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First report on subsequent agreements and subsequent practice in relation to treaty interpretation

by Georg Nolte, Special Rapporteur

Contents

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I. Introduction and previous work of the Commission

1. During its sixty-fourth session, at its 3136th meeting on 31 May 2012, the Commission decided to change the format of work on the topic "Treaties over time" and to appoint Georg Nolte as Special Rapporteur* for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[1] The present report builds upon and continues the previous work of the Commission on "Treaties over time".

2. The topic "Treaties over time" was included in the Commission's programme of work at its sixtieth session (2008).[2] At its sixty-first session (2009), the Commission established a Study Group on Treaties over time, chaired by Mr. Nolte.[3] At the sixty-second session (2010), the study group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chair on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction.[4] At the sixty-third session (2011), the Study Group began its consideration of the second report by the Chair on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice, focusing on 12 of the general conclusions proposed therein.[5] In the light of the discussions in the Study Group, the Chair reformulated the text of his proposed conclusions to what became nine preliminary conclusions.[6]

3. At the sixty-fourth session (2012), the Study Group completed its consideration of the second report by its Chair.[7] In so doing, the Study Group examined six additional general conclusions proposed in the second report. In the light of the discussions in the Study Group, the Chair reformulated the text of what became six additional preliminary conclusions.[8] The Study Group agreed that the preliminary conclusions by its Chair would be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur.[9] In addition to considering the remainder of the second report, the Study Group also considered parts of the third report prepared by its Chair on subsequent agreements and subsequent practice of States outside of judicial and quasi-judicial proceedings.[10]

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1 A/67/10, para. 269.

2 A/63/10, para. 353: for the syllabus of the topic, see ibid., annex A. The General Assembly, in paragraph 6 of its resolution 63/123, took note of the decision.

3 A/64/10, paras. 220-226.

4 A/65/10, paras. 344-354. The introductory, second and third reports, originally informal working papers, will be included in the forthcoming publication, Georg Nolte (ed.) *Treaties and Subsequent Practice* (Oxford University Press, 2013).

5 A/66/10, paras. 336-341.

6 For the text of the nine preliminary conclusions by the Chair of the Study Group, see ibid., para. 344.

7 A/67/10, paras. 225-239.

8 For the text of the six additional preliminary conclusions by the Chair of the Study Group, see ibid., para. 240.

9 Ibid., para. 231.

10 Ibid., paras. 232-234.

II. Scope, aim and possible outcome of the work

4. The original purpose for the Commission to pursue work on the topic "Treaties over time" within the format of a Study Group had been to give the members the opportunity to consider whether the topic should be approached with a broad focus, which would have also involved, inter alia, an in-depth treatment of the termination and the formal amendment of treaties, or whether the topic should be limited to a narrower focus on the aspect of subsequent agreements and subsequent practice. The discussions within the Study Group have led to the agreement, in accordance with the view originally expressed by the Chair, that it would be preferable to limit the topic to the narrower aspect of the legal significance of subsequent agreements and practice. The Study Group ultimately agreed that the main focus of the future work would be on the legal significance of subsequent agreements and subsequent practice for interpretation (Vienna Convention on the Law of Treaties, article 31) and related aspects,[11] as explained in the original proposal for the topic.[12] According to the original proposal, these means of interpretation are important because of their function with regard to the interpretation of treaties over time:

> As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties' provisions will be subject to efforts of reinterpretation, and possibly even of informal modification. This may concern technical rules as well as more general substantive rules. As their context evolves, treaties face the danger of either being "frozen" into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.[13]

5. The present report, in accordance with the discussions in the Study Group on Treaties over time at the Commission's sixty-fourth session (2012), synthesizes elements of the three reports of the Study Group[14] and takes into account the discussions within that Group. It contains four proposed draft conclusions, explained by commentaries, which cover some basic aspects of the topic. Due to certain constraints, in particular space constraints, it has not been possible to synthesize the entirety of the three reports for the Study Group into the present report. However, the Special Rapporteur is confident that it will be possible to synthesize the remainder of those reports in a further report which will cover other and more specific aspects of the topic. He envisages that the work on the topic will be finalized, as foreseen, within the current quinquennium (see the programme of work in chapter VII below).

6. The aim of the discussion on the present topic is to examine the role which subsequent agreements and subsequent practice play in the interpretation of treaties,

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[11] Ibid., para. 238.
[12] A/63/10, annex A, paras. 11ff.
[13] Ibid., para. 14.
[14] See footnotes 4, 5 and 10.

and to give, thereby, some orientation to those who interpret or apply treaties. This group includes judges (at the international and the national levels), officials of States and international organizations, academics and other private actors. The materials and analyses which are contained in the present and in the future reports, as well as the conclusions of the Commission, should provide a common reference and thereby contribute, as far as possible and reasonable, to a common and uniform approach to the interpretation and application of a particular treaty. The present report is based primarily on the jurisprudence of a, hopefully, representative group of international courts, tribunals and other adjudicative bodies,[15] as well as on documented instances of State practice. Together this collection is an element, necessarily incomplete, of a repertory of practice. As it is formulated in the original proposal for the topic of Treaties over time:

> The (…) goal of the consideration of the topic should be to derive some general conclusions or guidelines from the repertory of practice. Such conclusions or guidelines should not result in a Draft Convention, if only for the reason that guidelines to interpretation are hardly ever codified even in domestic legal systems. Such general conclusions or guidelines could, however, give those who interpret and apply treaties an orientation for the possibilities and limits of an increasingly important means of interpretation that is specific to international law. These conclusions, or guidelines, would neither provide a straightjacket for the interpreters, nor would they leave them in a void. They would provide a reference point for all those who interpret and apply treaties, and thereby contribute to a common background understanding, minimizing possible conflicts and making the interpretive process more efficient.[16]

7. The delineation of the present topic from other topics is reasonably clear. One topic which might raise questions in this respect is “Formation and evidence of customary international law”. In this respect, the Special Rapporteur is in agreement with the opinion of Sir Michael Wood, Special Rapporteur on the topic of “Formation and evidence of customary international law”, that, while the effect of treaties on the formation of customary international law is part of that topic, the role of customary international law in the interpretation of treaties is part of the present topic. Needless to say, the topic does not concern the determination of the content of particular treaty rules, but is, rather focused on the elucidation of the role and possible effects of subsequent agreements and subsequent practice in relation to treaty interpretation. Another topic which could have points of contact is “Provisional application of treaties”. The focus of this topic does not, however, seem to be on the effect of provisional application on the interpretation of a treaty.[17]

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

[16] A/63/10, annex A, para. 22.

[17] A/67/10, paras. 144-155.

III. General rule and means of treaty interpretation

8. The legal significance of subsequent agreements and subsequent practice for the interpretation of treaties depends, as a point of departure, on the general rule regarding treaty interpretation. This general rule, consisting of different sub-rules or elements, is codified in article 31 of the Vienna Convention on the Law of Treaties, which was adopted on 23 May 1969 and entered into force on 27 January 1980.[18] The International Court of Justice (ICJ) has recognized that this general rule on treaty interpretation reflects customary international law.[19] Together with article 32, article 31 of the Convention lists a number of relevant "means of interpretation"[20] (among them "subsequent agreement" and "subsequent practice" as "authentic means of interpretation"[21]) which shall be taken into account in the process of interpretation.

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

1. International Court of Justice

10. After an initial period of hesitation,[23] ICJ began to refer to articles 31 and 32 of the Vienna Convention in the 1990s.[24] Since then the Court routinely bases its treaty interpretation on the general rule and the other means of interpretation according to articles 31 and 32 of the Vienna Convention.[25] The Court also typically reaffirms their customary nature, allowing the Court to apply the rules contained therein in cases where one or more parties to the dispute are not parties to the

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[18] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), United Nations, *Treaty Series*, vol. 1155, No. 18232.

[19] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) [2009] *I.C.J. Reports 2009*, p. 213, para. 47; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] *I.C.J. Reports 2007*, p. 43, para. 160.

[20] Vienna Convention on the Law of Treaties, article 32, *Yearbook of the International Law Commission* (1966), vol. II, pp. 218-223, paras. 2, 5, 8, 10, 15, 18, 19.

[21] Ibid., p. 222, para. 15; see sect. IV below, paras. 30 and 64 (draft conclusion 2).

[22] Ibid., p. 219, para. 8.

[23] On the different periods of reception of the Vienna rules by ICJ, see 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 and others (eds.), *Liber Amicorum: Professor Ign az Seidl-Hohenveldern (in honour of his 80th birthday)* (Kluwer Law International, 1998), p. 721; see also R. Gardiner, *Treaty Interpretation* (Oxford University Press, 2010), pp. 12ff.

[24] *Arbitral Award of July 1989 (Guinea-Bissau v. Senegal)* (Judgment) [1991], *I.C.J. Reports 1991*, p. 53, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening)* [1992], *I.C.J. Reports 1992*, p. 351, paras. 373 and 376.

[25] For a recent case, see *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece)* (Judgment) [5 December 2011], para. 91 (http://www.icj-cij.org/docket/files/142/16827.pdf, accessed 7 March 2013).

Vienna Convention, as well as in relation to treaties concluded before its entry into force in 1980.[26]

2. Adjudicative bodies under international economic regimes

11. The World Trade Organization (WTO) Appellate Body bases its practice of treaty interpretation on articles 31 and 32 of the Vienna Convention.[27] Panels and the Appellate Body typically concentrate on the text of the respective agreement.[28] So far the Appellate Body has not put a particular emphasis on the object and purpose as a means of interpretation.[29] It has only occasionally resorted to an evolutive interpretation[30] or applied the principle of effectiveness in order to avoid "reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[31]

12. The Iran-United States Claims Tribunal has also recognized the rules of interpretation as they are enunciated in articles 31 and 32 of the Vienna Convention.[32] In its jurisprudence it has primarily relied on the ordinary meaning of the terms in question and on their object and purpose.[33] Thus, the Tribunal is

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[26] *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 19); *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) [2004], *I.C.J. Reports 2004*, p. 136, para. 94; *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) [2004], *I.C.J. Reports 2004*, p. 12, para. 83; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)* (Judgment) [2002], *I.C.J. Reports 2002*, p. 625, para. 37; *LaGrand (Germany v. United States of America)* (Judgment) [2001], *I.C.J. Reports 2001*, p. 466, para. 99; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010], *I.C.J. Reports 2010*, p. 14, para. 65 (Vienna Convention, article 31); *Kasikili/Sedudu Island (Botswana v. Namibia)* (Judgment) [1999], *I.C.J. Reports 1999*, p. 1045, para. 18 (Vienna Convention, article 31); *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* (Judgment) [1994], *I.C.J. Reports 1994*, p. 6, para. 41, without expressly mentioning article 32, but referring to the supplementary means of interpretation.

[27] Georges Abi-Saab, "The Appellate Body and Treaty Interpretation" in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) *Treaty Interpretation and the Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2010), pp. 99-109.

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

[29] Donald McRae, "Approaches to the Interpretation of Treaties: The European Court of Human Rights and the WTO Appellate Body", in Stephan Breitenmoser, Luzius Wildhaber et al. (eds.) *Human Rights, Democracy and the Rule of Law* (Dike, 2007), pp. 1407-1422.

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

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

[32] George Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press, 1996), p. 361, citing *Case A/1 (Issues I, III and IV), Decision No. DEC 12-A1-FT* (1982) 1 Iran-USCTR, p. 189, paras. 190-192.

[33] Ibid., paras. 362-365.

following a rather balanced interpretative approach which does not put particular emphasis on one particular means of interpretation.[34]

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

14. The general approach to interpretation by Panels under the North American Free Trade Agreement (NAFTA) can be described as proceeding from the Vienna Convention rules on interpretation, with an emphasis on trade liberalization as the main object and purpose of the Agreement.[38]

3. Human rights courts and the Human Rights Committee

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

> In the way in which it is presented in the "general rule" in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single

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[34] Karl-Heinz Böckstiegel, "Zur Auslegung völkerrechtlicher Verträge durch das Iran-United States Claims Tribunal", in Kay Hailbronner (ed.), *Staat und Völkerrechtsordnung. Festschrift für Karl Doehring* (Springer 1989), pp. 119-131; George Aldrich (see footnote 32), pp. 360ff; Charles Brower and Jason Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff, 1998), pp. 263ff.

[35] Christoph Schreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration", in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) *Treaty Interpretation and the Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2010), pp. 129ff; Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals — An Empirical Analysis" (2008), European Journal of International Law, Issue vol. 19, p. 314; Romesh J. Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press, 2012).

[36] Fauchald (see footnote 35), pp. 311, 313 and 341.

[37] Ibid., pp. 315-319.

[38] *Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (Final Report of the Panel) Arbitral Panel Established Pursuant to article 2008, Secretariat File No. CDA-95-2008-01 (2 December 1996), paras. 118 and 119 (http://registry.nafta-sec-alena.org/cmdocuments/0c7973b9-1088-4221-99a5-e279075380b0.pdf, accessed 16 January 2013); see also for Chapter 11 Panels, *Canadian Cattlemen for Fair Trade (CCFT) v. United States of America* (Award on Jurisdiction), United Nations Commission on International Trade Law (UNCITRAL) Arbitration under the North American Free Trade Agreement, chapter eleven (28 January 2008), paras. 45-48 and 122 (http://www.naftaclaims.com/Disputes/USA/CCFT/CCFT-USA-Award.pdf, accessed 16 January 2013).

[39] *Golder v. the United Kingdom* (1975), European Court of Human Rights, Series A, No. 18.

[40] Ibid.

> combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.[41]

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

> the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a "collective enforcement.[44]

17. The interpretation of the Convention would therefore have to take into account the "effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)".[45] The identification of these characteristics of the Convention has contributed to the recognition by the Court "that the Convention is a living instrument which must be interpreted in the light of present-day conditions".[46] This "living instrument" approach is not, however, an exception to the general method of interpretation on the basis of articles 31 to 33 of the Vienna Convention. Indeed, the European Court of Human Rights has regularly reiterated "that the Convention must be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties" and that it "must determine the responsibility of the States in accordance with the principles of international law governing this sphere, while taking into account the special nature of the Convention as an instrument of human rights protection".[47]

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[41] *Golder* (see footnote 39), para. 30; for the wording of ILC, see *Yearbook of the International Law Commission* (1966), vol. II, p. 219, para. 8.

[42] *Mamatkulov and Askarov v. Turkey* [GC] ECHR 2005-I, paras. 111 and 123; *Bankovic and others v. Belgium and 16 Other Contracting States* (dec) [GC] ECHR 2001-XII, paras. 55-58; *Al-Adsani v. the United Kingdom* [GC] ECHR 2001-XI, para. 55; *Loizidou v. Turkey* (Preliminary Objections) (1995), Series A, No. 310, para. 73; *Cruz Varas and others v. Sweden* (1991), Series A, No. 201, para. 100; *Johnston and others v. Ireland* (1985), Series A, No. 112, para. 51; *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08 (European Court of Human Rights, 2 March 2010), para. 126; *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (European Court of Human Rights, 7 January 2010), paras. 273-274, selected for publication in Reports of Judgments and Decisions; *Demir and Baykara v. Turkey* [GC] Application No. 34503/97 (European Court of Human Rights, 12 November 2008), para. 65, selected for publication in Reports of Judgments and Decisions.

[43] *Ireland v. the United Kingdom* (1978), European Court of Human Rights, Series A, No. 25, para. 239; *Al-Saadoon and Mufdhi* (see footnote 42), para. 127; *Soering v. the United Kingdom* (1989), European Court of Human Rights, Series A, No. 161, para. 87.

[44] *Ireland* (see footnote 43), para. 239.

[45] *Loizidou* (see footnote 42), para. 75.

[46] *Tyrer v. the United Kingdom* (1978), European Court of Human Rights, Series A, No. 26, para. 31; *Al-Saadoon and Mufdhi* (see footnote 42), para. 119, quoting *Öcalan v. Turkey* [GC] ECHR 2005-IV, para. 163; *Selmouni v. France* [GC] ECHR 1999-V, para. 101.

[47] *Mamatkulov and Askarov* (see footnote 42), para. 111; see also *Al-Saadoon and Mufdhi* (see footnote 42), para. 119; *Al-Adsani* (see footnote 42), para. 55, *Loizidou* (see footnote 42), para. 43; and *Bayatyan v. Armenia* [GC], Application No. 23459/03 (European Court of Human Rights, 7 July 2011), paras. 98-108.

18. In a similar vein, the Inter-American Court of Human Rights acknowledges that, according to the Vienna Convention:

> … the process of interpretation should be taken as a whole.[48]

19. Although the Court usually begins its reasoning by looking at the text,[49] it has, in general, not relied on a primarily textual approach but rather resorted to other means of interpretation.[50] The Court's reluctance to assign a more prominent role to a provision's ordinary meaning is ultimately the consequence of the Court's emphasis on object and purpose.[51] Thus, the Court stressed that

> … the "ordinary meaning" of terms cannot of itself become the sole rule, for it must always be considered within its context and, in particular, in the light of the object and purpose of the treaty.[52]

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

> ... when interpreting [the] Convention the Court must do it in such a way that the system for the protection of human rights has all its appropriate effects (*effet utile*).[53]

21. The Human Rights Committee has recognized the Vienna Convention rules on interpretation[54] but applies them mostly by implication. In its jurisprudence, the "object and purpose" of the International Covenant on Civil and Political Rights has played the most important role among the various means of interpretation which are referred to in articles 31 and 32 Vienna Convention.[55] One important aspect of the Human Rights Committee's interpretative approach is its evolutive understanding of

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[48] *"White Van" (Paniagua-Morales and others v. Guatemala)* (Preliminary Objections, Judgment), Inter-American Court of Human Rights, Series C, No. 23 (25 January 1996), para. 49.

[49] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Articles 74 and 75)*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights, Series A, No. 2 (24 September 1982), para. 19; *Enforceability of the Right to Reply or Correction (Articles 14(1) 1(1) and 2, American Convention on Human Rights)*, Advisory Opinion OC-7/86, Inter-American Court of Human Rights, Series A, No. 7 (29 August 1986).

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

[51] Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights" (2010), European Journal of International Law, Issue vol. 21, pp. 587 and 588.

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

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

[54] *Alberta Union v. Canada* (18 July 1986), Communication No. 118/1982 (CCPR/C/28/D/118/1982), para. 6.3.

[55] *Setelich v. Uruguay* (28 October 1981), Communication No. 63/1979 (CCPR/C/14/63/1979), paras. 11, 14 and 18.

the rights of the Covenant. For example, in the case of *Yoon and Choi v. the Republic of Korea*,[56] the Committee stressed that any right contained in the Covenant evolved over time,[57] and by this reasoning justified a certain departure from its own prior jurisprudence.[58] However, in the case of *Atasoy and Sarkut v. Turkey*, the Committee has emphasized that evolutive interpretation "cannot go beyond the letter and spirit of the treaty or what the States parties initially and explicitly so intended".[59]

4. Other international adjudicative bodies

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

23. The Seabed Disputes Chamber has outlined the importance of the Vienna Convention for the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion on the *responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*:

> Among the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role. The applicable rules are set out in Part III, Section 3, entitled "Interpretation of Treaties" and comprising articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (...). These rules are to be considered as reflecting customary international law. Although the Tribunal has never stated this view explicitly, it has done so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation (see the Tribunal's Judgment of 23 December 2002 in the "*Volga*" Case (…)[60]

24. On occasion the International Tribunal has shown its readiness to employ a dynamic and evolutive approach to interpretation. Thus, the Seabed Disputes Chamber has characterized certain "obligations to ensure"[61] as due diligence obligations[62] which were "variable concepts" and which "may change over time as measures considered sufficiently diligent at a certain moment may be come not diligent enough in light, for instance, of new scientific or technological knowledge".[63] Thus, where appropriate, the Tribunal seems to be prepared to interpret the United Nations Convention on the Law of the Sea in an evolutive and dynamic manner on the basis of the Vienna Convention, presumably as a feature of the object and purpose of the provision.

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[56] *Yoon and Choi v. the Republic of Korea* (3 November 2006), Communication Nos. 1321/2004 and 1322/2004 (CCPR/C/88/D/1321-1322/2004).

[57] *Yoon and Choi* (see footnote 56), para. 8.2.

[58] *LTK v. Finland* (9 July 1985), Communication No. 185/1984 (CCPR/C/25/D/185/1984), para. 5.2.

[59] *Atasoy and Sarkut v. Turkey* (29 March 2012), Communication Nos. 1853/2008 and 1854/2008, (CCPR/C/104/D/1853-1854/2008), para. 7.13.

[60] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Advisory Opinion of 1 February 2011)*, ITLOS, Case No. 17, paras. 57 and 58.

[61] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), United Nations, *Treaty Series*, vol. 1833, No. 31383, article 153(4) and article 4(4) in annex III.

[62] *Responsibilities and Obligations of States*, ITLOS, Case No. 17 (see footnote 60), para. 110.

[63] Ibid., paras. 117 and 211.

25. The International Criminal Court has repeatedly pronounced that, in interpreting its Statute and other applicable treaties, it follows the rules of the Vienna Convention.[64] The International Tribunal for the Former Yugoslavia has also stated on several occasions that the Vienna Convention rules are applicable to the interpretation of treaties.[65]

26. The European Court of Justice treats the rules of the founding treaties ("primary Union law") as constituting an "autonomous legal order" and accordingly does not refer to the Vienna Convention when interpreting those treaties. In contrast, when the European Court of Justice interprets agreements of the Union with third States it considers itself bound by the rules of customary international law as they are reflected in the rules on interpretation of the Vienna Convention.[66] In *Brita GmbH v. Hauptzollamt Hamburg-Hafen*,[67] the European Court of Justice remarked:

> ... even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the Community institutions and form part of the Community legal order.[68]

and concluded that:

> the rules laid down in the Vienna Convention apply to an agreement concluded between a State and an international organization, such as the EC-Israel Association Agreement, in so far as the rules are an expression of general international customary law.[69]

27. Quoting article 31 of the Vienna Convention, the Court then noted that treaties must not only be interpreted according to their textual meaning, but also in the light of their object and purpose. For example, in a case concerning the draft agreement relating to the creation of the European Economic Area between the Community and the countries of the European Free Trade Association,[70] the Court stressed

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

[65] See *Jelisić* (Judgment), ICTY-95-10 (14 December 1999), para. 61; *Čelebići* (Judgment) ICTY-96-21 (20 February 2001), paras. 67ff; *Krstić* (Judgment) ICTY-98-33 (2 August 2001), para. 541; *Stakić* (Judgment) ICTY-97-24 (31 July 2003), para. 501; *Galić* (Judgment), ICTY-98-29 (5 December 2003), para. 91.

[66] See Pieter Jan Kuijper, "The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969" (1998), *Legal Issues of European Integration*, vol. 25, Issue 1; Case C-344/04, *The Queen on the application of: International Air Transport Association and European Low Fares Airline Association v. Department for Transport* (Preliminary Ruling) (2006), ECR I-403, para. 40.

[67] Case C-386/08, *Brita GmbH v. Hauptzollamt Hamburg-Hafen* (2010), ECR I-01289.

[68] Ibid., para. 42.

[69] Ibid., para. 41; see also Case C-6/60, *Jean-E. Humblet v. Belgian State* (1960), ECR 559, p. 574.

[70] European Court of Justice, Opinion 1/91 (1991), ECR I-6079.

> the fact that the provisions of the agreement and the corresponding Community provision are identically worded does not mean that they must be interpreted identically.[71]

and determined that the meaning of identically worded provisions in the European Free Trade Association Agreement and the European Economic Community Treaty differed.[72]

5. Conclusion: draft conclusion 1

28. Taken together, these sources suggest the following draft conclusion:[73]

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.

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[71] Ibid., para. 14.

[72] Ibid., para. 35.

[73] See preliminary conclusions 1 to 3 of the Chair of the Study Group on Treaties over time (A/66/10, para. 344), in particular preliminary conclusion (1) and (2) (first para.):

(1) General rule on treaty interpretation

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

(2) Approaches to interpretation

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

IV. Subsequent agreements and subsequent practice as means of interpretation

29. The general rule on the interpretation of treaties recognizes subsequent agreements and subsequent practice of the parties under certain conditions to be among the different means of interpretation (Vienna Convention, article 31 (3) (a) and (b)). The Commission, in its commentary on the draft articles on the Law of Treaties, 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.[74]

30. By considering subsequent agreement and subsequent practice according to articles 31 (3) (a) and (b) of the Vienna Convention to be "objective evidence of the understanding of the Parties", the Commission conceived them as "authentic"[75] means of interpretation. This understanding as an authentic means of interpretation suggests that such subsequent agreements and subsequent practice of the parties are often, but not necessarily always,[76] particularly important factors for the interpretation of treaties.[77]

1. Recognition by international adjudicatory bodies

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

(a) International Court of Justice

32. The International Court of Justice "has itself frequently examined the subsequent practice of the parties in the application of (...) [a] treaty".[78] Its jurisprudence provides a general orientation and significant examples of the possible legal effects of subsequent agreements and subsequent practice as means of

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[74] *Yearbook of the International Law Commission* (1966), vol. II, p. 221, para. 15.

[75] Ibid.

[76] It has been asserted that the interpretation of treaties which establish rights for other States or actors is less susceptible to "authentic" interpretation by their parties, for example in the context of investment treaties: *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (28 September 2007), para. 386 (https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8, accessed 6 March 2013); *Enron Corporation, Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (22 May 2007), para. 337 (http://italaw.com/documents/Enron-Award.pdf, accessed 6 March 2013).

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

[78] *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999], *I.C.J. Reports 1999*, p. 1076, para. 50; see also Application of the Interim Accord of 13 September 1995 (*The Former Yugoslav Republic of Macedonia v. Greece*) (Judgment) [5 December 2011], para. 99 (see http://www.icj-cij.org/docket/files/142/16827.pdf).

interpretation as well as their interplay with other means of interpretation (see in more detail in sect. 2 below).

(b) Adjudicatory bodies under economic treaty regimes

33. International adjudicatory bodies under economic treaty regimes have frequently addressed subsequent agreements and subsequent practice as means of interpretation. Thus, the WTO Appellate Body has recognized subsequent practice as a means of interpretation and has applied it on several occasions[79] and has also taken a subsequent agreement into account.[80] The same is true for the Iran-United States Claims Tribunal,[81] which has held:

> Hence, far from playing a secondary role in the interpretation of treaties, the subsequent practice of the Parties constitutes an important element in the exercise of interpretation. In interpreting treaty provisions, international tribunals have often examined the subsequent practice of the parties. The Tribunal has also recognized the importance of the subsequent practice of the parties and has referred to it in several cases.[82]

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

[80] WTO, *United States: Tuna II (Mexico), Report of the Appellate Body* (16 May 2012), WT/DS381/AB/R, para. 372.

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

[82] *The Islamic Republic of Iran and the United States of America,* Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (9 September 2004), 2004, WL 2210709 (Iran-USCTR), para. 111.

34. ICSID tribunals have frequently recognized subsequent agreements and subsequent practice as means of interpretation.[83] In some decisions, tribunals have even emphasized that subsequent practice is a particularly important means of interpretation for such provisions which the parties to the treaty intended to evolve in the light of subsequent treaty practice. In the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, for example, the Tribunal held:

> 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.[84]

35. NAFTA panels have on several occasions recognized subsequent agreements and subsequent practice as means of interpretation.[85] While NAFTA Panels do not seem to have discussed subsequent practice very often,[86] they have intensely argued about the legal effects of a document held to be a subsequent agreement.[87]

(c) Human rights courts and the Human Rights Committee

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

37. The European Court of Human Rights has from time to time invoked article 31 (3) (b) of the Vienna Convention, mostly in cases which concerned the relationship of the Court with the member States, and in cases which raised

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[83] See *Enron Corporation and Ponderosa Assets, LP v. Argentine Republic* (United States/Argentina BIT) (Annulment Proceeding, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award) ICSID Case No. ARB/01/3 (7 October 2008), para. 70 (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC830_En&caseId=C3, accessed 24 January 2013); *Siemens AG v. Argentine Republic* (Germany/Argentina BIT) (Decision on Jurisdiction), ICSID Case No. ARB/02/8 (3 August 2004), para. 105 (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC508_En&caseId=C7, accessed 24 January 2013); *National Grid PLC v. the Argentine Republic* (UK/Argentina BIT) (Decision on Jurisdiction) UNCITRAL (20 June 2006), paras. 84 and 85 (http://ita.law.uvic.ca/documents/NationalGrid-Jurisdiction-En.pdf, accessed 24 January 2013).

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

[85] *CCFT v. United States* (see footnote 38), paras. 181-183.

[86] *In the Matter of Cross-Border Trucking Services* (Final Report of the Panel), Arbitral Panel Established Pursuant to article 2008, Secretariat File No. USA-MEX-98-2008-01 (6 February 2001), paras. 220, 221 and 235 (http://registry.nafta-sec-alena.org/cmdocuments/8f70c18a-7f02-4126-96f6-182a11c90517.pdf, accessed 16 January 2013); *Agricultural Tariffs (United States v. Canada)* (see footnote 38), paras. 119, 141 and 142.

[87] See below at sect. V.1. (e), paras. 88-90.

questions of general international law.[88] More often, however, the Court has referred to the legislative practice of member States without explicitly mentioning article 31 (3) (b) of the Vienna Convention.[89] In such cases the Court has confirmed that uniform, or largely uniform national legislation, and even domestic administrative practice, can in principle constitute relevant subsequent practice[90] and may have effects which can go even beyond that of being merely a means of interpretation according to article 31 (3) (b) of the Vienna Convention.[91] Thus, judgments in which the Court has relied on subsequent State practice without explicitly quoting article 31 (3) (b) are more characteristic than those in which it has. Since *Tyrer v. the United Kingdom* the Court has typically relied on subsequent State (and other) practice as orientation for its "dynamic" or "evolutive" interpretation. The Court determines the character and the extent of its evolutive interpretation by looking at the more or less specific "present-day conditions" and "developments in international law" which the Court recognizes on the basis of:

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

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

39. It appears that the Inter-American Court of Human Rights, in contrast to the European Court of Human Rights, has so far not referred to article 31 (3) (a) or (b) of the Vienna Convention, and the number of decisions in which the Court has referred to subsequent practice is rather limited.[94] However, despite its rare

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[88] *Cruz Varas* (see footnote 42), para. 100; *Loizidou* (see footnote 42), para. 73; *Bankovic* (see footnote 42), para. 56.

[89] See, for example *Lautsi and Others v. Italy* [GC], Application No. 30814/06 (European Court of Human Rights, 18 March 2011), para. 61, and *Herrmann v. Germany* [GC], Application No. 9300/07 (European Court of Human Rights, 26 June 2012), para. 78.

[90] See, for example, *Mamatkulov and Askarov v. Turkey* (see footnote 42), paras. 111 and 123; *Johnston and others v. Ireland* (see footnote 42), para. 51; *Al-Saadoon and Mufdhi* (see footnote 42), para. 126; *Rantsev v. Cyprus and Russia* (see footnote 42), paras. 273 and 274; *Demir and Baykara* (see footnote 42), para. 65.

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

[92] *Demir and Baykara* (see footnote 42), para. 76.

[93] See, for example, *Öcalan* (see footnote 46), para. 163; *VO v. France* [GC] ECHR 2004-VIII; *Johnston* (see footnote 42), para. 53; *Bayatyan v. Armenia* Application No. 23459/03 (European Court of Human Rights, 27 October 2009), para. 63, selected for publication in *Reports of Judgments and Decisions*; *Soering* (see footnote 43), para. 103; *Öcalan* (see footnote 46), para. 191; *Al-Saadoon and Mufdhi* (see footnote 42), para. 119.

[94] *Gelman v. Uruguay* (Merits and Reparations, Judgment), Inter-American Court of Human Rights, Series C, No. 221 (27 February 2011), paras. 215-224, and the Concurring Opinion of Judge Vio Grossi in *Lopéz Mendoza v. Venezuela* (Merits, Reparations and Costs, Judgment), Inter-American Court of Human Rights, Series C, No. 233 (1 September 2011), para. 3; see also *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago* (Merits, Reparations and Costs, Judgment), Inter-American Court of Human Rights, Series C, No. 94 (21 June 2002), para. 12; see also *"White Van" (Paniagua-Morales and others v. Guatemala)* (see footnote 48).

mentioning of subsequent practice *stricto sensu*, the Inter-American Court makes abundant references to international developments in a broader sense, which are located somewhere between subsequent practice, in the sense of article 31 (3) (b), and other "relevant rules" related to article 31 (3) (c) of the Vienna Convention.[95] The Human Rights Committee, on its part, has occasionally considered subsequent State practice more closely.[96] The reason why the Inter-American Court of Human Rights and the Human Rights Committee refer less to subsequent practice than the European Court of Human Rights may, inter alia, have to do with a lack of resources to reliably verify a sufficiently representative part of the relevant practice.

(d) Other international adjudicative bodies

40. The International Tribunal for the Law of the Sea has, on some occasions, considered the subsequent practice of the parties as means of interpretation.[97] The International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have recognized that the interpretation of substantive international criminal law, including treaties, must take into account the subsequent interpretative practice of national courts.[98] Both Tribunals have not limited themselves to considering the subsequent jurisprudence of domestic courts, but they also refer to subsequent executive or military State practice.[99] The International Tribunal for the Former Yugoslavia has even taken more general forms of State practice into account, including trends in the legislation of member States which, in turn, can give rise to a changed interpretation of the scope of crimes or their elements. In *Furundžija*, for example, the Chamber of the International Tribunal for the Former Yugoslavia, in search of a definition for the crime of rape as prohibited by article 27 of the Fourth Geneva Convention, article 76 (1) of the first additional Protocol, and article 4 (2) (e) of the second additional Protocol,[100] examined the principles of criminal law common to the major legal systems of the world and held

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

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[95] See, for example, *Velásquez-Rodríguez v. Honduras* (Merits, Judgment), Inter-American Court of Human Rights, Series C, No. 4 (29 July 1988), para. 151; *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law* (Advisory Opinion), Inter-American Court of Human Rights, Series A, No. 16 (1 October 1999), paras. 130-133 and 137.

[96] *Kindler v. Canada* (30 July 1993), Communication No. 470/1991, para. 14.2; *Judge v. Canada* (5 August 2002), Communication No. 829/1998, para. 10.3; *Barrett and Sutcliffe v. Jamaica* (30 March 1992), Communication No. 270/1980, para. 8.4; *Simms v. Jamaica* (3 April 1995), Communication No. 541/1993, para. 6.5.

[97] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)* (Judgment of 1 July 1999) ITLOS Case No. 2, paras. 155 and 156; see also *The M/V "SAIGA" (No. 1) Case (Saint Vincent and the Grenadines v. Guinea)* (Prompt Release) (Judgment of 4 December 1997), ITLOS Case No. 1, para. 57.

[98] *Kupreškić and others* (Judgment), ICTY-95-16 (14 January 2000), para. 541; see also, *Akayesu* (Judgment), ICTR-96-4-T, T Ch I (2 September 1998), paras. 503 and 542ff.

[99] *Tadić* (Judgment), ICTY-94-1 (15 July 1999), para. 94; *Jelisić* (see footnote 65), para. 61 (footnotes omitted).

[100] *Furundžija* (Judgment), ICTY-95-17/1 (10 December 1998), paras. 165 ff.

> stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.[101]

41. The European Court of Justice, in contrast to other international adjudicatory bodies, has refrained from taking subsequent practice of the member States into account when interpreting the founding treaties of the Union (primary Union law). This is in keeping with its general approach to treat the founding treaties as constituting an "autonomous legal order" and thus not to refer to and apply the Vienna Convention when interpreting those treaties.[102] However, the Court does take subsequent practice into account when it interprets agreements which the Union has concluded with third States, and it has recognized the relevance of "settled practice of the parties to the Agreement" for the purpose of their interpretation.[103]

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

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

(a) Ordinary meaning

43. As far as the "ordinary meaning" of treaty terms is concerned, the Court has, for example,[104] determined in the *Nuclear Weapons Advisory Opinion* that "poison or poisonous weapons":

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

44. In the Case of *United States Nationals in Morocco*, ICJ stated that:

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[101] Ibid., para. 179; similarly *Musema* (Judgment), ICTR-96-13-A, Trial Chamber I (27 January 2000), paras. 220 ff, in particular para. 228.

[102] See paras. 26 and 27 above.

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

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

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

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

45. And in the *Mazilu Case* ICJ held that:

> [i]n practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials. (...) In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of such committees and commissions, have been regarded as experts on mission within the meaning of Section 22.[107]

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

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

(b) Context

48. The interpretation of a treaty is not confined to the interpretation of the text of its specific terms but also encompasses the "terms of the treaty in their context" (article 31 (1) of the Vienna Convention) as a whole. Subsequent agreements and subsequent practice may also influence the interpretation of a particular rule when the practice relates to the treaty as a whole or to other relevant treaty rules.[111] Accordingly, ICJ held in the *IMCO* case:

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[106] *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)* [1952], *I.C.J. Reports 1952*, p. 211.

[107] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989], *I.C.J. Reports 1989*, p. 194, para. 48.

[108] See, for an exception, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)* [1992], *I.C.J. Reports 1992*, p. 586, para. 380.

[109] *Certain Expenses of the United Nations* (Advisory Opinion) [1962], *I.C.J. Reports 1962*, pp. 158ff ("expenses") and pp. 164ff ("action").

[110] The European Court of Human Rights, in particular, accepts that diverse or non-uniform practice may indicate that the contracting parties enjoy a wide margin of appreciation in complying with their obligations under the European Convention on Human Rights; see e.g., *Lautsi and Others v. Italy* [GC], Application No. 30814/06 (European Court of Human Rights, 18 March 2011), para. 61, and *Van der Heijden v. the Netherlands* [GC], Application No. 42857/05 (European Court of Human Rights, 3 April 2012), paras. 31 and 61.

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

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

49. While subsequent agreements and subsequent practice are mostly used to elucidate ambiguous or general terms,[113] it would go too far to assume that the meaning of apparently clear terms is largely immune from being called into question by subsequent agreements or subsequent practice of the parties.[114] The ICJ has indeed, on occasion, found subsequent practice to render an apparently clear treaty provision more open-ended. One example is the *Wall Advisory Opinion* in which ICJ has held:

> that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.[115]

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

(c) Object and purpose

51. Article 31 (1) of the Vienna Convention provides that a treaty shall also be interpreted "in the light of its object and purpose". Subsequent agreements and subsequent practice, on the one hand, and the object and purpose of a treaty, on the other, can be closely interrelated. Thus, subsequent conduct of the parties is sometimes used for specifying the object and purpose of the treaty in the first place.[116] In *Denmark v. Norway*, for example, ICJ clarified the object and purpose of a bilateral agreement on the delimitation of the continental shelf by referring to

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[112] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960], *I.C.J. Reports 1960*, p. 169 and 167ff; in the same sense: *Proceedings pursuant to the OSPAR Convention (Ireland — United Kingdom)* (2003), *Reports of International Arbitral Awards*, vol. XXIII (Part II), p. 91, para. 141.

[113] *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)* [1960], *I.C.J. Reports 1960*, pp. 208ff; *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19), Declaration of Judge ad hoc Guillaume, p. 290.

[114] *Certain Expenses of the United Nations* (Advisory Opinion) (Dissenting Opinion of Judge Spender) [1962], *I.C.J. Reports 1962*, p. 189.

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

[116] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* (Advisory Opinion) [1971], *I.C.J. Reports 1971*, p. 179; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004], *I.C.J. Reports 2004*, p. 179, para. 109; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection) [1996], *I.C.J. Reports 1996*, p. 815, para. 30; Rosalyn Higgins, "Some Observations on the Inter-Temporal Rule in International Law" in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International, 1996), p. 180; Giovanni Distefano, "La pratique subséquente des Etats Parties à un traité" (1994), *Annuaire français de droit international*, vol. 40, pp. 52-54.

subsequent practice as well as to the implementation by the parties.[117] In *Cameroon v. Nigeria* ICJ held:

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

52. It has been suggested that the character of an instrument (for example multilateral/bilateral/unilateral; law-making/contractual) and the nature of the subject matter (for example technical/value-oriented; economic/human rights) as elements of the object and purpose of a treaty would contribute to determining how much room is available for subsequent agreements and subsequent practice as a means of interpretation.[119] Such assumptions cannot, however, be clearly confirmed by the jurisprudence of ICJ. Subsequent agreements and subsequent practice have been used as an important means of interpretation of the Charter of the United Nations,[120] as well as for bilateral boundary treaties[121] and for unilateral submissions to the jurisdiction of a court or tribunal.[122] And there seems to be no conspicuous difference with respect to the relative importance of subsequent agreements or subsequent practice between "law-making" and "contractual" treaties, if such a distinction can be drawn at all. The same is true for the difference between more technical and more value-oriented treaties or provisions.

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

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[117] *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* [1993], *I.C.J. Reports 1993*, p. 51, para. 27.

[118] See also *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* (Preliminary Objections) [1998], *I.C.J. Reports 1998*, p. 306, para. 67.

[119] *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) [1971], *I.C.J. Reports 1971*, p. 154, footnote 1.

[120] See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004], *I.C.J. Reports 2004*, p. 149, para. 27.

[121] See, for example, *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999], *I.C.J. Reports 1999*, p. 1087, para. 63.

[122] See, for example, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* (Preliminary Objection) [1952], *I.C.J. Reports 1952*, p. 106.

[123] See paras. 11-27 above.

3. Contemporaneous and evolutive interpretation

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

(a) The Commission's previous work

55. The Commission has dealt with the question of intertemporal law primarily in its work on the law of treaties and on the fragmentation of international law. During its work on the draft articles on the law of treaties, the Commission discussed the question of treaty interpretation "over time" in the context of what would later become article 31 (3) (c) of the Vienna Convention. At the time the Commission found that "to attempt to formulate a rule covering comprehensively the temporal element would present difficulties" and it, therefore, "concluded that it should omit the temporal element".[128]

56. The matter was addressed again within the Study Group on fragmentation.[129] The debates within that Study Group led to the conclusion that it is difficult to formulate and to agree on a general rule which would give preference either to a principle of contemporaneous interpretation or to one of evolutive interpretation. In his final report, the Chair of the Study Group, Martti Koskenniemi, therefore, concluded that it would be "best (...) to merely single out some considerations"[130] to be taken into account when interpreting a particular treaty:

> The starting-point must be (...) the fact that deciding this issue is a matter of interpreting the treaty itself. Does the language used give any indication? The starting-point of the argument might plausibly be the "principle of contemporaneity" — with regard to the normative environment as it existed at

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[124] Malgosia Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties" (2008) *Hague Yearbook of International Law*, vol. 21, pp. 101ff; T.O. Elias, "The Doctrine of Intertemporal Law" (1980) *American Journal of International Law*, vol. 74, pp. 285ff; Don Greig, *Intertemporality and the Law of Treaties* (British Institute of International and Comparative Law, 2003); Markus Kotzur, "Intertemporal Law", *Max Planck Encyclopedia of Public International Law* (http://www.mpepil.com accessed 22 January 2013); Ulf Linderfalk, "Doing the Right Thing for the Right Reason: Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties" (2008), *International Community Law Review*, vol. 10, No. 2, pp. 109ff; Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (3rd edition, Duncker & Humblot, 1984), pp. 496ff, paras. 782ff.

[125] M. Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties" (see footnote 124), p. 101.

[126] *Island of Palmas* case *(Netherlands v. USA)* (1928), *Reports of International Arbitral Awards*, vol. II, p. 845.

[127] Higgins (see footnote 116), p. 174.

[128] *Yearbook of the International Law Commission* (1966), vol. II, p. 222, para. 16; Higgins (see footnote 116), p. 178.

[129] United Nations General Assembly, "Fragmentation of international law", Report of the ILC Study Group, finalized by Martti Koskenniemi (2006) (A/CN.4/L.682 and Corr.1, para. 475).

[130] Ibid., para. 478.

> the moment when the obligation entered into force for a relevant party. When might the treaty language itself, in its context, provide for the taking account of future developments? Examples of when this might be a reasonable assumption include at least:
>
> (a) Use of a term in the treaty which is "not static but evolutionary". (...)
>
> (b) The description of obligations in very general terms, thus operating a kind of *renvoi* to the State of the law at the time of its application. (...)

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

(b) The relationship between evolutive interpretation and interpretation in the light of subsequent practice

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

> On the one hand, the subsequent practice of the parties, within the meaning of article 31 (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.[132]

59. The Court then held that the term "comercio" was a "generic term" of which "the parties necessarily" had "been aware that the meaning (...) was likely to evolve over time" and that "the treaty has been entered into for a very long period", and concluded that "the parties must be presumed (...) to have intended" this term to "have an evolving meaning".[133] And since the term "commerce" would today generally be understood to cover both goods and services, the Court concluded that Costa Rica had the right, under the treaty, to transport not only goods but also persons on the San Juan River.[134] Judge Skotnikov, while considering that an evolutive treaty interpretation was not appropriate, arrived at the same result by accepting that a subsequent practice of Costa Rican-operated tourism on the San Juan River "for at least a decade" against which Nicaragua "never protested" but

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[131] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19), p. 213.

[132] Ibid., para. 64.

[133] Ibid., paras. 66-68.

[134] Ibid., para. 71.

rather "engaged in consistent practice of allowing tourist navigation" had led to a different understanding of the treaty, which would result in such services being included in the term "objetos de comercio".[135] Judge ad hoc Guillaume, also found "that the practice accords with this, as shown by the Memorandum of Understanding of 5 June 1994 between the two States' Ministers of Tourism and by the growth of tourist cruise traffic on the San Juan in recent years".[136]

60. The *Costa Rica v. Nicaragua* judgment demonstrates that subsequent agreements and subsequent practice of the parties can have both a supportive and a restrictive effect on the possibility of an evolutive interpretation. The supportive effect consists in confirming that an evolved understanding of a treaty can be based on subsequent practice as an authentic means of interpretation. The restrictive effect of subsequent practice[137] emerges when it is contrasted with an evolutive interpretation which is based on other grounds, in particular on the object and purpose of the treaty. Thus, the judges who emphasized the need for stability of treaty relations (Skotnikov, Guillaume) favoured the recognition of informally developed interpretation by way of subsequent practice, whereas the Opinion of the Court adopts a more dynamic approach by engaging in a more abstract form of evolutive interpretation. In any case, all judges in *Costa Rica v. Nicaragua* supported the conclusion that an evolutive interpretation is possible if it is accompanied by a common subsequent practice of the parties.

61. The nuanced approach, which is reflected in the report of the ILC Study Group on fragmentation of international law and in the *Costa Rica v. Nicaragua* judgment, is well-grounded in the jurisprudence of ICJ. This does not, however, prevent the alternative between a more contemporaneous or a more evolutive interpretation from re-emerging in specific cases. Judge Guillaume, in particular, has suggested that two different strands of jurisprudence existed, one tending towards a more contemporaneous and the other towards a more evolutive interpretation.[138] It is noteworthy, however, that the cases which, according to him, favour a more contemporaneous approach mostly concern rather specific terms in boundary treaties ("watershed";[139] "main channel/Thalweg";[140] names of places;[141] "mouth" of a river[142]). In such cases it is plausible that changes in the meaning of a (general or specific) terminology normally do not affect the substance of the specific

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[135] Ibid., Separate Opinion of Judge Skotnikov, p. 283 and p. 285, para. 9.

[136] Ibid., Declaration of Judge ad hoc Guillaume, p. 290 and pp. 298 and 299, para. 16.

[137] See, for example, Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), p. 246.

[138] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (footnote 19), Declaration of Judge ad hoc Guillaume, p. 290, pp. 294ff, paras. 9ff; see also *Report of the International Law Commission, Fifty-seventh Session* (A/60/10, paras. 467 and 479); *Report of the International Law Commission Study Group on fragmentation of international law, finalized by Martti Koskenniemi* (2006) (A/CN.4/L.682 and Corr.1, 1, para. 478); resolution of the Institut de droit international on "Le problème intertemporel en droit international public" (1975) *Annuaire de l'Institut de droit international*, 536.

[139] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1962] *I.C.J. Reports 1962*, p. 14.

[140] *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] *I.C.J. Reports 1999*, p. 1060f, para. 21.

[141] *Decision regarding delimitation of the border between Eritrea and Ethiopia (Eritrea v. Ethiopia)* (2002) *Reports of International Arbitral Awards*, vol. XXV, part III, p. 110, para. 3.5.

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

arrangement, which is designed to be as stable and as divulged from contextual elements as possible. On the other hand, those cases which would support the legitimacy of an evolutive interpretation turn around terms whose meaning is inherently more context dependent. This is true, in particular, for the terms "the strenuous conditions of the modern world" or "the well-being and development of such peoples" in article 22 of the Covenant of the League of Nations, which ICJ, in its *Namibia Opinion*, has given a progressive interpretation by referring to the evolution of the right of peoples to self-determination after the Second World War.[143] Other recognized grounds for the possibility of an evolutive interpretation are the "generic" character of a particular term in a treaty[144] and the fact that the treaty is designed to be "of continuing duration".[145] There may even be more specific reasons which can justify an evolutive interpretation. In the *Iron Rhine* case, for example, the continued viability and effectiveness of the arrangement, as such, was an important reason for the Tribunal to accept that even rather technical rules may have to be given an evolutive interpretation.[146]

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

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[143] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* [1971], *I.C.J. Reports 1971*, p. 30, para. 51.

[144] *Aegean Sea Continental Shelf* case *(Greece v. Turkey)* [1978] *I.C.J. Reports 1978*, p. 32, para. 77.

[145] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19), p. 213, para. 66.

[146] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. the Netherlands)* Permanent Court of Arbitration (award of 24 May 2005), 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 (Judgment) [1978] *I.C.J. Reports 1978*, p. 32, para. 77; see *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)* (Award of 31 July 1989) *Reports of the International Arbitral Awards*, pp. 151-152, para. 85.

[147] See also *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* (1989), *Reports of International Arbitral Awards*, vol. XX, part II, pp. 119ff and 151f, para. 85.

[148] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19) Declaration of Judge ad hoc Guillaume, p. 290 and p. 294, para. 9; Verdross and Simma, *Universelles Völkerrecht* (see footnote 124), p. 498.

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

63. On balance, the jurisprudence of ICJ and arbitral tribunals does not seem to contradict the "general support among the leading writers today for evolutive interpretation of treaties", as the Tribunal in the *Iron Rhine* case has noted.[150] Other international adjudicatory bodies have displayed different degrees of openness towards evolutive interpretation. While the Appellate Body of WTO has only exceptionally recognized and performed an evolutive interpretation, an evolutive approach to interpretation has become a characteristic feature of the jurisprudence of the European Court of Human Rights (European Convention on Human Rights as a "living instrument").[151] Thus, even if it would be still appropriate to proceed from a presumption that a treaty should be given a contemporaneous interpretation, this is not a strong presumption and it stands in the face of an open list of exceptions.

4. Conclusion: draft conclusion 2

64. Taken together, the preceding considerations suggest the following draft conclusion 2:[152]

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

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

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

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[150] *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. the Netherlands)* (see footnote 146), para. 81; see, for example, J.M. Sorel, "Article 31", in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le Droit des Traités* (Bruylant, 2006), p. 1330, para. 55.

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

[152] See preliminary conclusions 4 and 7 of the Chair of the Study Group on Treaties over time (A/66/10, para. 344), in particular preliminary conclusions 4 and 7 (first and second sentences):

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

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

(7) Evolutionary interpretation and subsequent practice

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

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

65. Article 31 (3) (a) of the Vienna Convention recognizes "any subsequent agreement" (1) and article 31 (3) (b) of the Vienna Convention admits "subsequent practice" (2) under certain conditions as means of treaty interpretation. Subsequent practice by one or more parties to a treaty may also be a means of interpretation under article 32 of the Vienna Convention even if not all conditions of article 31 (3) (b) are fulfilled. The concepts of "subsequent agreement" and "subsequent practice" thus need to be defined.

1. Subsequent agreement

66. The concept "subsequent agreement" raises questions as to: (a) its form and distinction from "subsequent practice (…) which, establishes the agreement of the parties"; (b) its relational character; (c) the required number of parties; and (d) its subsequent character.

(a) Form of "any subsequent agreement" and distinction from "subsequent practice (…) which establishes the agreement of the parties"

67. Article 31 (3) (a) of the Vienna Convention uses the term "subsequent agreement" and not the term "subsequent treaty". This does not mean, however, that a "subsequent agreement" is necessarily less formal than a "treaty". Whereas a "treaty" within the meaning of the Vienna Convention must be in written form (article 2 (1) (a) of the Vienna Convention), general international law knows no such requirement.[153] The term "agreement" in the Vienna Convention[154] and in general international law equally 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".[155] The drafters of the

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[153] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1994] *I.C.J. Reports 1994*, p. 92, para. 120f; see Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2008), p. 81; Philippe Gautier, "Article 2 (1969)", in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary, vol. I* (Oxford University Press, 2011), pp. 38f; Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, 1996), pp. 49f; see also A. Aust, "The theory and practice of informal international instruments" (1986) *International and Comparative Law Quarterly*, vol. 35, Issue 4, pp. 787 and 794ff.

[154] See articles 2 (1) (a), 3, 24 (2), 39-41, 58, 60 of the Vienna Convention.

[155] *Yearbook of the International Law Commission* (1966), vol. II, p. 232; see also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (see footnote 153) article 39, p. 513, para. 7; Philippe Sands, "Article 39 (1969)" in Corten and Klein (eds.), *The Vienna Convention on the Law of Treaties* (see footnote 153), pp. 971-972, paras. 31-34.

Vienna Convention have also not envisaged any particular formal requirements for agreements in the sense of article 31 (3) (a) and (b) of the Vienna Convention.[156]

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

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

70. It should be noted at the outset that by distinguishing between "any subsequent agreement" (article 31 (3) (a)) and "subsequent practice (...) which establishes the agreement of the parties" (article 31 (3) (b)), the Commission did not intend to denote a difference concerning their possible legal effect. The Commentary describes a "subsequent agreement" as representing "an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation",[158] and states that "subsequent practice" "similarly" "constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".[159] This explanation suggests that the difference between the two concepts lies in the fact that a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a "subsequent practice" only has this effect if it "shows the common understanding of the parties as to the meaning of the terms".[160] This suggests that a "subsequent agreement between the parties" is

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[156] ILC draft article 27 (3) (b), which later became article 31 (3) (b) of the Vienna Convention, contained the word "understanding" which was changed to "agreement" by the Vienna Conference. This change was "merely a drafting matter", see *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, United Nations Conference on the Law of Treaties (First session, *Official Records*) (Vienna, 26 March-24 May 1968) (A/CONF.39/11, p. 169); Hazel Fox, "Articles 31 (3) (a) and (b) of the Vienna Convention", in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, 2010), p. 63; see also *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] *I.C.J. Reports 1999*, p. 1045, Dissenting Opinion of Judge Weeramantry, paras. 23f.

[157] But see Ronald Bettauer, Deputy Legal Adviser, United States Department of State, remarks at the meeting, held on 10 October 2006, of the Lawyers' Committee on Nuclear Policy, New York City Bar, on the topic "Is the United States in compliance with international law on nuclear weapons?", excerpts reprinted in Sally J. Cummins (ed.), *Digest of United States Practice in International Law 2006* (International Law Institute, 2007), pp. 1260 and 1261.

[158] *Yearbook of the International Law Commission* (1966), vol. II, p. 221, para. 14.

[159] Ibid., para. 15.

[160] *Yearbook of the International Law Commission* (1966), vol. II, p. 222, para. 15; Wolfram Karl, *Vertrag und spätere Praxis im Völkerrecht* (Springer, 1983), p. 294.

typically easier to prove than a "subsequent practice (...) which establishes the agreement of the parties".[161]

71. The jurisprudence of international courts and other adjudicative bodies shows a certain reluctance to clearly distinguish between subsequent agreements and subsequent practice. In *Libya v. Chad*, ICJ used the expression "subsequent attitudes" both to denote what it later described as "subsequent agreements" as well as subsequent unilateral "attitudes".[162] In the case of *Indonesia v. Malaysia*, ICJ left the question open whether the use of a particular map could constitute a subsequent agreement or subsequent practice.[163] In the *Gabčíkovo-Nagymaros* 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".[164] In the *CME* award, an UNCITRAL tribunal recalled the term "common position" between the State of the investor and the respondent State in order to confirm its interpretation of the investment treaty without identifying this as a case of article 31 (3) (a) or (b) of the Vienna Convention.[165] Similarly the Panels and the Appellate Body of WTO also do not always distinguish clearly between subsequent agreement and subsequent practice.[166]

72. The NAFTA Panel in *CCFT (v. United States)*[167] addressed the question of the distinction between a subsequent agreement in the sense of article 31 (3) (a) of the Vienna Convention and subsequent practice in the sense of article 31 (3) (b) of the Convention more explicitly. In this case, the United States asserted that a number of unilateral actions by each of the three parties to NAFTA would, taken together,

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[161] *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)* [1999], *I.C.J. Reports 1999*, p. 1087, para. 63.

[162] *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994], *I.C.J. Reports 1994*, p. 34, paras. 66ff.

[163] *Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)* [2002], *I.C.J. Reports 2002*, p. 656, para. 61.

[164] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997], *I.C.J. Reports 1997*, p. 77, para. 138, see also *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1995], *I.C.J. Reports 1995*, p. 122, para. 28 ("subsequent conduct").

[165] *CME Czech Republic B.V. (The Netherlands) v. the Czech Republic* (Final Award) UNCITRAL Arbitration (14 March 2003), para. 437 (http://italaw.com/documents/CME-2003-Final_001.pdf, accessed 6 March 2013).

[166] See "Scheduling guidelines" in *Mexico: Telecoms — Report of the Panel* (2 April 2004) (WT/DS204/R) and in *United States: Gambling: Report of the Appellate Body* (7 April 2005) (WT/DS285/AB/R); to qualify "1981 Understanding" see *United States: Tax Treatment for Foreign Sales Corporations, Report of the Panel, unopposed* (8 October 1999) (WT/DS108/R). See "SCM Code" in *Brazil: Measures affecting desiccated coconut, Report of the Panel, unopposed* (17 October 1996) (WT/DS22/R), and a "waiver" in *European Communities: Bananas III, second recourse to article 21.5, Appellate Body Report* (26 November 2008) (WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA).

[167] *CCFT (v. United States)* (see footnote 38); *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) ICSID Case No. ARB/97/3 (3 October 2001) [2004] ICSID Rep 330, para. 12; see Panos Merkouris and Malgosia Fitzmaurice, "Canons of Treaty Interpretation: Selected Case Studies From the World Trade Organization and the North American Free Trade Agreement", in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, 2010), pp. 217-233.

constitute a subsequent agreement.[168] In a first step, the Panel did not find that the evidence was sufficient to establish a subsequent agreement:

> The Respondent maintains that there is such a "subsequent agreement", and points to its own statements on the issue, before this Tribunal and elsewhere; to Mexico's Article 1128 submission in this arbitration; and to Canada's statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the Myers case.
>
> All of this is certainly suggestive of something approaching an agreement, but, to the Tribunal, all of this does not rise to the level of a "subsequent agreement" by the NAFTA Parties. (…) The Tribunal concludes that there is no "subsequent agreement" on this issue within the meaning of Article 31 (3) (a) of the Vienna Convention.[169]

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

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

74. This jurisprudence suggests that the distinction between a "subsequent agreement" and "subsequent practice (…) which establishes the agreement of the parties" in the sense of article 31 (3) of the Vienna Convention points to a different evidentiary standard for the determination of the "authentic" expression of the will of the parties. Subsequent agreements and subsequent practice are distinguished according to whether a common position can be identified *as such*, in a common expression, or whether it is necessary to indirectly identify an agreement through particular conduct or circumstances. In this sense, a "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention must be manifested as such, though not necessarily in written form,[171] whereas "subsequent practice" encompasses all (other) forms of relevant subsequent conduct by one or more parties to a treaty which contributes to the manifestation of an agreement of the parties regarding the interpretation of the treaty.

75. Thus, while "subsequent practice" can contribute to identifying an agreement between the parties, such practice is not the agreement itself. It is, however, not

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[168] *CCFT (v. United States)* (see footnote 38), paras. 174-177.

[169] Ibid., paras. 184-187.

[170] Ibid., paras. 188-189; in a similar sense: *Aguas del Tunari SA v. Republic of Bolivia* (Netherlands/Bolivia BIT) (Decision on Respondent's Objections to Jurisdiction) ICSID Case No. ARB/02/3 (21 October 2005) [2005] 20 *ICSID Review, Foreign Investment Law Journal* (2006), p. 450, para. 251; *Proceedings pursuant to the OSPAR Convention (Ireland — United Kingdom)* (2003) (see footnote 112), p. 110, para. 180.

[171] Sorel, "Article 31" (see footnote 150), p. 1320, para. 43; Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), p. 209.

excluded that "practice" and "agreement" coincide and cannot be distinguished by external evidence. This explains why the term subsequent practice is often used in the sense of a broader general category which encompasses both means of interpretation that are referred to in article 31 (3) (a) and (b) of the Vienna Convention.[172] Such a broad understanding of "subsequent practice", while perfectly possible in theory, would, however, level the distinction which is contained in the Vienna Convention and which serves the purpose of alerting States and other law appliers to different types of relevant subsequent interpretative conduct of the parties.

(b) Relational character

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

77. A reference "regarding the (…) treaty" can often be identified by some indication of subordination of the "subsequent agreement" under the treaty to which it refers. Such reference may also be comprised in a later treaty which contains an agreement regarding the meaning of a previous treaty between the same parties. In the case of *Denmark v. Norway*, for example, ICJ considered whether a "subsequent treaty" between the parties "in the same field" could be used for the purpose of the interpretation of the previous treaty, but rejected this possibility because the later treaty did not in any way "refer" to the previous treaty.[174] In the case of *Costa Rica v. Nicaragua*, Judge Guillaume referred to the actual practice of tourism on the San Juan River in conformity with a memorandum of understanding between the two States.[175] The question is, however, whether this particular memorandum of understanding was meant by the parties to serve as an interpretation of the boundary treaty under examination. Thus, even an explicit agreement between the parties is not necessarily a "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention if it does not sufficiently relate to the treaty under review.

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

(c) Number of parties

79. A "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention is one between "the parties", that is, between all the parties to the treaty

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

[173] WTO, *United States: Tuna II (Mexico)* (see footnote 80), WT/DS381/AB/R, paras. 366-378, in particular para. 372; Ulf Linderfalk, *On the Interpretation of Treaties* (Springer, 2007), pp. 164f.

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

[175] *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 19) Declaration of Judge ad hoc Guillaume, pp. 290, 298-299, para. 16.

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

80. Treaties with a broader membership are sometimes implemented by subsequent bilateral or regional agreements. Such agreements usually imply assertions concerning the permissible interpretation of the underlying treaty itself ("serial bilateralism").[176] The 1944 Chicago Convention on International Civil Aviation[177] is an example of such a form of subsequent implementation through bilateral agreements within a multilateral treaty framework. Between three and four thousand mostly bilateral air service agreements (ASA) or air transport agreements (ATA)[178] have been concluded since the entry into force of the Chicago Convention. This bilateral system has been described as a "complex web of interlocking ASA agreements",[179] which "evolved through subsequent State practice".[180] Such bilateral treaties are not, as such, subsequent agreements in the sense of article 31 (3) (a) of the Vienna Convention since they are only concluded between a limited number of the parties to the multilateral treaty. However, if taken together and sufficiently consistent and widespread, they may establish an agreement between all the parties regarding the meaning and scope of a respective multilateral treaty provision.

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

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[176] The expression is borrowed from Eyal Benvenisti and George W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law" (2007) *Stanford Law Review*, vol. 60, pp. 610-611.

[177] Convention on International Civil Aviation (Chicago Convention) (adopted on 7 December 1944, entered into force on 4 April 1947) United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

[178] See Harry A Bowen, "The Chicago International Civil Aviation Conference (1944-1945)" 13 *George Washington Law Review*, pp. 308 and 309ff.

[179] Department of Infrastructure and Transport, Australia, "The Bilateral System — how international air services work" (http://www.infrastructure.gov.au/aviation/international/bilateral_system.aspx, accessed 31 January 2013).

[180] Brian F. Havel, *Beyond Open Skies, A New Regime for International Aviation* (Kluwer Law International, 2009), p. 10.

82. Ultimately, however, it is more convenient for the purpose of the present project to limit the use of the term "subsequent agreement" to such agreements between all the parties to a treaty which are manifested in one individual agreement (or in one act with regard to which all parties agree in whatever form).[181] The example of bilateral air service agreements demonstrates that a group of different agreements between a limited number of parties of a multilateral treaty can just as well be conceived as a set of different factual elements — a "subsequent practice" — which together "establish the agreement of [all] the parties regarding" the interpretation of the treaty in the sense of article 31 (3) (b) of the Vienna Convention.

83. A group of different agreements between a limited number of parties is not one individual agreement, as the term "any subsequent agreement" in article 31 (3) (a) of the Vienna Convention suggests. The concept "subsequent agreement" should, for the sake of terminological clarity, be limited to individual agreements between all the parties, as indicated in article 31 (3) (a). Subsequent agreements (in a broader sense) between a limited number of parties may have interpretative value as a supplementary means of interpretation within the meaning of article 32 of the Vienna Convention, but in this case they are a form of "subsequent practice" (in a broader sense) which does not (yet) establish the agreement of all the parties (see below at sect. V.2 (a)).

(d) "Subsequent"

84. The Commission has explained that "subsequent agreements" in the sense of article 31 (3) (a) of the Vienna Convention are only those which are reached "after the conclusion of the treaty".[182] This point in time is not necessarily the moment in which the treaty has entered into force (article 24 of the Vienna Convention). Articles 18 and 25 of the Convention show that a treaty can already be regarded as being "concluded" for certain purposes before its actual entry into force. In such cases the relevant point in time is when the text of the treaty has been established as definite.[183]

85. This point in time is also appropriate for the determination of the moment from which an agreement can be regarded as "subsequent" in the sense of article 31 (3) (a) of the Vienna Convention. It would be difficult to identify a reason why an agreement by the parties which occurs between the moment when the text of a treaty has been established as definite and the entry into force of the treaty should not be as relevant for the purpose of interpretation as an agreement which occurs after the

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[181] See WTO, *United States: Tuna II (Mexico)* (see footnote 80) WT/DS381/AB/R, para. 371; Review Conference of the Rome Statute (Kampala, 31 May-11 June 2010), RC/Res. 6, annex III, adopted at the 13th plenary meeting, on 11 June 2011; and, generally, Stefan Barriga and Leena Groover, "A historic breakthrough on the crime of aggression" (2011) *American Journal of International Law*, vol. 105, No. 3, pp. 517 and 533. This aspect will be addressed in more detail in a later report.

[182] *Yearbook of the International Law Commission* (1966), vol. II, p. 221, para. 14.

[183] *Yearbook of the International Law Commission* (1951), vol. II, pp. 70ff; *Yearbook of the International Law Commission* (1956), vol. II, p. 112; Shabtai Rosenne, "Treaties, Conclusion and Entry into Force", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (North Holland Publishing, 2000), p. 933: "Strictly speaking it is the negotiation that is concluded through a treaty"; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (see footnote 153), p. 1295-1298, paras. 9-13.

entry into force. This is in line with the reservations regime under articles 19 to 23 of the Convention and with the rules on interpretative declarations which are *lex specialis*.[184]

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

87. "Agreements" and "instruments"[185] which "are made in connection with the conclusion of the treaty" (article 31 (2) of the Vienna Convention) can be made either before or after the moment when the text of the treaty was established as definite.[186] If they are made after this moment such "agreements" and agreed "instruments" are special forms of "subsequent agreements".

(e) Interpretative agreements pursuant to a specific treaty provision

88. Certain treaty provisions, such as article IX.2 of the Agreement establishing WTO, provide that the parties may, under certain conditions, adopt more or less binding interpretations with respect to certain or all provisions of the treaty. The legal effects of decisions by the parties pursuant to such provisions are governed, in the first place, by the respective special treaty provisions. This does not exclude, however, that such decisions may, at the same time, constitute a "subsequent agreement" in the sense of article 31 (3) (a) of the Vienna Convention. This has been recognized, for example, by a Panel under NAFTA in the case of *Methanex v. the United States.* This case concerned a provision (article 1105 of NAFTA) with respect to which the parties to NAFTA had adopted an "interpretative note" ("Free Trade Commission Note") pursuant to article 1131 (2) of NAFTA, according to which "the (intergovernmental) Free Trade Commission may adopt an interpretation of a provision of NAFTA which shall be binding on a Tribunal established under Chapter 11":

> Leaving to one side the impact of Article 1131 (2) NAFTA, the FTC's interpretation must also be considered in the light of Article 31 (3) (a) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA[187]

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[184] See A/66/10/Add.1.

[185] This may include unilateral declarations if the other party did not object, see German Federal Constitutional Court, *BVerfGE*, vol. 40, p. 176; see generally Gardiner (see footnote 171), pp. 215 and 216.

[186] Jennings and Watts, *Oppenheim's International Law* (see footnote 77), p. 1274, para. 632.

[187] *Methanex Corporation v. United States of America* (Final Award of the Tribunal on Jurisdiction and Merits) UNCITRAL Arbitration under NAFTA, Chapter Eleven (3 August 2005), Part II, chap. H, para. 23 (http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf, accessed 28 January 2013).

89. Although the Federal Trade Commission Note has received a mixed reaction from some Chapter Eleven panels,[188] panels have generally not disputed that a decision pursuant to article 1131 (2) of NAFTA can, in principle, simultaneously be a subsequent agreement within the meaning of article 31 (3) (a) of the Vienna Convention. In a similar vein, the WTO Appellate Body has held in *EC — Banana III*:

> We consider that a multilateral interpretation pursuant to Article IX:2 of the WTO Agreement can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31 (3) (a) of the Vienna Convention, as far as the interpretation of the WTO agreements is concerned. (...)
>
> We further observe that, in its commentary on the Draft Articles on the Law of Treaties, the International Law Commission (the "ILC") describes a subsequent agreement within the meaning of Article 31 (3) (a) of the Vienna Convention "as a further *authentic element of interpretation* to be taken into account together with the context". In our view, by referring to "authentic interpretation", the ILC reads Article 31 (3) (a) as referring to agreements bearing specifically upon the interpretation of a treaty. In the WTO context, multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement are most akin to subsequent agreements within the meaning of Article 31 (3) (a) of the Vienna Convention, …[189]

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

2. Subsequent practice

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

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[188] *Pope & Talbot Inc. (Claimant) v. Government of Canada (Respondent)* (Award on the Merits of Phase 2), UNCITRAL Arbitration under NAFTA Chapter Eleven (10 April 2001), para. 46f (http://www.naftaclaims.com/Disputes/Canada/Pope/PopeFinalMeritsAward.pdf, accessed 28 January 2013); *ADF Group Inc. v. United States of America* (Award), ICSID Arbitration under NAFTA Chapter Eleven, ICSID Case No. ARB(AF)/00/1 (9 January 2003), para. 177 (http://www.state.gov/documents/organization/16586.pdf, accessed 28 January 2013); Charles Brower, "Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105" (2006) *Virginia Journal of International Law* vol. 46, No. 2, pp. 349 and 350 with further citations; Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation" (2010), American Journal of International Law vol. 104, No. 2, pp. 179-225.

[189] *European Communities: Bananas III, Second Recourse to Article 21.5, Appellate Body Report* (26 November 2008) WT/DS27/AB/RW2/ECU and Corr.1 and WT/DS27/AB/RW/USA and Corr.1, paras. 383 and 390.

(a) Narrow or broad definition?

92. In *Japan: Alcoholic Beverages II*[190] the WTO Appellate Body has formulated a narrow definition of subsequent practice for the purpose of treaty interpretation:

> … subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[191]

93. This definition is not limited to defining "subsequent practice" by parties in the application of the treaty *as such*,[192] but it adds other elements which are contained in article 31 (3) (b) of the Vienna Convention, in particular "the agreement of the parties regarding its interpretation". The definition suggests that only such "subsequent practice in the application of the treaty" "which establishes the agreement of the parties regarding its interpretation" can at all be relevant for the purpose of treaty interpretation, and not any other form of subsequent practice by one or more parties. This suggestion, however, is misleading. The jurisprudence of ICJ and other international courts and tribunals (i), and even the jurisprudence of the WTO itself (ii) 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 is relevant for the purpose of treaty interpretation. This leads to the conclusion that "subsequent practice" in the application of a treaty by one or more parties as such should be distinguished from the question whether any such "subsequent practice" "establishes the agreement between the parties regarding its interpretation" (iii).

(i) Jurisprudence of the International Court of Justice and other international courts and tribunals

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

95. In the *Case of Kasikili/Sedudu Island*, for example, ICJ held that a report by a technical expert which had been commissioned by one of the parties and which had "remained at all times an internal document",[193] while not representing "subsequent practice which establishes the agreement of the parties within the meaning of" article 31 (3) (b) of the Vienna Convention, could "nevertheless support the conclusions" which the Court had reached by other means of interpretation.[194] The same was true with respect to "factual findings that the parties concerned arrived at separately" and "which were expressed in concurrent terms in a joint report".[195] Of course, such unilateral or parallel subsequent interpretative practice does not carry

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

[191] WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, sect. E.

[192] Emphasis added.

[193] *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] *I.C.J. Reports 1999*, p. 1078, para. 55.

[194] Ibid., p. 1096, para. 80.

[195] Ibid., p. 1096, para. 80.

the same weight as subsequent practice which establishes the agreement of all the parties and thus cannot embody an "authentic" interpretation of a treaty by its parties.

96. ICSID Tribunals have also used subsequent State practice as means of interpretation in a broad sense.[196] 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.[197]

97. The European Court of Human Rights has in some cases referred to article 31 (3) (b) of the Vienna Convention without identifying an agreement between the parties in the respective subsequent practice. Thus, the Court asserted in *Loizidou v. Turkey*[198] that its interpretation was "confirmed by the subsequent practice of the Contracting parties",[199] that is, "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 (...) of the Convention do not permit territorial or substantive restrictions".[200]

98. More often the European Court has relied on, not necessarily uniform, subsequent State practice by referring to national legislation, and even domestic administrative practice, as means of interpretation: Since *Tyrer v. the United Kingdom* the Court has typically given its "dynamic" or "evolutive" interpretations direction by describing and relying on subsequent State (and other) practice. Depending on the outcome of its analysis, consensus, no consensus, or a sufficiently qualified majority or tendency, the Court proceeds with a dynamic interpretation or not. In the case of *Demir and Baykara v. Turkey*,[201] 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 authorities has been recognized"[202] and that "the remaining exceptions can be justified only by particular circumstances".[203] In *Koch v. Germany*, on the other hand, the Court remarked that the contracting parties were "far from reaching a consensus" in

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196 Fauchald (see footnote 35) p. 345.

197 *CMS Gas Transmission Company v. Argentine Republic* (United States/Argentina BIT) (Decision of the Tribunal on Objections to Jurisdiction) ICSID Case No. ARB/01/8, (17 July 2003) [2003], 7 ICSID Report 492 (2003) para. 47 (footnote omitted).

198 *Loizidou* (see footnote 42).

199 Ibid., para. 79.

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

201 *Demir and Baykara* (see footnote 42).

202 Ibid., para. 52.

203 Ibid., para. 151; similarly *Jorgic v. Germany*, Application No. 74613/01 (ECtHR, 12 July 2007), para. 69, selected for publication in ECtHR, *Reports of Judgments and Decisions*; *Sigurdur A. Sigurjónsson v. Iceland* (1993), ECtHR, Series A, No. 264, para. 35; *A v. the United Kingdom* (ECHR 2002-X), paras. 80 and 83.

respect of allowing assistance to suicide and thus refused to limit their margin of appreciation by adopting an evolutive interpretation.[204] Finally, in *SH and Others v. Austria* the Court noted that an "emerging consensus" alone was not sufficient to restrict the member States' margin of appreciation for allowing or not allowing gamete donation for the purpose of in vitro fertilization.[205]

99. Even in those rare cases in which the Inter-American Court of Human Rights and the Human Rights Committee have taken subsequent practice of the parties into account,[206] they have 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*[207] the Inter-American Court held that the mandatory imposition of the death penalty for every form of conduct which resulted in the death of another person was incompatible with article 4 (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[208]

and observed that

> [i]n these countries the gradation according to gravity of each theory of deprivation of life is well recognized: from homicide to parricide. In all these countries, there exists a diversity of penalties corresponding to the diversity in gravity.[209]

100. Like the European Court of Human Rights, the Human Rights Committee is open to arguments based on subsequent practice when it comes to the justification of interference with the rights set forth in the Covenant.[210] Interpreting the rather general terms contained in article 19 (3) of the International Covenant on Civil and Political Rights (permissible restrictions of the freedom of expression), the Committee looked at relevant State practice. Based on the observation that:

> similar restrictions can be found in many jurisdictions,[211]

the Committee concluded that the aim pursued by the contested law did not, as such, fall outside the legitimate aims of article 19 (3) of the International Covenant on Civil and Political Rights.[212] The Committee, however, when it takes account of

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[204] *Koch v. Germany*, Application No. 497/09 (ECtHR, 19 July 2012), para. 70.

[205] *SH and Others v. Austria* [GC] Application No. 57813/00 (ECtHR, 3 November 2011), para. 96; see also *Stummer v. Austria* [GC] Application No. 37452/02 (ECtHR, 7 July 2011), paras. 105-109 and 129-132, where the Court also merely observed an "evolving trend" and, failing to identify a "European consensus", refused to proceed with a dynamic interpretation.

[206] See above at para. 39.

[207] *Hilaire, Constantine and Benjamin and others v. Trinidad and Tobago* (see footnote 94) (Concurrring separate opinion of Judge Sergio García Ramírez).

[208] Ibid., para. 12.

[209] Ibid.

[210] *Kim Jong-Cheol v. the Republic of Korea* (27 July 2005) (CCPR/C/84/D/968/2001) Communication No. 968/2001.

[211] Ibid., para. 8.3.

[212] Ibid.

subsequent practice typically does so by way of a summary assessment and does not give specific references.[213]

101. ITLOS has on some occasions referred to the subsequent practice of the parties without verifying whether such practice actually established an agreement between the parties regarding the interpretation of the treaty. In *the M/V "SAIGA" (No. 2)*,[214] for example, the Tribunal reviewed State practice with regard to the right of self-defence under Article 51 of the Charter of the United Nations. Relying on the "normal practice used to stop a ship", the Tribunal did not specify the respective State practice but rather assumed a certain general standard to exist.[215] In the *Southern Bluefin Tuna Cases* the Tribunal held that the practice by parties under the Convention for the Conservation of Southern Bluefin Tuna of 1993 was relevant to evaluate the extent to which States have complied with their obligations under the United Nations Convention on the Law of the Sea.[216] Thus, by taking into account the practice under another treaty with different parties the Tribunal has used the (subsequent) practice under a different treaty which does not encompass all parties to the Law of the Sea Convention.[217]

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

> the Trial Chamber (...) interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. (...) The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgements rendered by the Tribunal for Rwanda. (…) The practice of States, notably through their national courts, and the work of international authorities in this field have also been taken into account.[218]

103. The International Tribunal for the Former Yugoslavia has taken even more general forms of State practice into account, including trends in the legislation of member States which in turn can give rise to a changed interpretation of the scope of crimes or their elements.[219]

(ii) Jurisprudence by WTO adjudicatory bodies

104. Even the WTO adjudicatory organs occasionally distinguish between "subsequent practice" that satisfies all the conditions of article 31 (3) (b) of the Vienna Convention and other forms of subsequent practice in the application of the

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[213] For a similar case see *Yoon and Choi v. The Republic of Korea* (see footnote 56) para. 8.4; in this case (see CCPR/C/88/D/1321-1322/2004, appendix), Committee Member Wedgwood criticized the approach of the Committee as displaying a selective perspective.

[214] *The M/V "SAIGA" (No. 2) Case (Judgment)* (see footnote 97), paras. 155 and 156.

[215] Ibid., para. 156; see also *The "Tomimaru" Case (Japan v. Russian Federation), Prompt Release* (Judgment of 6 August 2007), ITLOS Case No. 15, para. 72.

[216] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures, Order of 27 August 1999), ITLOS Case Nos. 3 and 4, para. 50.

[217] Ibid., para. 45.

[218] *Jelisic* (see footnote 65) para. 61 (footnotes omitted); similarly *Krstić* (see footnote 65) para. 541.

[219] *Furundzija* (see footnote 100) paras. 165ff and 179.

treaty, which they also recognize as being relevant for the purpose of treaty interpretation. In *US — Section 110(5) Copyright Act*[220] (not appealed), for example, the Panel had to determine whether a "minor exceptions doctrine" concerning royalty payments applied.[221] 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.[222]

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.[223]

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

> A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions (...) However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant.[224]

106. Thus, on closer inspection, the jurisprudence of the WTO adjudicatory bodies distinguishes between a narrow definition which sets out the conditions under which "subsequent practice" is fully relevant in the sense of article 31 (3) (b) of the Vienna Convention and a broader concept of subsequent practice which does not presuppose an agreement between all the parties of the treaty.[225] Such subsequent

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[220] *United States: Section 110(5) Copyright Act*, Report of the Panel (15 June 2000), WT/DS160/R.

[221] See Trade-Related Aspects of Intellectual Property Rights (TRIPS), article 9.1.

[222] *United States: Section 110(5) Copyright Act — Panel* (see footnote 220), para. 6.55.

[223] Ibid., footnote 68.

[224] *European Communities: Computer Equipment* (see footnote 79) para. 90, see also Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009), p. 342.

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

practice in a broader sense may then be relevant as a supplementary means of treaty interpretation within the meaning of article 32 of the Vienna Convention.

(iii) Conclusion

107. The jurisprudence of international courts and tribunals, including the Dispute Settlement Body of WTO, recognizes that not only "subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation" may be relevant for the purpose of interpretation, but possibly also other subsequent practice which does not reflect an agreement on interpretation by all the parties. The concept of "subsequent practice" should therefore be defined broadly. A narrow definition such as the one by the WTO Appellate Body in the *Japan: Alcoholic Beverages II case*[226] may be helpful in identifying a fully agreed and authentic interpretation of a treaty in the sense of article 31 (3) (b) of the Vienna Convention. The taking into account of other treaty practice by States for the purpose of interpretation should not be excluded at the outset since it may in some situations serve as a supplementary means of interpretation in the sense of article 32 of the Vienna Convention. Such use of subsequent practice (in a broad sense) must, however, always remain within the limit of the rule that treaty interpretation is not self-judging and that "the view of one State does not make international law".[227] The distinction between agreed subsequent practice in the narrow sense of article 31 (3) (b) of the Vienna Convention and all other subsequent practice (in a broad sense) then serves to indicate a greater interpretative value which is to be attributed to the former.

108. The distinction between (agreed) subsequent practice in the narrow sense of article 31 (3) (b) of the Vienna Convention and subsequent practice in a broad sense of any particular instance of treaty interpretation or application by a party also helps to answer the question whether "subsequent practice" requires repeated action with some frequency[228] or whether a one-time application of the treaty may be enough.[229] Within 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.[230]

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[226] See para. 92 above; the Appellate Body has taken the formula from a publication by Sir Ian Sinclair (*The Vienna Convention on the Law of Treaties* (2nd edition), Manchester University Press, 1984, p. 137), who drew on a similar formulation in French by Mustafa Kamil Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités" (1976, vol. 3), *Recueil des Cours* vol. 151, pp. 48 and 49. Yasseen, a former member of ILC, had relied on elements from the work of the Commission, but this definition has never been adopted by ILC or ICJ.

[227] *Sempra Energy International v. Argentine Republic* (Award) ICSID Case No. ARB/02/16 (28 September 2007) para. 385 (https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8, accessed 6 March 2013); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (Award) ICSID Case No. ARB/01/3 (22 May 2007), para. 337; WTO, *United States: Large Civil Aircraft (2nd complaint)*, Report of the Panel (22 October 2010), WT/DS353/R, para. 7.953, footnote 2420.

[228] Villiger (see footnote 153) p. 431.

[229] Linderfalk, *On the Interpretation of Treaties* (see footnote 173) p. 166.

[230] *Japan: Alcoholic Beverages II*, Appellate Body (see footnote 31) sect. E.

109. If, however, the concept of subsequent practice is divulged from a possible agreement between the parties, as it is recognized by international adjudicatory bodies, frequency is not a necessary element of the definition of the concept of "subsequent practice".[231]

110. Thus, "subsequent practice" in the broad sense covers any application of the treaty by one or more parties. It can take various forms.[232] Practice may either consist of a direct application of the respective treaty or be a statement regarding the interpretation or application of the treaty. Such practice may include official statements concerning the treaty's meaning, protests against non-performance, or tacit consent to statements or acts by other parties.[233]

(b) Relational character

111. Like a subsequent agreement under article 31 (3) (a) of the Vienna Convention, subsequent practice must be "in the application of the treaty". This is true not only for agreed subsequent practice within the meaning of article 31 (3) (b) of the Vienna Convention, but also for subsequent practice generally. Thus, action or relevant silence[234] must be taken in application of the treaty, including the invocation of provisions of the treaty; the same is true for pronouncements regarding the treaty in the course of a legal dispute or at a diplomatic conference; official communications for which the treaty gives cause; or the enactment of domestic legislation or conclusion of new international agreements for the purpose of implementing a treaty.

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

> Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to Article 27 of the Vienna Convention, which states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA. To do so would be to apply an inappropriate legal framework.[235]

113. While the rule contained in article 27 of the Vienna Convention is certainly valid and important, it does not follow from it that national law may not be taken into account as a possible interpretative aid in the form of subsequent State practice in the implementation of the treaty. Other international adjudicatory bodies, in particular in the context of the WTO and the European Court of Human Rights, have

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[231] Robert Kolb, *Interprétation et création du droit international* (Bruylant, 2006), pp. 506f.

[232] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), p. 191.

[233] Wolfram Karl (see footnote 160), p. 114.

[234] *Yearbook of the International Law Commission* (1966), vol. II, p. 222, para. 15; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1962], *I.C.J. Reports 1962*, p. 23; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction and Admissibility) [1984], *I.C.J. Reports 1984*, p. 410, para. 39; *Dispute between Argentina and Chile concerning the Beagle Channel* (1977), *Reports of International Arbitral Awards*, vol. XXI, part II, paras. 168 and 169; the role of silence will be elaborated upon in greater detail in the next report on the topic.

[235] In the matter of *Cross-Border Trucking Services* (see footnote 86), para. 224.

recognized and regularly distinguish between national legislation (and other implementing measures at the national level) which violates treaty obligations, and national legislation and measures which can serve as a means to interpret the treaty.[236]

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

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

(c) Subsequent

116. As with regard to subsequent agreements, relevant interpretative practice is "subsequent" if it has taken place "after the conclusion of the treaty",[237] that is, after the text of the treaty has been established as definite.[238]

(d) Actors

117. An important question relates to the actors who may perform relevant subsequent practice. Article 31 (3) (b) of the Vienna Convention does not explicitly require that it must be the practice of the parties to the treaty themselves, but the provision seems to imply this requirement. It is certainly the parties themselves, acting through their organs,[239] who are competent to engage in interpretative treaty practice and to apply or to comment upon a treaty. However, it is also not excluded that private (natural and legal) persons "apply" a treaty in certain cases. Such non-State practice, however, needs to be attributable to a particular State party in

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[236] See, for example, *United States: Section 110(5) Copyright Act — Panel* (footnote 220), para. 6.55; *United States: Continued Zeroing Methodology*, Report of the Panel, WT/DS350/R, para. 7.217; WTO, *United States: Anti-Dumping and Countervailing Duties (China)*, Report of the Appellate Body (11 March 2011) WT/DS379/AB/R, paras. 335 and 336; *CMS Gas Transmission Company v. Argentine Republic* (see footnote 197), para. 47; *V v. the United Kingdom* [GC] Application No. 24888/94, ECHR 1999-IX, para. 73; *Kart v. Turkey* [GC] Application No. 8917/05 (ECtHR, 13 December 2009), para. 54, selected for publication in *Reports of Judgments and Decisions*; *Sigurjónsson* (see footnote 203), para. 35; *A v. the United Kingdom* (see footnote 203), para. 80.

[237] *Yearbook of the International Law Commission* (1966), vol. II, p. 221, para. 14.

[238] See paras. 84-87 above.

[239] Karl (see footnote 160), p. 115f.

order to be relevant for the purpose of establishing an authentic element of interpretation.[240] This point is developed below in section VI (draft conclusion 4).

3. Conclusion: draft conclusion 3

118. Taken together, these sources and considerations suggest the following draft conclusion 3:[241]

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.

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[240] See paras. 119-144 below.

[241] See preliminary conclusions 5 and 8 of the Chair of the Study Group on Treaties over time (A/66/10, para. 344), in particular, preliminary conclusion 5:

> **(5) Concept of subsequent practice as a means of interpretation**
>
> Most adjudicatory bodies reviewed have not defined the concept of subsequent practice. The definition given by the WTO Appellate Body ("concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties [to the treaty] regarding its interpretation") combines the element of "practice" ("sequence of acts or pronouncements") with the requirement of agreement ("concordant, common") as provided for in Article 31 (3) (b) VCLT (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed have, however, also used the concept of "practice" as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense).

VI. Attribution of treaty-related practice to a State

119. Whereas article 31 (3) (a) of the Vienna Convention speaks of any subsequent agreement "between the parties", article 31 (3) (b) merely speaks of "subsequent practice in the application of the treaty". This raises the question under which circumstances practice "in the application of the treaty" can be attributed to a State and thus be relevant interpretative State practice (1). Related questions are whether social developments (2) and practice by other actors than States (3) can also be relevant for the interpretation of a treaty and, in particular, whether they "can establish the agreement of the parties regarding its interpretation".

1. Scope of relevant State practice

120. Whether a certain conduct amounts to a relevant subsequent treaty practice by a State depends, inter alia, on the applicable rules of attribution. In its articles on State Responsibility for internationally wrongful acts (ASR) the Commission has adopted rules on the attribution of conduct to a State.[242] The determination of State responsibility, however, serves a different purpose than the attribution of practice for the purpose of identifying relevant interpretative practice. The range of possible wrongful acts by a State is necessarily much wider than those which are "in application of" a treaty. It is, for example, difficult to conceive of a relevant treaty practice by way of the "conduct of an organ of a State" which "exceeds its authority" (article 7 ASR), or by way of the "conduct of an insurrectional movement" (article 10 ASR).

121. The pertinent rules of attribution for the present purpose of treaty interpretation must therefore be derived from the specific character of the interpretation and the application of treaties by their parties. This suggests that only such conduct which is undertaken or deemed to be accepted by those organs of a State party which are internationally regarded as being responsible for the application of the treaty (as a whole, or of a particular provision of a treaty) may be attributed to a State. Subsequent practice of States may certainly be performed by high-ranking government officials in the sense of article 7 of the Vienna Convention. Yet, since many treaties are typically not applied by high government officials, international courts and tribunals have recognized that the conduct of minor authorities, or even other actors, can also be relevant subsequent conduct for the interpretation of a treaty. Thus, ICJ has recognized in the case concerning the rights *of Nationals of the United States of America in Morocco* that article 95 of the Act of Algeciras had to be interpreted flexibly in light of the inconsistent practice of local customs authorities.[243] In the *Kasikili/Sedudu* case, ICJ even considered that the regular use of an island on the border between Namibia (former South-West Africa) and Botswana (former Bechuanaland) by members of a local tribe, the Masubia, could be regarded as subsequent practice in the sense of article 31 (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,

[242] General Assembly resolution 56/83, annex.

[243] *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)* [1952] *I.C.J. Reports 1952*, p. 211.

> and second, that the Bechuanaland authorities were fully aware and accepted this as a confirmation of the treaty boundary.[244]

122. The *Temple* case, however, illustrates that situations may arise in which the conduct of minor officials and local practice cannot be attributed to the State. Trying to defend a boundary, Thailand argued that certain maps, delivered by France and apparently deviating from the line which had originally been agreed on, had only been "seen" by Siamese officials of lower rank who were not in a position to agree on behalf of Siam with the boundary line as it was drawn on the maps. By holding that:

> If the Siamese authorities did show these maps only to minor officials, they clearly acted at their own risk, and the claim by Thailand could not, on the international plane, derive any assistance from that fact.[245]

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

123. The jurisprudence of arbitral tribunals confirms that relevant subsequent practice can emanate from lower government officials if they can be internationally expected as being responsible for the application of the treaty. In the *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.[246] And in the case concerning the *Tax regime governing pensions paid to retired UNESCO officials residing in France*, the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice, but ultimately considered a few official pronouncements by a higher authority, the French government, to be decisive.[247]

124. It follows that the practice of lower and local authorities in the application of a treaty can be considered to be relevant subsequent practice for the purpose of treaty interpretation when the higher authorities can be expected to be aware of this practice and to accept it as an element of treaty interpretation or application.[248]

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[244] *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999] *I.C.J. Reports 1999*, p. 1095, para. 74.

[245] *Case concerning the Temple of Preah Vihear* (see footnote 139), p. 25.

[246] *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 of 16 May 1980, *Reports of International Arbitral Awards*, vol. XIX, part III, p. 103, para. 31.

[247] *Question of the tax regime governing pensions paid to retired UNESCO officials residing in France*, Award of 14 January 2003, *Reports of International Arbitral Awards*, vol. XXV, part IV, p. 257, para. 66 and p. 259, para. 74.

[248] See also M. Kamto, "La volonté de l'État en droit international" (2004) *Recueil des Cours*, vol. 310, pp. 141-144.

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

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

126. The Iran-United States Claims Tribunal, being concerned with matters which involve a close cooperation between State organs and private entities, has been confronted with the question of whether certain conduct by private entities could be attributed to one of the two States for the purpose of determining relevant subsequent State practice:

> It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty. Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be attributed as such to the United States as the other party to the Algiers Declarations.[249]

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

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

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[249] *The United States of America (and others)* and *the Islamic Republic of Iran (and others)* (see footnote 81), p. 71; similarly *the Islamic Republic of Iran v. the United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim) (9 September 2004) (Iran-USCTR) paras. 127 and 128; see also Dissenting Opinion of President Lagergren in *International Schools Services, Inc. (ISS)* and *National Iranian Copper Industries Company (NICICO)* (see footnote 81), pp. 348 and 353: "the provision in the Vienna Convention on subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case".

> States. Such subsequent practice of the parties is decisive and provides additional evidence in support of Iran's argument.[250]

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

129. The European Court of Human Rights seems to be the only[251] international judicial body to have occasionally considered "increased social acceptance"[252] (of certain behaviour or personal characteristics) and "major social changes"[253] to be relevant, for the purpose of treaty interpretation, without clearly linking such developments in society to specific decisions of State organs. The two most important[254] cases are *Dudgeon v. the United Kingdom*[255] and *Christine Goodwin v. the United Kingdom*.[256]

130. *Dudgeon v. the United Kingdom* concerned the right of mutually consenting adult homosexuals not to be criminalized for their sexual intercourse. The Court held with respect to the Northern Irish legislation at the time that "as compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour".[257] The Court based this assertion on the fact

> that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.[258]

131. *Christine Goodwin v. the United Kingdom* concerned the right of transsexuals to marry in their assigned gender.[259] In this case the Court stated that it "must have regard to the changing conditions within the respondent State and within Contracting States generally"[260] and admonished the respondent State that it:

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[250] Dissenting Opinion of Parviz Ansari in *The United States of America (and others)* and *The Islamic Republic of Iran (and others)*, Award No. 108-A-16/582/591-FT (1985), 9 Iran-USCTR, pp. 97 and 99.

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

[252] *Christine Goodwin v. the United Kingdom*, ECHR 2002-VI, para. 85.

[253] *Christine Goodwin* (see footnote 252), para. 100.

[254] See also *I. v. the United Kingdom* [GC] Application No. 25680/94 (ECtHR, 11 July 2002), para. 65; *Burden and Burden v. the United Kingdom*, Application No. 13378/05 (ECtHR, 12 December 2006), para. 57; *Shackell v. the United Kingdom* (Decision) Application No. 45851/99 (ECtHR, 27 April 2000), para. 1; *Schalk and Kopf v. Austria*, Application No. 30141/04 (ECtHR, 24 June 2010), para. 58, selected for publication in *Reports of Judgments and Decisions*, citing *Christine Goodwin* (see footnote 252), para. 100.

[255] *Dudgeon v. the United Kingdom* (1981) (ECtHR), Series A, No. 45.

[256] *Christine Goodwin* (see footnote 252).

[257] *Dudgeon* (see footnote 255), para. 60.

[258] Ibid.

[259] *Christine Goodwin* (see footnote 252).

[260] Ibid., para. 74.

> had not yet taken any steps to (...) [keep the need for appropriate legal measures under review] despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted.[261]

132. A close analysis of the Court's case law, however, reveals that the invocation by the Court, for the purpose of treaty interpretation, of "social changes" or "social acceptance" ultimately remained linked to State practice. In *Dudgeon v. the United Kingdom* the Court demonstrated the "increased tolerance of homosexual behaviour" by pointing to the fact "that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied" and that it could therefore not "overlook the marked changes which have occurred in this regard in the domestic law of the member States".[262] The Court further pointed to the fact that "in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law".[263] Even 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 of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".[264]

133. Invocation of "social acceptance" by the European Court of Human Rights is rare and has been limited to cases which concerned marginal groups whose situations had not been fully considered within the political and legal system of the State concerned.[265] In contrast, the Court does not rely on politically contested social developments. In *Johnston v. Ireland*, for example, which concerned the claim that the right to marry implied the right to have a divorce in order to be able to remarry, "the applicants set considerable store on the social developments that have occurred since the Convention was drafted, notably an alleged substantial increase in marriage breakdown".[266] The Court, however, while recognizing "that the Convention and its Protocols must be interpreted in the light of present-day conditions" refused to take a closer look at those "social developments" and concluded that it could not "by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset".[267] In the same vein, the Court held in *Schalk and Kopf v. Austria*:

> although, as it noted in *Christine Goodwin*, the institution of marriage has undergone major social changes since the adoption of the Convention, the Court note[s] that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage.[268]

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[261] Ibid., para. 92.
[262] *Dudgeon* (see footnote 255), para. 60.
[263] Ibid.
[264] *Christine Goodwin* (see footnote 252), para. 85, see also para. 90.
[265] See Jeffrey A. Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights" (2004), *Columbia Journal of International Law*, vol. 11, p. 145.
[266] *Johnston* (see footnote 42), para. 53.
[267] Ibid.
[268] *Schalk* (see footnote 254), para. 58.

134. Thus, the Court typically determines, explicitly or implicitly, whether social developments are actually reflected in State practice and it takes this reflection in legislative or administrative practice as being the most relevant indicator.[269] This was true, for example, in cases concerning the status of children born out of wedlock[270] and in cases which concerned the alleged right of Gypsy people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.[271] The European Court of Human Rights has only exceptionally implied that the existence of contrary legislation in the respondent State was due to administrative or legislative inertia and did not anymore reflect the considered view of the responsible State bodies.[272] It can therefore be concluded that mere (subsequent) social practice, as such, is not sufficient to constitute relevant subsequent treaty practice but that it must be supported by some form of accompanying State practice.

3. Practice of other actors as evidence of State practice

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

(a) International organizations

136. Decisions, resolutions and other practice by international organizations can possess relevance for the interpretation of treaties in their own right. This is recognized, for example, in article 2 (j) of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations of 1986, which mentions the "established practice of the organization" as one form of the "rules of the organization". This aspect of subsequent practice to a treaty will be the subject of a later report. Here, the focus is limited to whether the practice of international organizations may be indicative of, or evidence for, relevant State treaty practice.

137. In this sense, collections and other reports by international organizations on subsequent State practice can possess, more or less, evidentiary weight. Reports by

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[269] But see George Letsas, "Strasbourg's Interpretative Ethic: Lessons for the International Lawyer" (2010) *European Journal of International Law*, vol. 21, No. 3, p. 530.

[270] *Mazurek v. France*, ECHR 2000-II, para. 52 ("The Court notes at the outset that the institution of the family is not fixed, be it historically, sociologically or even legally"); see also *Marckx v. Belgium* (1979) Series A, No. 31, para. 41; *Inze v. Austria* (1987) Series A, No. 126, para. 44; and *Brauer v. Germany*, Application No. 3545/04 (ECtHR, 28 May 2009) para. 40, selected for publication in *Reports of Judgments and Decisions*.

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

[272] *Christine Goodwin* (see footnote 252), para. 92.

organizations at the universal level which are prepared on the basis of a specific mandate to provide accounts on the State practice in a particular field enjoy considerable authority without necessarily being authoritative in all cases. For example, State officials who are responsible for interpreting and applying the Convention relating to the Status of Refugees resort to the Office of the United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* as a reference work for State practice.[273] Although the UNHCR Handbook is sometimes loosely referred to as if it would itself express State practice, this view has correctly been rejected by the Federal Court of Australia in *Semunigus v. the Minister for Immigration and Multicultural Affairs*.[274] Another example is the work of the United Nations Security Council Committee established pursuant to resolution 1540 (2004)[275] which has proved to be of relevance for the interpretation of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction.[276] As part of its work on the implementation of Security Council resolution 1540 (2004), the Committee entertains a systematic compilation of implementation measures taken by member States, the so-called 1540 matrix.[277] As far as the matrix relates to the implementation of the Biological Weapons Convention, as well as to the 1993 Chemical Weapons Convention,[278] it is a source of evidence of subsequent State practice with regard to the said treaties.[279]

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[273] 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 — re-edited) (HCR/IP/4/Eng/REV.1) foreword at para. VII; see also Gardiner (footnote 171), p. 239.

[274] Federal Court of Australia, *Semunigus v. the Minister for Immigration and Multicultural Affairs* [1999] FCA 422 (14 April 1999) paras. 5-13; this does not exclude that the Handbook possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based not only on its quality as a professional collection, but also on article 35(1) of the Convention relating to the Status of Refugees according to which "the Contracting States undertake to cooperate with the Office of the United Nations High (…) in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention".

[275] Security Council resolution 1540 (2004), para. 8 (c).

[276] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention) (adopted 10 April 1972, entered into force 26 March 1975) United Nations, *Treaty Series*, vol. 1015, No. 14860.

[277] According to the 1540 Committee's webpage, "the 1540 Matrix has functioned as the primary method used by the 1540 Committee to organize information about implementation of United Nations Security Council resolution 1540 (2004) by Member States (…) The 1540 Committee uses the matrices as a reference tool to examine the status of implementation of Security Council resolution 1540 and in its dialogue with States as a tool to identify lacunae existing at national level and facilitate technical assistance". (see http://www.un.org/en/sc/1540/1540/national-implementation/matrix/shtml, accessed 30 March 2012).

[278] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention) (adopted 13 January 1993, entered into force on 29 April 1997) United Nations, *Treaty Series*, vol. 1974, No. 33757.

[279] See Gardiner (footnote 171), p. 239.

(b) Non-governmental organizations

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

139. This is the case, for example, for the Landmine and Cluster Munition Monitor, which is a joint initiative of the International Campaign to Ban Landmines and the Cluster Munition Coalition. The Monitor is described as the "de facto monitoring regime"[280] for the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention)[281] and the 2008 Convention on Cluster Munitions (Dublin Convention).[282] Apart from providing country profiles for States parties, signatories, States not parties and "Other Areas",[283] the Cluster Munition Monitor 2011 identifies different interpretative issues concerning the Dublin Convention, and lists pertinent statements and practice by States parties and signatories. These concern: the prohibition on assistance and interoperability; foreign stockpiling and transit; and the issue of disinvestment.[284]

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

(c) The special role of the International Committee of the Red Cross

141. The role which the International Committee of the Red Cross (ICRC) assumes with regard to the Geneva Conventions and the Additional Protocols is a case apart. ICRC, formally a private, non-profit association incorporated under Swiss domestic law,[285] has been a catalyst in the development of international humanitarian law

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[280] See at http://www.the-monitor.org, accessed 18 March 2012.

[281] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) United Nations, *Treaty Series*, vol. 2056, No. 35597.

[282] Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) (A/C.1/63/5, enclosure, part II).

[283] Cluster Munition Monitor 2011, pp. 59-344 (http://www.the-monitor.org/cmm/2011/pdf/Cluster_Munition_Monitor_2011.pdf, accessed 18 March 2012).

[284] Ibid., pp. 24-31; the same interpretative issues have already been assessed in the 2009 and 2010 reports.

[285] Hans-Peter Gasser, "International Committee of the Red Cross (ICRC)", para. 20, in *Max Planck Encyclopedia of Public International Law* (http://www.mpepil.com, accessed 25 March 2012) para. 20.

treaties since the original Geneva Convention of 1864.[286] ICRC has the legal personality in international law as the entity responsible for carrying out the mandate conferred on it by the international community through the Geneva Conventions and by the statutes of the International Red Cross and Red Crescent Movement.[287] In addition, ICRC occasionally provides interpretative guidance on the Geneva Conventions and the Additional Protocols, a mandate it derives from the statutes of the Movement, adopted at the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006.[288] 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.[289]

142. In 2009, ICRC published, on the basis of its mandate,[290] a note on "Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law".[291] The guidance is the outcome of an "expert process" conducted from 2003 to 2008 drawing from academic, military, governmental and non-governmental circles, all participating in their private capacity, but ostensibly basing their analysis on State treaty and customary practice. The interpretative guidance consists of 10 recommendations with accompanying commentary and "reflect[s] the ICRC's institutional position as to how existing international humanitarian law should be interpreted".[292] It is too early for a general assessment of the significance of the Guidance, but its impact on the subsequent practice of States will be of interest.

143. In this context, States have reaffirmed their role in the development of international humanitarian law. While resolution 1 of the 31st International Red Cross and Red Crescent Conference of 2011 recalls "that one of the important roles of the ICRC (…) is in particular 'to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof'" it also emphasizes "the primary role of States in the development of international humanitarian law".[293] It should be noted that ICRC purports to interpret international humanitarian law as such, and not only the

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[286] Ibid., para. 14.

[287] Ibid., para. 25.

[288] See www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf, accessed 25 March 2012.

[289] Emphasis added.

[290] "[T]he responsibility for the interpretive guidance is assumed by ICRC as a neutral and independent humanitarian organization mandated by the international community of States to promote and work for a better understanding of international humanitarian law," citing article 5 (2) (c) and (g) of the statutes of the Movement (electronic version www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, accessed 25 March 2012).

[291] ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law; for the expert process, see http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm, accessed 25 March 2012.

[292] Ibid., p. 9.

[293] 31st International Conference 2011: Resolution 1 — Strengthening legal protection for victims of armed conflicts (1 December 2012) (http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm, accessed 25 March 2012).

Geneva Conventions and the Additional Protocols.[294] The distinction between subsequent practice of States parties pursuant to treaties and pursuant to general customary practice may thus be blurred.

4. Conclusion: draft conclusion 4

144. Taken together, these sources and considerations suggest the following draft conclusion:[295]

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.

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[294] See ICRC, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law (footnote 290), p. 9.

[295] See preliminary conclusion 9 of the Chair of the Study Group on Treaties over time, A/66/10, para. 344:

> **(9) Possible authors of relevant subsequent practice**
>
> Relevant subsequent practice can consist of acts of all State organs (executive, legislative, and judicial) which can be attributed to a State for the purpose of treaty interpretation. Such practice may under certain circumstances even include "social practice" as far as it is reflected in State practice.

VII. Future programme of work

145. The Special Rapporteur proposes to submit, for the session in 2014, his second report on further aspects of the topic, most of which have been addressed in his three reports for the Study Group on Treaties over time[296] and which the Study Group has, in part, discussed in 2011 and 2012.[297] In 2015, he envisages submitting the third report, in which he will discuss the practice of international organizations and on the jurisprudence of national courts.[298] In 2016, the Special Rapporteur will submit a final report, with revised conclusions and commentaries, in particular taking account of the discussions in the Commission and the debates in the Sixth Committee.

[296] See footnotes 4, 5 and 10.

[297] A/66/10, paras. 336-341; and A/67/10, paras. 225-240.

[298] As it was envisaged in the original proposal, see A/63/10, annex A, paras. 17, 18, 39 and 42.