, para. 3 (available at: http://www.state.gov/documents/organization/138852.pdf). To the extent that the statement by the United States relates to the interpretation of the Optional Protocol to the International Covenant of

settlement body in relation to the interpretation of the treaty concerned,[204] or acts of technical bodies which are tasked by Conferences of the States Parties to advise on the implementation of treaty provisions, or different forms of conduct or statements of non-State actors.

(13) The phrase "assessing the subsequent practice" in the second sentence of paragraph 2 should be understood in a broad sense as covering both the identification of the existence of a subsequent practice and the determination of its legal significance. Statements or conduct of other actors, such as international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty.[205] Such reflection or initiation of subsequent practice of the parties by the conduct of other actors should not, however, be conflated with the practice by the parties to the treaty themselves, including practice which is attributable to them. Activities of actors which are not State parties, as such, may only contribute to assessing subsequent practice of the parties to a treaty.

(14) 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".[206] Draft conclusion 5 only concerns the question whether the practice of international organizations may be indicative of relevant practice by States parties to a treaty.

(15) Reports by international organizations at the universal level, which are prepared on the basis of a mandate to provide accounts on the State practice in a particular field, may enjoy considerable authority in the assessment of such practice. For example, the Handbook of the UNHCR on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Handbook) is an important work which reflects and thus provides guidance for State practice.[207] The same is true for the so-called 1540 Matrix, which is a systematic compilation by the United Nations Security Council Committee established pursuant to resolution 1540 (2004) of implementation measures taken by Member States.[208] As far as the Matrix relates to the

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Civil and Political Rights, to which the US is not party nor a contracting State, its statement constitutes "other conduct" under draft conclusion 5 (2).

[204] See, e.g., International Law Association, Committee on International Human Rights Law and Practice, "Final Report on the Impact of the Findings of United Nations Human Rights Treaty Monitoring Bodies", *International Law Association Reports of Conferences*, vol. 71 (2004), p. 621, paras. 21 ff.

[205] See Gardiner, *supra* note 23, at p. 239.

[206] This aspect of subsequent practice to a treaty will be the addressed at a later stage of the work on the topic.

[207] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (January 1992 – reedited), HCR/IP/4/Eng/REV.1, Foreword at VII; the view that the UNHCR Handbook itself expresses State practice has correctly been rejected by the Federal Court of Australia in *Semunigus v. The Minister for Immigration & Multicultural Affairs* [1999] FCA 422 (1999), Judgment, 14 April 1999, paras. 5–13; the Handbook nevertheless possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based on article 35 (1) of the Convention Relating to the Status of Refugees, 1951, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137, according to which "the Contracting States undertake to cooperate with the Office of the United Nations (…) in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention".

[208] Security Council resolution 1540 (28 April 2004), operative para. 8 (c); according to the 1540 Committee's website, "the 1540 Matrix has functioned as the primary method used by the 1540

implementation of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction (BWC),[209] as well as to the 1993 Chemical Weapons Convention (CWC),[210] it constitutes evidence for and an assessment of subsequent State practice to those treaties.[211]

(16) Other non-State actors may also play an important role in assessing subsequent practice of the parties in the application of a treaty. A pertinent example is the International Committee of the Red Cross (ICRC).[212] Apart from fulfilling a general mandate conferred on it by the Geneva Conventions and by the Statutes of the Movement,[213] the ICRC occasionally provides interpretative guidance on the Geneva Conventions and the Additional Protocols on the basis of a mandate from the Statutes of the International Red Cross and Red Crescent Movement.[214] Article 5 (2) (g) of the Statutes provides:

> "The role of the International Committee, in accordance with its Statutes, is in particular: (…) (g) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof."

On the basis of this mandate, the ICRC, for example, published in 2009 an "Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law".[215] The Guidance is the outcome of an "expert process" based on an analysis of State treaty and customary practice and it "reflect[s] the ICRC's institutional position as to how existing IHL should be interpreted".[216] In this context it is, however, important to note that States have reaffirmed their primary role in the development of international humanitarian law. Resolution 1 of the 31st Red Cross and Red Crescent Conference of 2011, while recalling "the important roles of the ICRC", "*emphasiz*[es] the primary role of States in the development of international humanitarian law".[217]

(17) Another example for conduct of non-State actors which may be relevant for assessing the subsequent practice of States parties is "The Monitor", a joint initiative of the "International Campaign to Ban Landmines" and the "Cluster Munitions Coalition". "The Monitor" acts as a "*de facto* monitoring regime"[218] for the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention)[219] and the 2008 Convention on Cluster

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Committee to organize information about implementation of UN Security Council resolution 1540 by Member States (…)" (http://www.un.org/en/sc/1540/national-implementation/matrix.shtml (accessed 24 July 2013)).

[209] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction, 1972, United Nations, *Treaty Series*, vol. 1015, No. 14860, p. 163.

[210] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993, United Nations, *Treaty Series*, vol. 1974, No. 33757, p. 317.

[211] See generally Gardiner, *supra* note 23, at p. 239.

[212] H.-P. Gasser, "International Committee of the Red Cross (ICRC)", *Max Planck Encyclopedia of Public International Law*, (http://www.mpepil.com), para. 20.

[213] *Ibid.*, para. 25.

[214] Adopted by the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006.

[215] ICRC, *Direct Participation in Hostilities* (2009), p. 10.

[216] *Ibid.*, p. 9.

[217] ICRC, 31st International Conference 2011: Resolution 1 – Strengthening legal protection for victims of armed conflicts, 1 December 2012.

[218] See http://www.the-monitor.org (accessed 24 July 2013).

[219] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

Munitions (Dublin Convention).[220] The Cluster Munitions Monitor lists pertinent statements and practice by States parties and signatories and identifies, *inter alia*, interpretative questions concerning the Dublin Convention.[221]

(18) The examples of the ICRC and of "The Monitor" show that non-State actors can provide valuable evidence of subsequent practice of parties, contribute to assessing this evidence, and even solicit its coming into being. However, non-State actors can also pursue their own goals, which may be different from those of States parties. Their assessments thus must be critically reviewed.

(19) The Commission considered whether it should also refer, in the text of draft conclusion 5, to "social practice" as an example of "other conduct … which may be relevant when assessing the subsequent practice of parties to a treaty".[222] Taking into account the concerns expressed by several members regarding the meaning and relevance of that notion, the Commission considered it preferable to address the question of the possible relevance of "social practice" in the commentary.

(20) The European Court of Human Rights has occasionally considered "increased social acceptance"[223] and "major social changes"[224] to be relevant for the purpose of treaty interpretation. The invocation of "social changes" or "social acceptance" by the Court, however, ultimately remains linked to State practice.[225] This is true, in particular, for the important cases of *Dudgeon v. the United Kingdom*[226] and *Christine Goodwin v. the United Kingdom*.[227] In *Dudgeon v. the United Kingdom*, the Court found that there was an "increased tolerance of homosexual behaviour" by pointing to the fact "that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied", and that it could therefore not "overlook the marked changes which have occurred in this regard in the domestic law of the member States".[228] The Court further pointed to the fact that "in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law".[229] And in *Christine Goodwin v. the United Kingdom*, the Court attached importance "to the clear and uncontested evidence of a continuing international trend in favour not only

[220] Convention on Cluster Munitions, 2008, United Nations, *Treaty Series*, No. 47713.

[221] See, e.g., *Cluster Munitions Monitor* (2011), pp. 24–31.

[222] See First Report, paras. 129 ff.

[223] *Christine Goodwin v. the United Kingdom* [GC], Judgment (Merits and Just Satisfaction), 11 July 2002, Application No. 28957/95, ECHR 2002-VI, para. 85.

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

[225] See also *I. v. the United Kingdom* [GC], Judgment (Merits and Just Satisfaction), 11 July 2002, Application No. 25680/94, para. 65; *Burden and Burden v. the United Kingdom* [GC], Judgment, 12 December 2006, Application No. 13378/05, para. 57; *Shackell v. the United Kingdom*, Decision on Admissibility, 27 April 2000, Application No. 45851/99, para. 1; *Schalk and Kopf v. Austria*, Judgment (Merits and Just Satisfaction), 24 June 2010, Application No. 30141/04, ECHR 2010, para. 58.

[226] *Dudgeon v. the United Kingdom*, Judgment (Merits), 22 October 1981, Application No. 7525/76, ECHR Series A No. 45, in particular para. 60.

[227] *Christine Goodwin v. the United Kingdom* [GC], Judgment (Merits and Just Satisfaction), 11 July 2002, Application No. 28957/95, ECHR 2002-VI, in particular para. 85.

[228] *Dudgeon v. the United Kingdom*, Judgment (Merits), 22 October 1981, Application No. 7525/76, Series A No. 45, para. 60.

[229] *Ibid.*

of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".[230]

(21) The European Court of Human Rights thus verifies whether social developments are actually reflected in State practice. This was true, for example, in cases concerning the status of children born out of wedlock[231] and in cases that concerned the alleged right of certain Roma ("Gypsy") people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.[232]

(22) It can be concluded that mere (subsequent) social practice, as such, is not sufficient to constitute relevant subsequent practice in the application of a treaty. Social practice has, however, occasionally been recognized by the European Court of Human Rights as contributing to the assessment of State practice.

[230] *Christine Goodwin v. the United Kingdom* [GC], Judgment (Merits and Just Satisfaction), 11 July 2002, Application No. 28957/95, ECHR 2002-VI, para. 85, see also para. 90.

[231] *Mazurek v. France*, Judgment, 1 February 2000, Application No. 34406/97, ECHR 2000-II, para. 52; see also *Marckx v. Belgium*, Judgment, 13 June 1979, Application No. 6833/74, ECHR Series A, No. 31, para. 41; *Inze v. Austria*, Judgment, 28 October 1987, Application No. 8695/79, ECHR Series A No. 126, para. 44; *Brauer v. Germany*, Judgment (Merits), 28 May 2009, Application No. 3545/04, para. 40.

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

Chapter V
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

40. 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.[233] 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.[234]

41. 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).[235] The Commission was unable to consider the topic at its sixty-first session (2009) and at its sixty-second session (2010).[236]

42. 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 newly appointed Special Rapporteur at the same session (2012).[237]

B. Consideration of the topic at the present session

43. The Commission had before it the second report of the Special Rapporteur (A/CN.4/661). The Commission considered the report at its 3164th to 3168th and 3170th meetings, on 15 to 17, 21, 22 and 24 May 2013, respectively.

44. In the second report, the Special Rapporteur built upon the methodological approaches and general workplan set out in the preliminary report (A/CN.4/654), taking into account the debates, in 2012, in the Commission and the Sixth Committee. The report considered: (a) the scope of the topic and of the draft articles; (b) the concepts of immunity and jurisdiction; (c) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (d) the identification of the normative elements of the regime of immunity *ratione personae*. On the basis of the analysis, six draft articles were presented for the consideration of the Commission. These draft articles addressed the scope of the

[233] 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 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).

[234] *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.

[235] A/CN.4/601 (preliminary report); A/CN.4/631 (second report); and A/CN.4/646 (third report).

[236] 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.

[237] A/CN.4/654 (preliminary report).

draft articles (draft article 1);[238] immunities not included in the scope of the draft articles (draft article 2);[239] definitions of criminal jurisdiction, immunity from foreign criminal jurisdiction, immunity *ratione personae* and immunity *ratione materiae* (draft article 3);[240] the subjective scope of immunity *ratione personae* (draft article 4);[241] the material scope of immunity *ratione personae* (draft article 5);[242] and the temporal scope of immunity *ratione personae* (draft article 6).[243]

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[238] Draft article 1 read as follows:

Scope of the draft articles

Without prejudice to the provisions of draft article 2, these draft articles deal with the immunity of certain State officials from the exercise of criminal jurisdiction by another State.

[239] Draft article 2 read as follows:

Immunities not included in the scope of the draft articles

The following are not included in the scope of the present draft articles:

(a) Criminal immunities granted in the context of diplomatic or consular relations or during or in connection with a special mission;

(b) Criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organizations and their officials or agents;

(c) Immunities established under other *ad hoc* international treaties;

(d) Any other immunities granted unilaterally by a State to the officials of another State, especially while they are in its territory.

[240] Draft article 3 read as follows:

Definitions

For the purposes of the present draft articles:

(a) The term "criminal jurisdiction" means all of the forms of jurisdiction, processes, procedures and acts which, under the law of the State that purports to exercise jurisdiction, are needed in order for a court to establish and enforce individual criminal responsibility arising from the commission of an act established as a crime or misdemeanour under the applicable law of that State. For the purposes of the definition of the term "criminal jurisdiction", the basis of the State's competence to exercise jurisdiction is irrelevant;

(b) "Immunity from foreign criminal jurisdiction" means the protection from the exercise of criminal jurisdiction by the judges and courts of another State that is enjoyed by certain State officials;

(c) "Immunity *ratione personae*" means the immunity from foreign criminal jurisdiction that is enjoyed by certain State officials by virtue of their status in their State of nationality, which directly and automatically assigns them the function of representing the State in its international relations;

(d) "Immunity *ratione materiae*" means the immunity from foreign criminal jurisdiction that is enjoyed by State officials on the basis of the acts which they perform in the discharge of their mandate and which can be described as "official acts".

[241] Draft article 4 read as follows:

The subjective scope of immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity from the exercise of criminal jurisdiction by States of which they are not nationals.

[242] Draft article 5 read as follows:

The material scope of immunity *ratione personae*

1. The immunity from foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.

45. Following its debate on the second report of the Special Rapporteur, the Commission, at its 3170th meeting on 24 May 2013, decided to refer the six draft articles contained therein to the Drafting Committee with the understanding that it would take into account the views expressed in the plenary debate.

46. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted three draft articles (see section C.1. below).

47. At its 3193rd to 3196th meetings, on 6 and 7 August 2013, the Commission adopted the commentaries to the draft articles provisionally adopted at the present session (see section C.2 below).

C. Text of the draft articles on Immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. Text of the draft articles

48. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials[244] from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

…

2. Heads of State, Heads of Government and Ministers for Foreign Affairs do not enjoy immunity *ratione personae* in respect of acts, whether private or official, that they perform after they have left office. This is understood to be without prejudice to other forms of immunity that such persons may enjoy in respect of official acts that they perform in a different capacity after they have left office.

[243] Draft article 6 read as follows:

The temporal scope of immunity *ratione personae*

1. Immunity *ratione personae* is limited to the term of office of a Head of State, Head of Government or Minister for Foreign Affairs and expires automatically when it ends.

2. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.

[244] The use of the term "officials" will be subject to further consideration.

Part Two
Immunity *ratione personae*

Article 3
Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

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

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

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials[245] from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

…

Commentary

(1) Draft article 1 is devoted to establishing the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction. It incorporates in a single provision the dual perspective originally proposed by the Special Rapporteur in two separate articles.[246] Paragraph 1 explains the cases to which the draft articles apply, while paragraph 2 contains a saving or "without prejudice" clause listing the situations which, under international law, are governed by special regimes that are not affected by the present draft articles. In the past, the Commission has used various techniques for defining this dual dimension of the scope of a set of draft articles,[247] but in this case it has thought it preferable to combine both

[245] *Idem*.
[246] See A/CN.4/661, draft arts. 1 and 2. See also paras. 19–34.
[247] In the draft articles on Jurisdictional immunities of States and their property, the Commission chose to deal with the dual dimension of the scope in two separate draft articles, and this was ultimately

dimensions in a single provision, especially since this presents the advantage of facilitating the simultaneous treatment of both dimensions under a single title. It also avoids the use in the title of a different article of expressions such as "do not apply", "exclude" and "do not affect", which some members of the Commission see as not entirely compatible with the "without prejudice" clause.

(2) Paragraph 1 establishes the scope of the draft articles in its positive dimension. To this end, in the paragraph, the Commission has decided to use the phrase "the present draft articles apply to", which is the wording used recently in other draft articles adopted by the Commission that contain a provision referring to their scope.[248]

On the other hand, the Commission considered that the scope of the draft articles should be defined as simply as possible, so that it could frame the rest of the draft articles and not affect or prejudge the other issues to be addressed later in other provisions in the text. Accordingly, the Commission decided to make a descriptive reference to the scope, listing the elements comprising the title of the topic itself. For the same reason, the phrase "from the exercise of", initially proposed by the Special Rapporteur, has been left out of the definition of the scope. This phrase was interpreted by various members of the Commission in different and even contradictory ways, in terms of the consequences for the definition of the scope of foreign criminal jurisdiction. Account was also taken of the fact that the phrase "exercise of" is used in other draft articles formulated by the Special Rapporteur.[249] The Commission was therefore of the view that the phrase was not needed to define the general scope of the draft articles and has reserved it for use in other parts of the draft articles in which it will have a better place.[250]

(3) Paragraph 1 covers the three elements defining the purpose of the draft articles, namely: (a) who are the persons enjoying immunity? (State officials); (b) what type of jurisdiction is affected by immunity? (criminal jurisdiction); and (c) in what domain does such criminal jurisdiction operate? (the criminal jurisdiction of another State).

(4) As to the first element, the Commission has chosen to confine the draft articles to the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of a State. In the Commission's previous work, the persons enjoying immunity have been referred to using the term "officials".[251] However, the use of this term, and its equivalents in the other language versions, has raised certain problems to

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reflected in the Convention adopted in 2004 (see United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, General Assembly resolution, 59/38 of 2 December 2004, annex, arts. 1 and 3). On the other hand, in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 1975, A/CONF.67/16, and in the United Nations Convention on the Law of Non-Navigational Uses of Watercourses, 1997, General Assembly resolution 51/229 of 21 May 1997, annex, the various aspects of the scope are defined in a single article, which also refers to special regimes. Although the draft articles on the Expulsion of aliens, adopted by the Commission, on first reading, in 2012, *Official Records of the General Assembly, Sixty-seventh Session Supplement No. 10* (A/67/10), chap. IV, also dealt with the scope in a single article consisting of two paragraphs, the same draft articles include other separate provisions whose purpose is to keep certain special regimes within a specific scope.

[248] This wording has been used, for example, in draft art. 1 of the draft articles on the Expulsion of aliens.

[249] See, in particular, draft art. 3 (b) and 4, as originally proposed by the Special Rapporteur (A/CN.4/661, paras. 46 and 67).

[250] Thus, draft art. 3, as adopted by the Commission (Persons enjoying immunity *ratione personae*).

[251] The words used in the various language versions are as follows: المسؤولون (Arabic), 官员 (Chinese), "officials" (English), "représentants" (French), должностные лица (Russian) and "funcionarios" (Spanish)

which the Special Rapporteur has drawn attention in her reports,[252] and which have also been pointed out by some members of the Commission. It should be noted, first, that the terms used in the various language versions are neither interchangeable nor synonymous. It should also be taken into account that these terms are not necessarily suitable for referring to each and every person to whom the present draft articles apply. The Commission consequently considers that the definition of "official" (and its equivalents in the various language versions), as well as decisions on the terms to be used to refer to the persons to whom immunity applies, are matters requiring detailed consideration which, the Special Rapporteur has proposed, should be undertaken at a later stage, particularly in connection with the analysis of immunity *ratione materiae*. Consequently, at the present stage of the work, the Commission has decided to continue to use the original terminology, on the understanding that it will be given consideration later. This is reflected by the footnote in the text of draft article 1, paragraph 1. The use of the term "official" in the commentaries must be understood to be subject to the same reservation.

(5) Secondly, the Commission has decided to confine the scope of the draft articles to immunity from criminal jurisdiction. The present draft article is not intended to define the concept of criminal jurisdiction, which is being considered by the Commission in relation to another draft article.[253] Nevertheless, the Commission has debated the scope of "criminal jurisdiction" in relation to the acts that would be covered by the concept, particularly with reference to the extension of immunity to certain acts that are closely linked to the concept of personal inviolability, such as the arrest or detention of an individual. With this in mind, and subject to later developments in the Commission's treatment of this issue, for the purposes of defining the scope of the present draft articles, the reference to foreign criminal jurisdiction should be understood as meaning the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual, including coercive acts that can be carried out against persons enjoying immunity in this context.

(6) Thirdly, the Commission decided to confine the scope of the draft articles to immunity from the "foreign" criminal jurisdiction, that which reflects the horizontal relations between States. This means that the draft articles will be applied solely in respect to the immunity from the criminal jurisdiction "of another State". Consequently, the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the draft articles. This exclusion must be understood to mean that none of the rules that govern immunity before such tribunals are to be affected by the content of the present draft articles.

Nevertheless, the need to consider the special problem presented by so-called mixed or internationalized criminal tribunals has been raised. Similarly, a question has been raised regarding the effect that existing international obligations imposed on States to cooperate with international criminal tribunals would have on the present draft articles. Although diverse views were expressed with regard to both subjects, it is not possible at this stage to definitively address these aspects.

(7) It must be emphasized that paragraph 1 refers to "immunity … from the criminal jurisdiction of another State". The use of the term "from" creates a link between the concepts of "immunity" and "foreign criminal jurisdiction" (or jurisdiction "of another

[252] See A/CN.4/654, para. 66, and A/CN.4/661, para. 32.

[253] It must be kept in mind that the Special Rapporteur formulated a draft definition of criminal jurisdiction in her second report in the context of a draft article on definitions (A/CN.4/661, draft art. 3. See also paras. 36 to 41 of the same report). This draft article has been referred to the Drafting Committee which, after extensive discussion, decided to take it up progressively throughout the quinquennium, and not to take a decision on it now.

State") that must be duly taken into account. On this point, the Commission is of the view that the concepts of immunity and foreign criminal jurisdiction are closely interrelated: it is impossible to view immunity in abstract terms, without relating it to a foreign criminal jurisdiction which, although it exists, will not be exercised by the forum State precisely because of the existence of immunity. Or, as the International Court of Justice has put it, "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to exercise of that jurisdiction".[254]

(8) The Commission regards immunity from foreign criminal jurisdiction as being procedural in nature. Consequently, immunity from foreign criminal jurisdiction cannot constitute a means of exempting the criminal responsibility of a person enjoying immunity from the substantive rules of criminal law, a responsibility which accordingly is preserved, independently of the fact that a State cannot, through the exercise of its jurisdiction, determine that such responsibility exists at a specific moment and with regard to a given person. On the contrary, immunity from foreign criminal jurisdiction is strictly a procedural obstacle or barrier to the exercise of a State's criminal jurisdiction against the officials of another State. This position was affirmed by the International Court of Justice in the *Arrest Warrant* case,[255] which is followed in the majority of State practice and in the literature.

(9) Paragraph 2 refers to cases in which there are special rules of international law relating to immunity from foreign criminal jurisdiction. This category of special rules has its most well-known and frequently cited manifestation in the regime of privileges and immunities granted under international law to diplomatic agents and to consular officials.[256] However, there are other examples in contemporary international law, both treaty-based and custom-based, which in the Commission's view should likewise be taken into account for the purposes of defining the scope of the present draft articles. Concerning those special regimes, the Commission considers that these are legal regimes that are well established in international law and that the present draft articles should not affect their content and application. It should be recalled that during the preparation of the draft articles on Jurisdictional immunities of States and their property, the Commission acknowledged the existence of special immunity regimes, albeit in a different context, and specifically referred to them in article 3, entitled "Privileges and immunities not affected by the present articles".[257]

The relationship between the regime for immunity of State officials from foreign criminal jurisdiction set out in the draft articles and the special regimes just mentioned was established by the Commission with the inclusion of a saving clause in, paragraph 2, according to which the provisions of the present draft articles are "without prejudice" to what is set out in the special regimes; here the Commission has followed the wording it used before, in the draft articles on Jurisdictional immunities of States and their property.

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[254] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002,* para. 46. See also the Commission's commentary to art. 6 of the Draft articles on Jurisdictional immunities of States and their property, particularly paras. (1), (2) and (3) (*Yearbook ... 1991*, vol. II (Part Two)).

[255] *Arrest Warrant* case, para. 60. The International Court of Justice has taken the same position regarding State immunity: see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, I.C.J. Reports 2012*, paras. 58 and 100.

[256] See the Vienna Convention on Diplomatic Relations, 1961, United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95., art. 31, and the Vienna Convention on Consular Relations, 1963, United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261, art. 43.

[257] See *Yearbook ... 1991*, vol. II (Part Two), commentary to art. 3.

(10) The Commission has used the term "special rules" as a synonym for the words "special regimes" in its earlier work. Although the Commission has not defined the concept of "special regime", attention should be drawn to the conclusions of the Study Group on Fragmentation of International Law, particularly conclusions 2 and 3.[258] For the purposes of the present draft articles, the Commission understands "special rules" to mean those international rules, whether treaty- or custom-based, that regulate the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations. The Commission sees such "special rules" as coexisting with the regime defined in the present draft articles, the special regime being applied in the event of any conflict between the two regimes.[259] In any event, the Commission considers that the special regimes in question are only those established by "rules of international law", this reference to international law being essential for the purpose of defining the scope of the "without prejudice" clause.[260]

(11) The special regimes included in paragraph 2 relate to three areas of international practice in which norms regulating immunity from foreign criminal jurisdiction have been identified, namely: (a) the presence of a State in a foreign country through diplomatic missions, consular posts and special missions; (b) the various representational and other activities connected with international organizations; and (c) the presence of a State's military forces in a foreign country. Although in all three areas, treaty-based norms establishing a regime of immunity from foreign criminal jurisdiction may be identified, the Commission has not thought it necessary to include in paragraph 2 an explicit reference to such international conventions and instruments.[261]

The first group includes special rules relating to the immunity from foreign criminal jurisdiction of persons connected with carrying out the functions of representation, or protection of the interests of the State in another State, whether on a permanent basis or otherwise, while connected with a diplomatic mission, consular post or special mission. The Commission takes the view that the rules contained in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions, as well as the relevant rules of customary law, fall into this category.

The second group includes special rules applicable to the immunity from criminal jurisdiction enjoyed by persons connected with an activity in relation to or in the framework of an international organization. In this category are included the special rules applicable to persons connected with missions to an international organization or delegations to organs of international organizations or to international conferences.[262] The Commission's understanding is that it is unnecessary to include in this group of special

[258] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 251.

[259] In its commentary to art. 3 of the draft articles on Jurisdictional immunities of States and their property, the Commission referred to this aspect in the following terms: "The article is intended to leave existing special regimes unaffected, especially with regard to persons connected with the missions listed" (para. (5) of the commentary). See also para. (1) of the same commentary.

[260] The Commission also included a reference to international law in the above-mentioned art. 3 of the draft articles on Jurisdictional immunities of States and their property. It should be noted that the Commission drew special attention to this formulation in its commentary to the draft article, particularly paras. (1) and (3) thereof.

[261] It must be kept in mind that the Commission also did not list such conventions in the draft articles on Jurisdictional immunities of States and their property. However, the commentary to draft art. 3 (para. (2) thereof) referred to the areas in which there are such special regimes and expressly mentioned some of the conventions establishing those regimes.

[262] This list corresponds to the one already formulated by the Commission in draft art. 3, para. 1 (a), of the draft articles on Jurisdictional immunities of States and their property.

rules those that apply in general to the international organizations themselves. However, it considers that this category does include norms applicable to the agents of an international organization, especially in cases when the agent has been placed at the disposal of the organization by a State and continues to enjoy the status of State official during the time when he or she is acting on behalf of and for the organization. Regarding this second group of special regimes, the Commission has taken into account the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies, as well as other treaty-based and customary norms applicable in this area.

The third group of special rules includes those according immunity from criminal jurisdiction to persons connected with the military forces of a State located in a foreign State. This category includes the whole set of rules regulating the stationing of troops in the territory of a third State, even those included in Status of Forces Agreements (the so-called SOFAs) and those included in headquarters agreements or military cooperation accords envisaging the stationing of troops. Also included in this category are agreements made in connection with the short-term activities of military forces in a foreign State.

(12) The list of the special rules described in paragraph 2 is qualified by the words "in particular" to indicate that the clause does not exclusively apply to these special rules. In this connection, various members of the Commission drew attention to the fact that special rules in other areas may be found in practice, particularly in connection with the establishment in a State's territory of foreign institutions and centres for economic, technical, scientific and cultural cooperation, usually on the basis of specific headquarters agreements. Although the Commission has accepted in general terms the existence of these special regimes, it has considered that there is no need to mention them in paragraph 2.

(13) Lastly, it should be noted that the Commission considered the possibility of including in paragraph 2, the practice whereby a State unilaterally grants a foreign official immunity from foreign criminal jurisdiction. However, the Commission decided against such inclusion. This issue may be revisited at a later stage in the consideration of work on the topic.

(14) On the other hand, the Commission has considered that the formulation of paragraph 2 should parallel the structure of paragraph 1 of the draft article. It must thus be borne in mind that the present draft articles refer to the immunity from foreign criminal jurisdiction of certain persons described as "officials" and that consequently, this subjective element should also be reflected in the "without prejudice" clause. This is why paragraph 2 refers expressly to "persons connected with". The phrase "persons connected with" has been used in line with the terminology in the United Nations Convention on Jurisdictional Immunities of States and Their Property (art. 3). The scope of the term "persons connected with" will depend on the content of the rules defining the special regime that applies to them; it is therefore not possible *a priori* to draw up a single definition for this category. This is also true for civilian personnel connected with the military forces of a State, who will be included in the special regime only to the extent that the legal instrument applicable in each case so establishes.

(15) The combination of the terms "persons connected with" and "special rules" is essential in determining the scope and meaning of the saving or "without prejudice" clause in paragraph 2. The Commission considers that the persons covered in this paragraph (diplomatic agents, consular officials, members of special missions, agents of international organizations and members of the military forces of a State) are automatically excluded from the scope of the present draft articles, not by the mere fact of belonging to that category of officials, but by the fact that one of the special regimes referred to in draft article 1, paragraph 2, applies to them under certain circumstances. In such circumstances,

the immunity from foreign criminal jurisdiction that these persons may enjoy under the special regimes applicable to them will not be affected by the provisions of the present draft articles.

Part Two
Immunity *ratione personae*

Article 3
Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Commentary

(1) Draft article 3 lists the State officials who enjoy immunity *ratione personae* from foreign criminal jurisdiction, namely: the Head of State, Head of Government and Minister for Foreign Affairs. The draft article confines itself to identifying the persons to whom this type of immunity applies, making no reference to its substantive scope, which will be dealt with in other draft articles.

(2) The Commission considers that there are two reasons, representational and functional, for granting immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[263] Second, they must be able to discharge their functions unhindered.[264] It is irrelevant whether those officials are nationals of the State in which they hold the office of Head of State, Head of Government or Minister for Foreign Affairs.

(3) The statement that the Heads of State enjoy immunity *ratione personae* is not subject to dispute, given that this is established in existing rules of customary international law. In addition, various conventions contain provisions referring directly to the immunity from jurisdiction of the Head of State. In this connection, mention must be made of article 21, paragraph 1, of the Convention on Special Missions, which expressly acknowledges that when the Head of State leads a special mission, he or she enjoys, in addition to what is granted in the Convention, the immunities accorded by international law to Heads of State on an official visit. Similarly, article 50, paragraph 1, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refers to the other "immunities accorded by international law to Heads of State". Along the same lines, albeit in a different field, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes, in the saving clause in article 3, paragraph 2, an express reference to the immunities accorded under international law to Heads of State.

The immunity from foreign criminal jurisdiction of the Head of State has also been recognized in case law at both the international and national levels. Thus, the International Court of Justice has expressly mentioned the immunity of the Head of State from foreign

[263] The International Court of Justice has stated that "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions" (*Armed activities on the territory of the Congo (New application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and admissibility, Judgment, I.C.J. Reports 2006*, para. 46).

[264] See the *Arrest Warrant* case, paras. 53 and 54, in which the International Court of Justice particularly emphasized the second element with respect to the Minister for Foreign Affairs.

criminal jurisdiction in the *Arrest Warrant*[265] and *Certain Questions of Mutual Assistance in Criminal Matters*[266] cases. It must be emphasized that examples of national judicial practice, although limited in number, are consistent in showing that Heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction, both in the proceedings concerning the immunity of the Head of State and in the reasoning that such courts follow in deciding whether or not other State officials also enjoy immunity from criminal jurisdiction.[267]

[265] *Arrest Warrant* case, para. 51.

[266] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, para. 170.

[267] National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see *Re Honecker*, Federal Supreme Court, Second Criminal Chamber (Federal Republic of Germany), Judgment of 14 December 1984 (Case No. 2 ARs 252/84) reproduced in *International Law Reports*, vol. 80, pp. 365–366; *Rey de Marruecos*, *Audiencia Nacional* (Spain), *Auto de la Sala de lo Penal*, 23 December 1998; *Kadhafi, Cour de cassation (Chambre criminelle)* (France), Judgment No. 1414 of 13 March 2001 reproduced in *Revue générale de droit international public*, vol. 105 (2001), p. 474; English version in *International Law Reports*, vol. 125, p. 508–510; *Fidel Castro*, *Audiencia Nacional* (Spain), *Auto del Pleno de la Sala de lo Penal*, 13 December 2007 (the tribunal had already made a similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and *Case against Paul Kagame, Audiencia Nacional, Juzgado de Instrucción No. 4* (Spain), Judgment of 6 February 2008. Again in the context of criminal proceedings, but this time as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In those cases, the national courts have not referred to the immunity of a specific Head of State, either because the person had completed his or her term of office and was no longer an incumbent Head of State or because the person was not and had never been a Head of State. See: *Pinochet (solicitud de extradición)*, *Audiencia Nacional, Juzgado de Instrucción No. 5* (Spain), request for extradition of 3 November 1998; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte* (*Pinochet* (No. 3)), House of Lords (United Kingdom), Judgment of 24 March 1999 reproduced in *International Legal Materials*, vol. 38 (1999), pp. 581–663; *H.S.A. et al. v. S.A. et al. (indictment of Ariel Sharon, Amos Yaron and others)*, Court of Cassation (Belgium), Judgment of 12 February 2003 (P-02-1139) reproduced in ILM, vol. 42, No. 3 (2003), pp. 596–605; *Scilingo, Audiencia Nacional*, *Sala de lo penal*, third section (Spain), Judgment of 27 June 2003; *Association Fédération nationale des victimes d'accidents collectifs "FONVAC SOS catastrophe"; Association des familles des victimes du Joola*, *Cour de cassation, Chambre criminelle* (France), Judgment of 19 January 2010 (09-84818); *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court of Justice, Queen's Bench Division Administrative Court (United Kingdom), Judgment of 29 July 2012 ([2011] EWHG 2020 (Admin)); *Nezzar*, Federal Criminal Tribunal (Switzerland), Judgment of 25 July 2012 (BB.2011-140). It should be emphasized that national courts have never stated that a Head of State does not have immunity from criminal jurisdiction, and that this immunity is *ratione personae*. It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see: *Kline v. Kaneko*, Supreme Court of the State of New York, Judgment of 31 October 1988 (141 Misc.2d 787); *Mobutu v. SA Cotoni*, Civil Court of Brussels, Judgment of 29 December 1988; *Ferdinand et Imelda Marcos v. Office fédéral de la police*, Federal Tribunal (Switzerland), Judgment of 2 November 1989; *Lafontant v. Aristide*, United States District Court for the Eastern District of New York (United States), Judgment of 27 January 1994; *W. v. Prince of Liechtenstein*, Supreme Court (Austria), Judgment of 14 February 2001 (7 Ob 316/00x); *Tachiona v. Mugabe* ("*Tachiona I*"), District Court for the Southern District of New York, Judgment of 30 October 2001 (169 F.Supp.2d 259); *Fotso v. Republic of Cameroon*, District Court of Oregon (United States), Judgment of 22 February 2013 (6:12CV 1415-TC).

The Commission considers that the immunity from foreign criminal jurisdiction *ratione personae* of the Head of State is accorded exclusively to persons who actually hold that office, and that the title given to the Head of State in each State, the conditions under which he or she acquires the status of Head of State (as a sovereign or otherwise) and the individual or collegial nature of the office are irrelevant for the purposes of the present draft article.[268]

(4) The recognition of immunity *ratione personae* in favour of the Head of Government and the Minister for Foreign Affairs is a result of the fact that, under international law, their representative functions of the State have become recognized as approximate to those of the Head of State. Examples of this may be found in the recognition of full powers for the Head of Government and the Minister for Foreign Affairs for the conclusion of treaties[269] and the equality of the three categories of officials in terms of their international protection[270] and their involvement in the representation of the State.[271] The immunity of Heads of Government and Ministers for Foreign Affairs has been referred to in the Convention on Special Missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, and, implicitly, in the United Nations Convention on Jurisdictional Immunities of States and Their Property.[272] The inclusion of the Minister for Foreign Affairs in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, is particularly significant, since in its own draft articles on the subject, the Commission decided not to include government officials in the list of persons

[268] In this connection, the provisions of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 50, para. 1) and the Convention on Special Missions, 1969, United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 231 (art. 21, para. 1), which refer to the case of collegial bodies acting as Head of State, are of interest. On the other hand, the Commission did not see any need to include a reference to this category in the draft articles on the prevention and punishment of internationally protected persons, including diplomatic agents (see *Yearbook ... 1972*, vol. II, para. (2) of the commentary to draft art. 1), and no reference was accordingly made in the Convention.

[269] Vienna Convention on the Law of Treaties, 1969, art. 7, para. 2 (a). The International Court of Justice has made a similar statement on the capacity of the Head of State, Head of Government and Minister for Foreign Affairs to make a commitment on behalf of the State through unilateral acts (*Armed activities* case, para. 46).

[270] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167, art. 1, para. 1 (a).

[271] In this connection, see the Convention on Special Missions, art. 21, and the Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 50.

[272] Art. 21 of the Convention on Special Missions, in addition to the Head of State, refers to the Head of Government and Minister for Foreign Affairs, although it does so in separate paragraphs (para. 1 refers to the Head of State and para. 2 refers to the Head of Government, Minister for Foreign Affairs and other persons of high rank). The same model is followed in the Vienna Convention on the Representation of States in their relations with International Organizations of a Universal Character, which also refers to the officials mentioned in separate paragraphs. By contrast, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes only a mention *eo nomine* of the Head of State (art. 3, para. 2), and the other two categories of officials must be considered as included in the concept of "representatives of the State" found in art. 2.1 (a) (iv)). See paras. 6 and 7 of the commentary to draft article 3 on jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two).

internationally protected,[273] but the Minister for Foreign Affairs was nevertheless included in the final Convention adopted by States.

All of the above-mentioned examples have emerged from the work of the Commission, which has on several occasions dealt with the question of whether or not expressly to include Heads of State, Heads of Government and Ministers for Foreign Affairs in international instruments. In this connection, there was noted that there was specific mention to the Head of State in article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property while excluding any express reference to the Head of Government and Minister for Foreign Affairs. However, there is very little reason to conclude that these examples mean that in the present draft article, the Commission must treat Heads of State, Heads of Government and Ministers for Foreign Affairs differently. It is even less reasonable to conclude that the Head of Government and Minister for Foreign Affairs must be excluded from draft article 3. A number of factors must be taken into account here. First, the present draft articles refer solely to the immunity from foreign criminal jurisdiction of State officials, whereas the Convention on Special Missions, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, refer to all the immunities from which Heads of State, Heads of Government and Ministers for Foreign Affairs may enjoy. Secondly, the United Nations Convention on Jurisdictional Immunities of States and Their Property refers to the immunities of States; immunity from criminal jurisdiction remains outside its scope.[274] In addition, far from rejecting the immunities that might be enjoyed by the Head of Government and the Minister for Foreign Affairs, the Commission actually recognized them, but simply did not mention these categories specifically in article 3, paragraph 2, "since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons".[275] And thirdly, it must also be borne in mind that all the examples mentioned above preceded the judgment by the International Court of Justice in the *Arrest Warrant* case.

(5) In its judgment in the *Arrest Warrant* case, the International Court of Justice expressly stated that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[276] This statement was later reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[277] Both of these judgments were discussed extensively by the Commission, particularly with regard to the Minister for Foreign Affairs. During the discussion, most members expressed the view that the *Arrest Warrant* case reflects the current state of international law and that it must accordingly be concluded that there is a customary rule under which the immunity from foreign criminal jurisdiction *ratione personae* of the

[273] See *Yearbook ... 1972*, vol. 2, para. (3) of the commentary to draft art. 1. It must be kept in mind that the Commission decided not to make this reference because it could not be based upon any "broadly accepted rule of international law", but it did acknowledge that "[a] cabinet officer would, of course, be entitled to special protection whenever he was in a foreign State in connexion with some official function" (*Yearbook ... 1972*. This sentence is included in both the English and French versions of the commentary, but not in the Spanish version).

[274] The statement that the Convention "does not cover criminal proceedings" was proposed by the Ad Hoc Committee set up on the subject by the General Assembly and was ultimately included in para. 2 of General Assembly resolution 59/38 of 2 December 2004, by which the Convention was adopted.

[275] See para. (7) of the commentary to draft art. 3 of the draft articles (*Yearbook ... 1991*).

[276] *Arrest Warrant* case, para. 51.

[277] *Certain Questions* case, para. 170.

Minister for Foreign Affairs is recognized. In the view of these members, the position of the Minister for Foreign Affairs and the special functions he or she carries out in international relations constitute the basis for the recognition of such immunity from foreign criminal jurisdiction. On the other hand, some members of the Commission pointed out that the Court's judgment was not sufficient grounds for concluding that a customary rule existed, as it did not contain a thorough analysis of the practice and that several judges expressed opinions that differed from the majority view.[278] One member of the Commission who considers that the Court's judgment does not show that there is a customary rule nevertheless said that, in view of the fact that the Court's judgment in that case has not been opposed by States, the absence of a customary rule does not prevent the Commission from including that official among the persons enjoying immunity *ratione personae* from foreign criminal jurisdiction, as a matter of progressive development of international law.

(6) As to the practice of national courts, the Commission has also found that while there are very few rulings on the immunity *ratione personae* from foreign criminal jurisdiction of the Head of Government and almost none in respect of the Minister for Foreign Affairs, the national courts that have had occasion to comment on this subject have nevertheless always recognized that those high-ranking officials do have immunity from foreign criminal jurisdiction during their term of office.[279]

(7) As a result of the discussion, the Commission found that there are sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. Consequently, it has been decided to include them in draft article 3.

(8) The Commission has also looked into whether other State officials could be included in the list of the persons enjoying immunity *ratione personae*. This has been raised as a possibility by some members of the Commission in the light of the evolution of international relations, particularly the fact that high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs are becoming increasingly involved in international forums and making frequent trips outside the national territory. Some members of the Commission have supported the view that other high-ranking officials should be included in draft article 3 with a reference to the *Arrest Warrant* case, stating that the use of the words "such as" should be interpreted to extend the regime of immunity *ratione personae* to high-ranking State officials, other than the Head of State, Head of Government and Minister for Foreign Affairs, who have major responsibilities within the State and who are involved in representation of the State in the fields of their

[278] See in particular the joint separate opinion, in the *Arrest Warrant* case, of Judges Higgins, Kooijmans and Buergenthal; the dissenting opinion of Judge Al-Kasawneh; and the dissenting opinion of Judge *ad hoc* Van den Wyngaert.

[279] With regard to recognition of the immunity from foreign criminal jurisdiction of the Head of Government and the Minister for Foreign Affairs, see the following cases, both criminal and civil, in which national courts have made statements on this subject, either as the grounds for decisions on substance or as *obiter dicta*: *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris (France), Judgment of 28 April 1961 (implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs) reproduced in ILR, vol. 47, pp. 275–277 (original French version in RGDIP (1962), p. 418, translated version in ILR, vol. 47, p. 276); *Chong Boon Kim v. Kim Tong Shik and David Kim*, Circuit Court of the First Circuit (State of Hawaii) (United States), Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186–187; *Saltany and others v. Reagan and others*, District Court for the District of Columbia (United States), Judgment of 23 December 1988, 702 F.Supp. 319; *Tachiona v. Mugabe ("Tachiona I")*, District Court for the Southern District of New York (United States), Judgment of 30 October 2001 (169 F.Supp.2d.259); *H.S.A. et al. v. S.A. et al. (indictment of Ariel Sharon, Amos Yaron and others)*, Court of Cassation (Belgium), Judgment of 12 February 2003 (P-02-1139.f).

activity. In this connection, some members of the Commission have suggested that immunity *ratione personae* is enjoyed by a Minister of Defence or a Minister of International Trade. Other members of the Commission, however, see the use of the words "such as" as not widening the circle of the persons who enjoy this category of immunity, since the Court uses the words in the context of a specific dispute, the subject of which is the immunity from foreign criminal jurisdiction of a Minister for Foreign Affairs. Lastly, several members of the Commission have drawn attention to the difficulty inherent in determining which persons should be deemed to be "other high-ranking officials," since this will depend to a large extent on each country's organizational structure and method of conferring powers, which differ from one State to the next.[280]

(9) In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice reverted to the subject of the immunity of high-ranking State officials other than the Head of State, Head of Government and Minister for Foreign Affairs. The Court dealt separately with the immunity of the Head of State of Djibouti and of the two other high-ranking officials, namely the Attorney-General (*procureur de la République*) and the Head of National Security. With regard to the Head of State, the Court made a very clear pronouncement that in general, he or she enjoys immunity from foreign criminal jurisdiction *ratione personae*, although that was not applicable in the specific case, since the invitation to testify issued by the French authorities was not a measure of constraint.[281] With regard to the other high-ranking officials, the Court argued that the acts attributed to them were not carried out within the scope of their duties;[282] it considered that Djibouti did not make it sufficiently clear whether it was claiming State immunity, personal immunity or some other type of immunity; and it concluded that "the Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case".[283]

(10) In national judicial practice, a number of decisions deal with the immunity *ratione personae* from foreign criminal jurisdiction of other high-ranking officials. However, the decisions in question are not conclusive. While some of the decisions are in favour of the immunity *ratione personae* of high-ranking officials such as the Minister of Defence or Minister of International Trade,[284] in others, the national courts found that the person under

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[280] This problem has already been raised by the Commission itself, in para. (7) of its commentary to draft art. 3 of the draft articles on Jurisdictional immunities of States and their property (see, *Yearbook ... 1991*, vol. II (Part Two). The Commission drew attention to the same problems in para. (3) of the commentary to draft art. 1 of the draft articles on the Prevention and punishment of crimes against internationally protected persons (*Yearbook ... 1972*, vol. II) and in para. (3) of the commentary to draft art. 21, para. 1, of the draft articles on Special missions (*Yearbook ... 1967*, vol. II).

[281] *Certain Questions* case, paras. 170–180.

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

[283] *Ibid.*, para. 194. See, in general, paras. 181–197.

[284] In this connection, see the case *Re General Shaul Mofaz* (Minister of Defence of Israel), Bow Street Magistrates' Court (United Kingdom), Judgment of 12 February 2004; and the case *Re Bo Xilai* (Minister for International Trade of China), Bow Street Magistrates' Court, Judgment of 8 November 2005, in which the immunity of Mr. Bo Xilai is acknowledged, not just because he was considered to be a high-ranking official, but particularly because he was on special mission in the United Kingdom. A year later, in a civil case, a U.S. court recognized Mr. Bo Xilai's immunity, again because he was on special mission in the United States: *Suggestion of Immunity and Statement of Interest of the United States*, District Court for the District of Columbia, Judgment of 24 July 2006 (Civ. No. 04-0649). In the *Association Fédération nationale des victimes d'accidents collectifs "FONVAC SOS catastrophe"; Association des familles des victimes du Joola* case (*Cour de cassation, Chambre*

trial did not enjoy immunity, either because he or she was not a Head of State, Head of Government or Minister for Foreign Affairs or because he or she did not belong to the narrow circle of officials who deserve such treatment,[285] which illustrates the major difficulty involved in identifying the high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs who can indisputably be deemed to enjoy immunity *ratione personae*. It should also be pointed out, however, that in some of these decisions, the immunity from foreign criminal jurisdiction of a high-ranking official is analysed from various perspectives (immunity *ratione personae*, immunity *ratione*

criminelle (France), Judgment of 19 January 2010 (09-84818)), the court acknowledged in general terms that an incumbent Minister of Defence enjoys immunity *ratione personae* from foreign criminal jurisdiction, but in the specific case recognized only immunity *ratione materiae*, since the person on trial no longer held that office. In the *Nezzar* case (Federal Criminal Tribunal, Switzerland, Judgment of 25 July 2012 (BB.2011-140)), the tribunal stated in general that an incumbent Minister of Defence enjoyed immunity *ratione personae* from foreign criminal jurisdiction, but in the case in question, it did not recognize immunity because Mr. Nezzar had completed his term of office, and the acts carried out constitute international crimes, depriving him also of immunity *ratione materiae.*

[285] An example of this is the case of *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court of Justice Queen's Bench Division Administrative Court (United Kingdom), Judgment of 29 July 2011 ([2011] EWHG 2020 (Admin)), in which the court admitted, based on the International Court of Justice's Judgment in the *Arrest Warrant* case, that "in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office" as long as they belong to a narrow circle of specific individuals because "it must be possible to attach to the individual in question a similar status" to that of the Head of State, Head of Government and Minister for Foreign Affairs referred to in the above-mentioned judgment. After analysing the functions carried out by Mr. Khurts Bat, the court concluded that he "falls out with that narrow circle". Earlier, the Paris Court of Appeal also failed to recognize the immunity of Mr. Ali Ali Reza because, although he was Minister of State of Saudi Arabia, he was not the Minister for Foreign Affairs (see *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris (France), Judgment of 28 April 1961). In the *United States of America v. Manuel Antonio Noriega* case, the Court of Appeals for the Eleventh Circuit, in its Judgment of 7 July 1997 (appeals Nos. 92-4687 and 96-4471), stated that Mr. Noriega, former Commander in Chief of the Armed Forces of Panama, could not be included in the category of persons who enjoy immunity *ratione personae*, dismissing Mr. Noriega's allegation that at the time of the events, he had been Head of State, or *de facto* leader, of Panama. Another court, in the *Republic of the Philippines v. Marcos* case (District Court of the Northern District of California, Judgment of 11 February 1987 (665 F. Supp. 793)), indicated that the Attorney-General of the Philippines did not enjoy immunity *ratione personae*. In the case *I.T. Consultants, Inc. v. The Islamic Republic of Pakistan*, Court of Appeals, District of Columbia Circuit, Judgment of 16 December 2003, the court did not recognize the immunity of the Ministry of Agriculture of Pakistan. Similarly, in the recent case *Fotso v. Republic of Cameroon*, the court found that the Minister of Defence and the Secretary of State for Defence did not enjoy immunity *ratione personae*, which it nevertheless acknowledged was enjoyed by the President of Cameroon. It should be kept in mind that the three cases previously cited involved the exercise of civil jurisdiction. It must also be noted that on some occasions, national courts have not recognized the immunity from jurisdiction of persons holding high-ranking posts in constituent units within a federal State. In this connection, see the following cases: *R. (on the application of Diepreye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service*, Queen's Bench Division (Divisional Court) (United Kingdom), Judgment of 25 November 2005 (EWHC (QB) 2704), in which the court did not recognize the immunity of the Governor and Chief Executive of Bayelsa State in the Federal Republic of Nigeria; and *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, Court of Cassation (Third Criminal Section) (Italy), Judgment of 28 December 2004, in which the court denied immunity to the President of Montenegro before it became an independent State. Finally, in *Evgeny Adamov v. Federal Office of Justice*, Federal Tribunal (Switzerland), Judgment of 22 December 2005, the court denied immunity to a former Minister of Atomic Energy of the Russian Federation in an extradition case; however, it acknowledged in an *obiter dictum* that it was possible for high-ranking officials, without stating that they do enjoy immunity.

materiae, State immunity, immunity deriving from a special mission), reflecting the uncertainty in determining precisely what might be the immunity from foreign criminal jurisdiction that is enjoyed by high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs.[286]

(11) On another level, it must be recalled that the Commission has already referred to the immunity of other high-ranking officials, in its draft articles on special missions and its draft articles on the representation of States in their relations with international organizations of a universal character.[287] It must be recalled that these instruments only establish a regime under which such persons continue to enjoy the immunities accorded to them under international law beyond the framework of those instruments. However, neither in the text of the draft articles nor in the Commission's commentaries thereto is it clearly indicated what these immunities are and whether they do or do not include immunity from foreign criminal jurisdiction *ratione personae*. It must also be emphasized that although these high-ranking officials may be deemed to be included in the category of "State representatives" mentioned in article 2, paragraph 1 (a) (iv), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, that instrument — as previously mentioned — does not apply to "criminal proceedings". Nevertheless, some members of the Commission stated that high-ranking officials do benefit from the immunity regime of special missions, including immunity from foreign criminal jurisdiction, when they are on an official visit to a third State as part of their fulfilment of the functions of representing the State in the framework of their substantive duties. It was said that this offers a means of ensuring the proper fulfilment of the sectoral functions of this category of high-ranking officials at the international level.

(12) In view of the foregoing, the Commission considers that other "high-ranking officials" do not enjoy immunity *ratione personae* for purposes of the present draft articles, but that this is without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when they are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.

(13) The phrase "from the exercise of" has been used in the draft article with reference both to immunity *ratione personae* and to foreign criminal jurisdiction. The Commission decided not to use the same phrase in draft article 1 (Scope of the present draft articles) so as not to prejudge the substantive aspects of immunity, in particular its scope, that will be

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[286] The decision in the *Khurts Bat* case cited above is a good example of this. In the *Association Fédération nationale des victimes d'accidents collectifs "FONVAC SOS catastrophe"*; *Association des familles des victimes du Joola* case, Judgment of 19 January 2010 (09-84818), the court ruled simultaneously, and without sufficiently differentiating its ruling, on immunity *ratione personae* and immunity *ratione materiae*. In the *Nezzar* case, after making a general statement about immunity *ratione personae*, the Swiss Federal Criminal Tribunal also considered whether immunity *ratione materiae* or diplomatic immunity claimed by the person concerned could be applied. The arguments used by national courts in other cases are even more imprecise, as in the case of *Kilroy v. Windsor*, District Court for the Northern District of Ohio, Eastern Division, which in its Judgment of 7 December 1978 in a civil case (Civ. No. C-78-291), recognized the immunity *ratione personae* of the Prince of Wales because he was a member of the British royal family and was heir apparent to the throne, but also because he was on official mission to the United States. Noteworthy in the *Bo Xilai* case was the fact that, while both the British and the U.S. courts recognized the immunity from jurisdiction of the Chinese Minister of Commerce, they did so because he was on official visit and enjoyed the immunity derived from special missions.

[287] On other occasions the Commission has used the expressions "other persons of high rank" (draft articles on the Prevention and punishment of crimes against internationally protected persons) and "high official" (draft articles on Special missions).

taken up in other draft articles.[288] In the present draft article, the Commission has decided to retain the phrase "from the exercise of," since it illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[289]

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Commentary

(1) Draft article 4 deals with the scope of immunity *ratione personae* from both the temporal and material standpoints. The scope of immunity *ratione personae* must be understood by looking at the temporal aspect (paragraph 1) in conjunction with the material aspect (paragraph 2). Although each of these aspects is conceptually distinct, the Commission has chosen to cover them in a single article, since this offers a more comprehensive view of the meaning and scope of the immunity enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs. The Commission has decided to cover the temporal aspect first, since this gives a better understanding of the material scope of immunity *ratione personae*, which is limited to a specific period of time.

(2) With regard to the temporal scope of immunity *ratione personae*, the Commission has thought it necessary to include the term "only" so as to emphasize the point that this type of immunity applies to Heads of State, Heads of Government and Ministers for Foreign Affairs exclusively during the period when they hold office. This is consistent with the very reason for according such immunity, which is the special position held by such officials within the State's organizational structure and which, under international law, places them in a special situation of having a dual representational and functional link to the State in the ambit of international relations. Consequently, immunity *ratione personae* loses its significance when the person enjoying it ceases to hold one of those posts.

This position has been upheld by the International Court of Justice, which stated in the *Arrest Warrant* case that "(…) after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity".[290] Although the Court was referring to the Minister for Foreign Affairs, the same reasoning applies, *a fortiori* to the Head of State and the Head of Government. Moreover, the limitation of immunity *ratione personae* to the period of time in which the persons enjoying such immunity hold

[288] See above, para. (2) of the above-mentioned commentary.
[289] See *Arrest Warrant* case, para. 60, and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, para. 58.
[290] *Arrest Warrant* case, para. 61.

office is also recognized in the conventions establishing special regimes of immunity *ratione personae*, particularly the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.[291] The Commission itself, in its commentaries to the draft articles on Jurisdictional immunities of States and their property, stated that "the immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated."[292] The strict temporal scope of immunity *ratione personae* is also confirmed by various national court decisions.[293]

Consequently, the Commission considers that after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. The Commission has not thought it necessary to indicate the specific criteria to be taken into account in order to determine when the term of office of the persons enjoying such immunity begins and ends, since this depends on each State's legal order, and practice in this area varies.

(3) During — and only during — the term of office, immunity *ratione personae* extends to all the acts carried out by the Head of State, Head of Government and Minister for Foreign Affairs, both those carried out in a private capacity and those performed in an official capacity. In this way, immunity *ratione personae* is configured as "full immunity"[294] with reference to any act carried out by any of the individuals just mentioned. This configuration reflects State practice.[295]

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[291] See the Vienna Convention on Diplomatic Relations, art. 39, para. 2, and the Convention on Special Missions, art. 43, para. 2.

[292] It added: "All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts." *Yearbook ... 1991*, vol. II (Part Two), para. (19) of the commentary to draft art. 2, para. 1 (b) (v).

[293] Such decisions often arisen in the context of civil cases, where the same principle of a temporal limitation for the immunity applies. See, e.g., *Cour d'appel* de Paris, *Mellerio c. Isabelle de Bourbon, ex-Reine d'Espagne*, 3 June 1872; Tribunal civil de la Seine, *Seyyid Ali Ben Hammond, Prince Rashid c. Wiercinski*, 25 July 1916; Cour d'appel de Paris, *Ex-roi d'Egypte Farouk c. s.a.r.l. Christian Dior,* 11 April 1957, reproduced in *Journal du droit international* (1957), pp. 716–718; Tribunal de Grande Instance de la Seine, *Société Jean Dessès c. Prince Farouk et Dame Sadek,* 12 June 1963, reproduced in Clunet, 1964, p. 285 and, English version, in ILR, vol. 33, pp. 37–38; *United States of America v. Noriega* (1990) 746 F.Supp. 1506; *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1994); and the Spanish request for extradition delivered on 3 November 1998 in the *Pinochet* case (*Auto de solicitud de extradición de Pinochet, Madrid, 3 November 1998*).

[294] The International Court of Justice refers to the material scope of immunity *ratione personae* as "full immunity" (*Arrest Warrant* case, para. 54). The Commission itself, for its part, has stated with reference to the immunity *ratione personae* of diplomatic agents that "[t]he immunity from criminal jurisdiction is complete" (see *Yearbook ... 1958*, vol. II, p. 98, para. (4) of the commentary to art. 29 of the draft articles on Diplomatic intercourse and immunities).

[295] See, e.g., *Arafat e Salah, Rivista di diritto internazionale*, vol. LXIX (1986), p. 886; *Ferdinand et Imelda Marcos c. Office fédéral de police*, ATF 115 Ib 496, partially reproduced in *Revue suisse de droit international et de droit européen* (1991), pp. 534–537 (English version in ILR, vol. 102, pp. 198–205); House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999, reproduced in ILM, vol. 38, 1999, p. 592; Court of Appeal of Paris (Chambre d'accusation), *Affaire Kadhafi*, Judgment of 20 October 2000 (English version in ILR, vol. 125, p. 495, at p. 509); *H.S.A. et al. v. S.A. et al*., Decision related to the indictment of Ariel Sharon, Amos Yaron and others, No. P.02.1139.f, 12 February 2003, reproduced in ILM, vol. 42, No. 3 (2003), p. 596, at p. 599; Supreme Court of Sierra Leone, *Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondewa, Moinina Fofana v. President of the Special Court, Registrar of the Special Court, Prosecutor of the Special Court, Attorney-General and Minister of Justice*, Judgment of 14 October

As the International Court of Justice stated in the *Arrest Warrant* case, with particular reference to a Minister for Foreign Affairs, extension of immunity to acts performed in both a private and official capacity is necessary to ensure that the persons enjoying immunity *ratione personae* are not prevented from exercising their specific official functions, since "[t]he consequences of such impediment to the exercise of those official functions are equally serious, (…) regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity".[296] Thus, "no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity'".[297] The same reasoning must apply, *a fortiori*, to the Head of State and Head of Government.

(4) As regards the terminology used to refer to acts covered by immunity *ratione personae*, it must be borne in mind that no single, uniform wording is actually in use. For example, the Vienna Convention on Diplomatic Relations makes no express distinction between acts carried out in a private or official capacity in referring to acts to which the immunity from criminal jurisdiction of diplomatic agents extends, although it is understood to apply to both categories.[298] Moreover, the terminology in other instruments, documents and judicial decisions, as well as in the literature, also lacks consistency, with the use, among others, of the terms "official acts and private acts", "acts performed in the exercise of their functions", "acts linked to official functions" and "acts carried out in an official or private capacity". In the present draft article, the Commission has found it preferable to use the phrase "acts performed, whether in a private or official capacity", following its use by the International Court of Justice in the *Arrest Warrant* case.

However, the Commission has not found it necessary to take a position at the present time on what types of acts should be considered "acts performed in an official capacity", since this is a category of acts which will be taken up at a later stage, in connection with the analysis of immunity *ratione materiae*, and which should not be prejudged now.

It should also be pointed out that in adopting paragraph 2, the Commission has not concerned itself with the issue of possible exceptions to immunity, a subject that will be taken up at a later stage.

(5) The Commission understands the term "acts" to refer both to acts and to omissions. Although the terminology to be employed has been the subject of debate, the Commission has chosen to use the term "acts" in line with the English text of the articles on the responsibility of States for internationally wrongful acts, article 1 of which uses the term "acts" in the sense that an act "may consist in one or more actions or omissions or a

2005, SC No. 1/2003; *Case against Paul Kagame*; Spain, *Auto del Juzgado Central de Instrucción No. 4* (2008), pp. 156–157. Among more recent cases, see *Association fédération nationale des victimes d'accidents collectifs "Fenvac SOS catastrophe", Association des familles des victimes du Joola et al., Paris Chambre d'instruction de la Cour d'Appel*, Judgment, 16 June 2009, confirmed by the *Cour de Cassation*, Judgment, 19 January 2010; *Khurts Bat v. Investigating Judge of the German Federal Court*, High Court of Justice Queen's Bench Division Administrative Court, Judgment, 29 July 2011 ([2011] EWHG 2020 (Admin), para. 55); and *Nezzar* case, Swiss Federal Criminal Court, Judgment, 25 July 2012 (case No. BB.2011-140, legal ground No. 5.3.1). See also *Cour d'Appel de Paris, Pôle 7, Deuxième chambre d'instruction*, Judgment, 13 June 2013.

[296] *Arrest Warrant* case, para. 55.

[297] *Ibid*.

[298] This is the conclusion to be drawn from reading art. 31, para. 1, in conjunction with art. 39, para. 2, of the Convention. Arts. 31, para. 1, and 43, para. 2, of the Convention on Special Missions must be construed in the same way.

combination of both".[299] In addition, the term "act" is commonly used in international criminal law to define conduct (active and passive) from which criminal responsibility is established. In the Rome Statute of the International Criminal Court, the term "acts" has been used in a general sense in articles 6, 7 and 8, without having elicited questions about whether both acts and omissions are included under that term, since this depends solely on each specific criminal offence. The statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda use the term "act" to refer to conduct, both active and passive, constituting an offence falling within the competence of those tribunals. The term "act" has also been used in various international treaties which are designed to impose obligations upon States but nevertheless specify conduct that may give rise to criminal responsibility. This is the case, for example, with the Convention on the Prevention and Punishment of the Crime of Genocide (art. 2) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 1).

(6) The acts to which immunity *ratione personae* extends are those that a Head of State, Head of Government or Minister for Foreign Affairs has carried out during or prior to their term of office. The reason for this is the purpose of immunity *ratione personae*, which relates both to protection of the sovereign equality of the State and to guarantees that the persons enjoying this type of immunity can perform their functions of representation of the State unimpeded throughout their term of office. In this sense, there is no need for further clarification regarding the applicability of immunity *ratione personae* to the acts performed by such persons throughout their term of office. As regards acts performed prior to the term of office, it must be noted that immunity *ratione personae* applies to them only if the criminal jurisdiction of a third State is to be exercised during the term of office of the Head of State, Head of Government or Minister for Foreign Affairs. This is because, as the International Court of Justice stated in the *Arrest Warrant* case, "[…] no distinction can be drawn (…) between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether (…) the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office."[300]

In any event, it must be noted that, as the International Court of Justice has also stated in the same case, immunity *ratione personae* is procedural in nature and must be interpreted, not as exonerating a Head of State, Head of Government or Minister for Foreign Affairs from criminal responsibility for acts committed during or prior to their term of office, but solely as suspending the exercise of foreign jurisdiction during the term of office of those high-ranking officials.[301] Consequently, when the term of office ends, the acts carried out during or prior to the term of office cease to be covered by immunity *ratione personae* and may, in certain cases, be subject to the criminal jurisdiction that cannot be exercised during the term of office.

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[299] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 63: para. (1) of the commentary to draft art. 1. It should be pointed out that although the Spanish and French versions use different terms to refer to the same category of acts ("*hecho*" and "*fait*", respectively), in the part of the Commission's commentary cited above, the three language versions coincide.

[300] *Arrest Warrant* case, para. 55.

[301] "Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility" (*Arrest Warrant* case, para. 60).

Lastly, it should be noted that immunity *ratione personae* does not in any circumstances apply to acts carried out by a Head of State, Head of Government or Minister for Foreign Affairs after their term of office. Since they are now considered "former" Head of State, Head of Government or Minister for Foreign Affairs such immunity would have ceased when the term of office ends.

(7) Paragraph 3 addresses what happens with respect to acts carried out in an official capacity while in office by the Head of State, Head of Government or Minister for Foreign Affairs after their term of office ends. Paragraph 3 proceeds with the principle that immunity *ratione personae* ceases when the Head of State, Head of Government or Minister for Foreign Affairs leaves office. Consequently, immunity *ratione personae* no longer exists after their term of office ends. Nevertheless, it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during their term of office, have carried out acts in an official capacity which do not lose that quality merely because the term of office has ended and may accordingly be covered by immunity *ratione materiae*. This matter has not been disputed in substantive terms, although it has been expressed variously in State practice, treaty practice and judicial practice.[302]

Thus paragraph 3 sets forth a "without prejudice" clause on the potential applicability of immunity *ratione materiae* to such acts. This does not mean that immunity *ratione personae* is prolonged past the end of term of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* which applies automatically by virtue of paragraph 3. The Commission considers that the "without prejudice" clause simply leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by a former Head of State, Head of Government or Minister for Foreign Affairs when the rules governing that category of immunity make this possible. Paragraph 3, does not prejudge the content of the immunity *ratione materiae* regime, which will be developed in Part III of the draft articles.

[302] Thus, for example, with reference to the immunity of members of diplomatic missions, the Vienna Convention on Diplomatic Relations expressly states that "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist" (art. 39, para. 2); the formulation is repeated in the Convention on Special Missions (art. 43, para. 1). In the judicial practice of States, this has been expressed in a wide variety of ways: reference is sometimes made to "residual immunity", the "continuation of immunity in respect of official acts" or similar wording. On this aspect, see the analysis by the Secretariat in its 2008 memorandum (A/CN.4/596, paras. 137 *et seq*).

Chapter VI
Protection of persons in the event of disasters

A. Introduction

50. The Commission, at its fifty-ninth session (2007), decided to include the topic "Protection of persons in the event of disasters" in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.[303] At the same session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic.

51. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, and identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area. It also presented in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1 to 3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

52. The Commission considered, at its sixty-first session (2009), the second report of the Special Rapporteur (A/CN.4/615 and Corr.1) analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report contained proposals for three draft articles. The Commission also had before it written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

53. At its sixty-second session (2010), the Commission provisionally adopted draft articles 1 (Scope), 2 (Purpose), 3 (Definition of disaster), 4 (Relationship with international humanitarian law) and 5 (Duty to cooperate), which had been considered at the previous session, at the 3057th meeting, held on 4 June 2010. The Commission further had before it the third report of the Special Rapporteur (A/CN.4/629) providing an overview of the views of States on the work undertaken by the Commission, a consideration of the principles that inspire the protection of persons in the event of disasters, and a consideration of the question of the responsibility of the affected State. Proposals for three further draft articles were made in the report.

[303] At its 2929th meeting, on 1 June 2007, (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375). 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 D to the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10)).

54. At its sixty-third session (2011), the Commission provisionally adopted draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity), 8 (Human rights) and 9 (Role of the affected State), which had been considered at the previous session, at the 3102nd meeting, held on 11 July 2011. The Commission also had before it the fourth report of the Special Rapporteur (A/CN.4/643 and Corr.1) containing, *inter alia*, a consideration of the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance, and the right to offer assistance in the international community. Proposals for a further three draft articles were made in the report. The Commission provisionally adopted draft articles 10 (Duty of the affected State to seek assistance) and 11 (Consent of the affected State to external assistance) at the 3116th meeting, held on 2 August 2011, but was unable to conclude its consideration of draft article 12 owing to a lack of time.

55. At its sixty-fourth session (2012), the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/652) providing an overview of the views of States on the work undertaken by the Commission, a brief discussion of the Special Rapporteur's position on the Commission's question in Chapter III.C of its 2011 annual report, as well as a further elaboration of the duty to cooperate. The report also contained a discussion of the conditions for the provision of assistance and the question of the termination of assistance. Proposals for an additional three draft articles were made in the report. At its 3152nd meeting, on 30 July 2012, the Commission took note of draft articles 5 *bis* and 12 to 15, as provisionally adopted by the Draft Committee (A/CN.4/L.812).

B. Consideration of the topic at the present session

56. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/662) dealing with aspects of prevention in the context of the protection of persons in the event of disasters, including disaster risk reduction, prevention as a principle of international law, and international cooperation on prevention. The report further provided an overview of national policy and legislation. Proposals for the following two draft articles were made in the report: draft articles 5 *ter* (Cooperation for disaster risk reduction)[304] and 16 (Duty to prevent).[305]

57. The Commission considered the sixth report at its 3175th to 3180th meetings, from 8 to 16 July 2013.

58. At its 3180th meeting, on 16 July 2013, the Commission referred draft articles 5 *ter* and 16 to the Drafting Committee.

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[304] Draft article 5 *ter* read as follows:

Cooperation for disaster risk reduction

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

[305] Draft article 16 read as follows:

Duty to prevent

1. States shall undertake to reduce the risk of disasters by adopting appropriate measures to ensure that responsibilities and accountability mechanisms be defined and institutional arrangements be established, in order to prevent, mitigate and prepare for such disasters.

2. Appropriate measures shall include, in particular, the conduct of multi- hazard risk assessments, the collection and dissemination of loss and risk information and the installation and operation of early warning systems.

59. The Commission adopted the report of the Drafting Committee on draft articles 5 *bis* and 12 to 15, which had been considered at the previous session, at the 3162nd meeting, held on 10 May 2013. The Commission further adopted the report of the Drafting Committee on draft articles 5 *ter* and 16, at the 3187th meeting, held on 26 July 2013 (sect. C.1 below).

60. At its 3190th and 3191st meeting, on 2 and 5 August 2013, the Commission adopted commentaries to draft articles 5 *bis*, 5 *ter* and 12 to 16 (sect. C.2 below).

C. Text of the draft articles on the Protection of persons in the event of disasters provisionally adopted so far by the Commission

1. Text of the draft articles

61. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.[306]

Article 1
Scope

The present draft articles apply to the protection of persons in the event of disasters.

Article 2
Purpose

The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

Article 3
Definition of disaster

"Disaster" means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

Article 4
Relationship with international humanitarian law

The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

Article 5
Duty to cooperate

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

[306] For the commentaries to draft articles 1 to 5, see *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 331. For the commentaries to draft articles 6 to 11, see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 289.

Article 5 *bis*
Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.

Article 5 *ter*
Cooperation for disaster risk reduction

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

Article 6
Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 7
Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 8
Human rights

Persons affected by disasters are entitled to respect for their human rights.

Article 9
Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

Article 10
Duty of the affected State to seek assistance

To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate.

Article 11
Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

Article 12
Offers of assistance

In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

Article 13
Conditions on the provision of external assistance

The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

Article 14
Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Article 15
Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.

Article 16
Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

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

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

Article 5 *bis*
Forms of cooperation

For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.

Commentary

(1) Draft article 5 *bis* seeks to clarify the various forms which cooperation between affected States, assisting States, and other assisting actors may take in the context of the protection of persons in the event of disasters. Cooperation is enshrined in general terms in draft article 5 as a guiding principle and fundamental duty with regard to the present topic, as it plays a central role in disaster relief efforts. The essential role of cooperation lends itself to a more detailed enunciation of the kinds of cooperation relevant in this context. The present draft article is therefore designed to further elaborate on the meaning of draft article 5, without creating any additional legal obligations.

(2) The list of forms of cooperation in draft article 5 *bis* — humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources — is loosely based on the second sentence of paragraph 4 of draft article 17 of the final draft articles on the law of Transboundary Aquifers, which expands upon the general obligation to cooperate in article 7 of those draft articles by describing the cooperation necessary in emergency situations.[307] The second sentence of paragraph 4 of draft article 17 reads:

> "Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance."[308]

As this provision had been specifically drafted with reference to a related context — namely, the need for cooperation in the event of an emergency affecting a transboundary aquifer — the Commission felt that its language was a useful starting point for the drafting of draft article 5 *bis*. However, the text of article 5 *bis* was tailored to appropriately reflect the context and purpose of the present draft articles, and to ensure that it took into account the major areas of cooperation dealt with in international instruments addressing disaster response. Similar language is contained in the ASEAN Declaration on Mutual Assistance on Natural Disasters, of 26 June 1976, which states that "Member Countries shall, within their respective capabilities, cooperate in the improvement of communication channels among themselves as regards disaster warnings, exchange of experts and trainees, exchange of information and documents, and dissemination of medical supplies, services and relief assistance."[309] In a similar vein, in explaining the areas in which it would be useful for the United Nations to adopt a coordinating role and encourage cooperation, General Assembly resolution 46/182 calls for coordination with regards to "specialized personnel and teams of technical specialists, as well as relief supplies, equipment, and services …".[310]

[307] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), Chapter IV.E, paras. 53–54.
[308] *Ibid*.
[309] ASEAN Documents Series 1976.
[310] Para. 27.

(3) The beginning of draft article 5 *bis* states that the forms of cooperation are outlined "[f]or the purposes of the present draft articles." Therefore, draft article 5 *bis*, which is to be read in light of the other draft articles, is oriented towards the purpose of the topic as a whole as stated in draft article 2, namely, "to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights." In the context of the present topic, the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in draft article 5 *bis*, is the protection of persons affected by disasters.

(4) While the draft article highlights specific forms of cooperation, the list is not meant to be exhaustive, but is instead illustrative of the principal areas in which cooperation may be appropriate according to the circumstances. The non-exhaustive nature of the list is emphasized by the use of the word "includes", and its equivalent in the other official languages. The Commission determined that the highlighted forms are the main areas in which cooperation may be warranted, and that the forms are broad enough to encapsulate a wide variety of cooperative activities. Cooperation may, therefore, include the activities mentioned, but is not limited to them; other forms of cooperation not specified in the present draft article are not excluded, such as financial support; technological transfer covering, among others, satellite imagery; training; information-sharing and joint simulation exercises and planning.

(5) As draft article 5 *bis* is illustrative of possible forms of cooperation, it is not intended to create additional legal obligations for either affected States or assisting actors to engage in certain activities. The forms which cooperation may take will necessarily depend upon a range of factors, including, *inter alia*, the nature of the disaster, the needs of the affected persons, and the capacities of the affected State and assisting actors involved. As with the principle of cooperation itself, the forms of cooperation in draft article 5 *bis* are meant to be reciprocal in nature, as cooperation is not a unilateral act, but rather one that involves the collaborative behaviour of multiple parties.[311] The draft article is therefore not intended to be a list of activities in which an assisting State may engage, but rather areas in which harmonization of efforts through consultation on the part of both the affected State and assisting actors may be appropriate.

(6) Moreover, cooperation in the areas mentioned must be in conformity with the other draft articles. For example, as with draft article 5, the forms of cooperation touched upon in draft article 5 *bis* must be consistent with draft article 9, which grants the affected State, "by virtue of its sovereignty" the primary role in disaster relief assistance. Cooperation must also be in accordance with the requirement of consent of the affected State to external assistance (draft article 11), as well as the recognition that the affected State may place appropriate conditions on the provision of external assistance, particularly with respect to the identified needs of persons affected by disaster and the quality of the assistance (draft article 13). Cooperation is also related to draft article 14, which recognizes the role of the affected State in facilitation of prompt and effective assistance to persons affected by disaster. As such, and since draft article 5 *bis* does not create any additional legal obligations, the relationship between the affected State, assisting State, and other assisting actors with regards to the abovementioned forms of cooperation will be in accordance with the other provisions of the present draft articles.

(7) Humanitarian assistance is intentionally placed first among the forms of cooperation mentioned in draft article 5 *bis*, as the Commission considers this type of cooperation of paramount importance in the context of disaster relief. The second category — coordination

[311] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 331, commentary to draft article 5, para. (6).

of international relief actions and communications — is intended to be broad enough to cover most cooperative efforts in the disaster relief phase, and may include the logistical coordination, supervision, and facilitation of the activities and movement of disaster response personnel and equipment and the sharing and exchange of information pertaining to the disaster. Though information exchange is often referred to in instruments that emphasize cooperation in the pre-disaster phase as a preventive mode to reduce the risk of disasters,[312] communication and information is also relevant in the disaster relief phase to monitor the developing situation and to facilitate the coordination of relief actions amongst the various actors involved. A number of instruments deal with communication and information sharing in the disaster relief context.[313] The mention of "making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources" refers to the provision of any and all resources necessary for disaster response operations. The reference to "personnel" may entail the provision of and cooperation between medical teams, search and rescue teams, engineers and technical specialists, translators and interpreters, or other persons engaged in relief activities on behalf of one of the relevant actors – affected State, assisting State, or other assisting actors. The term "resources" covers scientific, technical, and medical expertise and knowledge as well as equipment, tools, medicines, or other objects that would be useful for relief efforts.

(8) Draft article 5 *bis* presents a list of the possible forms of cooperation in the disaster relief, or post-disaster, phase. As such, the content of the draft article is without prejudice to any applicable rule on cooperation in the pre-disaster phase, including disaster prevention, preparedness, and mitigation.

Article 5 *ter*
Cooperation for disaster risk reduction

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

Commentary

(1) While draft article 5 *bis* concerns the various forms which cooperation may take in the disaster relief or post-disaster phase of the disaster cycle, draft article 5 *ter* indicates that the scope of application *ratione temporis* of the duty to cooperate, enshrined in general terms in draft article 5, also covers the pre-disaster phase. Thus, while draft article 5 *bis* deals with the response to a disaster, draft article 5 *ter* addresses the reduction of disaster risk.

(2) This provision qualifies the cooperation referred to as being related to the "taking of measures intended to reduce the risk of disasters". This phrase is to be understood in the light of both paragraphs of draft article 16, in particular its paragraph 2 which envisages a series of measures that are specifically aimed at the reduction of disaster risk.

[312] See e.g., ASEAN Agreement on Disaster Management and Emergency Response, (26 July 2005), ASEAN Documents Series 2005, p. 157 ("ASEAN Agreement"), art. 18, para. 1.

[313] See e.g., Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, United Nations, *Treaty Series*, vol. 2296, p. 5 ("Tampere Convention"), art. 3 (calling for "the deployment of terrestrial and satellite telecommunication equipment to predict, monitor and provide information concerning natural hazards and disasters," and "the sharing of information about natural hazards, health hazards and disasters among the States Parties and with other States, non-State entities and intergovernmental organizations, and the dissemination of such information to the public, particularly to at-risk communities"); Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines"), as revised in 2006, para. 54. See also discussion in Secretariat Memorandum, A/CN.4/590, paras. 159–72.

(3) Draft article 5 *ter* has been provisionally adopted on the understanding that adoption was without prejudice to its final location in the set of draft articles, including, in particular, its being incorporated at the same time as draft article 5 *bis*, into a newly revised draft article 5. These are matters that have been left in abeyance for adjustment during the finalization of the first reading of the draft articles.

Article 12
Offers of assistance

In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

Commentary

(1) Draft article 12 acknowledges the interest of the international community in the protection of persons in the event of disasters, which is to be viewed as complementary to the primary role of the affected State enshrined in draft article 9. It is an expression of the principle of solidarity underlying the whole set of draft articles on the topic and, in particular, of the principle of cooperation embodied in draft articles 5 and 5 *bis*.

(2) Draft article 12 is only concerned with "offers" of assistance, not with the actual "provision" thereof. Such offers, whether made unilaterally or in response to a request, are essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist. Nor does an offer of assistance create for the affected State a corresponding obligation to accept it. In line with the fundamental principle of sovereignty informing the whole set of draft articles, an affected State may accept in whole or in part, or not accept, offers of assistance from States or non-State actors in accordance with article 11.[314]

The requirement that offers of assistance be made "in accordance with the present draft articles" implies, among other consequences, that such offers cannot be discriminatory in nature nor be made subject to conditions that are unacceptable to the affected State.

(3) Offers of assistance which are consistent with the present draft articles cannot be regarded as interference in the affected State's internal affairs. This conclusion accords with the statement of the *Institut de Droit International* in its 1989 resolution on the protection of human rights and the principle of non-intervention in internal affairs of States:

> "An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened, cannot be considered an unlawful intervention in the internal affairs of that State. […]"[315]

(4) Draft article 12 addresses the question of offers of assistance to affected States made by third actors by mentioning in two separate sentences those most likely to be involved in such offers after the occurrence of a disaster. States, the United Nations and other competent intergovernmental organizations are listed in the first sentence while the second concerns non-governmental organizations. The Commission decided to use a different

[314] For the views expressed on draft article 12 see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 278–283. See also *ibid.* para. 44 and A/CN.4/652, paras. 55–78.

[315] *Institut de Droit International*, Session of Santiago de Compostela, "The Protection of human rights and the principle of non-intervention in the internal affairs of States" (13 December 1989), art. 5.

wording in each of the two sentences. In the first sentence it opted for the phrasing "have the right to offer assistance" for reasons of emphasis. States, the United Nations and intergovernmental organizations not only are entitled but are also encouraged to make offers of assistance to the affected State. When referring to non-governmental organizations in the second sentence, the Commission adopted instead the wording "may also offer assistance" to stress the distinction, in terms of nature and legal status, that exists between the position of those organizations and that of States and intergovernmental organizations.

(5) The second sentence of draft article 12 recognizes the important role played by those non-governmental organizations which, because of their nature, location and expertise, are well placed to provide assistance in response to a particular disaster. The position of non-governmental, and other, actors in carrying out relief operations is not a novelty in international law. The Geneva Conventions of 1949 already provided that, in situations of armed conflict:

> "[…] An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."[316]

Similarly, the Protocol II Additional to the Geneva Conventions provides that:

> "Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked."[317]

The important contribution of non-governmental organizations, working with strictly humanitarian motives, in disaster response was stressed by the General Assembly in its resolution 43/131 of 8 December 1988, entitled "Humanitarian assistance to victims of natural disasters and similar emergency situations", in which the Assembly, *inter alia*, invited all affected States to "facilitate the work of [such] organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential" and appealed "to all States to give their support to [those] organizations working to provide humanitarian assistance, where needed, to the victims of natural disasters and similar emergency situations".[318]

Article 13
Conditions on the provision of external assistance

> The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

[316] See, for example, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, United Nations, *Treaty Series*, vol. 75, No. 970, p. 31, art. 3 (2).

[317] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609, art. 18 (1).

[318] See General Assembly resolution 43/131 of 8 December 1988, paras. 4–5.

Commentary

(1) Draft article 13 addresses the establishment of conditions by affected States on the provision of external assistance on their territory. It affirms the right of affected States to place conditions on such assistance, in accordance with the present draft articles and applicable rules of international and national law. The article indicates how such conditions are to be determined. The identified needs of the persons affected by disasters and the quality of the assistance guide the nature of the conditions. It also requires the affected State, when formulating conditions, to indicate the scope and type of assistance sought.

(2) The draft article furthers the principle enshrined in draft article 9, which recognizes the primary role of the affected State in the direction, control, coordination and supervision of disaster relief and assistance on its territory. By using the phrasing "may place conditions", which accords with the voluntary nature of the provision of assistance, draft article 13 acknowledges the right of the affected State to establish conditions for such assistance, preferably in advance of a disaster's occurrence but also in relation to specific forms of assistance by particular actors during the response phase. The Commission makes reference to "external" assistance because the scope of the provision covers the assistance provided by third States or other assisting actors, such as international organizations, but not assistance provided from internal sources, such as domestic non-governmental organizations.

(3) The draft article places limits on an affected State's right to condition assistance, which must be exercised in accordance with applicable rules of law. The second sentence outlines the legal framework within which conditions may be imposed, which comprises "the present draft articles, applicable rules of international law, and the national law of the affected State." The Commission included the phrase "the present draft articles" to stress that all conditions must be in accordance with the principles reflected in previous and subsequent articles, there being no need to repeat an enumeration of the humanitarian and legal principles already addressed elsewhere, notably, good faith, sovereignty and the humanitarian principles dealt with in draft article 6, that is, humanity, neutrality, impartiality and non-discrimination.

(4) The reference to national law emphasizes the authority of domestic laws in the particular affected area. It does not, however, imply the prior existence of national law geared to the specifics of the conditions brought forth by an affected State in the event of a disaster. Although there is no requirement of specific national legislation before conditions can be fixed, they must be in accordance with whatever relevant domestic legislation is in existence in the affected State.

(5) The affected State and the assisting actor must both comply with the applicable rules of national law. The affected State can only impose conditions that are in accordance with such laws, and the assisting actor must comply with such laws at all times throughout the duration of assistance. This reciprocity is not made explicit in the draft article, since it is inherent in the broader principle of respect for national law. Existing international agreements support the assertion that assisting actors must comply with national law. The ASEAN Agreement, for example, provides in article 13 (2) that "[m]embers of the assistance operation shall respect and abide by all national laws and regulations". Several

other international agreements also require assisting actors to respect national law[319] or to act in accordance with the law of the affected State.[320]

(6) The duty of assisting actors to respect national law implies the obligation to require that: members of the relief operation observe the national laws and regulations of the affected State,[321] the head of the relief operation takes all appropriate measures to ensure the observance of the national laws and regulations of the affected State,[322] and assisting personnel cooperate with national authorities.[323] The obligation to respect the national law and to cooperate with the authorities of the affected State accords with the overarching principle of the sovereignty of the affected State and the principle of cooperation.

(7) The right to condition assistance is the recognition of a right of the affected State to deny unwanted or unneeded assistance, and to determine what and when assistance is appropriate. The third sentence of the draft article gives an explanation of what is required of conditions set by affected States, namely, that they must "take into account" not only the identified needs of the persons affected by disasters but also the quality of the assistance. Nevertheless, the phrase "take into account" does not denote that conditions relating to the identified needs and the quality of assistance are the only ones which States can place on the provision of external assistance.

(8) The Commission included the word "identified" to signal that the needs must be apparent at the time conditions are set and that needs can change as the situation on the ground changes and more information becomes available. It implies that conditions should not be arbitrary, but be formulated with the goal of protecting those affected by a disaster. "Identified" indicates there must be some process by which needs are made known, which can take the form of a needs assessment, preferably also in consultation with assisting actors. However, the procedure to identify needs is not predetermined, and it is left to the affected State to follow the most suitable one. This is a flexible requirement that may be satisfied according to the circumstances of a disaster and the capacities of the affected State. In no instance should identifying needs hamper or delay prompt and effective assistance. The provision of the third sentence is meant to "meet the essential needs of the persons concerned" in the event of a disaster, as expressed in draft article 2, and should be viewed as further protection of the rights and needs of persons affected by disasters. The reference to "needs" in both draft articles is broad enough to encompass the special needs of women, children, the elderly, persons with disabilities, and vulnerable or disadvantaged persons and groups.

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[319] See, for example, the Inter-American Convention to Facilitate Disaster Assistance, 1991, arts. VIII and XI (d); and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986, United Nations, *Treaty Series*, vol. 1457, No. 24643, p. 133, art. 8 (7).

[320] *Ibid.*, Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, 1998, arts. 5 and 9.

[321] See, for example, Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, United Nations, *Treaty Series*, vol. 2105, No. 36605, p. 457, annex X (1): "The personnel involved in the assisting operation shall act in accordance with the relevant laws of the requesting Party."

[322] See, for example, ASEAN Agreement, art. 13 (2): "The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations."

[323] See, for example, Peter MacAlister-Smith, Draft international guidelines for humanitarian assistance operations (Heidelberg, Germany: Max Planck Institute for Comparative Public Law and International Law, 1991), para. 22 (b): "At all times during humanitarian assistance operations the assisting personnel shall … [c]ooperate with the designated competent authority of the receiving State."

(9) The inclusion of the word "quality" is meant to ensure that affected States have the right to reject assistance that is not necessary or that may be harmful. Conditions may include restrictions based on, *inter alia*, safety, security, nutrition and cultural appropriateness.

(10) Draft article 13 contains a provision on the "scope and type of assistance sought." This is in line with previous international agreements that contain a similar provision.[324] By the use of the words "shall indicate" the draft article puts the onus on the affected State to specify the type and scope of assistance sought when placing conditions on assistance. At the same time, it implies that once fixed, the scope and type of such assistance will be made known to the third actors that may provide it, which would facilitate consultations. This will increase the efficiency of the assistance process, and will ensure that appropriate assistance reaches those in need in a timely manner.

(11) The Commission considered several possibilities for the proper verb to modify the word "conditions". The Commission's decision to use two different words, "place" and "formulate", is a stylistic choice that does not imply differentiation of meaning between the two uses.

Article 14
Facilitation of external assistance

1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

Commentary

(1) Draft article 14 addresses the facilitation of external assistance. Its purpose is to ensure that national law accommodates the provision of prompt and effective assistance. To that effect, it further requires the affected State to ensure that its relevant legislation and regulations are readily accessible to assisting actors.

(2) The draft article provides that affected States "shall take the necessary measures" to facilitate the prompt and effective provision of assistance. The phrase "take necessary measures, within its national law" may include, *inter alia*, legislative, executive, and administrative measures. Measures may also include actions taken under emergency legislation, as well as permissible temporary adjustment or waiver of the applicability of particular national legislation or regulations, where appropriate. In formulating the draft article in such a manner, the Commission encourages States to allow for temporary non-applicability of their national laws in the event of disasters, and for appropriate provisions to be included within their national law so as to not create any legal uncertainty in the critical period following a disaster when such emergency provisions become necessary.

[324] See, for example, Tampere Convention, article 4 (2): "A State Party requesting telecommunication assistance shall specify the scope and type of assistance required."

(3) The draft article outlines examples of areas of assistance in which national law should enable the taking of appropriate measures. The words "in particular" before the examples indicate that this is not an exhaustive list, but rather an illustration of the various areas that may need to be addressed by national law to facilitate prompt and effective assistance.

(4) Subparagraph (a) envisages relief personnel. Specific mention of both civilian and military relief personnel indicates the Commission's recognition that the military often plays a key role in disaster response actions. Military relief personnel are those involved in the provision of humanitarian assistance. The areas addressed in the subparagraph provide guidance as to how personnel can be better accommodated. Granting of privileges and immunities to assisting actors is an important measure included in many international agreements to encourage the help of foreign aid workers.[325] Waiver or expedition of visa and entry requirements and work permits is necessary to ensure prompt assistance.[326] Without a special regime in place, workers may be held up at borders or unable to work legally during the critical days after a disaster, or forced to exit and re-enter continually so as not to overstay their visas. Freedom of movement means the ability of workers to move freely within a disaster area in order to properly perform their specifically agreed upon functions.[327] Affected States can restrict access to certain sensitive areas while still allowing for freedom within the area concerned. Unnecessary restriction of movement of relief personnel inhibits workers' ability to provide flexible assistance.

(5) Subparagraph (b) addresses goods and equipment, which encompasses any and all supplies, tools, machines, foodstuffs, medicines, and other objects necessary for relief operations. The Commission intends that this category also include search dogs, which are normally regarded as goods and equipment, rather than creating a separate category for animals. Goods and equipment are essential to the facilitation of effective assistance, and national laws must be flexible to address the needs of persons affected by disasters and to ensure prompt delivery. Custom requirements and tariffs, as well as taxation, should be waived or lessened in order to reduce costs and prevent delay of goods.[328] Goods and equipment that are delayed can quickly lose their usefulness, and normal procedures in place aiming at protecting the economic interests of a State can become an obstacle in connection with aid equipment that can save lives or provide needed relief.

(6) The second paragraph of the draft article requires that all relevant legislation and regulations are readily accessible to assisting actors. By using the words "readily accessible", what is required is ease of access to such laws without creating the burden on the affected State to physically provide this information separately to all assisting actors.

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[325] See, for example, the Framework Convention on Civil Defence Assistance, of 22 May 2000, United Nations, *Treaty Series*, vol. 2172, No. 38131, p. 213, art. 4 (5): "The Beneficiary State shall, within the framework of national law, grant all privileges, immunities, and facilities necessary for carrying out the assistance."

[326] The League of Red Cross Societies has long noted that entry requirements and visas serve as a "time-consuming procedure which often delays the dispatch of such delegates and teams," thus delaying the vital assistance the affected State has a duty to provide. Resolution adopted by the League of Red Cross Societies Board of Governors at its 33rd session, Geneva, 28 October–1 November, 1975.

[327] See Model Rules for Disaster Relief Operations, 1982, United Nations Institute for Training and Research, Policy and Efficacy Studies No. 8 (Sales No. E.82.XV.PE/8), annex A, rule 16, which states that an affected State must permit assisting "personnel freedom of access to, and freedom of movement within, disaster stricken areas that are necessary for the performance of their specifically agreed functions."

[328] This is stressed in various international treaties. See, for example, Tampere Convention, art. 9 (4); see also ASEAN Agreement, art. 14 (b).

Article 15
Termination of external assistance

The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.

Commentary

(1) Draft article 15 deals with the question of termination of external assistance. The provision is comprised of two sentences. The first sentence concerns the requirement that the affected State, the assisting State, and as appropriate other assisting actors consult each other as regards the termination of the external assistance, including the modalities of such termination. The second sentence sets out the requirement that parties wishing to terminate assistance provide appropriate notification.

(2) When an affected State accepts an offer of assistance, it retains control over the duration for which that assistance will be provided. Draft article 9, paragraph 2, explicitly recognizes that the affected State has the primary role in the direction, control, coordination and supervision of disaster relief and assistance on its territory. For its part, draft article 11 requires the consent of the affected State to external assistance, with the caveat that consent shall not be withheld arbitrarily. The combined import of the foregoing provisions is that the affected State can withdraw consent, thereby terminating external assistance and bringing to an end the legal regime under which the assistance was being provided.

(3) Draft article 15 seeks to strike a balance between the right of the affected State to terminate external assistance and the position of assisting actors, with a view to providing adequate protection to persons affected by disasters. Accordingly, the provision does not recognize the right of only the affected State to unilaterally terminate assistance. Instead, the Commission acknowledges that assisting States and other assisting actors may themselves need to terminate their assistance activities. Draft article 15 thus preserves the right of any party to terminate the assistance being provided, on the understanding that this is done in consultation with the other States or actors, as appropriate.

(4) The words "assisting actors" are drawn from existing instruments[329] to describe international organizations and non-governmental organizations which provide disaster relief and assistance, on the understanding that they will be defined in an article on the use of terms. Draft article 15 is drafted in bilateral terms, but it does not exclude the scenario of multiple assisting actors providing external assistance.

(5) The requirement to consult reflects the spirit of solidarity and cooperation implicit throughout the draft articles, and the principle of cooperation enshrined in draft articles 5 and 5 *bis*. The Commission anticipates that termination may become necessary for a variety of reasons and at different stages during the provision of assistance. The relief operations may reach a stage where it would be only logical either for the affected State or one or more of the assisting parties to cease operations. Circumstances leading to termination may include instances in which the resources of assisting actors are depleted, or where the occurrence of another disaster makes the diversion of resources necessary. Draft article 15 is flexible, allowing adjusting the duration of assistance according to the circumstances, while implying that parties should consult in good faith. In any event, draft article 15

[329] Article 12 of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, November 2007, adopted at the 30th International Conference of the Red Cross and Red Crescent, Geneva, 26-30, 30IC/07/R4, annex, and annotations thereto.

should be read in light of the purpose of the draft articles, as indicated in draft article 2; thus, decisions regarding the termination of assistance are to be made taking into consideration the needs of the persons affected by disaster, namely, whether and how far such needs have been met.

(6) The word "modalities" refers to the procedures to be followed in terminating assistance. Even though termination on a mutual basis may not always be feasible, consultation in relation to the modalities would enable the relevant parties to facilitate an amicable and efficient termination.

(7) The second sentence establishes a requirement of notification by the party wishing to terminate external assistance. Appropriate notification is necessary to ensure a degree of stability in the situation, so that no party is adversely affected by an abrupt termination of assistance. The provision is drafted flexibly so as to anticipate notification before, during or after the consultation process. No procedural constraints have been placed on the notification process. However, notification should be "appropriate" according to the circumstances, including the form and timing, preferably early, of the notification.

Article 16
Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

Commentary

(1) Draft article 16 deals with the duty to reduce the risk of disasters. The draft article is composed of two paragraphs. Paragraph 1 establishes the basic obligation to reduce the risk of disasters by taking certain measures, and paragraph 2 provides an indicative list of such measures.

(2) Draft article 16 represents the acknowledgement of the need to cover in the draft articles on Protection of Persons in the Event of Disasters, not only the response phase of a disaster, but also the pre-disaster duties of States. The concept of disaster risk reduction has its origins in a number of General Assembly resolutions and has been further developed through the 1994 World Conference on Natural Disaster Reduction in Yokohama,[330] the 2005 Hyogo Framework for Action 2005–2015,[331] and four sessions of the Global Platform for Disaster Risk Reduction, the latest of which took place in May of 2013.

(3) As stated in the 2005 Hyogo Declaration: "a culture of disaster prevention and resilience, and associated pre-disaster strategies, which are sound investments, must be fostered at all levels, ranging from the individual to the international levels … Disaster risks, hazards and their impacts pose a threat, but appropriate response to this can and should lead to actions to reduce risks and vulnerabilities in the future". At the fourth session of the Global Platform for Disaster Risk Reduction in 2013, the concluding summary by the Chair drew attention to the "growing recognition that the prevention and reduction of

[330] See *Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and Plan of Action*, A/CONF.172/9, chap. I, resolution I, annex I.

[331] *Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters*, A/CONF.206/6 and Corr.1, chap. I, resolution 2.

disaster risk is a legal obligation, encompassing risks assessments, the establishment of early warning systems, and the right to access risk information".

(4) The rule embodied in draft article 16 draws inspiration from among the sources of law identified by Article 38, paragraph 1, of the Statute of the International Court of Justice. The Commission bases itself on the fundamental principles of State sovereignty and non-intervention and, at the same time, draws on principles emanating from international human rights law, including the States' obligation to respect, protect, and fulfil human rights, in particular the right to life. Protection not only relates to actual violations of human rights but also entails an affirmative obligation on States to take the necessary and appropriate measures which are designed to prevent the occurrence of such violations, no matter the source of the threat. This is confirmed by the decisions of international tribunals, notably the European Court of Human Rights judgments in the *Öneryildiz v. Turkey*[332] and *Budayeva and Others v. Russia*[333] cases, which affirmed the duty to take preventive measures. In addition, draft article 16 draws from a number of international environmental law principles, including the "due diligence" principle.

(5) An important legal foundation for draft article 16 is the widespread practice of States reflecting their commitment to reduce the risk of disasters. Many States have entered into multilateral, regional and bilateral agreements concerned with reducing the risk of disasters, including: the ASEAN Agreement;[334] the Beijing Action for Disaster Risk Reduction in Asia (2005); the Delhi Declaration on Disaster Risk Reduction in Asia (2007); the Kuala Lumpur Declaration on Disaster Risk Reduction in Asia (2008); the 2010 Fourth Asian Ministerial Conference on Disaster Risk Reduction, leading to the Incheon Declaration on Disaster Risk Reduction in Asia and the Pacific 2010, the Incheon Regional Roadmap and Action Plan on Disaster Risk Reduction through Climate Change Adaptation in Asia and the Pacific, reaffirming the Framework for Action and proposing Asian initiatives for climate change adaptation and disaster risk reduction considering vulnerabilities in the region;[335] the African Union Africa Regional Strategy for Disaster Risk Reduction of 2004, which was followed by a programme of action for its implementation (originally for the period 2005–2010, but later extended to 2015);[336] four sessions of the African Regional Platform for Disaster Risk Reduction, the most recent in 2013;[337] the Arab Strategy for Disaster Risk Reduction 2020, adopted by the Council of Arab Ministers Responsible for the Environment at its twenty-second session, in December 2010;[338] and, lastly, the Nayarit Communiqué on Lines of Action to Strengthen Disaster Risk Reduction in the Americas (2011).[339]

(6) Recognition of this commitment is further shown by the States' incorporation of disaster risk reduction measures into their national policies and legal frameworks. A

[332] European Court of Human Rights, Ö*neryildiz v. Turkey*, Case No. 48939, Grand Chamber, Judgment, 30 November 2004.

[333] European Court of Human Rights, *Budayeva and Others v. Russia*, Chamber (First Section), Case Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment, 20 March 2008.

[334] The Agreement is the first international treaty concerning disaster risk reduction to have been developed after the adoption of the Hyogo Framework for Action.

[335] For the text of the Declaration, see http://www.preventionweb.net/files/16327_ finalincheondeclaration1028.pdf.

[336] *Extended Programme of Action for the Implementation of the Africa Regional Strategy for Disaster Risk Reduction (2006–2015)*, Introduction.

[337] UNISDR, "Africa seeks united position on disaster risk reduction", 13 February 2013. Available from http://www.unisdr.org/archive/31224.

[338] For the text of the Strategy, see http://www.unisdr.org/files/18903_17934asdrrfinalenglishjanuary 20111.pdf.

[339] For the text of the Communiqué, see http://www.unisdr.org/files/18603_communiquenayarit.pdf.

compilation of national progress reports on the implementation of the Hyogo Framework[340] indicates that 64 States or areas reported having established specific policies on disaster risk reduction, evenly spread throughout all continents and regions, including the major hazard-prone locations. They are: Algeria, Anguilla, Argentina, Armenia, Bangladesh, Bolivia (Plurinational State of), Brazil, British Virgin Islands, Canada, Cape Verde, Chile, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Cuba, Dominican Republic, Fiji, Finland, Georgia, Germany, Ghana, Guatemala, Honduras, India, Indonesia, Italy, Japan, Kenya, Lao People's Democratic Republic, Lebanon, Madagascar, Malawi, Malaysia, Maldives, Marshall Islands, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Nepal, New Zealand, Nicaragua, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Saint Kitts and Nevis, Saint Lucia, Samoa, Senegal, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, United Republic of Tanzania, United States, Vanuatu and Venezuela (Bolivarian Republic of). More recently, the United Nations International Strategy for Disaster Reduction (UNISDR) has identified 76 States that have adopted national platforms, defined as a "coordinating mechanism for mainstreaming disaster risk reduction into development policies, planning and programmes", to implement disaster risk reduction strategies.[341] Several countries have adopted legislation specifically addressing disaster risk reduction either as stand-alone legislation or as part of a broader legal framework concerning both disaster risk management and disaster response, including: Algeria,[342] Cameroon,[343] China,[344] the Dominican Republic,[345] El Salvador,[346] Estonia,[347] France,[348] Guatemala,[349] Haiti,[350] Hungary,[351] India,[352] Indonesia,[353] Italy,[354] Madagascar,[355] Namibia,[356] New Zealand,[357] Pakistan,[358] Peru,[359] the Philippines,[360] the Republic of Korea,[361] Slovenia,[362] South Africa,[363] Thailand[364] and the United States.[365]

[340] Hyogo Framework for Action (2009–2011), Hyogo Framework for Action priority 1, core indicator 1.1.

[341] For a list of States that have adopted national platforms, see http://www.unisdr.org/partners/countries.

[342] Algeria, Risk Prevention and Disaster Management Act of 25 December 2004.

[343] Cameroon, Arrêté No. 037/PM du 19 mars 2003 portant création, organisation et fonctionnement d'un Observatoire National des Risques.

[344] China, Disaster Prevention and Response Act (2002).

[345] Dominican Republic, Decree No. 874-09 approving the Regulation for the application of Law No. 147-02 on Risk Management and repealing Chapters 1, 2, 3, 4 and 5 of Decree No. 932-03 (2009).

[346] El Salvador, Law on Civil Protection, Disaster Prevention and Disaster Mitigation (2005).

[347] Estonia, Emergency Preparedness Act (2000).

[348] France, Law No. 2003-699 regarding the prevention of technological and natural risks and reparation of damages (2003).

[349] Guatemala, Decree No. 109-96, Law on the National Coordinator for the Reduction of Natural or Man-made Disasters (1996).

[350] Haiti, National Risk and Disaster Management Plan (1988).

[351] Hungary, Act LXXIV on the management and organization for the prevention of disasters and the prevention of major accidents involving dangerous substances (1999).

[352] India, Disaster Management Act, No. 53 (2005).

[353] Indonesia, Law No. 24 of 2007 Concerning Disaster Management.

[354] Italy, Decree of the Prime Minister to establish a national platform for disaster risk reduction (2008).

[355] Madagascar, Decree No. 2005-866 setting out the manner of application of Law No. 2003-010 of 5 September 2003 on the national risk and disaster management policy (2005).

[356] Namibia, Disaster Risk Management Act (2012).

[357] New Zealand, National Civil Defence Emergency Management Plan Order 2005 (SR 2005/295), part 3.

[358] Pakistan, National Disaster Management Act (2010). See also the official statement of the Government of Pakistan at the third session of the Global Platform for Disaster Risk Reduction, in

(7) Draft article 16 is to be read together with the rules of general applicability adopted thus far, including those principally concerned with the response to a disaster. Its ultimate placing in the first reading set of draft articles will be decided at the time that reading is completed.

Paragraph 1

(8) Paragraph 1 starts with the words "Each State". The Commission opted for this formula over "States", for the sake of consistency with the draft articles previously adopted, where care had been taken to identify the State or States which bore the legal duty to act. In contrast to those draft articles dealing directly with disaster response where a distinction exists between an affected State or States and other States, in the pre-disaster phase the obligation in question applies to every State. Furthermore as is evident from paragraph 2, the obligation to reduce risk implies measures primarily taken at the domestic level. Any such measures requiring interaction between States or with other international actors are meant to be covered by article 5 *ter*. In other words, the obligation applies to each State individually. Hence the Commission decided against using the word "States" also to avoid any implication of a collective obligation.

(9) The word "shall" signifies the existence of the international legal obligation to act in the manner described in the paragraph and is the most succinct way to convey the sense of that legal obligation. This is confirmed by the title of the draft article, which refers to the "duty" to reduce the risk of disasters. While each State bears the same obligation, the question of different levels of capacity among States to implement the obligation is dealt with under the phrase "by taking the necessary and appropriate measures".

(10) The obligation is to "reduce the risk of disasters".[366] The Commission adopted the present formula in recognition of the fact that the contemporary view of the international community, as reflected in several major pronouncements, most recently in the Hyogo Declaration issued at the 2005 World Conference on Disaster Reduction, was that the focus should be placed on the reduction of the risk of harm caused by a hazard, as distinguished from the prevention of disasters themselves. Accordingly, the emphasis in paragraph 1 is placed on the reduction of the risk of disasters. This is achieved by taking certain measures so as to prevent, mitigate and prepare for such disasters.

(11) The phrase "by taking the necessary and appropriate measures" indicates the specific conduct being required. In addition to the further specification about legislation and regulations explained in paragraph (13) below, the "measures" to be taken are qualified by the words "necessary" and "appropriate" which accord with common practice. What might be "necessary and appropriate" in any particular case is to be understood in terms of the stated goal of the measures to be taken, namely "to prevent, mitigate, and prepare for disasters" so as to reduce risk. This is to be evaluated within the broader context of the

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2011, available from http://www.preventionweb.net/files/globalplatform/pakistanofficialstatement.pdf.

359 Peru, Law No. 29664 creating the National System for Disaster Risk Management (2011).

360 The Philippines, Philippine Disaster Risk Management Act (2006).

361 Republic of Korea, National Disaster Countermeasures Act (1995); National Disaster Management Act (2010).

362 Slovenia, Act on the Protection against Natural and Other Disasters (2006).

363 South Africa, Disaster Management Act No. 57 of 2002.

364 Thailand, Disaster Prevention and Mitigation Act (2007).

365 United States, Disaster Mitigation Act (2000).

366 The Commission notes the existence of a linguistic difference involving the United Nations official translation into French of the term "Disaster Risk Reduction" (DRR).

existing capacity and availability of resources of the State in question, as has been noted in paragraph (8) above. The fundamental requirement of due diligence is inherent to the concept of "necessary and appropriate". It is further understood that the question of the effectiveness of the measures is implied in that formula.

(12) The paragraph indicates by means of the phrase "including through legislation and regulations", the specific context in which the corresponding measures are to be taken. The envisaged outcome consists of a number of concrete measures which are typically taken within the context of a legislative or regulatory framework. Accordingly, for those States which do not already have such framework in place, the general obligation to reduce the risk of disasters would also include an obligation to put such legal framework into place so as to allow for the taking of the "necessary and appropriate" measures. The phrase "legislation and regulations" is meant to be understood in broad terms to cover as many manifestations of law as possible, it being generally recognized that such law-based measures are the most common and effective way for facilitating (hence the word "through") the taking of disaster risk reduction measures at the domestic level.

(13) The qualifier "including" indicates that while "legislation and regulations" may be the primary methods, there may be other arrangements under which such measures could be taken. The word "including" was chosen in order to avoid the interpretation that the adoption and implementation of specific legislation and regulations would always be required. This allows a margin of discretion for each State to decide on the applicable legal framework, it being understood that having in place a legal framework which anticipates the taking of "the necessary and appropriate measures" is a *sine qua non* for disaster risk reduction. The use of the definite article "the" before "necessary", therefore, serves the function of specifying that it is not just any general measures which are being referred to, but rather, specific, and concrete, measures aimed at prevention, mitigation and preparation for disasters.

(14) The phrase "through the adoption of legislation and regulations" imports a reference to ensuring that mechanisms for implementation and accountability for non-performance be defined within domestic legal systems. Since such issues, though important, are not the only ones which could be the subject of legislation and regulations in the area of disaster risk reduction, singling them out in the text of paragraph 1 could have led to a lack of clarity.

(15) The last clause, namely "to prevent, mitigate, and prepare for disasters" serves to describe the purpose of the "necessary and appropriate" measures which States are to take during the pre-disaster phase, with the ultimate goal of reducing their exposure to the risk of disasters. The phrase tracks the now well-accepted formula used in major disaster risk reduction instruments. The Commission was cognizant of the fact that adopting a different formulation could result in unintended *a contrario* interpretations as to the kinds of activities being anticipated in the draft article.

(16) To illustrate the meaning of each of the three terms used, prevention, mitigation and preparedness, the Commission deems it appropriate to have recourse to the Terminology on Disaster Risk Reduction prepared by UNISDR in 2009,[367] according to which:

> (i) "*Prevention* is 'the outright avoidance of adverse impacts of hazards and related disasters'…
>
> Prevention (i.e. disaster prevention) expresses the concept and intention to completely avoid potential adverse impacts through action taken in advance … Very

[367] See http://www.unisdr.org/we/inform/terminology.

often the complete avoidance of losses is not feasible and the tasks transform to that of mitigation. Partly for this reason, the terms prevention and mitigation are sometimes used interchangeably in casual use;"

(ii) "*Mitigation* is 'the lessening or limitation of the adverse impacts of hazards and related disasters' …

The adverse impacts of hazards often cannot be prevented fully, but their scale or severity can be substantially lessened by various strategies and actions … It should be noted that in climate change policy 'mitigation' is defined differently, being the term used for the reduction of greenhouse gas emissions that are the source of climate change;"[368]

(iii) "*Preparedness* is 'the knowledge and capacities developed by governments, professional response and recovery organizations, communities and individuals to effectively anticipate, respond to and recover from the impacts of likely, imminent or current hazard events or conditions' …

Preparedness action is carried out within the context of disaster risk management and aims to build the capacities needed to efficiently manage all types of emergencies and achieve orderly transitions from response through sustained recovery. Preparedness is based on a sound analysis of disaster risks and good linkages with early warning systems … [The measures to be taken] must be supported by formal institutional, legal and budgetary capacities."

Paragraph 2

(17) Paragraph 2 lists three categories of disaster risk reduction measures, namely: the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems. As noted in paragraph (3), these three measures were singled out in the Chair's summary at the conclusion of the fourth session of the Global Platform for Disaster Risk Reduction held in May 2013. The Commission decided to refer expressly to the listed three examples as reflecting the most prominent types of contemporary disaster risk reduction efforts. The word "include" serves to indicate that the list is non-exhaustive. The listing of the three measures is without prejudice to other activities aimed at the reduction of the risk of disasters which are being undertaken at present, or which may be undertaken in the future.

(18) The practical measures that can be adopted are innumerable and depend on the social, environmental, financial, cultural, and other relevant circumstances. Practice in the public and private sectors provides a wealth of examples. Among them may be cited: community-level preparedness and education; the establishment of institutional frameworks; contingency planning; setting up of monitoring mechanisms; land-use controls; construction standards; ecosystems management; drainage systems; funding; and insurance.

(19) The three consecutive measures selected in paragraph 2 share a particular characteristic: they are instrumental to the development and applicability of many if not all other measures, for instance in decision-making, concerning definitions of priorities or investment planning, both in the public and the private sector.

(20) The first measure — *risk assessments* — is about generating knowledge concerning both hazards and vulnerabilities. As such, it is the first step towards any sensible measure to

[368] The Commission is conscious of the discrepancy in the concordance between the English and French versions of the official United Nations use of the term "mitigation".

reduce the risk of disasters. Without a sufficiently solid understanding of the circumstances surrounding disasters and their characteristics, no effective measure can be enacted. Risk assessments also compel a closer look at local realities and the engagement of local communities.

(21) The second measure — *the collection and dissemination of risk and past loss information* — is the next step. Reducing disaster risk requires action by all actors in the public and private sectors and civil society. Collection and dissemination should result in the free availability of risk and past loss information, which is an enabler of effective action. It allows all stakeholders to assume responsibility for their actions and to make a better determination of priorities for planning purposes; it also enhances transparency in transactions and public scrutiny and control. The Commission wishes to emphasize the desirability of the dissemination and free availability of risk and past loss information, as it is the reflection of the prevailing trend focusing on the importance of public access to such information. The Commission, while recognizing the importance of that trend, felt that it was best dealt with in the commentary and not in the body of paragraph 2, since making it a uniform legal requirement could prove burdensome for States.

(22) The third measure concerns *early warning systems*, which are instrumental both in initiating and implementing contingency plans, thus limiting the exposure to a hazard; as such, they are a pre-requisite for effective preparedness and response.

(23) As it has been explained in paragraph (11), paragraph 2 concerns the taking of the envisaged measures within the State. Any inter-State component would be covered by the duty to cooperate in article 5, read together with article 5 *ter*. Accordingly, the extent of any international legal duty relating to any of the listed and not listed measures that may be taken in order to reduce the risk of disasters is to be determined by way of the relevant specific agreements or arrangements each State has entered into with other actors with which it has the duty to cooperate.

Chapter VII
Formation and evidence of customary international law

A. Introduction

63. The Commission, at its sixty-fourth session (2012), 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.[369] At the same session, the Commission had before it a Note by the Special Rapporteur (A/CN.4/653).[370] 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.[371]

B. Consideration of the topic at the present session

64. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/663), as well as a memorandum of the Secretariat on the topic (A/CN.4/659). The Commission considered the report at its 3181st to 3186th meetings, from 17 to 25 July 2013.

65. At its 3186th meeting, on 25 July 2013, the Commission decided to change the title of the topic to "Identification of customary international law".

1. Introduction by the Special Rapporteur of the first report

66. The first report, which was introductory in nature, aimed to provide a basis for future work and discussions on the topic, and set out in general terms the Special Rapporteur's proposed approach to it. The report presented, *inter alia*, a brief overview of the previous work of the Commission relevant to the topic, and highlighted some views expressed by delegates made in the context of the Sixth Committee during the sixty-seventh session of the General Assembly. It also discussed the scope and possible outcomes of the topic, and considered some issues concerning customary international law as a source of law. It proceeded to describe the range of materials to be consulted, as well as a proposed programme for the Commission's future work on the topic.

67. In introducing his report, the Special Rapporteur noted the importance of taking into account the practice of States from all legal systems and regions of the world while considering this topic, as well as the usefulness of exchanges of views between the Commission and other bodies and with the wider academic community. The Special Rapporteur also considered that the Memorandum prepared by the Secretariat, which

[369] 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).

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

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

described elements in the previous work of the Commission that could be particularly relevant to the topic, would be of substantial assistance. In particular, the Memorandum's observations and explanatory notes would constitute important points of reference for the Commission's future work.

68. The Special Rapporteur was fully aware of the complexities involved in the topic and the need to approach it with caution so as to ensure, in particular, that the flexibility of the customary process was preserved. He recalled that the intention was neither to consider the substance of customary international law nor to resolve purely theoretical disputes about the basis of customary law. Instead, the Special Rapporteur proposed that the Commission focus on the elaboration of conclusions, with accompanying commentaries, on the identification of rules of customary international law. It was envisaged that such an outcome would be of practical assistance to judges and lawyers, particularly those who may not be well versed in public international law.

69. In light of the proposed focus on the method of identifying customary rules, and since the title of the topic's reference to "formation" had given rise to some confusion regarding the scope of the topic, the Special Rapporteur suggested changing the title to the "Identification of customary international law". Even if the title were changed, the proposed work of the Commission would nevertheless include an examination of the requirements for the formation of rules of customary international law, as well as the material evidence of such rules, both being necessary to the determination of whether a rule of customary international law existed. The Special Rapporteur further reiterated his preference to not deal with *jus cogens* as part of the scope of the present topic.

70. Concerning customary international law as a source of international law, the Special Rapporteur first turned to Article 38, paragraph 1, of the Statute of the International Court of Justice, on the basis that it was an authoritative statement of sources of international law. The Special Rapporteur then addressed the relationship between customary international law and other sources of international law. While observing that its relationship with treaties was a matter of great practical importance, he also noted that it was a relatively well-understood question. Less obvious, in his view, was the relationship between customary international law and general principles of law, which required a careful examination by the Commission. In drawing attention to the importance of consistent terminology he further proposed to include a conclusion on use of terms.

71. The report also provided an illustrative list of materials relevant for the consideration of the topic. Although not intended to be exhaustive, the materials identified were thought to reflect the general approach to the formation and evidence of customary international law. Upon an initial examination of certain materials on State practice, as well as the case law of the International Court of Justice and other courts and tribunals, the Special Rapporteur preliminarily noted that, although there were some inconsistencies, virtually all of the materials reviewed stressed that both State practice and *opinio juris* were required for the formation of a rule of customary international law. He further observed that the work of other bodies on this topic, such as the International Law Association, the *Institut de droit international* and the International Committee of the Red Cross, as well as ensuing debates and writings, would be of interest.

72. While the Special Rapporteur observed that the inclusion of two draft conclusions in the report confirmed his intention concerning the form of the outcome of the Commission's work, he considered it premature to refer them to the Drafting Committee. Instead, his intention was to conduct informal consultations in order to reach agreement on the title of the topic and whether or not to deal with *jus cogens*.

2. Summary of the debate

(a) General comments

73. There was general agreement that the work of the Commission could usefully shed light on the process of identifying rules of customary international law. Broad support was expressed for the development of a set of conclusions with commentaries, a practical outcome which would serve as a guide to lawyers and judges who are not experts in public international law. It was underscored that customary international law remained highly relevant despite the proliferation of treaties and the codification of several areas of international law. At the same time, it was the general view of the Commission that the work on this topic should not be unduly prescriptive, as the flexibility of the customary process remained fundamental. It was also emphasized that the process of formation of customary international law is a continuing one, which does not stop when a rule has emerged.

74. Some members commented on the need to identify the added value that the Commission could offer on this topic, and to distinguish the work on this topic from the prior work of the Commission and other entities. In this regard, it was suggested that it was important to distinguish the work of the Commission from similar work undertaken by the International Law Association, and to clarify which gaps in treatment the Commission would address.

75. A number of members noted the complexity and difficulty inherent in the topic. The view was expressed that the ambiguities surrounding the identification of customary international law had given rise to legal uncertainty and instability, as well as opportunistic or bad faith arguments regarding the existence of a rule of customary international law. The proposed effort to clarify the process by which a rule of customary international law is identified was thus generally welcomed.

(b) Scope of the topic

76. A preliminary matter which raised issues relating to scope was the title of the topic. Several members agreed with the proposal of the Special Rapporteur to change the title from "Formation and evidence of customary international law" to the "Identification of customary international law", though several members also expressed support for maintaining the current title. Other members suggested alternative titles, including "The evidence of customary international law" and "The determination of customary international law". The view was also expressed that it would not be appropriate for the Commission to address the theoretical aspects relating to "formation", and it should thus be removed from the title. Ultimately, there was a general view that, even if the title were changed, it remained important to include both the formation and evidence of customary international law within the scope of the topic.

77. There was general agreement that the main focus of the Commission's work should be to clarify the common approach to identifying the formation and evidence of customary international law. The relative weight to be accorded to the consideration of "formation" and "evidence" was, however, the subject of debate. Some members were sceptical that the largely academic or theoretical questions relating to the formation of customary international law were necessary or relevant to the Commission's work on the topic. A view was expressed that formation and evidence are diametrically opposed concepts, as the former refers to dynamic processes that occur over time, while the latter refers to the state of the law at a particular moment. Several other members were of the view that it was impossible to distinguish the process of formation from the evidence required to identify the existence of a rule.

78. Several members agreed with the proposal to not undertake a study of *jus cogens* within the scope of the topic. A number of members observed that *jus cogens* presented its own peculiarities in terms of formation and evidence. The identification of the existence of a rule of customary international law was a different question than whether such a rule also possessed the additional characteristic of not being subject to derogation by way of treaty. It was also noted that a proposal had been made for a possible new topic on *jus cogens*. Other members suggested that *jus cogens* should be dealt with as part of this topic, as the interrelation between the two concepts is substantial and should be studied. Some members indicated that it would be useful to address the issue of the hierarchy of sources of international law, including treaty law and *jus cogens*.

79. Several members agreed with the proposal of the Special Rapporteur to study the relationship between customary international law and general principles of international law and general principles of law. It was suggested that the Commission should endeavour to clarify the complex and unclear relationship between the concepts. In this regard, some members noted that distinguishing between general principles of international law and customary international law is not always possible. A similar point was made as to general principles of law and customary international law. At the same time, some members were of the view that broad questions relating to general principles and general principles of international law that are unrelated to customary international law should be excluded, as any study of such matters would unduly broaden this topic.

80. General support was expressed for an examination of the relationship between customary international law and treaty law. It was recalled in this context that it is generally recognized that treaties may codify, crystallize or generate rules of customary international law. The point was also made that a rule of customary international law may operate in parallel to an identical treaty provision. Support was also expressed for the study of the effects on customary international law of multilateral treaties with very few States parties. It was suggested that any examination of the relationship with treaty law should be reserved for a later stage of the work on the topic, as a thorough analysis of the constitutive elements of customary international law was first required.

81. Consideration of the relationship between customary international law and other sources of international law, including unilateral declarations, was also recommended. Some members suggested an analysis of the interplay between non-binding instruments or norms and the formation and evidence of customary international law.

82. Some members expressed support for the study of regional customary international law, with particular emphasis on the relationship between regional and general customary international law. As part of its consideration of this relationship, it was suggested that the Commission look at regional practice, including relevant judicial decisions, agreements and regulations. It was noted in this context that it can be difficult to distinguish between the practice of regional organizations and individual States.

(c) Methodology

83. Broad support was expressed for the proposal of the Special Rapporteur to consider both the formative elements of customary international law, namely the elements that give rise to the existence of a rule of customary international law, as well as the requisite criteria for proving the existence of such elements. General support was also expressed for the proposed focus on the practical process of identifying rules of customary international law, rather than the content of such rules. It was suggested, however, that it would be impossible to fully distinguish the substance of primary rules from the analysis of applicable secondary rules. According to another view, the emphasis on the approach to the identification of rules would need to be supported by illustrative examples of primary rules.

84. Broad support was also expressed for the Special Rapporteur's proposal carefully to examine State practice and *opinio juris sive necessitates*, the two widely accepted constituent elements of customary international law. Several members noted that the identification of rules of customary law must be based on an assessment of State practice, and due regard should be given to the generality, continuity and representativeness of such practice. It was agreed that not all international acts bear legal significance in this regard, particularly acts of comity or courtesy. Some members similarly suggested that certain State positions may not reflect *opinio juris*, particularly where a State indicates as much. Several members commented that identifying the existence of the requisite State practice and/or *opinio juris* was a difficult process. It was also noted that *opinio juris* may be revealed in both acts and omissions.

85. Attention was drawn to the need to study carefully the temporal aspects of the "two-elements" approach, in particular whether *opinio juris* may precede State practice, and whether a rule of customary international law may emerge in a short period of time. The utility of determining the relative weight accorded to State practice and *opinio juris* was also mentioned. In this regard, it was suggested that the Commission's work on the topic could be critical to bridging the gap between the "traditional" and "modern" approaches to customary international law. According to the view of other members, while it was important to analyse varying approaches to customary international law, classifying such approaches with terms such as "traditional" and "modern" was unnecessary or misleading.

86. Several members agreed that the Commission should aspire towards the elaboration of a common, unified approach to the identification of rules of customary international law, as such rules arise in a single, interconnected international legal system. According to the view of several other members, a system-wide or unitary approach should not be assumed as the approach to the identification of rules may vary according to the substantive area of international law. The view was expressed that the relative weight to be accorded to the evidence of State practice or *opinio juris* may vary depending on the field. In this regard, it was suggested that differing weight was accorded to certain materials in different fields of international law. In particular, it was suggested that "soft law" may play a greater role in the formation of customary international law in certain areas.

87. A view was expressed that the proposed approach of the Special Rapporteur did not take sufficient account of the distinction between formal and material sources of customary international law. It was also suggested that the proposal of the Special Rapporteur to incorporate the definition of international custom contained in the Statute of the International Court of Justice may be misguided. Some members indicated that a definition of customary international law should consider Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, particularly as the constituent elements identified therein are widely cited and accepted, but any definition produced by the Commission should focus primarily on the core elements which give customary international law its binding nature.

88. Some members also stressed the importance of addressing the process by which a rule of customary international law becomes obsolete.

89. A number of members recommended that the Commission examine the role of other actors in the formation of customary international law. In particular, it was suggested that the potential juridical value of determinations of *sui generis* subjects of international law, such as the International Committee for the Red Cross, should be examined. A view was expressed that such actors and interest groups play a significant role in the development, and the pace of development, of customary international law in certain fields. According to another view, determinations of certain non-governmental organizations should be accorded lesser weight than the practice or pronouncements of States.

(d) Range of materials to be consulted

90. There was general support for the range of materials the Special Rapporteur proposed to consult. It was suggested, however, that a distinction should be made between the relative weight accorded to different materials.

91. There was broad support for a careful examination of the practice of States. A view was expressed that materials on State practice should be examined from all areas of the world, though it was also noted that, regrettably, not all States publish a survey of State practice. It was suggested that State practice in some areas may be limited as not all States have participated in the formation of certain rules of customary international law. Several members suggested that the Commission research the decisions of national courts, statements of national officials, as well as State conduct. The view was expressed that the Commission should carefully consider the actual behaviour of States, particularly where it conflicted with national statements. Attention was also drawn to States' arguments before international courts and tribunals, as they may usefully indicate positions on the formation and evidence of customary international law. In addition, where available, it was suggested that the Commission consider the analysis of legal advisers to governments, as well as the relevance of confidential exchanges of views between States.

92. With regard to the jurisprudence of national courts, several members agreed that such cases should be approached cautiously, and should be carefully scrutinized for consistency. It was suggested that the manner in which national courts apply customary international law is a function of internal law, and domestic judges may not be well versed in public international law.

93. There was general support for the proposal to examine the jurisprudence of international, regional and subregional courts. Several members expressed particular support for an analysis of the jurisprudence of the International Court of Justice. Some members expressed the view that the jurisprudence of the International Court of Justice may be considered the primary source of material on the formation and evidence of rules of customary international law, as it constituted the principal judicial organ of the United Nations whose authoritative status on such matters was widely recognized. The view was expressed that advisory opinions, while not binding, may also deserve consideration. Several members also stressed the importance of analysing the jurisprudence of other international courts and tribunals, particularly as it appeared that certain courts and tribunals adopted varying approaches to the assessment of customary international law.

94. The view was expressed that the Commission should be careful not to place too much emphasis on jurisprudence, as courts and tribunals are charged with the resolution of specific disputes, and not with the development of uniform international legal criteria or procedures. Some members also indicated that the apparent difference in approaches among courts and tribunals may, in actuality, simply constitute variance in drafting.

95. The general view was that the role of the practice of international and regional organizations merited consideration. Attention was drawn to the value of resolutions, declarations, recommendations and decisions of such organizations as potential evidence of both State practice and *opinio juris*. It was suggested, however, that greater weight should be accorded to the practice of the intergovernmental organs of international organizations.

96. Some members were of the view that the Commission should not have an overly restrictive conception of the "law" relevant to its work on this topic. In particular, it was noted that "soft law" norms have played a role in the emergence of rules of customary international law.

97. The point was also made that writings of publicists would usefully shed light on the topic. Attention was drawn to the widespread support among writers for the "two-elements"

approach to customary international law, as well as to the existence of critics advocating other approaches.

(e) Future work on the topic

98. The general view was that the Commission should produce a practical outcome that would be useful to practitioners and judges. It was recalled, however, that any outcome of the Commission should not prejudice the flexibility of the customary process or future developments concerning the formation and evidence of customary international law.

99. General support was also expressed for the plan of work for the quinquennium proposed by the Special Rapporteur. Several members were, however, of the view that the plan of work was overly ambitious and may not be feasible given the difficulties inherent in the topic, though it was also noted that the proposed focus on practical issues could make the work plan feasible. In addition, the suggestion that the Commission ask States to respond to a request for information on their practice relating to the topic by no later than 31 January 2014 was generally welcomed. A view was expressed that the lack of practice provided so far by States was regrettable.

100. Several members expressed support for the proposed effort to build common understanding and usage of terminology by developing a glossary of terms in all languages. The potential practical utility of such an endeavour was emphasized. According to the view of some other members, a rigid lexicon of terms was not advisable since a general phrase such as "rules of international law" might not adequately reflect the spectrum of customary international law, which includes principles and norms as well as rules. According to another view, a lexicon or glossary of terms might not result in the desired clarity as it would be difficult to suggest that certain terms have been consistently used while others have not. Attention was also drawn to the varying use of terms and standards by the Commission itself in its identification of rules of customary international law.

3. Concluding remarks of the Special Rapporteur

101. The Special Rapporteur observed that there was general agreement that the outcome of the work of this topic should be of an essentially practical nature. In that regard, there was broad support for the elaboration of a set of "conclusions" with commentaries. He also noted the general support among members for the "two-elements" approach, that is to say, that the identification of customary international law requires an assessment of both State practice and *opinio juris*, while recognizing that the two elements might sometimes be "closely entangled", and that the relative weight to be given to each might vary depending on the context.

102. There also seemed to be support among members for a unified or common approach to the identification of customary international law.

103. With regard to the scope of the topic, there seemed to be broad support for examining the relationship between customary international law and other sources of international law, including treaty law and general principles of law. There was also widespread interest in the consideration of regional customary international law. As to *jus cogens*, the Special Rapporteur observed that there was general agreement that it should not be dealt with in detail as part of the present topic.

104. As to the concerns expressed about his emphasis on terminological clarity, the Special Rapporteur indicated that his underlying intention was to promote a degree of clarity in reasoning. He added that the Commission had over the years been able to bring a degree of terminological clarity and uniformity to many areas of international law. At the same time, there was a balance to be struck between clarity and flexibility.

105. The Special Rapporteur was aware that his proposal to conclude work on the topic by 2016 might not be feasible; there had to be adequate time for research, study and reflection within the Commission, the Sixth Committee and the international community more generally. He explained that the proposed date should be understood simply as a target date, and not as suggesting an intention to rush ahead with undue speed.

106. With respect to the proposal to change the title of the topic, the Special Rapporteur noted that the issue had also been discussed in informal consultations. Consensus had been reached on the title in all official languages, including "Identification of customary international law" in English and "La détermination du droit international coutumier" in French. The Special Rapporteur recommended that the title be changed accordingly.

107. The Special Rapporteur welcomed the important discussion on the matter of the publication of State practice, and indicated that a good first step would be to draw up a comprehensive list of existing digests and publications. There was also general support for a renewed call to States for information on their approach to the identification of customary international law.

Chapter VIII
Provisional application of treaties

A. Introduction

108. 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.[372] At the same session, the Commission took note of an oral report, presented by the Special Rapporteur, at the 3151st meeting, on 27 July 2012, on the informal consultations held on the topic, under his chairmanship. The Commission also decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, 1969 ("Vienna Convention"). 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.

B. Consideration of the topic at the present session

109. At the present session, 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 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.

110. The Commission considered the first report at its 3185th to 3188th meetings, from 24 to 30 July 2013.

1. Introduction by the Special Rapporteur of the first report

111. The Special Rapporteur explained that the object of his preliminary report was to establish the main parameters of provisional application, so as to encourage greater recourse to it by States. The Vienna Convention was the logical point of departure. He indicated a provisional preference for not considering the question of the provisional application of treaties by international organizations, as envisaged in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986.

112. In providing an overview of his report, the Special Rapporteur pointed to the terminological discrepancy between the draft article adopted by the Commission in 1966, which referred to "provisional entry into force", and article 25, which had been modified at the Vienna Conference so as to refer to "provisional application". While the record showed

[372] At its 3132nd meeting, on 22 May 2012, (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 267). 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 C to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10)).

that the two phrases had been used somewhat interchangeably, he noted that, upon closer scrutiny, they were distinct legal concepts. The Special Rapporteur further recalled the possible reasons which motivated States to resort to provisional application, as outlined in his report.

113. Concerning the legal effects of provisional application, the Special Rapporteur noted that, as a general matter, such effects could depend on the content of the substantive rule of international law being provisionally applied. The secondary consequences of the breach of an obligation arising from a rule being provisionally applied arose not from the fact of provisional application, but from the normal application of the secondary rules of international law pertaining to breaches of obligations. It was also suggested that the provisional application of treaties had to be considered within the general context of article 31, paragraph 2, of the Vienna Convention.

114. While it was his intention to consider the question of the legal effects in greater detail at a later stage, the Special Rapporteur recalled that both Special Rapporteurs Fitzmaurice and Waldock had been of the view that the provisional application of a treaty gave rise to the same obligations which would arise upon the entry into force of the treaty. He pointed in that regard to the relevance of the principle of *pacta sunt servanda* as reflected in article 26 of the Vienna Convention. He, furthermore, recalled the view which had emerged from the informal consultations, held in 2012, that the provisional application of a treaty gave rise to obligations which extended beyond that not to defeat the object and purpose of a treaty prior to its entry into force (article 18 of the Vienna Convention).

115. He pointed to the key features of the legal regime applicable to provisional application of treaties, namely: that it may be envisaged expressly in a treaty, or provided for by means of a separate agreement between the parties; that States may express their intention to provisionally apply a treaty either expressly or tacitly; and that termination of provisional application may be undertaken unilaterally or by agreement between the parties.

116. The Special Rapporteur expressed his preliminary view that the topic was best suited for the development of guidelines or model clauses aimed at providing guidance to governments.

2. Summary of the debate

117. The Commission joined the Special Rapporteur in expressing appreciation to the Secretariat for the preparation of the memorandum.

118. The view was expressed that it was inappropriate, as a matter of legal policy, for the Commission to seek to promote the provisional application of treaties. Examples were cited where the provisional application of treaties had discouraged their ratification. Other members pointed out that it was not the task of the Commission to encourage or discourage recourse to provisional application, since such decision was essentially a policy matter for States. From the perspective of international law, States were free to decide to provisionally apply a treaty or not. It was also noted that the significance of the possibility of provisional application was confirmed by its frequent use by States. Far from being a means of undermining treaties, the drafters of article 25 had viewed it as a practical way of ensuring legal security, e.g. in the case of successive treaties, by providing an expedited path for States to begin cooperation with regard to a treaty.

119. A further concern was expressed that the provisional application of treaties raised serious questions about the circumvention of established domestic procedures, including constitutional requirements, for participation in treaties. Other members did not share such concerns. It was observed that States were free to establish rules, under their respective internal legal systems, on how to engage at the international level. The Commission had to proceed from the assumption that the provisional application of treaties was undertaken in

conformity with the internal laws of the State in question (subject to the applicability of article 46 of the Vienna Convention). The Commission's task was simply to consider the extent to which contemporary international law was required to take into account limitations under domestic laws, without considering those limitations themselves. From the perspective of international law, the consent of a contracting State was decisive. Once such consent to provisionally apply a treaty had been given, whether in the treaty itself or by means of a separate agreement, the State could not invoke the provisions of its internal law as a justification for its failure to perform its international obligations (article 27 of the Vienna Convention). It was also suggested that concerns about the circumvention of domestic rules could be met by clarifying that the "provisional application" of a treaty carried with it the consequence that the obligations under the treaty would become binding on the State. This would help States decide whether they were constitutionally empowered to provisionally apply a treaty.

120. It was observed that the Commission's task was to develop a practical guide for States when they negotiated new clauses on provisional application, or when they interpreted and applied existing clauses; especially since the 1966 commentaries on the law of treaties did not deal with important aspects of the text of article 25, as adopted in Vienna.

121. The view was expressed that determining the legal effect of provisional application was the central task at hand. Several members were of the opinion that, unless the parties agreed otherwise, agreement to provisionally apply a treaty implied that the parties concerned were bound by the rights and obligations under the treaty in the same way as if it were in force. The view was expressed that the Commission ought not to ascribe legal significance to the shift in terminology from "provisional entry into force" to "provisional application". In terms of another suggestion, a distinction could be drawn between treaties being provisionally applied and "provisional" or "interim" agreements. The Special Rapporteur was further encouraged to consider the relationship with other provisions of the Vienna Convention, including articles 18, 26, 27 and 46. Different views were expressed on the advisability of considering questions of State responsibility within the topic.

122. It was suggested that the Special Rapporteur could seek to ascertain whether the rules in article 25 were applicable, as rules of customary international law or otherwise, in cases where the Vienna Convention did not apply. A further suggestion was to consider the extent to which the fact that a treaty was being provisionally applied might contribute to the formation of rules of customary international law.

123. Other suggestions for possible discussion included: determining whether there existed procedural requirements for the provisional application of treaties; considering the relationship between parties provisionally applying a treaty and third parties; analyzing the requirement that the intention to provisionally apply a treaty should be clear and unambiguous; considering the applicability of the rules on reservations to treaties; analyzing the distinction between provisional application and the necessary application of certain provisions of a treaty from the time of the adoption of its text (article 24, paragraph (4), of the Vienna Convention); considering the applicability of the rules on interpretation of treaties; studying the question of the termination of provisional application (including the effect on the legal position of third parties); considering the position of non-signatory or acceding States wishing to provisionally apply a multilateral treaty; considering whether certain provisions of a treaty, such as those establishing monitoring mechanisms, would, by definition, fall outside of provisional application; clarifying the temporal scope of provisional application, including the possibility of indefinite provisional application; and considering the question of the retroactivity of obligations once a treaty which had been applied provisionally entered into force. It was further suggested that a general distinction be drawn between provisional application in the context of bilateral and multilateral treaties.

124. A preference was expressed for including article 25 of the Vienna Convention of 1986 within the scope of the topic, since international organizations could also be involved in the provisional application of treaties.

125. Some members were of the view that it was too early to take a position on the eventual outcome of the topic, while several stated that conclusions with commentaries could be a useful way of clarifying various aspects related to the provisional application of treaties.

3. Concluding remarks of the Special Rapporteur

126. The Special Rapporteur indicated that the Commission should be guided by the practice of States during the negotiation, implementation and interpretation of treaties being provisionally applied. He stressed his support for the view that the Commission should not be seen as encouraging or discouraging recourse to provisional application. The objective was to provide greater clarity to States when negotiating and implementing provisional application clauses. On the question of terminology, he indicated that, notwithstanding the reference to "provisional entry into force" in the Commission's earlier work, the focus should be on the terminology used in article 25, namely "provisional application". He was also of the view that the question of the customary international law character of the provisional application of treaties merited consideration in the situation where two or more States seeking to provisionally apply a treaty were not parties to the Vienna Convention and no separate agreement existed. He further supported the view that it was not for the Commission to embark on an analysis of the internal rules of States. References to domestic legislation, therefore, were to be viewed as merely illustrative of the position taken by States, and it was solely for States to ascertain the implications, for their internal legal systems, of the resort to provisional application.

127. He confirmed that he intended to consider the relationship between article 25 and other provisions of the Vienna Convention, including those on the expression of consent, the entering of reservations, the effects on third States, the applicability of the rules on interpretation, application and termination of treaties, as well as the invalidity of treaties. He also noted the necessity to consider the temporal component of provisional application, including whether it could be undertaken indefinitely. Furthermore, he suggested that analysis be undertaken of the legal effect of provisional application in the context of treaty rules establishing the rights of individuals. A further distinction worth exploring was that between multilateral and bilateral treaties.

128. The Special Rapporteur concurred with those members who preferred not to undertake an analysis of the applicable rules of State responsibility in the context of the provisional application of treaties. In his view, it was sufficient to indicate that the breach of an obligation arising from a treaty being provisionally applied triggered the legal consequences arising from the established rules on the responsibility of States for internationally wrongful acts. He also took note of the interest of some members in including the Vienna Convention of 1986 within the scope of the topic.

129. The Special Rapporteur indicated that he considered the development of guidelines with commentaries to be an appropriate outcome of the consideration of the topic.

Chapter IX
Protection of the environment in relation to armed conflicts

A. Introduction

130. The Commission, at its sixty-third session (2011), decided to include the topic "Protection of the environment in relation to armed conflicts" in its long-term programme of work,[373] on the basis of the proposal which was reproduced in annex E to the report of the Commission on the work of that session.[374] The General Assembly, in paragraph 7 of its resolution 66/98 of 9 December 2011, took note of the inclusion of the topic in the Commission's long-term programme of work.

131. At its 3171st meeting, on 28 May 2013, the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work and decided to appoint Ms. Marie G. Jacobsson as Special Rapporteur for the topic.

B. Consideration of the topic at the present session

132. At its 3188th meeting, on 30 July 2013, the Special Rapporteur presented to the Commission the following oral report on the informal consultations held on the topic, under her chairmanship, on 6 June and 9 July 2013. At the same meeting, the Commission took note of the report.

Report of the Special Rapporteur on the informal consultations held on the topic

133. The purpose of the informal consultations had been to initiate an informal dialogue with members of the Commission on a number of issues that could be of relevance to the consideration of this topic during the present quinquennium. To facilitate the consultations, the Special Rapporteur had prepared two informal papers setting forth some preliminary elements, which were to be read together with the syllabus reproduced in annex E to the Commission's 2011 report (A/66/10) containing the initial proposal for the topic.

134. The initial consultations had offered members of the Commission an opportunity to reflect and comment on the road ahead. The elements of the work discussed included scope and methodology, the general direction of work, as well as the timetable for future work.

135. With respect to the questions of scope and methodology, the Special Rapporteur had proposed that the topic could be addressed through a temporal perspective, rather than from the perspective of various areas of international law, such as international environmental law, the law of armed conflict and international human rights law, so as to make the topic more manageable and easier to delineate. The temporal phases would address legal measures taken to protect the environment before, during and after an armed conflict (respectively, Phase I, Phase II and Phase III). Such an approach was encouraged as it would allow the Commission to identify concrete legal issues relating to the topic that arose at the different stages relating to an armed conflict. The identification of such issues could then facilitate the development of concrete conclusions or guidelines.

[373] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 365–367.

[374] *Ibid.*, pp. 347–364.

136. The Special Rapporteur further proposed that the focus of the work would be on Phase I, i.e., obligations of relevance to a potential armed conflict, and Phase III, post-conflict measures. Phase II, i.e., the phase during which the laws of war apply, would be given less focus, as it was suggested that it was not the task of the Commission to modify those existing legal regimes. It was proposed that the work on Phase II would also focus on non-international armed conflicts.

137. The approach of addressing the topic in temporal phases had been generally welcomed by members of the Commission. Several members emphasized that Phase II was the most important phase. Other Members were of the opinion that the most important phase was either Phase I or Phase III or both. Ultimately, there was general agreement with the view of the Special Rapporteur that, although the work was to be divided in temporal phases, there could not be a strict dividing line between the different phases. Such a dividing line would be artificial and would not correspond with the way in which the relevant legal rules operated. The law of armed conflict, for example, consisted of rules applicable before, during and after an armed conflict.

138. The informal consultations also addressed whether the Commission should consider the effects of certain weapons on the environment. The Special Rapporteur proposed that the effect of particular weapons should not be the focus of the topic. Some members had agreed, cautioning against consideration of the issue of weapons, whereas a few members had taken the view that it should be addressed.

139. In order to facilitate a discussion on the road ahead, the Special Rapporteur had circulated an outline for the future work on the topic, including the proposed focus of her first report. A three-year timetable for the work was proposed, with one report to be submitted for consideration by the Commission each year.

140. The Special Rapporteur indicated that she intended to present her first report to the Commission for consideration at its sixty-sixth session (2014). The focus of the first report would be on Phase I, namely obligations of relevance to a potential armed conflict. It would not address post-conflict measures *per se*, even if preparation for post-conflict measures needed to be undertaken before an armed conflict had broken out. The Special Rapporteur also indicated that she planned to identify, for purposes of her first report, the issues previously considered by the Commission which could be of relevance to the present topic.

141. It was proposed that the second report, to be submitted in 2015, would be on the law of armed conflict, including non-international armed conflict, and would contain an analysis of existing rules. The third report would focus on post-conflict measures, including reparation for damage, reconstruction, responsibility, liability and compensation, with particular attention being given to the consideration of case law. All three reports would contain conclusions or draft guidelines to be discussed in the Commission, with the possibility of referral to the Drafting Committee.

142. To assist with her work on the topic, the Special Rapporteur indicated that it would be important to gather information from a variety of sources. In that regard, the Special Rapporteur indicated that it would be useful if the Commission could ask States to provide examples of when international environmental law, including regional and bilateral treaties, had continued to apply in times of international or non-international armed conflict. Members of the Commission had also encouraged consultations with other United Nations organs or international organizations involved in the protection of the environment, such as UNEP, UNESCO, UNHCR and the ICRC. Consultations with regional bodies, such as the African Union, the European Union, the League of Arab States and the Organization of American States, had also been generally welcomed.

143. With respect to the final outcome of the Commission's work on the topic, the Special Rapporteur indicated that the topic was more suited to the development of non-

binding draft guidelines than to a draft convention. Some members had considered it premature to decide on the final form of the work.

144. Attention was also drawn to a discrepancy in the prior translation of the title of the topic into certain official languages, which had been the source of confusion. The title of the topic should read “Protection of the environment in relation to armed conflict”. The phrase “in relation to” had to be included in all languages so as to indicate that the topic covered the three temporal phases, and was not limited to the armed conflict phase.

Chapter X
The obligation to extradite or prosecute (*aut dedere aut judicare*)

A. Introduction

145. The Commission, at its fifty-seventh session (2005), decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur.[375]

146. The Special Rapporteur submitted four reports. The Commission received and considered the preliminary report at its fifty-eighth session (2006), the second report at its fifty-ninth session (2007), the third report at its sixtieth session (2008) and the fourth report at its sixty-third session (2011).[376]

147. At the sixty-first session (2009), an open-ended Working Group was established under the chairmanship of Mr. Alain Pellet,[377] and from its discussions, a proposed general framework for consideration of the topic, specifying the issues to be addressed by the Special Rapporteur, was prepared.[378] At the sixty-second session (2010), the Working Group was reconstituted and, in the absence of its Chairman, was chaired by Mr. Enrique Candioti.[379] The Working Group had before it the Survey of multilateral conventions which might be of relevance for the topic prepared by the Secretariat (A/CN.4/630). At the sixty-fourth session (2012), the Commission established an open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), under the chairmanship of Mr. Kriangsak Kittichaisaree, to evaluate progress of work on the topic in the Commission and to explore possible future options to be taken by the Commission.[380]

B. Consideration of the topic at the present session

148. At the present session, the Commission reconstituted the open-ended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the

[375] At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500). The General Assembly, in paragraph 5 of resolution 60/22 of 23 November 2005, endorsed 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 at its fifty-sixth session (2004), on the basis of the proposal annexed to that year's report (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362–363).

[376] A/CN.4/571 (preliminary report); A/CN.4/585 and Corr.1 (second report); A/CN.4/603 (third report); and A/CN.4/648 (fourth report).

[377] During its sixtieth session, at its 2988th meeting on 31 July 2008, the Commission decided to establish a working group on the topic under the chairmanship of Mr. Alain Pellet, with a mandate and membership to be determined at the sixty-first session (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 315).

[378] For the proposed general framework prepared by the Working Group, see *ibid.*, *Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 204.

[379] At its 3071st meeting, on 30 July 2010, the Commission took note of the oral report of the temporary Chairman of the Working Group (*ibid.*, *Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 337–340).

[380] At its 3152nd meeting, on 30 July 2012, the Commission took note of the oral report of the Chairman of the Working Group (*ibid.*, *Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 208–221).

chairmanship of Mr. Kriangsak Kittichaisaree. The Working Group continued to evaluate work on this topic, particularly in the light of the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, of 20 July 2012. The Working Group held 7 meetings, on 8, 14, 16 and 28 May, on 5 June and on 18 and 24 July 2013.

149. At its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Working Group, which appears as Annex A to the present report.

Chapter XI
The Most-Favoured-Nation clause

A. Introduction

150. 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.[381]

151. The Study Group, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera, was established at the sixty-first session (2009),[382] and reconstituted at the sixty-second (2010) and sixty-third (2011) sessions, under the same co-chairmanship.[383] At the sixty-fourth session, the Commission reconstituted the Study Group on The Most-Favoured-Nation clause, under the chairmanship of Mr. Donald M. McRae.[384]

B. Consideration of the topic at the present session

152. At the present session, the Commission reconstituted the Study Group on The Most-Favoured-Nation clause, under the chairmanship of Mr. Donald M. McRae. In his absence, Mr. Mathias Forteau served as Chairman. The Study Group held four meetings on 23 May, and on 10, 15 and 30 July 2013.

153. At its 3189th meeting, on 31 July 2013, the Commission took note of the report of the Study Group.

1. Work of the Study Group

154. It will be recalled that the overall objective of the Study Group is to seek to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in the arbitral decisions in the area of investment

[381] 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.

[382] 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.

[383] 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.

[384] 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.

particularly in relation to MFN provisions. The Study Group continues to work towards making a contribution in assuring greater certainty and stability in the field of investment law. It intends to elaborate an outcome that would be of practical use to those involved in the investment field and to policymakers. It is not the intention of the Study Group to prepare any draft articles or to revise the 1978 draft articles of the Commission on the Most-Favoured-Nation clause.

155. In seeking to throw further light on the contemporary challenges posed by the MFN clause in investment law, the Study Group had since 2010 prepared and considered several background working papers. In particular, it had examined: (a) the typology of existing MFN provisions, which is an ongoing exercise; (b) the 1978 Draft articles adopted by the Commission and areas of their continuing relevance; (c) aspects concerning how the MFN clause had developed and was developing in the context of the GATT and the WTO; (d) other developments in the context of the OECD and UNCTAD; (e) contemporary issues concerning the scope of application of the MFN clause, such as those arising in the *Maffezini* award; (f) how the MFN clause had been interpreted by investment tribunals, *Maffezini* and post-*Maffezini*; and (g) the effect of the mixed nature of investment tribunals on the application of MFN Clauses to procedural provisions.[385]

156. The Study Group had also undertaken work identifying the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision interpreted. Additionally, to identify further the normative content of the MFN clauses in the field of investment, it considered an informal paper on model MFN clauses post-*Maffezini*, examining the various ways in which States have reacted to the *Maffezini* decision, including by specifically stating that the MFN clause does not apply to dispute resolution provisions, specifically stating that the MFN clause does apply to dispute resolution provisions, or specifically enumerating the fields to which the MFN clause applies. It has also considered an informal working paper providing an overview of MFN-type language in Headquarters Agreements, conferring on representatives of States to an organization the same privileges and immunities granted to diplomats in the host State. These informal working papers, together with an informal working paper on "Bilateral Taxation Treaties and the Most-Favoured-Nation Clause", are still a work in progress.

157. The Study Group had previously identified the need to study further the question of MFN in relation to trade in services under GATS and investment agreements, the relationship between MFN, fair and equitable treatment, and national treatment standards, as well as regional economic integration agreements (REIOs) and free trade agreements (FTAs) to assess whether any application of MFN in such areas might provide some insight for the work of the Study Group. Attention was also drawn to the need to consider the relationship between bilateral and multilateral treaties and how the MFN clause operated in a more varied and complex environment since the adoption by the Commission of the 1978 draft articles on the MFN clause; and the question of reciprocity in the application of MFN, particularly in agreements between developed and developing countries.

[385] Catalogue of MFN provisions (Mr. D.M. McRae and Mr. A.R. Perera); The 1978 draft articles of the International Law Commission (Mr. S. Murase) (this paper was further revised in 2013); MFN in the GATT and the WTO (Mr. D.M. McRae); The Work of OECD on MFN (Mr. M. Hmoud); The Work of UNCTAD on MFN (Mr. S.C. Vasciannie); The Maffezini problem under investment treaties (Mr. A.R. Perera); Interpretation and Application of MFN Clauses in Investment Agreements (D.M. McRae); Interpretation of MFN Clauses by Investment Tribunals (D.M. McRae); and Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions (Mr. M. Forteau).

158. It was generally understood that the end goal would be to put together an overall report that systematically analyses the various issues identified as relevant. It was envisaged that the final report would provide a general background to the work within the broader framework of general international law, in the light of subsequent developments, including following the adoption of the 1978 Draft articles. Accordingly, the report would also seek to address contemporary issues concerning MFN clauses, analysing in that regard such aspects as the contemporary relevance of MFN provisions, the work on MFN provisions done by other bodies, and the different approaches taken in the interpretation of MFN provisions. It was considered that the final report of the Study Group might address broadly the question of the interpretation of MFN provisions in investment agreements in respect of dispute settlement, analysing the various factors that are relevant to that process and presenting, as appropriate, guidelines and examples of model clauses for the negotiation of MFN provisions, based on State practice.

2. Discussions of the Study Group at the present session

159. The Study Group had before it a working paper entitled "A BIT on Mixed Tribunals: Legal Character of Investment Dispute Settlements" by Mr. S. Murase, as well as a working paper entitled "Survey of MFN language and Maffezini-related Jurisprudence" by Mr. M.D. Hmoud. The Study Group also continued to examine contemporary practice and jurisprudence relevant to the interpretation of MFN clauses. In that connection, it had before it recent awards and dissenting and separate opinions[386] addressing the issues under consideration by the Study Group.

160. The working paper by Mr. Murase addressed an aspect of prior discussion of the Study Group in 2012 in relation to a working paper by Mr. M. Forteau on the "Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions", which had analysed the phenomenon of mixed tribunals by offering an explanation of the mixed nature of arbitration in relation to investment; assessing the peculiarities of the application of the MFN clause in mixed arbitration; studying the impact of such arbitration on the application of the MFN clause to procedural provisions; considering that the mixed nature of investment arbitration operated at two levels, because the parties to the proceedings, being a private claimant and a respondent State, were not of the same nature; and arguing that the tribunal in such instance was a functional substitute for an otherwise competent domestic court of the host State. Accordingly, a mixed arbitration was situated between the domestic plane and international plane, with affinities in relation to investment to both international commercial arbitration and public international arbitration; having both a private and a public element to it. The working paper by Mr. Murase sought to bring a historical perspective to development of the law in this area. It recalled that the process of "internationalization" of "concession agreements" concluded between an investor company and the host State emerged in the 19th and early 20th century. Those agreements were considered to be "private law contracts" or "public law (or administrative) contracts" regulated by the domestic law of either the investor's home State or the host State. After the Second World War, the exclusion of domestic law and domestic jurisdiction became an evident trend in such agreements, giving rise, in the doctrine, to considerations that such agreements were regulated by "the general principles

[386] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1 dispatched to the parties on 22 August 2012 and dissenting opinion of Judge Charles N. Brower and opinion of Professor Domingo Bello Janeiro; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 dispatched to the parties on 2 July 2013 and separate opinion of Professor William W. Park. See also ICSID decision on the objection to jurisdiction for lack of consent in *Garanti Koza LLP v. Turkmenistan* of 3 July 2013.

recognized by civilized nations" rather than domestic law of either State and that such agreements were "economic development agreements" governed neither by domestic law nor by international law but by the *lex contractus*, even though case law rejected such characterizations.[387] It was asserted that these concession agreements or economic development agreements were a precursor leading to the subsequent conclusion of numerous bilateral investments agreements (BITs), which are inter-State agreements, whose substantive rules are governed by international law. However, procedurally, it was argued that no matter the extent to which mixed tribunals may resemble inter-State tribunals, the Study Group ought to treat them with care, and differently from, for instance, WTO dispute cases.

161. The working paper by Mr. Hmoud provided a compilation of relevant treaty provisions which were the subject of examination in awards, and which addressed the *Maffezini*-related issue of whether an MFN clause extended to dispute settlement clauses, together with the relevant excerpts of the awards.

162. With regard to the *Daimler* and the *Kılıç* awards before the Study Group, it noted that they dealt with similar issues of contention as the *Maffezini* case and that the various elements raised in the awards could be of relevance to its work, as the Study Group in 2012 had addressed the various factors that tribunals take into account in the interpretation of MFN clauses. In particular, the Study Group recognized that the arbitral tribunals' interpretative approaches to the MFN clause and the relevance of the Vienna Convention on the Law of Treaties for this purpose were of particular interest. The awards highlighted several important aspects of treaty interpretation, such as the text and contextual framework of the treaty, including the treaty practice of the States concerned, the object and purpose of the treaty, as well as consent and contemporaneity. The Study Group also took note of the fact that the arbitral tribunal in the *Daimler* case examined the meaning of the concept "more" or "less" favourable treatment as related to the various dispute settlement procedures available to the parties under a treaty. It further considered that the overview in the *Kılıç* award of relevant jurisprudence could be useful in the development of its final report.

163. It had been anticipated that at the present session the Study Group would begin the consideration of the draft final report, which was to be prepared by the Chairman, taking into account the various working papers that had been presented to the Study Group. In the absence of the Chairman, the Study Group nevertheless exchanged further views on the broad outlines of its final report, recognizing once more that while the focus of its work was in the area of investment, the issues under discussion would best be located within a broader framework, namely against the background of general international law and prior work of the Commission. The report would address such issues as: origins and purpose of the work of the Study Group; the 1978 draft articles and their relevance; developments since 1978; the contemporary relevance of MFN provisions, including of the 1978 draft articles; the consideration of MFN provisions in other bodies such as UNCTAD and the OECD; contextual considerations, such as the phenomenon of mixed arbitrations as highlighted, for example, in the paper by Mr. Murase; and conflicting approaches to the interpretation of the MFN provisions in the case law.

[387] Cf. The International Court of Justice in the *Anglo-Iranian Oil Co. case (Jurisdiction), Judgment of 22 July 1952, I.C.J. Reports 1952*, p. 93 at 112 stated that: "The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation."

164. In further addressing the interpretation of MFN provisions in investment agreements, with the Vienna Convention of the Law of Treaties serving as a point of departure, the Study Group noted the possibility of developing for the final report guidelines and model clauses. It nevertheless recognized the risks of any outcome being overly prescriptive. Instead, it was noted that it might be useful to catalogue the examples that had arisen in the practice relating to treaties and drawing the attention of States to the interpretation that various awards had given to a variety of provisions. It was considered that the survey commenced by Mr. Hmoud would be helpful when the Study Group eventually addressed the question of guidelines and model clauses in relation to issues raised in the *Maffezini* award. The Study Group once more recalled that it had previously identified the need to study further the question of MFN in relation to trade in services under GATS and investment agreements, as well as the relationship between MFN, fair and equitable treatment, and national treatment standards. All those aspects would continue to be monitored by the Study Group as its work progressed. The Study Group was at the same time mindful that it should not overly broaden the scope of its work.

Chapter XII
Other decisions and conclusions of the Commission

A. Programme, procedures and working methods of the Commission and its documentation

165. At its 3160th meeting, on 7 May 2013, the Commission established a Planning Group for the current session.

166. The Planning Group held three meetings. It had before it Section I of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session entitled "Other decisions and conclusions of the Commission"; General Assembly resolution 67/92 on the Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions, in particular paragraphs 23 to 28; General Assembly resolution 67/1 of 24 September 2012 containing the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels; and General Assembly resolution 67/97 of 14 December 2012 on the rule of law at the national and international levels.

1. Inclusion of new topics on the programme of work of the Commission

167. At its 3171st meeting, on 28 May 2013, the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work and to appoint Ms. Marie G. Jacobsson as the Special Rapporteur for the topic.

168. At its 3197th meeting, on 9 August 2013, the Commission decided to include the topic "Protection of the atmosphere" in its programme of work and to appoint Mr. Shinya Murase as the Special Rapporteur for the topic. 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.

2. Working Group on the Long-term Programme of Work

169. At its 1st meeting, on 7 May 2013, the Planning Group decided to reconstitute for the current session the Working Group on the Long-term Programme of Work. In the absence of its chairman Mr. Donald M. McRae, the Working Group was chaired by Mr.

Mahmoud D. Hmoud. Mr. Hmoud submitted an oral interim report to the Planning Group, at its 2nd meeting, on 6 June and another report at its 3rd meeting, on 25 July 2013. The Working Group recommended the inclusion in the long-term programme of work of the Commission of the topic "Crimes against humanity" on the basis of the proposal prepared by Mr. Sean D. Murphy. The Working Group was guided by the recommendation of the Commission at its fiftieth session (1998) regarding the criteria for the selection of the topics, namely that:

(a) The topic should reflect the needs of the States in respect of the progressive development and codification of international law;

(b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;

(c) The topic is concrete and feasible for progressive development.

The Commission also 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.[388]

170. The Commission endorsed the recommendation for the inclusion of the topic "Crimes against humanity" in the long-term programme of work. The view was expressed that the consideration of the topic in the syllabus should have taken a broader perspective, including the coverage of all core crimes. The syllabus of the topic included by the Commission in its long-term programme of work at the present session appears in Annex B to the present report.

3. Consideration of General Assembly resolution 67/97 of 14 December 2012 on the rule of law at the national and international levels

171. The General Assembly, in resolution 67/97 of 14 December 2012, 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. The Commission has commented annually on its role in promoting the rule of law since its sixtieth session (2008). The Commission notes that the substance of the comprehensive comments contained in paragraphs 341 to 346 of its 2008 report (A/63/10) remains relevant and reiterates the comments in paragraph 231 of its 2009 report (A/64/10), paragraphs 390 to 393 of its 2010 report (A/65/10), paragraphs 392 to 398 of its 2011 report (A/66/10) and paragraphs 274 to 279 of its 2012 report (A/67/10).

172. The Commission welcomes the Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels contained in General Assembly resolution 67/1 and shares the commitment in the Declaration to an international order based on the rule of law, and the recognition that the rule of law applies to all States equally and to international organizations. The Commission also notes the appreciation expressed of the work of the International Law Commission in advancing the rule of law at the international level through the progressive development of international law and its codification.

173. The Commission recalls that the rule of law constitutes the essence of the Commission, for its basic mission is to work for the progressive development of international law and its codification, bearing in mind its implementation at the national level.

[388] *Yearbook ... 1998*, vol. II (Part Two), p. 10, para. 553.

174. The Commission wishes to reiterate that its work has led to the adoption by States of a significant number of conventions. For such conventions to serve their full purpose they need to be ratified and implemented. In addition to formulating draft articles, the Commission's output takes other forms, which also contribute to the progressive development of international law and its codification. 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 the rule of law as a principle of governance at the international level.

175. The Commission welcomes the positive contribution of the General Assembly, as the chief deliberative and representative organ of the United Nations, to the rule of law in all its aspects through policy making and standard setting, and through the progressive development of international law and its codification.

176. The Commission, as an organ established by the General Assembly and in keeping with the mandate set out in Article 13 (1) (a) of the Charter of the United Nations, and in its Statute, and in line with views expressed by States in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law, will continue to advance the rule of law through the progressive development of international law and its codification.

177. The Commission welcomes the decision of the General Assembly to select "The rule of law and the peaceful settlement of international disputes" as the thematic subject for the debate in the Sixth Committee this year.

178. Bearing in mind the close interrelation of the rule of law at the national and international levels, the Commission, in fulfilling its mandate concerning the progressive development of international law and its codification, considers that its work should take into account, where appropriate, the principles of 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.

179. Accordingly, the Commission has promoted awareness of the rule of law at the national and international levels, including, in particular, through its work on such topics as expulsion of aliens; protection of persons in the event of disasters; the obligation to extradite or prosecute (*aut dedere aut judicare*) and immunity of State officials from foreign criminal jurisdiction.

180. The Commission reiterates its commitment to the rule of law in all of its activities.

4. Honoraria

181. The Commission reiterates once more 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.[389] The Commission emphasizes that the above resolution especially affects Special Rapporteurs, as it compromises support for their research work.

[389] 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; and *ibid*., *Sixty-fourth Session, Supplement 10* (A/64/10), para. 280.

5. Documentation and publications

182. The Commission reiterated its recognition of the particular relevance and significant value to its work of the legal publications prepared by the Secretariat.[390] It noted with appreciation that the Codification Division was able significantly to expedite the issuance of its publications through the continuation and expansion of its desktop publishing initiative which greatly enhanced the timeliness and relevance of these publications to the Commission's work.

183. The Commission noted with 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. Given, however, that a shortage of staff in the units responsible for drafting Summary records might have an impact on the integrity and quality of the records, a number of experimental measures to streamline the processing of the Commission's Summary records were introduced following exchanges between the Secretariat of the Commission and the drafting units. The new arrangements entail more expeditious transmission of the provisional records to members of the Commission for timely correction, and prompt release of the final texts. It is hoped that they will result in a more rational use of resources and facilitate the preparation of the definitive records in all languages, without compromising their integrity.

184. The Commission is aware that in the present financial situation the continuation of several publications of the Codification Division may be in jeopardy.

185. In view of the extreme usefulness of the following publications to its work, the Commission decided to recommend that the General Assembly request the Secretary-General to continue these publications:

(a) *The Work of the International Law Commission* in all six official languages at the beginning of each quinquennium;

(b) *Reports of International Arbitral Awards* in English or French; and

(c) *Summaries of the Judgments, Advisory Opinions and Orders of the International Court of Justice* in all six official languages every five years.

186. 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, which contributed to the smooth conduct of the Commission's work.

187. The Commission expressed its appreciation to the United Nations Office at Geneva Library, which assisted its members very efficiently and competently.

6. Trust fund on the backlog relating to the *Yearbook of the International Law Commission*

188. The Commission reiterated that the *Yearbooks* were 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 67/92, expressed its appreciation to governments that had made voluntary contributions to the Trust Fund on the

[390] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 387–395.

backlog relating to the *Yearbook of the International Law Commission*, and encouraged further contributions to the Trust Fund.

7. *Yearbook of the International Law Commission*

189. The Commission decided to recommend that General Assembly *express its satisfaction* with the remarkable progress achieved in the last few years in catching up with the backlog of the *Yearbook of the International Law Commission* 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; *encourage* the Division of Conference Management to provide continuous necessary support to the Editing Section in advancing the *Yearbook*; and *request* that updates on the progress in this respect be provided to the Commission on a regular basis.

8. Assistance of the Codification Division

190. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and its involvement in research projects on the work of the Commission. In particular, the Commission expressed its appreciation to the Secretariat for its preparation of two memoranda on the topic "Provisional application of treaties" (A/CN.4/658) and "Formation and evidence of customary international law" (A/CN.4/659). The Commission 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.

9. Websites

191. The Commission once again expressed its appreciation for the results of the activity of the Secretariat in its continuous updating and management of its website on the International Law Commission.[391] The Commission reiterated that the website and other websites maintained by the Codification Division[392] 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 well as advance edited versions of the summary records of the Commission.

B. Date and place of the sixty-sixth session of the Commission

192. The Commission decided that its sixty-sixth session be held in Geneva from 5 May to 6 June and 7 July to 8 August 2014.

C. Cooperation with other bodies

193. At the 3182nd meeting, on 18 July 2013, Judge Peter Tomka, President of the International Court of Justice, addressed the Commission and briefed it on the recent

[391] Located at http://www.un.org/law/ilc/.

[392] Generally accessible through: http://www.un.org/law/lindex.htm.

judicial activities of the Court,[393] while also drawing attention to recent efforts to encourage the acceptance of the compulsory jurisdiction of the Court in accordance with its Statute. An exchange of views followed.

194. 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 3176th meeting, on 9 July 2013.[394] He focused on views of Member States of AALCO, on the basis of their statements in other international fora, on three topics on the programme of work of the Commission, namely "Immunity of State officials from foreign criminal jurisdiction", "Protection of persons in the event of disasters"; and the "Formation and evidence of customary international law". An exchange of views followed.

195. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe were represented at the present session of the Commission by the Chair of the Committee of Legal Advisers on Public international Law, Ms. Liesbeth Lijnzaad, and the Head *a.i.* of the Public International Law Division of the Council of Europe, Ms. Christina Olsen, both of whom addressed the Commission at the 3177th meeting, on 10 July 2013.[395] They focused on the current activities of CAHDI on a variety of legal matters, as well of the Council of Europe. An exchange of views followed.

196. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Miguel Pichardo Olivier, who addressed the Commission at the 3180th meeting, on 16 July 2013.[396] He gave an overview of the activities of the Committee as contained in its annual report and those planned for 2013. An exchange of views followed.

197. The African Union Commission on International Law was represented at the present session of the Commission by its Chairperson, Mr. Adelardus Kilangi, who addressed the Commission at the 3189th meeting, on 31 July 2013.[397] He gave an overview of the activities of the African Union Commission on International Law. An exchange of views followed.

198. On 16 July 2013, 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 activities of the ICRC Legal Division and on the Arms Trade Treaty and its humanitarian objective, as well as on topics on the programme of work of the Commission, including the topic "Formation and evidence of customary international law".[398]

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[393] This statement is recorded in the summary record of that meeting.

[394] *Ibid*.

[395] *Ibid*.

[396] *Ibid*.

[397] *Ibid*.

[398] Mr. Laurent Colassis, Deputy Head, Legal Division, ICRC, provided an overview of the work of the ICRC Legal Division and Ms. Nathalie Weizmann, Legal Adviser, Arms Unit, ICRC gave a presentation on the Arms trade treaty and its humanitarian objective. Mr. S.D. Murphy provided an overview of the topics of the programme of work of the Commission and Mr. M. Wood gave a presentation on "Formation and evidence of customary international law".

D. Representation at the sixty-eighth session of the General Assembly

199. The Commission decided that it should be represented at the sixty-eighth session of the General Assembly by its Chairman, Mr. Bernd H. Niehaus.

200. In view of the fact that the debate in the Sixth Committee on the topic "Reservations to treaties" was postponed to the sixty-eighth session of the General Assembly, the Commission reiterated its wish made at its last session (2012) that the former Special Rapporteur on the topic, Mr. Alain Pellet, be invited by the Sixth Committee in order to attend the debate in the Sixth Committee on the chapter of the 2011 report of the Commission which relates to that topic.[399]

E. Gilberto Amado Memorial Lecture

201. On 17 July 2013, members of the Commission, participants in the International Law Seminar and other experts of international law attended the Gilberto Amado Memorial Lecture, entitled "Contemporary trends on *opinio juris* and the material evidence of customary international law", which was delivered by Professor Paulo Borba Casella of the University of São Paulo. A discussion followed.

F. International Law Seminar

202. Pursuant to General Assembly resolution 67/92, the forty-ninth session of the International Law Seminar was held at the Palais des Nations from 8 to 26 July 2013, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or in posts in the civil service of their country.

203. Twenty-one participants of different nationalities, from all regional groups took part in the session.[400] The participants attended plenary meetings of the Commission, specially arranged lectures, and participated in working groups on specific topics.

204. The Seminar was opened by Mr. Bernd Niehaus, Chairman of the Commission. Mr. Markus Schmidt, Senior Legal Adviser of the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar. The substantive coordination of the Seminar was ensured by the University of Geneva. Mr.

[399] See *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10*, A/66/10 (chap. IV) and Add.1.

[400] The following persons participated in the Seminar: Mr. Hatem Alabd (Egypt), Ms. Makiko Asami (Japan), Mr. Jonas Attenhofer (Switzerland), Ms. Danai Azaria (Greece), Mr. Eduardo Cagnoni (Argentina), Mr. Jorge Luis Cepero Aguilar (Cuba), Mr. Rasmané Congo (Burkina Faso), Ms. Fiona Devlin (Ireland), Ms. Athikarn Dilogwathana (Thailand), Ms. Alicia Gauto Vázquez (Paraguay), Ms. Hyun Jung Kim (South Korea), Ms. Pamela López-Ruiz Montes (Peru), Mr. Brian McGarry (United State of America), Ms. Ha Thi Ngoc Nguyen (Viet Nam), Ms. Siham Sebbar (Morocco), Mr. Edgardo Sobenes Obregon (Nicaragua), Ms. Sarala Subramaniam (Singapore), Mr. Alexey Nikolayevich Trofimenkov (Russian Federation), Mr. Zoilo Velasco (Philippines), Mr. Mawuse Vormawor (Ghana), and Ms. Olga Voronovich (Belarus). The Selection Committee, chaired by Mr. Marco Sassoli, Professor and Director of the Department of public international Law of the University of Geneva, met on 22 April 2013 at the Palais des Nations and selected 24 candidates out of 86 applications for participation in the Seminar. At the last minute, three selected candidates could not attend the seminar.

Vittorio Mainetti, international law expert from the University of Geneva, acted as coordinator, assisted by Mr. Martin Denis, legal assistant.

205. The following lectures were given by members of the Commission: Mr. Ernest Petrič: "*The Work of the International Law Commission*"; Mr. Georg Nolte: "*Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*"; Ms. Concepción Escobar Hernández: "*Immunity of State Officials from Foreign Criminal Jurisdiction*"; Mr. Dire Tladi: "*The United Nations Convention on the Law of the Sea and Treaty Interpretation: Use of Subsequent Practice and Subsequent Agreements to Resolve Controversies on the Sustainable Use of Marine Biodiversity*"; Mr. Michael Wood: "*Formation and Evidence of Customary International Law*"; Mr. Sean D. Murphy: "*Selecting New Topics for the International Law Commission: Process and Substance*"; Mr. Mathias Forteau: "*Fair and Equitable Treatment in International Investment Law*"; and Mr. Shinya Murase: "*International Law-Making for the Protection of Global Environment*".

206. A lecture was also given by Ms. Iris Müller, Legal Adviser to the International Committee of the Red Cross, on "*Customary International Humanitarian Law*".

207. Seminar participants attended a special external "Brainstorming session" organized by the University of Geneva on the topic: "*The Protection of the Environment in Relation to Armed Conflict*". During this session, Ms. Marie Jacobsson, member of the Commission and Special Rapporteur on this topic, introduced the topic. Her introduction was followed by presentations and comments by Prof. Marco Sassoli, University of Geneva; Prof. Robert Kolb, University of Geneva; Prof. Makane Mbengue, University of Geneva; Dr. Mara Tignino, Senior Researcher, University of Geneva; Ms. Marie-Louise Tougas, International Committee of the Red Cross; Ms. Karen Hulme, Senior Lecturer, University of Essex; Ms. Britta Sjostedt, Researcher, University of Lund; and Mr. David Jensen, Head of Environment Cooperation for Peacebuilding, UNEP.

208. Seminar participants also attended the Gilberto Amado Memorial Lecture, delivered on 17 July 2013, followed by a reception offered by Brazil.

209. Seminar participants had the opportunity to familiarize themselves with the work of other international organisations based in Geneva. A visit to the International Telecommunication Union (ITU) was organized, and a presentation was given by Mr. Alexander Beck, Senior Legal Adviser at the Office of the United Nations High Commissioner for Refugees (UNHCR).

210. Three Seminar working groups on "*Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*", "*Protection of Persons in the Event of Disasters"* and *"Immunity of State Officials from Foreign Criminal Jurisdiction*" were organized. Each Seminar participant was assigned to one of them. Three members of the Commission, Ms. Concepción Escobar Hernández, Mr. Georg Nolte and Mr. Eduardo Valencia-Ospina supervised and provided expert guidance to the working groups. Each group prepared a report and presented its findings to the Seminar in a special session. The reports were compiled and distributed to all participants as well as to the members of the Commission.

211. The Republic and Canton of Geneva offered the participants a guided tour of the Geneva Town Hall and the Alabama Room.

212. Mr. Bernd Niehaus, Chairman of the Commission, Mr. Markus Schmidt, Director of the Seminar, and Ms. Pamela López-Ruiz Montes (Peru), on behalf of the participants of the seminar, addressed the Commission and the participants during the closing ceremony of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-ninth session of the Seminar.

213. The Commission noted with particular appreciation that since 2010 the Governments of Argentina, Austria, China, Finland, India, Ireland, Mexico, Sweden, Switzerland, and the United Kingdom of Great Britain and Northern Ireland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed awarding a sufficient number of fellowships to deserving candidates especially from developing countries in order to achieve adequate geographical distribution of participants. This year, 15 fellowships for travel and subsistence allowance were awarded.

214. Since 1965, 1,115 participants, representing 170 nationalities, have taken part in the Seminar. Of them, 684 have received a fellowship.

215. 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 2014 with as broad participation as possible, especially in the light of the forthcoming 50th anniversary of the Seminar.

G. Commemoration of the 50th Anniversary of the International Law Seminar

216. The Commission expressed its satisfaction that in 2014 the International Law Seminar will hold its 50th session and recognized the valuable contribution that the Seminar has made in allowing successive generations of young international lawyers to follow the debates and better understand the functioning of the Commission.

217. It was decided that the Commission, in cooperation with the Legal Liaison Office of the United Nations in Geneva, would organize an appropriate commemoration of the 50th anniversary, if possible inviting former participants of the Seminar, including those who later became members of the Commission and the International Court of Justice.

218. This commemoration could coincide with the visit to the Commission of the President of the International Court of Justice.

Annexes

Annex A
Report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)

1. Introduction

1. *Purpose*. This report is intended to summarize and to highlight particular aspects of the work of the Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", in order to assist States and to facilitate discussion on the topic in the Sixth Committee.

2. *Obligation to fight impunity in accordance with the rule of law*. States have expressed their desire to cooperate among themselves, and with competent international tribunals, in the fight against impunity for crimes, in particular offences of international concern[1] and in accordance with the rule of law.[2] In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, the Heads of State and Government and heads of delegation attending the meeting on 24 September 2012 committed themselves to "ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law …".[3] The obligation to cooperate in combating such impunity is given effect in numerous conventions, *inter alia*, through the obligation to extradite or prosecute.[4] The view that the obligation to extradite or

[1] See, e.g., General Assembly resolution 2840 (XXVI) of 18 December 1971 entitled "Question of the punishment of war criminals and of persons who have committed crimes against humanity"; General Assembly resolution 3074 (XXVIII) of 3 December 1973 on the "Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity"; and principle 18 of Economic and Social Council resolution 1989/65 of 24 May 1989 entitled "Effective prevention and investigation of extra-legal, arbitrary and summary executions".

[2] General Assembly resolution 67/1 of 24 September 2012.

[3] *Ibid.*, para. 22.

[4] See Part 3 below. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice states: "… Extradition and prosecution are alternative ways to combat impunity in accordance with Art. 7, para. 1 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984]. …" (Judgment of 20 July 2012, para. 50). The Court adds that the States parties to the Convention against Torture have "a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity" (*ibid.*, para. 68). The Court reiterates that the object and purpose of the Convention are "to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts" (*ibid.*, para. 74 and cf. also para. 75).

Special Rapporteur Zdzislaw Galicki's fourth report dealt at length with the issue of the duty to cooperate in the fight against impunity. He cited the following examples of international instruments which provide a legal basis for the duty to cooperate: Art. 1 (3) of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the preamble to the 1998 Rome Statute of the International Criminal Court, and guideline XII of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 Mar. 2011, A/CN.4/648, paras. 26–33.

prosecute plays a crucial role in the fight against impunity is widely shared by States;[5] the obligation applies in respect of a wide range of crimes of serious concern to the international community and has been included in all sectoral conventions against international terrorism concluded since 1970.

3. The role the obligation to extradite or prosecute plays in supporting international cooperation to fight impunity has been recognized at least since the time of Hugo Grotius, who postulated the principle of *aut dedere aut punire* (either extradite or punish): "When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal."[6] The modern terminology replaces "punishment" with "prosecution" as the alternative to extradition in order to reflect better the possibility that an alleged offender may be found not guilty.

4. *The importance of the obligation to extradite or prosecute in the work of the International Law Commission*. The topic may be viewed as having been encompassed by the topic "Jurisdiction with regard to crimes committed outside national territory" which was on the provisional list of fourteen topics at the first session of the Commission in 1949.[7] It is also addressed in articles 8 (Establishment of jurisdiction) and 9 (Obligation to extradite or prosecute) of the 1996 draft code of crimes against the peace and security of mankind. Article 9 of the draft code stipulates an obligation to extradite or prosecute for genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.[8] The principle *aut dedere aut judicare* is said to have derived from "a number of multilateral conventions"[9] that contain the obligation. An analysis of the draft code's history suggests that draft article 9 is driven by the need for an effective system of criminalization and prosecution of the said core crimes, rather than actual State practice and *opinio juris*.[10] The article is justified on the basis of the grave nature of the crimes involved and the desire to combat impunity for individuals who commit these crimes.[11] While the draft code's focus is on core crimes,[12] the material scope of the obligation to

[5] For example, Belgium (A/CN.4/612, para. 33); Denmark, Finland, Iceland, Norway and Sweden (A/C.6/66/SR.26, para. 10); Switzerland (*ibid.*, para. 18); El Salvador (*ibid.*, para. 24); Italy (*ibid.*, para. 42); Peru (*ibid.*, para. 64); Belarus (A/C.6/66/SR. 27, para. 41); Russian Federation (*ibid.*, para. 64); and India (*ibid.*, para. 81).

[6] Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chapter XXI, section IV (English translation by Francis W. Kelsey, (Oxford/London: Clarendon Press/Humphrey Milford, 1925), pp. 527–529 at 527).

[7] United Nations, *The Work of the International Law Commission*, Eighth edition (New York: United Nations 2012), vol. 1, p. 37.

[8] "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] or 20 [war crimes] is found shall extradite or prosecute that individual". See also the Commission's commentary on this article (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. II).

[9] Draft code of crimes against the peace and security of mankind *with Commentaries*, art. 8, para. (3) (*ibid.*).

[10] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), p. 80, para. 142.

[11] Draft code of crimes against the peace and security of mankind *with Commentaries*, art. 8, paras. (3), (4) and (8) and art. 9, para. (2) (*ibid., Fifty-first Session, Supplement No. 10* (A/51/10)).

[12] At the first reading in 1991, the draft code comprised the following 12 crimes: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and wilful and severe damage to the environment. At its sessions in 1995 and 1996, the

extradite or prosecute covers most crimes of international concern, as mentioned in (2) above.

5. *Use of the Latin terminology "*aut dedere aut judicare*"*. In the past, some members of the Commission, including Special Rapporteur Zdzislaw Galicki, doubted the use of the Latin formula "*aut dedere aut judicare*", especially in relation to the term "*judicare*", which they considered as not reflecting precisely the scope of the term "prosecute". However, the Special Rapporteur considered it premature at that time to focus on the precise definition of terms, leaving them to be defined in a future draft article on "Use of terms".[13] The report of the Working Group proceeds on the understanding that whether the mandatory nature of "extradition" or that of "prosecution" has priority over the other depends on the context and applicable legal regime in particular situations.

2. Summary of the Commission's work since 2006

6. The Commission included the topic "The Obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work at the fifty-seventh session (2005) and appointed Mr. Zdzislaw Galicki as Special Rapporteur.[14] This decision was endorsed by the Sixth Committee of the General Assembly.[15] From its fifty-eighth session (2006) to its sixty-third session (2011), the Commission received and considered four reports and four draft articles submitted by the Special Rapporteur.[16] A working group on the topic was established in 2009 under the Chairmanship of Mr. Alain Pellet to draw up a general framework for consideration of the topic, with the aim of specifying the issues to be

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Commission reduced the number of crimes in the final draft code to four crimes: aggression; genocide; war crimes; and crimes against humanity, adhering to the Nuremberg legacy as the criterion for the choice of the crimes covered by the draft code. The primary reason for this approach appeared to have been the unfavourable comments by 24 Governments to the list of 12 crimes proposed in 1991. A fifth crime, crimes against United Nations and associated personnel, was added at the last moment on the basis of its magnitude, the seriousness of the problem of attacks on such personnel and "its centrality to the maintenance of international peace and security" (A/CN.4/448 and Add.1).

The crime of aggression was not subject to the provision of art. 9 of the draft code. In the Commission's opinion, "[t]he determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parent imperium non habet*. … [and] the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security." (draft code of crimes against the peace and security of mankind *with Commentaries, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 30, para. 14).

[13] A/CN.4/603, paras. 36–37. In his preliminary report, the Special Rapporteur discussed various Latin formulas relevant to this topic; namely: *aut dedere aut punire*; *judicare aut dedere*; *aut dedere aut prosequi*; *aut dedere, aut judicare, aut tergiversari*; and *aut dedere aut poenam persequi* (A/CN.4/571, paras. 5–8). See also: Raphäel van Steenberghe, "The Obligation to Extradite or Prosecute: Clarifying its Nature" (*Journal of International Criminal Justice*, vol. 9 (2011), p. 1089 at pp. 1107–8, on the formulas *aut dedere aut punire*, *aut dedere aut prosequi*, and *aut dedere aut judicare*.

[14] At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500).

[15] General Assembly resolution 60/22 of 23 November 2005.

[16] The Special Rapporteur produced the preliminary report (A/CN.4/571) in 2006, his second report (A/CN.4/585 and Corr.1) in 2007, his third report (A/CN.4/603) in 2008, and his fourth report (A/CN.4/648) in 2011. Special Rapporteur Galicki proposed the draft articles in his second report (A/CN.4/585, para. 76), third report (A/CN.4/603, paras. 110–129) and, three years later, in his fourth report (A/CN.4/648, paras. 40, 70–71, and 95).

addressed and establishing an order of priority.[17] The Commission took note of the oral report of the Chairman of the Working Group and reproduced the proposed general framework for consideration of the topic, prepared by the Working Group, in its annual report of the sixty-first session (2009).[18]

7. Pursuant to section (a) (ii) of the proposed general framework which refers to "The obligation to extradite or prosecute in existing treaties", the Secretariat conducted a *Survey of multilateral conventions which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)"*[19] (hereinafter "Secretariat's Survey (2010)"). The study identified multilateral instruments at the universal and regional levels that contain provisions combining extradition and prosecution as alternatives for the punishment of offenders.

8. In June 2010, the Special Rapporteur submitted a working paper entitled *Bases for discussion in the Working Group on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)"*,[20] making observations and suggestions on the 2009 proposed general framework and drawing upon the Secretariat's Survey (2010). In particular, the Special Rapporteur drew attention to questions concerning: (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation to extradite or prosecute; (c) the content of the obligation to extradite or prosecute; and (d) the conditions for the triggering of the obligation to extradite or prosecute.

9. In 2010, the Working Group, under the acting chairmanship of Mr. Enrique J.A. Candioti, recognized that the Secretariat's Survey (2010) helped to elucidate aspects of the proposed general framework of 2009. It was noted that, in seeking to throw light on the questions agreed upon in the proposed general framework, the multilateral treaty practice on which the Secretariat's Survey (2010) had focused needed to be complemented by a detailed consideration of other aspects of State practice (including, but not limited to, national legislation, case law and official statements of governmental representatives). In addition, it was pointed out that, as far as the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute, a systematic assessment of State practice in that regard was necessary. This would clarify the extent to which that duty influenced, as a general rule or in relation to specific crimes, the Commission's work on the topic, including work in relation to the material scope, the content of the obligation to extradite or prosecute and the conditions for triggering of the obligation.

10. At the sixty-fourth session (2012), the Commission established an open-ended working group under the Chairmanship of Mr. Kriangsak Kittichaisaree to evaluate the progress of work on the topic in the Commission and to explore future possible options for the Commission to take.[21] At that juncture, no Special Rapporteur was appointed to replace Mr. Galicki, who was no longer a member of the Commission. The Chairman of the Working Group submitted four informal working papers at the sixty-fourth session (2012) and another four informal working papers at the sixty-fifth session (2013). The Working Group's discussion of those informal working papers forms a basis of this report.

[17] At its 2988th meeting, on 31 July 2008, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 315.

[18] *Ibid*., *Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 204.

[19] A/CN.4/630.

[20] A/CN.4/L.774.

[21] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 206.

3. Consideration by the Working Group in 2012 and 2013

11. The Working Group considered the Secretariat Survey (2010) and the Judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* useful in its work.

12. *Typology of provisions in multilateral instruments*. The Secretariat's Survey (2010) proposed a description and a typology of the relevant instruments in light of these provisions, and examined the preparatory work of certain key conventions that had served as models in the field. For some provisions, it also reviewed any reservations made. It pointed out the differences and similarities between the reviewed provisions in different conventions and their evolution, and offered overall conclusions as to: (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions. The survey classified conventions that included such provisions into four categories: (a) the 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model; (b) regional conventions on extradition; (c) the 1949 Geneva Conventions and the 1977 Additional Protocol I; and (d) the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions that have followed the same model.

13. The 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model[22] typically: (a) criminalize the relevant offence, which the States parties undertake to make punishable under their domestic laws; (b) make provision for prosecution and extradition which take into account the divergent views of States with regard to the extradition of nationals and the exercise of extraterritorial jurisdiction, the latter being permissive rather than compulsory; (c) contain provisions which impose an obligation to extradite, with prosecution coming into play once there is a refusal of extradition; (d) establish an extradition regime by which States undertake, under certain conditions, to consider the offence as extraditable; (e) contain a provision providing that a State's attitude on the general issue of criminal jurisdiction as a question of international law was not affected by its participation in the Convention; and (f) contain a non-prejudice clause with regard to each State's criminal legislation and administration. While some of the instruments under this model contain terminological differences of an editorial nature, others modify the substance of the obligations undertaken by States Parties.

14. Numerous regional conventions and arrangements on extradition also contain provisions that combine options of extradition and prosecution,[23] although those instruments typically emphasize the obligation to extradite (which is regulated in detail) and only contemplate submission to prosecution as an alternative to avoid impunity in the context of that cooperation. Under that model, extradition is a means to ensure the

[22] E.g., (a) 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs; (b) the 1937 Convention for the Prevention and Punishment of Terrorism; (c) the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; (d) the 1961 Single Convention on Narcotic Drugs; and (e) the 1971 Convention on Psychotropic Substances.

[23] These instruments include: (a) the 1928 Convention on Private International Law, also known as the "Bustamante Code", under Book IV (International Law of Procedure), Title III (Extradition); (b) the 1933 Convention on Extradition; (c) the 1981 Inter-American Convention on Extradition; (d) the 1957 European Convention on Extradition; (e) the 1961 General Convention on Judicial Cooperation (*Convention générale de coopération en matière de justice*); (f) the 1994 Economic Community of West African States (ECOWAS) Convention on Extradition; and (g) the London Scheme for Extradition within the Commonwealth.

effectiveness of criminal jurisdiction. States parties have a general duty to extradite unless the request fits within a condition or exception, including mandatory and discretionary grounds for refusal. For instance, extradition of nationals could be prohibited or subject to specific safeguards. Provisions in subsequent agreements and arrangements have been subject to modification and adjustment over time, particularly in respect of conditions and exceptions.[24]

15. The four Geneva Conventions of 1949 contain the same provision whereby each High Contracting Party is obligated to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and to bring such persons, regardless of their nationality, before its own courts. However, it may also, if it prefers, and in accordance with its domestic legislation, hand such persons over for trial to another High Contracting Party concerned, provided that the latter has established a *prima facie* case.[25] Therefore, under that model, the obligation to search for and submit to prosecution an alleged offender is not conditional on any jurisdictional consideration and that obligation exists irrespective of any request for extradition by another party.[26] Nonetheless, extradition is an available option subject to a condition that the prosecuting State has established a *prima facie* case. That mechanism is made applicable to Additional Protocol I of 1977 by *renvoi*.[27]

16. The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, stipulates in article 7 that "[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged ... to submit the case to its competent authorities for the purpose of prosecution". This "Hague formula" is a variation of the Geneva Conventions formula and has served as a model for several subsequent conventions aimed at the suppression of specific offences, principally in the field of the fight against terrorism, but also in many other areas (including torture, mercenarism, crimes against United Nations and associated personnel, transnational crime, corruption, and enforced disappearance).[28] However, many of those subsequent instruments have modified

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[24] It may also be recalled that General Assembly has adopted the Model Treaty on Extradition (resolution 45/116, annex) and the Model Treaty on Mutual Assistance in Criminal Matters (resolution 45/117).

[25] Arts. 49, 50, 129, and 146, respectively, of the First, Second, Third, and Fourth Geneva Conventions. The reason these Geneva Conventions use the term "hand over" instead of "extradite" is explained in the Secretariat's Survey (2010) at para. 54.

According to Claus Kreβ ("Reflection on the *Iudicare* Limb of the Grave Breaches Regime" *Journal of International Criminal Justice*, vol. 7 (2009), p. 789, what the *iudicare* limb of the grave breaches regime actually entails is a duty to investigate and, where so warranted, to prosecute and convict.

[26] See Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV (International Committee of the Red Cross 1958) 593.

[27] Art. 85 (1), (3) and art. 88 (2) of Additional Protocol I of 1977.

[28] These include, *inter alia*,: (a) the 1971 Organization of American States (OAS) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance; (b) the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (c) the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; (d) the 1977 European Convention on the Suppression of Terrorism; (e) 1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa; (f) the 1979 International Convention against the Taking of Hostages; (g) the 1979 Convention on the Physical Protection of Nuclear Material; (h) the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (i) the 1985 Inter-American Convention to Prevent and Punish Torture; (j) the 1987 South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism and the 2004 Additional Protocol thereto; (k) the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (l) the 1988

the original terminology which sometimes affect the substance of the obligations contained in the Hague formula.

17. In his Separate Opinion in the Judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judge Yusuf also addressed the typology of "treaties containing the formula *aut dedere aut judicare*" and divided them into two broad categories.[29] The first category comprised clauses which impose an obligation to extradite, and in which submission to prosecution becomes an obligation only after the refusal of extradition. Those conventions are structured in such a way that gives priority to extradition to the State in whose territory the crime is committed. The majority of those conventions do not impose any general obligation on States parties to submit to prosecution the alleged offender, and such submission by the State on whose territory the alleged offender is present becomes an obligation only if a request for extradition has been refused, or some factors such as nationality of the alleged offender exist. Examples of the first category are article 9, paragraph 22 of the 1929 International Convention for the Suppression of Counterfeiting Currency, article 15 of the African Union Convention on Preventing and Combating Corruption, and article 5 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; (m) the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; (n) the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries; (o) the 1994 Inter-American Convention on the Forced Disappearance of Persons; (p) the 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Optional Protocol; (q) the 1996 Inter-American Convention against Corruption; (r) the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; (s) the 1997 Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; (t) the 1997 International Convention for the Suppression of Terrorist Bombings; (u) the 1998 Convention on the Protection of the Environment through Criminal Law; (v) the 1999 Criminal Law Convention on Corruption; (w) the 1999 Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict; (x) the 1999 International Convention for the Suppression of the Financing of Terrorism; (y) the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; (z) the 2000 United Nations Convention against Transnational Organized Crime and its Protocols; (aa) the 2001 Council of Europe Convention on Cybercrime; (bb) the 2003 African Union Convention on Preventing and Combating Corruption; (cc) the 2003 United Nations Convention against Corruption; (dd) the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; (ee) the 2005 Council of Europe Convention on the Prevention of Terrorism; (ff) the 2006 International Convention for the Protection of All Persons from Enforced Disappearance; (gg) the 2007 Association of Southeast Asian Nations (ASEAN) Convention on Counter-Terrorism; (hh) 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft; and (ii) the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation.

[29] Separate Opinion of Judge Yusuf in *Belgium v. Senegal*, paras. 19–22. See also Secretariat survey (2010), para. 126. Cf. also Belgium's comments submitted to the Commission in 2009, where Belgium identified two types of treaties: (a) treaties which contain an *aut dedere aut judicare* clause with the obligation to prosecute conditional on refusal of a request for extradition of the alleged perpetrator of an offence; and (b) treaties which contain a *judicare vel dedere* clause with the obligation on States to exercise universal jurisdiction over perpetrators of the offences under the treaties, without making this obligation conditional on refusal to honour a prior extradition request (A/CN.4/612, para. 15), quoted by Special Rapporteur Galicki in his fourth report (A/CN.4/648, para. 85 and fn. 56).

The second category of international conventions comprises clauses which impose an obligation to submit to prosecution, with extradition being an available option, as well as clauses which impose an obligation to submit to prosecution, with extradition becoming an obligation if the State fails to do so. Such clauses in that category can be found in, for example, the relevant provisions of the four Geneva Conventions of 1949, article 7, paragraph 1 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, and article 7, paragraph 1 of the Convention against Torture.

18. In light of the above, the Working Group considers that when drafting treaties States can decide for themselves as to which conventional formula on the obligation to extradite or prosecute best suits their objective in a particular circumstance. Owing to the great diversity in the formulation, content, and scope of the obligation to extradite or prosecute in conventional practice, it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute.[30]

19. Although the Working Group finds that the scope of the obligation to extradite or prosecute under the relevant conventions should be analysed on a case-by-case basis, it acknowledges that there may be some general trends and common features in the more recent conventions containing the obligation to extradite or prosecute. One of the most relevant trends appears to be the "Hague formula" that serves "as a model for most of the contemporary conventions for the suppression of specific offences".[31] Of the conventions drafted on or after 1970, approximately three-quarters follow the "Hague formula". In those post-1970 conventions, there is a common trend that the custodial State shall, without exception, submit the case of the alleged offender to a competent authority if it does not extradite. Such obligation is supplemented by additional provisions that require States parties: (a) to criminalize the relevant offence under its domestic laws; (b) to establish jurisdiction over the offence when there is a link to the crime or when the alleged offender is present on their territory and is not extradited; (c) to make provisions to ensure the alleged offender is under custody and there is a preliminary enquiry; and (d) to treat the offence as extraditable.[32] In particular, under the prosecution limb of the obligation, the conventions only emphasize that the case be submitted to a competent authority for the purpose of prosecution. To a lesser extent, there is also a trend of stipulating that, absent prosecution by the custodial State, the alleged offender must be extradited *without exception whatsoever*.

20. The Working Group observes that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which may need to be closed. Notably, there is a lack of international conventions with this obligation in

[30] As the Secretariat's Survey (2010) concludes (A/CN.4/630, para. 153):

> "… The examination of conventional practice in this field shows that the degree of specificity of the various conventions in regulating these issues varies considerably, and that there exist very few conventions that adopt identical mechanisms for the punishment of offenders (including with respect to the relationship between extradition and prosecution). The variation in the provisions relating to prosecution and extradition appears to be determined by several factors, including the geographical, institutional and thematic framework in which each convention is negotiated … and the development of related areas of international law, such as human rights and criminal justice. It follows that, while it is possible to identify some general trends and common features in the relevant provisions, conclusive findings regarding the precise scope of each provision need to be made on a case-by-case basis, taking into account the formulation of the provision, the general economy of the treaty in which it is contained and the relevant preparatory works."

[31] *Ibid.*, para. 91.

[32] *Ibid.*, para. 109.

relation to most crimes against humanity,[33] war crimes other than grave breaches, and war crimes in non-international armed conflict.[34] In relation to genocide, the international cooperation regime could be strengthened beyond the rudimentary regime under the Convention for the Prevention and Punishment of the Crime of Genocide of 1948. As explained by the International Court of Justice in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, article VI of the Genocide Convention only obligates Contracting Parties to institute and exercise territorial criminal jurisdiction as well as to cooperate with an "international penal tribunal" under certain circumstances.[35]

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[33] The 2006 International Convention for the Protection of All Persons from Enforced Disappearance follows the Hague formula, and refers to the "extreme seriousness" of the offence, which it qualifies, when widespread or systematic, as a crime against humanity. However, outside of this, there appears to be a lack of international conventions with the obligation to extradite or prosecute in relation to crimes against humanity.

[34] The underlying principle of the four Geneva Conventions of 1949 is the establishment of universal jurisdiction over grave breaches of the Conventions. Each Convention contains an article describing what acts constitute grave breaches that follows immediately after the extradite-or-prosecute provision.

For the First and Second Geneva Conventions, this article is identical (arts. 50 and 51, respectively): "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

Art. 130 of the Third Geneva Convention stipulates: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

Art. 147 of the Fourth Geneva Convention provides: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

The four Conventions and the Additional Protocol I of 1977 do not establish an obligation to extradite or prosecute outside of grave breaches. No other international instruments relating to war crimes have this obligation, either.

[35] *I.C.J. Reports 2007*, paras. 442, 449. Art. VI reads: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." The Court at para. 442 did not exclude other bases when it observed that "Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so."

4. Implementation of the obligation to extradite or prosecute

21. *The Hague formula*. The Working Group views the Judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* to be helpful in elucidating some aspects relevant to the implementation of the obligation to extradite or prosecute. The Judgment confines itself to an analysis of the mechanism to combat impunity under the Convention against Torture. In particular, the Judgment focuses on the relationship between the different articles on the establishment of jurisdiction (article 5), the obligation to engage in a preliminary inquiry (article 6), and the obligation to prosecute or extradite (article 7).[36] While the Court's reasoning relates to the specific implementation and application of issues surrounding that Convention, since the relevant prosecute-or-extradite provisions of the Convention against Torture are modelled upon those of the "Hague formula", the Court's ruling may also help to elucidate the meaning of the prosecute-or-extradite regime under the 1970 Hague Convention and other conventions which have followed the same formula.[37] As the Court has also held that the prohibition of torture is a peremptory norm (*jus cogens*),[38] the prosecute-or-extradite formula under the Convention against Torture could serve as a model for new prosecute-or-extradite regimes governing prohibitions covered by peremptory norms (*jus cogens*), such as genocide, crimes against humanity, and serious war crimes.

22. The Court determined that States parties to the Convention against Torture have obligations to criminalize torture, establish their jurisdiction over the crime of torture so as to equip themselves with the necessary legal tool to prosecute that offence, and make an inquiry into the facts immediately from the time the suspect is present in their respective territories. The Court declares: "These obligations, taken as a whole, might be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven".[39] The obligation under article 7, paragraph 1, "to submit the case to the competent authorities for the purpose of prosecution", which the Court calls the "obligation to prosecute", arises regardless of the existence of a prior request for the extradition of the suspect. However, national authorities are left to decide whether or not to initiate proceedings in light of the evidence before them and the relevant rules of criminal procedure.[40] In particular, the Court rules that "[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State".[41] The Court also notes that both the 1970 Hague Convention and the Convention against Torture emphasize "that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned".[42]

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[36] *Belgium v. Senegal*, paras. 71–121.

[37] The Court notes that art. 7 (1) of the Convention against Torture is based on a similar provision contained in the 1970 Hague Convention (*ibid.*, para. 90). As Judge Donoghue puts it: "The dispositive paragraphs of today's Judgment bind only the Parties. Nonetheless, the Court's interpretation of a multilateral treaty (or of customary international law) can have implications for other States. The far-reaching nature of the legal issues presented by this case is revealed by the number of questions posed by Members of the Court during oral proceedings. …." (Declaration of Judge Donoghue in *Belgium v. Senegal*, para. 21.)

[38] *Belgium v. Senegal*, para. 99.

[39] *Ibid.*, para. 91. See also paras. 74–75, 78, 94.

[40] *Ibid.*, paras. 90, 94.

[41] *Ibid.*, para. 95.

[42] Art. 7, para. 2 of the Convention against Torture and art. 7 of the Hague Convention of 1970, *ibid.* para. 90.

23. *Basic elements of the obligation to extradite or prosecute to be included in national legislation*. The effective fulfilment of the obligation to extradite or prosecute requires undertaking necessary national measures to criminalize the relevant offences, establish jurisdiction over the offences and the person present in the territory of the State, investigate or undertake primary inquiry, apprehend the suspect, and submit the case to the prosecuting authorities (which may or may not result in the institution of proceedings) or extradition, if an extradition request is made by another State with the necessary jurisdiction and capability to prosecute the suspect.

24. *Establishment of the necessary jurisdiction*. Establishing jurisdiction is "a logical prior step" to the implementation of an obligation to extradite or prosecute an alleged offender present in the territory of a State.[43] For the purposes of the present topic, when the crime was allegedly committed abroad with no nexus to the forum State, the obligation to extradite or prosecute would necessarily reflect an exercise of universal jurisdiction,[44] which is "the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events"[45] where neither the victims nor alleged offenders are nationals of the forum State and no harm was allegedly caused to the forum State's own national interests. However, the obligation to extradite or prosecute can also reflect an exercise of jurisdiction under other bases. Thus, if a State can exercise jurisdiction on another basis, universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation to extradite or prosecute.

Universal jurisdiction is a crucial component for prosecuting alleged perpetrators of crimes of international concern, particularly when the alleged perpetrator is not prosecuted in the territory where the crime was committed.[46] Several international instruments, such as the very widely ratified four Geneva Conventions of 1949 and the Convention against Torture, require the exercise of universal jurisdiction over the offences covered by these instruments, or, alternatively to extradite alleged offenders to another State for the purpose of prosecution.

25. *Delay in enacting legislation*. According to the Court in *Belgium v. Senegal*, delay in enacting necessary legislation in order to prosecute suspects adversely affects the State party's implementation of the obligations to conduct a preliminary inquiry and to submit

[43] Report of the AU-EU Technical *ad hoc* Expert Group on the Principle of Universal Jurisdiction (8672/1/09/ Rev.1), annex, para. 11. The International Court of Justice in *Belgium v. Senegal* holds that the performance by States parties to the Convention against Torture of their obligation to establish universal jurisdiction of their courts is a necessary condition for enabling a preliminary inquiry and for submitting the case to their competent authorities for the purpose of prosecution (*Belgium v. Senegal*, Judgment, para. 74).

[44] According to one author, "The principle of *aut dedere aut judicare* overlaps with universal jurisdiction when a State has no other nexus to the alleged crime or to the suspect other than the mere presence of the person within its territory." (Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, 2005), p. 122).

[45] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) I.C.J. Reports 2002*, p. 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 42.

[46] It should be recalled that the "Obligation to extradite or prosecute"' in art. 9 of the 1996 draft code is closely related to the "'Establishment of jurisdiction"' under art. 8 of the draft code, which requires each State party thereto to take such measures as may be necessary to establish its jurisdiction over genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes, irrespective of where or by whom those crimes were committed. The Commission's commentary to art. 8 makes it clear that universal jurisdiction is envisaged (*Official Record of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 7).

the case to its competent authorities for the purposes of prosecution.[47] The State's obligation extends beyond merely enacting national legislation. The State must also actually exercise its jurisdiction over a suspect, starting by establishing the facts.[48]

26. *Obligation to investigate*. According to the Court in *Belgium v. Senegal*, the obligation to investigate consists of several elements:

- As a general rule, the obligation to investigate must be interpreted in light of the object and purpose of the applicable treaty, which is to make more effective the fight against impunity;[49]
- The obligation is intended to corroborate the suspicions regarding the person in question.[50] The starting point is the establishment of the relevant facts, which is an essential stage in the process of the fight against impunity;[51]
- As soon as the authorities have reason to suspect that a person present in their territory may be responsible for acts subject to the obligation to extradite or prosecute, they must investigate. The preliminary inquiry must be immediately initiated. This point is reached, at the latest, when the first complaint is filed against the person,[52] at which stage the establishment of the facts becomes imperative;[53]
- However, simply questioning the suspect in order to establish his/her identity and inform him/her of the charges cannot be regarded as performance of the obligation to conduct a preliminary inquiry;[54]
- The inquiry is to be conducted by the authorities who have the task of drawing up a case file and collecting facts and evidence (for example, documents and witness statements relating to the events at issue and to the suspect's possible involvement). These authorities are those of the State where the alleged crime was committed or of any other State where complaints have been filed in relation to the case. In order to fulfil its obligation to conduct a preliminary inquiry, the State in whose territory the suspect is present should seek cooperation of the authorities of the aforementioned States;[55]
- An inquiry taking place on the basis of universal jurisdiction must be conducted according to the same standards in terms of evidence as when the State has jurisdiction by virtue of a link with the case in question.[56]

27. *Obligation to prosecute*. According to the Court in *Belgium v. Senegal*, the obligation to prosecute consists of certain elements:

- The obligation to prosecute is actually an obligation to submit the case to the prosecuting authorities; it does not involve an obligation to initiate a prosecution. Indeed, in light of the evidence, fulfilment of the obligation may or may not result in

[47] *Belgium v. Senegal*, paras. 76, 77.
[48] *Ibid*., para. 84.
[49] *Ibid*., para. 86.
[50] *Ibid*., para. 83.
[51] *Ibid*., paras. 85–86.
[52] *Ibid.*, para. 88.
[53] *Ibid*., para. 86.
[54] *Ibid*., para. 85.
[55] *Ibid*., para. 83.
[56] *Ibid.*, para. 84.

the institution of proceedings.[57] The competent authorities decide whether to initiate proceedings, in the same manner as they would for any alleged offence of a serious nature under the law of the State concerned.[58]

- Proceedings relating to the implementation of the obligation to prosecute should be undertaken without delay, as soon as possible, in particular once the first complaint has been filed against the suspect.[59]
- The timeliness of the prosecution must be such that it does not lead to injustice; hence, necessary actions must be undertaken within a reasonable time limit.[60]

28. *Obligation to extradite*. With respect to the obligation to extradite:

- Extradition may only be to a State that has jurisdiction in some capacity to prosecute and try the alleged offender pursuant to an international legal obligation binding on the State in whose territory the person is present.[61]
- Fulfilling the obligation to extradite cannot be substituted by deportation, extraordinary rendition or other informal forms of dispatching the suspect to another State.[62] Formal extradition requests entail important human rights protections which may be absent from informal forms of dispatching the suspect to another State, such as extraordinary renditions. Under extradition law of most, if not all, States, the necessary requirements to be satisfied include double criminality, *ne bis in idem, nullem crimen sine lege*, speciality, and non-extradition of the suspect to stand trial on the grounds of ethnic origin, religion, nationality or political views.

29. *Compliance with object and purpose*. The steps to be taken by a State must be interpreted in light of the object and purpose of the relevant international instrument or other sources of international obligation binding on that State, rendering the fight against impunity more effective.[63] It is also worth recalling that, by virtue of article 27 of the Vienna Convention on the Law of Treaties, which reflects customary international law, a

[57] Cf. also *Chili Komitee Nederland v. Pinochet*, Court of Appeal of Amsterdam, 4 Jan. 1995 *Netherlands Yearbook of International Law*, vol. 28 (1997), pp. 363–365, in which the Court of Appeal held that the Dutch Public Prosecutor did not err in refusing to prosecute former Chilean President Pinochet while visiting Amsterdam because Pinochet might be entitled to immunity from prosecution and any necessary evidence to substantiate his prosecution would be in Chile with which the Netherlands had no cooperative arrangements regarding criminal proceedings. See Kimberley N. Trapp, *State Responsibility for International Terrorism* (Oxford: Oxford University Press 2011), p. 88, fn. 132.

[58] *Belgium v. Senegal*, paras. 90, 94.

[59] *Ibid.*, paras. 115, 117.

[60] *Ibid*., paras. 114, 115. Cf. Separate Opinion of Judge Çancado Trindade in that case at paras. 148, 151–153; Dissenting Opinion of Judge *ad hoc* Sur in the same case at para. 50; and Dissenting Opinion of Judge Xue, at para. 28.

[61] *Belgium v. Senegal*, para. 120.

[62] Cf. Draft article 13 of the draft articles on the expulsion of aliens adopted by the Commission on first reading in 2012, see *Official Records of the General Assembly, Sixty-seventh Session, Supplement 10* (A/67/10), chap. IV and European Court of Human Rights, *Bozano v. France*, Judgment of 18 December 1986, Application No. 9990/82, paras. 52–60, where the European Court of Human Rights has held that extradition, disguised as deportation in order to circumvent the requirements of extradition, is illegal and incompatible with the right to security of person guaranteed under art. 5 of the European Convention on Human Rights.

[63] See the reasoning in *Belgium v. Senegal*, paras. 85–86. Therefore, the Court rules that financial difficulties do not justify Senegal's failure to comply with the obligations under the Convention against Torture (*ibid*., para. 112). Likewise, seeking guidance from the African Union does not justify Senegal's delay in complying with its obligation under the Convention (*ibid.*).

State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[64] Besides, the steps taken must be in accordance with the rule of law.

30. In cases of serious crimes of international concern, the purpose of the obligation to extradite or prosecute is to prevent alleged perpetrators from going unpunished by ensuring that they cannot find refuge in any State.[65]

31. *Temporal scope of the obligation*. The obligation to extradite or prosecute under a treaty applies only to facts having occurred after its the entry into force of the said treaty for the State concerned, "unless a different intention appears from the treaty or is otherwise established".[66] After a State becomes party to a treaty containing the obligation to extradite or prosecute, it is entitled, with effect from the date of its becoming party to the treaty, to request another State party's compliance with the obligation to extradite or prosecute.[67] Thus, the obligation to criminalize and establish necessary jurisdiction over acts proscribed by a treaty containing the obligation to extradite or prosecute is to be implemented as soon as the State is bound by that treaty.[68] However, nothing prevents the State from investigating or prosecuting acts committed before the entry into force of the treaty for that State.[69]

32. *Consequences of non-compliance with the obligation to extradite or prosecute.* In *Belgium v. Senegal*, the Court found that the violation of an international obligation under the Convention against Torture is a wrongful act engaging the responsibility of the State.[70] As long as all measures necessary for the implementation of the obligation have not been taken, the State remains in breach of its obligation.[71] The Commission's articles on responsibility of States for internationally wrongful acts stipulate that the commission of an internationally wrongful act attributable to a State involves legal consequences, including cessation and non-repetition of the act (article 30), reparation (articles 31, 34–39) and countermeasures (articles 49–54).

33. *Relationship between the obligation and the "third alternative"*. With the establishment of the International Criminal Court and various *ad hoc* international criminal tribunals, there is now the possibility that a State faced with an obligation to extradite or prosecute an accused person might have recourse to a third alternative – that of surrendering the suspect to a competent international criminal tribunal.[72] This third

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[64] *Ibid.*, para. 113.

[65] *Belgium v. Senegal*, para. 120. As also explained by Judge Cançado Trindade,

> "… The conduct of the State ought to be one which is conducive to compliance with the obligations of result (in the *cas d'espèce*, the proscription of torture). The State cannot allege that, despite its good conduct, insufficiencies or difficulties of domestic law rendered it impossible the full compliance with its obligation (to outlaw torture and to prosecute perpetrators of it); and the Court cannot consider a case terminated, given the allegedly 'good conduct' of the State concerned." (Separate Opinion of Judge Cançado Trindade in *Belgium v. Senegal*, para. 50 and see also his full reasoning in paras. 43–51.)

[66] *Belgium v. Senegal*, paras. 100–102, citing art. 28 of the Vienna Convention on the Law of Treaties, which reflects customary international law.

[67] *Ibid*., paras. 103–105.

[68] *Ibid*., para. 75.

[69] *Ibid.*, paras. 102, 105.

[70] *Ibid*., para. 95.

[71] *Ibid*., para. 117.

[72] Art. 9 of the 1996 draft code of Crimes against the Peace of Mankind stipulates that the obligation to extradite or prosecute under that article is "[w]ithout prejudice to the jurisdiction of an international criminal court".

alternative is stipulated in article 11, paragraph 1 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2006.[73]

34. In her dissenting opinion in *Belgium v. Senegal*, Judge Xue opines that had Senegal surrendered the alleged offender to an international tribunal constituted by the African Union to try him, they would not have breached their obligation to prosecute under article 7 of the Convention against Torture, because such a tribunal would have been created to fulfil the purpose of the Convention, and this is not prohibited by the Convention itself or by State practice.[74] Of course, if "a different intention appears from the treaty or is otherwise established"[75] so as not to permit the surrender of an alleged offender to an international criminal tribunal, such surrender would not discharge the obligation of the States parties to the treaty to extradite or prosecute the person under their respective domestic legal systems.

35. It is suggested that in light of the increasing significance of international criminal tribunals, new treaty provisions on the obligation to extradite or prosecute should include this third alternative, as should national legislation.

36. *Additional observation*. A State might also wish to fulfil both parts of the obligation to extradite or prosecute, for example, by prosecuting, trying and sentencing an offender and then extraditing or surrendering the offender to another State for the purpose of enforcing the judgment.[76]

[73] "The State party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution."

[74] Dissenting Opinion of Judge Xue, at para. 42 (dissenting on other points).

[75] Article 28 of the Vienna Convention on the Law of Treaties.

[76] This possibility was raised by Special Rapporteur Galicki in his preliminary report (A/CN.4/571), paras. 49–50.

Annex B
Crimes against humanity
(Mr. Sean D. Murphy)

A. Introduction

1. In the field of international law, three core crimes have emerged: war crimes; genocide; and crimes against humanity.[1] While all three crimes have been the subject of jurisdiction within the major international criminal tribunals established to date, only two of them have been addressed through a global treaty that requires States to prevent and punish such conduct and to cooperate among themselves toward those ends. War crimes have been codified by means of the "grave breaches" provisions of the 1949 Geneva Conventions[2] and Protocol I.[3] Genocide has been codified by means of the 1948 Genocide Convention.[4] Yet no comparable treaty exists concerning crimes against humanity, even though the perpetration of such crimes remains an egregious phenomenon in numerous conflicts and crises worldwide.

2. For example, the mass murder of civilians perpetrated as part of an international armed conflict would fall within the grave breaches regime of the 1949 Geneva Conventions, but the same conduct arising as part of an internal armed conflict (as well as internal action below the threshold of armed conflict) would not. Such mass murder might meet the special requirements of the Genocide Convention, but often will not, as was the case with respect to the Khmer Rouge in Cambodia. Consequently, when mass murder or other atrocities occur, there will often be no applicable treaty that addresses inter-State cooperation.[5]

3. As such, a global convention on crimes against humanity appears to be a key missing piece in the current framework of international humanitarian law, international

[1] A fourth core crime is expected to become an operable part of the International Criminal Court's jurisdiction – the crime of aggression. Further, important treaties regulate specific types of crimes (e.g., torture, apartheid, or enforced disappearance) that if, committed on a widespread or systematic basis, may constitute crimes against humanity.

[2] Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, *United States Treaties and Other International Agreements* (U.S.T.), vol. 6, p. 3114, United Nations, *Treaty Series*, vol. 75, No. 970, p. 31; Geneva Convention Relative to the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, U.S.T., vol. 6, p. 3217, United Nations, *Treaty Series*, vol. 75, No. 971, p. 85; Geneva Convention Relative to the Treatment of Prisoners of War, 1949, U.S.T., vol. 6, p. 3316, United Nations, *Treaty Series*, vol. 75, No. 972, p. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, U.S.T., vol. 6, p. 3526, United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3.

[4] Convention on the Prevention and Punishment of the Crime of Genocide, 1948, United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[5] Existing treaties may address limited aspects of the atrocities. See, e.g., *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012*, paras. 53–55 at http://www.icj-cij.org/docket/files/144/17064.pdf (where despite alleged crimes against humanity, the relevant inter-State cooperation focused solely on conduct falling within the scope of the Convention against Torture).

criminal law, and international human rights law. The objective of the International Law Commission on this topic, therefore, would be to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity (Crimes against Humanity Convention).

B. Emergence of the concept of "Crimes against Humanity"

4. The "Martens Clause" of the 1899/1907 Hague Conventions made reference to the "laws of humanity and the . . . dictates of public conscience" in the crafting of protections to persons in time of war.[6] Thereafter, further thought was given to a prohibition on "crimes against humanity," with the central feature being a prohibition upon a government from inflicting atrocities upon its own people, and not necessarily in time of war. The tribunals established at Nuremberg and Tokyo in the aftermath of the Second World War included as a component of their jurisdiction "crimes against humanity," characterizing them as:

> "murder, extermination, enslavement, deportation or 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".[7]

5. The principles of international law recognized in the Nuremberg Charter were reaffirmed in 1946 by the General Assembly,[8] which also directed the International Law Commission to "formulate" those principles. The Commission then studied and distilled the Nuremberg principles in 1950, defining 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 connection with any crime against peace or any war crime".[9]

6. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly in 1968, called upon States to criminalize nationally "crimes against humanity" as defined in the Nuremberg Charter and to set aside statutory limitations on prosecuting the crime.[10] Consisting of just four substantive articles, that convention is narrowly focused on statutory limitations; while it does call upon Parties to take steps "with a view to making possible" extradition for the crime, the convention does not expressly obligate a Party to exert jurisdiction over crimes against humanity. The convention has, at present, attracted adherence by 54 States.

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[6] Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, preamble, Stat., vol. 36, p. 2277, Consol. T.S., vol. 187, p. 227.

[7] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, Charter of the International Military Tribunal, 1945, Art. 6 (c), United Nations, *Treaty Series*, vol. 82, No. 251, p. 280; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, Art. 5 (c), amended Apr. 26, 1946, *Bevans*, vol. 4, p. 20. No persons, however, were convicted of this crime at the Tokyo Tribunal.

[8] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, General Assembly resolution 95 (I), A/64/Add.1, at p. 188.

[9] *Yearbook ... 1950*, vol. II, p. 374.

[10] General Assembly resolution 2391 (XXIII), annex, A/7218 (1968), United Nations, *Treaty Series*, vol. 754, No. 10823, p. 73.

7. In 1993, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) included "crimes against humanity" as part of its jurisdiction,[11] as did the Statute for the International Criminal Tribunal for Rwanda in 1994.[12] In 1996, the Commission defined "crimes against humanity" as part of its 1996 draft code of crimes against the peace and security of mankind,[13] a formulation that would heavily influence the incorporation of the crime within the 1998 Rome Statute establishing the International Criminal Court (ICC).[14] Among other things, the Rome Statute defined the crime as being "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[15]

C. Key elements to be considered for a convention

8. There are several possible elements of a Crimes against Humanity Convention, which would need to be studied carefully by the Commission in the course of its work. The key elements that would appear necessary are to:

- Define the offence of "crimes against humanity" for purposes of the Convention as it is defined in Article 7 of the Rome Statute;
- Require the Parties to criminalize the offence in their national legislation, not just with respect to acts on its territory or by its nationals, but also with respect to acts by non-nationals committed abroad who then turns up in the Party's territory;
- Require robust inter-State cooperation by the Parties for investigation, prosecution, and punishment of the offence, including through mutual legal assistance and extradition, and recognition of evidence; and
- Impose an *aut dedere aut judicare* obligation when an alleged offender is present in a Party's territory.

Many conventions on other crimes have focused only on these core elements and the Commission could decide that a streamlined convention is also best in this instance.[16] In the course of its work on this topic, however, the Commission might identify additional elements that should be addressed.

D. Relationship of the Convention to the International Criminal Court

9. A natural question is how a Crimes against Humanity Convention would relate to the ICC. Certainly the drafting of the Convention would benefit considerably from the language of the Rome Statute and associated instruments and jurisprudence. At the same

[11] Statute of the International Criminal Tribunal for the former Yugoslavia, Security Council resolution 827, Annex at Art. 5 (May 25, 1993).

[12] Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955, Annex at Art. 3 (Nov. 8, 1994).

[13] *Yearbook ... 1996*, vol. II (Part Two), para. 50, at Art. 18.

[14] Rome Statute of the International Criminal Court, 1998, United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

[15] Art. 7.

[16] See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 1973, United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167. Drafted by the Commission at its twenty-fourth session in 1972, the Convention was opened for signature in 1973, entered into force in 1977, and at present has 176 States Parties.

time, adoption of the Convention would advance key initiatives not addressed in the Rome Statute, while simultaneously supporting the mission of the ICC.

10. First, the Rome Statute regulates relations between its States Parties and the ICC, but does not regulate matters among the Parties themselves (nor among Parties and non-Parties). At the same time, Part 9 of the Rome Statute on "International Cooperation and Judicial Assistance" implicitly acknowledges that inter-State cooperation on crimes within the scope of the ICC will continue to operate outside the Rome Statute. The Convention would help promote general inter-State cooperation on the investigation, apprehension, prosecution, and punishment of persons who commit crimes against humanity, an objective fully consistent with the Rome Statute's object and purpose.

11. Second, while the ICC will remain a key international institution for prosecution of high-level persons who commit this crime, the ICC was not designed (nor given the resources) to prosecute all persons who commit crimes against humanity. Rather, the ICC is predicated on the notion that national jurisdiction is, in the first instance, the proper place for prosecution, in the event appropriate national laws are in place (the principle of complementarity). In the view of many, given that the ICC does not have the capacity to prosecute all persons who commit crimes against humanity, effective prevention and prosecution of such crimes is necessary through the active cooperation among and enforcement by national jurisdictions.

12. Third, the Convention would require the enactment of national laws that prohibit and punish crimes against humanity, which many States to date have not done.[17]As such, the Convention would help fill a gap, and in doing so might encourage all States to ratify or accede to the Rome Statute. For States that have already adopted national laws on crimes against humanity, those laws often only allow for national prosecution of crimes committed by that State's nationals or on its territory; the Convention would also require the State Party to extend its law to cover other offenders who are present in its territory (non-nationals who commit the offence in the territory of another Party to the Convention).

13. Fourth, in the event that a State Party to the Rome Statute receives a request from the ICC for the surrender of a person to the ICC and also receives a request from another State for extradition of the person pursuant to the Convention, the Rome Statute provides in Article 90 for a procedure to resolve the competing requests. The Convention can be drafted to ensure that States Parties to both the Rome Statute and the Convention may continue to follow that procedure.

[17] Various studies have attempted to assess the existence of national legislation on crimes against humanity. See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2011); M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011) (see chapter 9 on "A Survey of National Legislation and Prosecutions for Crimes Against Humanity"); International Committee of the Red Cross, *International Humanitarian Law National Implementation Database* (updated periodically), *at* http://www.icrc.org/ihl-nat.nsf. A study undertaken by the George Washington University Law School International Human Rights Law Clinic projects that about one-half of United Nations Member States have not adopted national legislation on crimes against humanity – a statistic that does not significantly change when limited to just States that are Parties to the Rome Statute, even though the preamble of the Rome Statute identifies a duty to adopt national laws. See Rome Statute, preamble at para. 6 (recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"). Further, the study indicates that States that have adopted national legislation often have not included all the elements of the Rome Statute and/or have not criminalized conduct by non-nationals committed abroad.

E. Whether the topic meets the Commission's standards for topic selection

14. The Commission has previously determined that any new topic should: (a) reflect the needs of States in respect of the progressive development and codification of international law; (b) be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and (c) be concrete and feasible for progressive development and codification.[18]

15. With respect to (b) and (c), this topic is sufficiently advanced in terms of State practice given the emergence of national laws addressing crimes against humanity in approximately one-half of United Nations Member States, and the considerable attention given to this crime over the past twenty years in the constituent and associated instruments and jurisprudence of the international criminal tribunals, including the ICC, ICTY, ICTR, the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, and the Extraordinary Chambers in the Courts of Cambodia. Further, the drafting of the Convention appears technically feasible at this time given the large number of analogous conventions covering other types of crimes. The drafting of the Convention would build upon the Commission's prior work in this area, such as its reports and the Secretariat's study concerning *aut dedere aut judicare*,[19] and the Commission's 1996 draft code of crimes against the peace and security of mankind, which sought to promote, *inter alia*, cooperation among States in the criminalization, prosecution, and extradition of persons who commit crimes against humanity.

16. With respect to (a), States have shown a considerable interest in promoting measures that would punish serious international crimes, as is evident in the establishment of the ICC, and interest in concluding global instruments that define international criminal offences and call upon States to prevent and punish offenders. At present, there is considerable interest in developing national capacity for addressing serious international crimes, especially to ensure a well-functioning principle of complementarity. In light of these trends, States may wish to adopt a well-crafted Convention on Crimes against Humanity. Further, the possibility of a convention of this type has received support in recent years from numerous judges and prosecutors of the ICC and of other international criminal tribunals, as well as former United Nations and government officials, and those in the academic community.[20]

F. Possible timetable

17. If the Commission were to add this topic to its Long-Term Work Program during its sixty-fifth session, it then could seek the views of States in the Sixth Committee during the fall of 2013. If those reactions are favourable, the Commission could proceed during its sixty-sixth session with the topic as appropriate, perhaps through the appointment of a Special Rapporteur and the submission of a first report. Thereafter, completion of the project would depend on many factors, but the existence of analogous conventions, as well as a considerable foundation derived from the existing international criminal tribunals, suggests that the Commission may be able to adopt a full set of draft articles on first reading before the end of the current quinquennium.

[18] *Yearbook ... 1997*, vol. II (Part Two), para. 238 (1997).
[19] A/CN.4/630.
[20] See L. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (2011) (containing testimonials and endorsements).

G. Background materials

International Law Commission

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries, Yearbook ... 1950, vol. II, p. 374.

Draft code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), para. 50.

Preliminary, Second, Third, and Fourth Reports on the Obligation to Extradite or Prosecute, 2006–2008 and 2011 (A/CN.4/571, A/CN.4/585 and Corr.1, A/CN.4/603 and A/CN.4/648, respectively).

Case law

ICC: Various cases, including *Bemba Gombo*, *Gbagbo*, and *Katanga & Ngudjolo* cases.

ICTY: Various cases, including *Blaskić*, *Milutinović, Kordić*, *Kunarac*, *Kupreškić*, *Martić*, *Šešelj*, *Sikirica*, *Simić*, *Stakić*, *Stanković*, *Strugar*, *Tadić*, and *Vasiljević* cases.

ICTR: Various cases, including *Akayesu*, *Bagilishema*, *Bagosora*, *Bisengimana*, *Bikindi*, *Bucyibaruta*, *Gacumbitsi*, *Kajelijeli*, *Kambanda*, *Kamuhanda*, *Karemera*, *Karera*, *Kayishema & Ruzindana*, *Mpambara*, *Muhimana*, and *Musema* cases.

SCSL: Various cases, including *Brima*, *Fofana and Kondewa*, *Sesay*, and *Taylor* cases.

East Timor Special Panels: Various cases, including the decisions available at http://socrates.berkeley.edu/~warcrime/ET-special-panels-docs.htm.

Cambodia Extraordinary Chambers: Various cases, including *Kaing Guek Eav* and *Nuon Chea et al.* cases.

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