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Subsidiary means for the determination of rules of international law

Elements in the previous work of the International Law Commission that could be particularly relevant to the topic

Memorandum by the Secretariat

Summary

The present memorandum was prepared in response to a request made by the International Law Commission at its seventy-third session (2022). It includes endeavours to identify elements in the previous work of the Commission that could be particularly relevant to the topic "subsidiary means for the determination of rules of international law".

The memorandum is presented in the form of observations and accompanying explanations. After addressing, in the introduction, a few preliminary issues regarding the mandate from the Commission to the Secretariat, the memorandum presents the Commission's conceptualization and understanding of judicial decisions and teachings for the determination of rules of international law.

The memorandum then presents an assessment of the Commission's use of judicial decisions and teachings in its work, its use of these materials when considering broader questions concerning the international legal system and interactions among the sources of international law, and, finally, sets out the ways in which the Commission has incorporated such materials into its methods of work.

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I. Introduction

1. At its seventy-second session (2021), the International Law Commission decided to include the topic "subsidiary means for the determination of rules of international law" in its long-term programme of work.[1] At its seventy-third session (2022), the Commission included the topic in its current programme of work and appointed Mr. Charles Chernor Jalloh as Special Rapporteur.[2] Also at that session, the Commission requested that the Secretariat prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to the topic.[3]

2. Article 38, paragraph 1 (d), of the Statute of the International Court of Justice provides that the Court, in resolving disputes submitted to it, shall apply, "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

3. To fulfil the request from the Commission, the Secretariat has engaged in a review of the Commission's work since 1949 with a view to identifying the aspects most relevant to the use of judicial decisions and the teachings of the most highly qualified publicists of the various nations. It is important to highlight that, except in those instances dealt with in section II of the present memorandum, where the Commission has set out its conceptual approach to the use of subsidiary means, the Commission has generally not stated expressly whether any particular reference in its work to judicial decisions or teachings was in fact a use of such materials as subsidiary means within the meaning of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. The memorandum takes a broad approach in the sense that examples of such references to judicial decisions and teachings are included without the Secretariat taking a view on whether the Commission was or was not relying on these materials as subsidiary means within the meaning of Article 38, paragraph 1 (d).

4. With the above caveat, the Secretariat has presented examples of the Commission's work that are relevant to an understanding of the concept of subsidiary means, that demonstrate the uses and values of the materials relied on by the Commission and, in some examples in section III, that the Commission has referred to when commenting on the nature of the international legal system and interactions among the sources of international law set out in Article 38, paragraph 1, of the Statute of the International Court of Justice. These various aspects of the work of the Commission are reflected herein in the form of observations and, where appropriate, accompanying explanatory notes. In addition, the Secretariat has included observations concerning the use of such materials in the Commission's methods of work.

5. In developing the present memorandum, the Secretariat drew guidance from the issues identified as relevant to the topic in the syllabus prepared by Mr. Charles Chernor Jalloh.[4] The syllabus dealt, inter alia, with the scope and terminology regarding subsidiary means in the determination of rules of international law, the

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 302. By its resolution 76/111 of 17 December 2021, the General Assembly took note of the inclusion of the topic in the Commission's long-term programme of work.

[2] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 20.

[3] Ibid., para. 245.

[4] See Annex to the Commission's 2021 report, *Official Records of the General Assembly, Seventy-sixth Session, Supplement No* (A/76/10).

weight and value assigned to subsidiary means, their functions, and their relationship with sources of international law.[5]

6. It is important to note at the outset that the amount of work required to carry out a review of the Commission's yearbooks since 1949, to compile and analyse the relevant material, and to draft the memorandum, were such that the Secretariat has had to follow a pragmatic and expedient methodology. First, although various aspects of the Commission's working methods, such as the reports of Special Rapporteurs and debates in plenary, may be relevant to the present memorandum, they are not its central focus. This is because these aspects do not represent the work of the Commission as such, but rather the views of the Special Rapporteurs and other individual members of the Commission. The Secretariat has largely focused on the texts adopted in second reading with commentaries,[6] and the final reports of study groups.[7] The final versions of such drafts and commentaries were considered best to reveal the Commission's collective approach to subsidiary means. Second, given the volume of material relevant to the preparation of the memorandum, what is presented is a selection of examples that illustrate the observations rather than comprehensive supporting material.

7. Before proceeding to the observations, it is useful briefly to address in this introduction a few preliminary matters, including those concerning the Commission's previous work related to judicial decisions and the teachings of the most highly qualified publicists of the various nations.

8. The first preliminary point to highlight is that the Commission has referred to decisions of courts and tribunals, and to the teachings of publicists, in nearly all of the topics it has completed. However, as highlighted above, such references are not necessarily all within the scope of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

9. The second preliminary point is that Article 38, paragraph 1 (d), of the Statute of the International Court of Justice states that it is "subject to the provisions of Article 59" of that Statute. Article 59 concerns the binding force of judgments of the International Court of Justice between the parties in respect of the particular case concerned. For these parties, such judgments have binding force. They are not subsidiary means for the determination of the rights and obligations *inter partes* decided by the Court in the particular case.

10. The third preliminary point is that there is a difference between the classification of materials in Article 38, paragraph 1, of the Statute of the International Court of Justice, which concerns the sources of international law and subsidiary means that the International Court of Justice is to apply, and that in Article 24 of the Commission's Statute, which states that the Commission "shall consider ways and means for making the evidence of customary international law more readily available", including the collection and publication of documents "concerning State practice and of the decisions of national and international courts on questions of international law…".[8] The Commission submitted a report to the General Assembly in 1950 addressing

[5] *Ibid.*, Annex, para. 38.

[6] The review also included the first reading texts and titles of the articles on immunity of State officials from foreign criminal jurisdiction, adopted by the Commission on first reading at its seventy third session (2022).

[7] The final reports of the Study Groups on the Fragmentation of International Law, on the obligation to extradite or prosecute (a*ut dedere aut judicate)*, and the Most Favored Nations Clause.

[8] Article 24 of the Statute of the Commission provides that:

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

"Ways and means for making the evidence of customary international law more readily available" that highlighted this statutory distinction:

> 30. Article 24 of the Statute of the Commission seems to depart from the classification of article 38 of the Statute of the Court, by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts.[9]

The same report then addressed the role of the decisions of national courts, indicating that "the decisions of the national courts of a State are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law".[10]

11. The fourth preliminary point is that the present Commission topic "subsidiary means for the determination of rules of international law" is not the first occasion on which the Commission has conceptually addressed such materials, namely, *judicial decisions* and *the teachings of the most highly qualified publicists of the various nations*. When considering the sources of international law referred to in Article 38 of the Statute of the International Court of Justice in the context of its topics concerning interpretation of treaties, identification of customary international law and general principles of law, and also when considering peremptory norms of general international law (*jus cogens*), the Commission has analysed the use of judicial decisions and teachings. The Commission's draft conclusions and commentaries on these topics are particularly helpful because some of them address subsidiary means from a conceptual perspective.

12. Having addressed these preliminary matters in section I of the present memorandum, the remainder of the memorandum is divided into three further sections. Section II comprises observations and accompanying explanations concerning the Commission's conceptualization and understanding of the use of judicial decisions and teachings for the determination of rules of international law.

13. Section III addresses the practice of the Commission in its use of judicial decisions and teachings in the course of its work. It includes three subsections: first, a subsection with observations and select examples of the Commission's use of decisions of courts and tribunals, and of the writings of publicists; second, a subsection presenting observations and examples where judicial decisions and teachings have been used by the Commission to determine rules of treaty law and customary international law and general principles of law; and third, a subsection with observations and examples where the Commission has referred to judicial decisions and teachings when considering broader questions concerning the nature of the international legal system and interactions among the sources of international law contained in Article 38, paragraph 1 (a) to (c), of the Statute of the International Court of Justice.

14. Section IV contains observations concerning the ways in which judicial decisions and teachings have formed part of the methods of work used by the Commission to carry out its functions pursuant to its Statute. This methodology may be found in the yearbooks and annual reports of the Commission to the General Assembly, reports of Special Rapporteurs, memorandums prepared by the Secretariat, and also as part of the Commission's own outputs, which in some cases have included bibliographies containing judicial decisions and writings.

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[9] *Yearbook… 1950*, vol. II, p. 368, para. 30.

[10] *Ibid*., at p. 370, para. 54.

II. The Commission's conceptualization and understanding of the use of judicial decisions and teachings for the determination of rules of international law

15. The present section sets out observations relating to the Commission's conceptualization and understanding of the use of judicial decisions and teachings in its work, some of which refer expressly to subsidiary means within the meaning of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. It also highlights those aspects of the Commission's work that have identified the dual role that national judicial decisions may serve as a form of State practice and also as subsidiary means for the determination of rules of international law. The section also presents observations concerning criteria that the Commission has referred to for determining the value to be given to the various materials that it has relied on.

Observation 1

The Commission has followed the text of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice when formulating provisions concerning subsidiary means for the determination of rules of law.

16. In its recently concluded work on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission indicated that:[11]

> (2) Paragraph 1 of draft conclusion 9 contains two sentences. The first sentence provides that decisions of international courts and tribunals are a subsidiary means for determining the peremptory character of norms of general international law. *This provision mirrors Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, which provides, inter alia, that judicial decisions are a "subsidiary means for the determination of rules of law".* It is partly for that reason that paragraph 1 of draft conclusion 9 uses the words "means for determining" instead of "identifying" which has more often been resorted to in the present draft conclusions. (emphasis added)

A. Subsidiary means

Observation 2

The Commission has elaborated on the meaning of the term "subsidiary means" in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

17. The commentary to conclusion 13 of the conclusions on identification of customary international law presents the approach of the Commission to what is meant by the term "subsidiary means" when referring to judicial decisions:

> The term "subsidiary means" *denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law* (as are treaties, customary international law and general principles of law).[12]

[11] Para. (2) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), p. 43.

[12] Para. (2) of the commentary to conclusion 13 on identification of customary international law, *Yearbook…2018*, vol. II (Part Two), p. 109.

18. The commentary to conclusion 14 of the same conclusions, on teachings as means to identify rules of customary international law, followed the same approach:

> As with decisions of courts and tribunals, referred to above in draft conclusion 13, *writings are not themselves a source of international law, but may offer guidance for the determination of the existence and content of rules of customary international law*. This auxiliary role recognizes the value that the teachings may have in collecting and assessing State practice; in identifying divergences in State practice and the possible absence or development of rules and in evaluating the law.[13] (emphasis added)

19. The commentary to conclusion 14 further indicated that:[14]

> Following closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, it provides that such works may be resorted to as subsidiary means (*moyen auxiliaire*) for determining rules of customary international law, that is to say, when ascertaining whether there is a general practice that it is accepted as law (accompanied by *opinio juris*).

20. A similar approach was followed in the context of identification and legal consequences of peremptory norms of general international law (*jus cogens*), indicating that:

> It is important to emphasize that the use of *the word "subsidiary" in this context* is not meant to diminish the importance of such materials, but rather *aimed at expressing the idea that those materials facilitate the identification of "acceptance and recognition" but do not, in themselves, constitute evidence of such acceptance and recognition*.[15] (emphasis added)

B. Judicial decisions

21. The Commission has followed the position regarding International Court of Justice decisions established by Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, for example in the commentary to conclusion 13 on identification of customary international law, the Commission stated that conclusion 13:[16]

> [f]ollows closely the language of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, according to which, while decisions of the Court have no binding force except between the parties, judicial decisions are a subsidiary means for the determination of rules of international law, including rules of customary international law.

Observation 3

> **The Commission has expressed its views on what it considers to be "decisions" of courts and tribunals.**

22. In the conclusions on identification of customary international law the Commission noted that, for the purpose of conclusion 13:[17]

> …the term "decisions" includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters. Separate and dissenting opinions

[13] *Ibid*., at p. 110, para (2) of the commentary to conclusion 14.
[14] *Ibid*, para. (1) of the commentary to conclusion 14 on identification of customary international law, p. 110.
[15] Para. (1) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), (footnote 11 above), p. 43.
[16] Para. (2) of the commentary to conclusion 13 on identification of customary international law, (footnote 12 above), p. 109.
[17] Para. (5) of the commentary to conclusion 13 on identification of customary international law, (footnote 12 above), p. 109.

may shed light on the decision and may discuss points not covered in the decision of the court or tribunal, but they need to be approached with caution since they reflect the viewpoint of the individual judge and may set out points not accepted by the court or tribunal.

23. The commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*) interpreted the text of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice "decisions of courts" as comprising "both decisions of international courts and decisions of national courts".[18]

Observation 4

The Commission has expressed its views on which bodies are considered national or international courts and tribunals.

24. In the context of identification of customary international law, the Commission indicated in the commentary to conclusion 13 that the term "international courts and tribunals" was intended to cover "any international body exercising judicial powers that is called upon to consider rules of customary international law". The Commission noted that the term "includes (but is not limited to) specialist and regional courts, such as the International Tribunal for the Law of the Sea, the International Criminal Court and other international criminal tribunals, regional human rights courts and the World Trade Organization Dispute Settlement Body. It also includes inter-State arbitral tribunals and other arbitral tribunals applying international law".[19]

25. In the commentary to the same conclusion, the Commission noted that the distinction between national and international courts may sometimes not be clear, and included in the definition of national courts "courts … within one or more legal systems, such as 'hybrid' courts and tribunals involving mixed national and international composition and jurisdiction".[20]

Observation 5

The Commission has indicated that judicial decisions may support the methodology used to identify and interpret rules of international law.

26. The decisions of the International Court of Justice and other courts and tribunals have been used to guide the Commission's methodology in the identification of rules of international law, and the methodology used to interpret treaty provisions.[21]

27. In the context of its work on identification of customary international law, for example, the Commission clarified that "…reference in these commentaries to

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[18] Para. (5) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), (footnote 11 above), p. 45, referring to Article 38, paragraph 1(d) of the Statute of the International Court of Justice.

[19] See also, para. (4) of the commentary to conclusion 13 on identification of customary international law, (footnote 12 above), p. 109.

[20] Para. (6) of the commentary to conclusion 13 on identification of customary international law, *ibid*, pp. 109–110.

[21] Para. (18) of the commentary to article 28 on the law of treaties, *Yearbook…1966*, Vol. II, p. 223. ("In practice, international tribunals, as well as States and international organizations, have recourse to subsidiary means of interpretation, more especially *travaux préparatoires*, for the purpose of confirming the meaning that appears to result from an interpretation of the treaty in accordance with article 27.")
Para. (18) of the commentary to guideline 1.2. of the guide to practice on reservations, *Yearbook… 2011*, vol. II (Part Three), p. 54. ("Suffice it to say, in a phrase often recalled by the International Court of Justice, that "the expression 'to construe' ["interprétation" in French] must be understood as meaning to give a precise definition of the meaning and scope" of a binding legal instrument, in this case a treaty.")

particular decisions of courts and tribunals is made in order to illustrate the methodology of the decisions, not for their substance".[22]

28. The report of the Study Group on fragmentation of international law referred to judicial decisions as a means of study of possible normative conflict where international courts and tribunals interpret the law differently in analogous situations. The Commission noted that:[23]

> The point is not to take a stand in favour of either Tadic or Military and Paramilitary Activities in and against Nicaragua, *only to illustrate the type of normative conflict where two institutions faced with analogous facts interpret the law in differing ways*. (emphasis added)

29. In the guide to practice on reservations to treaties, the Commission referred to the approach of the International Court of Justice to determining the object and purpose of a treaty, taking into account various elements, including, among others, the title, preamble, preparatory works and articles indicating the objective, while also doubting that this could be regarded as a "method" for such determination.[24] The Commission noted that:[25]

> (4) It is difficult, however, to regard this as a "method" properly speaking: these disparate elements are taken into consideration, sometimes separately, sometimes together, and the Court forms a "general impression", in which subjectivity inevitably plays a considerable part. Since, however, the basic problem is one of interpretation, it would appear to be legitimate, mutatis mutandis, to transpose the principles in articles 31–32 of the Vienna Conventions applicable to the interpretation of treaties – the "general rule of interpretation" set forth in article 31 and the "supplementary means of interpretation" set forth in article 32 – and to adapt them to the determination of the object and purpose of the treaty.

Observation 6

> **The decisions of national courts have been referred to by the Commission as having a dual role.**

30. The Commission has referred to the use of decisions of national courts not only as subsidiary means for the determination of rules of international law, but also as a form of State practice. The Commission has additionally considered the decisions of national courts to be one of the multiple forms of subsequent practice of States that may be relevant for the interpretation of treaties.[26]

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[22] Para. (6) of the commentary to conclusion 1 on identification of customary international law, (footnote 12 above), p. 93, footnote 643.

[23] Final report of the study group on the fragmentation of international law, *Yearbook…2011*, vol. II (Part One), addendum one, para. 51, p. 18.

[24] Paras. (3) of the commentary to guideline 3.1.5.1 on reservations to treaties (footnote 21 above), p. 216.

[25] *Ibid.*, at para. (4) of the commentary to guideline 3.1.5.1 on reservations to treaties.

[26] Conclusion 5, paragraph 1, on subsequent agreements and subsequent practice, *Yearbook…2018*, vol. II (Part Two), p. 24. ("Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, *judicial*, or other functions.") (emphasis added)
Para. (35) of the commentary to conclusion 4 on subsequent agreements and subsequent practice, *ibid.*, p. 38. ("Such "conduct by one or more parties in the application of the treaty" may, in particular, consist of a direct application of the treaty in question, conduct that is attributable to a State party as an application of the treaty, a statement or a judicial pronouncement regarding its interpretation or application.")

31. In the commentary to the conclusions on identification of customary international law, the Commission stated that "…decisions of national courts may serve a dual role in the identification of customary international law. On the one hand,…they may serve as practice as well as evidence of acceptance as law (*opinion juris*)" and "…on the other hand,…such decisions may also serve as a subsidiary means (*moyen auxiliaire*) for the determination of rules of customary international law when they themselves examine the existence and content of such rules".[27]

32. The Commission stressed in the commentary to the conclusions on identification of customary international law that "[t]he role of decisions of national courts as a form of State practice is to be distinguished from their potential role as 'subsidiary means' for the determination of rules of customary international law".[28] Furthermore, it called for caution "when seeking to rely on decisions of national courts as subsidiary means for the determination of rules of customary law", noting that such courts operate in a specific legal system and may reflect a particular national perspective.[29]

33. The Commission also considered that decisions of national courts may have a dual role, as evidence of acceptance of a rule as one of a peremptory character, and as subsidiary means for the determination of the peremptory character of a norm of general international law (*jus cogens*). As in its approach to national court decisions in the context of the identification of customary international law, the Commission used the terms "may also" and "as appropriate" to indicate that, while national court decisions may serve as subsidiary means for the determination of peremptory norms of general international law, they should be approached with caution.[30]

34. In the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission refers in the commentary to the decisions of national courts as "[e]vidence of acceptance and recognition that a norm of general international law is a peremptory norm of general international law (*jus cogens*)".[31] The Commission added that "the relevance of the decision of the court concerns whether it evidences that State's position and not its broader assessment of the recognition and acceptance of the norm in question by the international community of States as a whole as peremptory in nature".[32]

C. Teachings of the most highly qualified publicists of the various nations

Observation 7

The Commission has expressed views on the meaning of "teachings of the most highly qualified publicists of the various nations" in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

35. In the commentary to the conclusions on identification of customary international law, the Commission referred to teachings as a subsidiary means for the

[27] Para. (1) of the commentary to conclusion 13 on identification of customary international law, (footnote 12 above), p. 149.

[28] Para. (6) of the commentary to conclusion 6 on identification of customary international law, (footnote 12 above), p. 99.

[29] Para. (7) of the commentary to conclusion 13 on identification of customary international law, *ibid.*, p. 110.

[30] Para. (5) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (footnote 11 above), p. 45.

[31] Draft conclusion 8 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *ibid.*, pp. 12–13.

[32] Para. (6) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *ibid.*, p. 45.

determination of rules of customary international law and elaborated on the meaning of "the most highly qualified publicists of the various nations" in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. It noted:[33]

> (4) The term "publicists", which comes from the Statute of the International Court of Justice, covers all those whose writings may elucidate questions of international law. While most such writers will, in the nature of things, be specialists in public international law, others are not excluded. The reference to "the most highly qualified" publicists emphasizes that attention ought to be paid to the writings of those who are eminent in the field.…The reference to publicists "of the various nations" highlights the importance of having regard, so far as possible, to writings representative of the principal legal systems and regions of the world and in various languages when identifying customary international law.

Observation 8

The Commission has, on occasion, used alternatives to the phrase "teachings" of the most highly qualified "publicists".

36. On certain occasions, the Commission has used the terms "literature"[34] and "writings"[35] in place of the term "teachings", and has used the terms "jurists",[36] "writers"[37] and "commentators"[38] in place of the term "publicists".

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[33] Para. (4) of the commentary to conclusion 14 on identification of customary international law, (footnote 12 above), p. 110.

[34] Para. (12) of the commentary to article 10 on the responsibility of States for internationally wrongful acts, *Yearbook…2001*, vol. II (Part Two), p. 51. ("Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10.")

[35] Para. (2) of the commentary to article 16 on the effect of armed conflicts on treaties, *Yearbook…2016*, vol. II (Part Two), p. 119. ("In particular, the primacy of Security Council decisions under Article 103 has been widely accepted in practice as well as in writings on international law.")

[36] See, for example, para. (4) of the commentary to article 7 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 46, addressing the attribution of conduct of organs or agents of a State even if it exceeds its authority or contravenes instructions, noting that "[t]he modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists."

[37] See, for example, para. (2) of the commentary to article 37 on diplomatic intercourse and immunities mentioned that at the time, the practice was not uniform in relation to the privileges and immunities of a diplomatic agent of the receiving State, "and the opinion of writers is also divided", *Yearbook…1958*, vol. II, p. 102.
See also para. (3) of the commentary to article 39 on the law of the sea, where the Commission noted that it followed "the line taken by most writers on the subject", *Yearbook…1956*, vol. II (Part Two), p. 282.
Para. (4) of the commentary to article 4 on identification of customary international law, (footnote 12 above), p. 97, noted that "[w]hile writers have from time to time sought to devise alternative approaches to the identification of customary international law, emphasizing one constituent element over the other or even excluding one element altogether, such theories have not been adopted by States or in the case law.")

[38] See para. (4) of the commentary to conclusion 3 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), pp. 30–31.

37. The term "doctrine"[39] has been used to refer collectively to the writings of a group of publicists.[40] For example, in the commentary to the articles on the most-favoured-nation clause, the Commission noted that up to the first decades of the twentieth century "international doctrine and practice were divided" on the interpretation of most-favoured-nation clauses that did not express whether they were conditional or not.[41] The Commission later concluded that "the doctrine and State practice today favour the presumption of the unconditionality of the most-favoured-nation clause".[42] The Commission has referred to the work of private expert bodies as part of doctrine.[43]

Observation 9

The Commission has referred to the forms that "teachings" may take.

38. In the commentary to the conclusions on identification of customary international law, the Commission noted that the term "teachings", "often referred to as 'writings', is to be understood in a broad sense; it includes teachings in non-written form, such as lectures and audiovisual materials".[44]

Observation 10

The Commission has sometimes referred to the outputs of expert bodies that may serve as subsidiary means.

39. The Commission has on occasion referred to the outputs of expert treaty bodies and also to the outputs of expert bodies established by States or international organizations that may serve as subsidiary means.

40. The Commission defined an expert treaty body in the commentary to the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties as one "consisting of experts serving in their personal

[39] Para. (2) of the commentary to article 3 on succession of States in respect of State property, archives and debts, *Yearbook…1981*, vol. II, part two, p. 108 ("It is on the basis of this assumption that State practice and legal doctrine will be examined in the following paragraphs")
Para. (2) of the commentary to article 21 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 75 mention that "Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate."
Para. (3) of the general comment to the guidelines on the protection of the atmosphere, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/76/10), p. 15. ("It is recalled that the expression [common concern of mankind] has commonly been used in the field of environmental law, even though doctrine is divided on its scope, content and consequences.")

[40] See, for example, para. (2) of the commentary to article 1 on nationality of natural persons in relation to the succession of States, *Yearbook…1999*, vol. II, p. 25 ("(2) The Commission acknowledges that the positive character of article 15 has been disputed in the doctrine.")
See also, para. (17) of the commentary to guideline 1.6.1 on reservations to treaties, (footnote 21 above) p. 79, mentioning that "Thus a "reservation" to a bilateral treaty appears to be a proposal to amend the treaty in question or an offer to renegotiate it. This analysis corresponds to the prevailing views in doctrine."

[41] Para. (12) of the commentary to article 10 on the Most Favoured Nation clauses, *Yearbook… 1978*, vol. II (Part Two), p. 35.

[42] Para. (22) of the commentary to article 10 on the Most Favoured Nation clauses, *ibid.*, p. 37.

[43] See, for example, para. (12) of the commentary to guideline 1.4. of the Guide to Practice on reservations, (footnote 21 above), p. 65, footnote 243. (The inherent conditional character of reservations is stressed in numerous doctrinal definitions, including that of the Harvard Law School (Research in International Law of the Harvard Law School, "Draft Convention on the Law of Treaties", *American Journal of International Law*, 1935, Supplement No. 4, p. 843…")

[44] Para. (1) of the commentary to article 14 on identification of customary international law, (footnote 12 above), p. 110.

capacity, which is established under a treaty and is not an organ of an international organization".[45]

41. In the same text, the Commission referred to the terms used by treaties to refer to the outputs of expert treaty bodies and explained the rationale for the use of the term "pronouncements":[46]

> Treaties use various terms for designating the forms of action of expert treaty bodies, for example "views", "recommendations", "comments", "measures", and "consequences." Draft conclusion 13 employs, for the purpose of the present draft conclusion, the general term "pronouncements." This term covers all relevant factual and normative assessments by expert treaty bodies. Other general terms that are in use for certain bodies include "jurisprudence" and "output". Such terms are either too narrow, suggesting a particular legal significance of the output of such a body, or too broad, covering any act of an expert treaty body, to be appropriate for the purpose of this draft conclusion, which applies to a broad range of expert treaty bodies.

42. The Commission has used the term "works" to refer to the final outcomes of expert bodies and the work leading up to those final outcomes.[47]

43. The draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) also mentioned that the works of "expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law".[48]

Observation 11

> **The Commission has referred in various ways to those whose teachings could serve as subsidiary means for the determination of rules of international law, including private expert bodies and bodies created by States and international organizations.**

44. The Commission has referred on a number of occasions to the outputs of international bodies engaged in the codification of international law.

45. In the commentary to the conclusions on identification of customary international law, for example, the Commission has recognized the value of the work of collective bodies engaged in the codification and development of international law as teachings. In this regard, the Commission noted that:[49]

> The output of international bodies engaged in the codification and development of international law may provide a useful resource in this regard. Such collective bodies include the Institute of International Law (*Institut de droit international*)

[45] Para. (1) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), p. 82.

[46] Para. (6) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *ibid.*, p. 83.

[47] Para. (8) of the commentary to draft article 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (footnote 11 above), p. 46. ("The term "works" covers not only the final outcomes of the expert bodies but also their work leading up to the final outcome.")

[48] Conclusion 9, paragraph 2, on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *ibid.*, p. 43.

[49] Para. (5) of the commentary to article 14 on identification of customary international law, (footnote 12 above), p. 110.

and the International Law Association, as well as international expert bodies in particular fields from different regions.

46. In the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission referred to the work of expert bodies established by States or international organizations, noting that:

> The paragraph [2 of draft conclusion 9] lists, as examples of other subsidiary means, the works of expert bodies and teachings of the most highly qualified publicists of the various nations, also referred to as scholarly writings.[50]

47. The Commission has also drawn a distinction between bodies established by States or international organizations, and private bodies, while acknowledging that the pronouncements of the latter may also serve as subsidiary means:[51]

> The phrase "established by States or by international organizations" means that private organizations which do not have an intergovernmental mandate are not included in the categories of expert bodies. This does not mean that the works of expert bodies without an intergovernmental mandate are irrelevant. The works of the Institute of International Law or the International Law Association may, for example, qualify as "teachings of the most highly qualified publicists" under paragraph 2 of draft conclusion 9.

Observation 12

> **The Commission has referred to subsidiary means within the meaning of Article 38, paragraph 1 (d), as a non-exhaustive category of materials for the identification of peremptory rules of general international law (*jus cogens*).**

48. In its work on identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission mentioned the potential existence of other subsidiary means that may assist in the identification of rules of international law. Draft conclusion 9 refers to decisions of national and international courts and tribunals, the works of expert bodies and the teachings of the most highly qualified publicists as possible subsidiary means for the determination of the peremptory nature of a norm of general international law.[52] The commentary explained that it was:

> …worth pointing out that the subsidiary means identified in paragraphs 1 and 2 of draft conclusion are not exhaustive. The means identified in the draft conclusion are, however, the most common subsidiary means that have been relied upon in the identification of peremptory norms of general international law (*jus cogens*).[53]

The Commission did not, however, provide specific examples of other materials that could also be considered as subsidiary means in the determination of rules of international law.

[50] Para. (7) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (footnote 11 above), pp. 45–46.

[51] Para. (8) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *ibid.*, p. 46.

[52] Draft conclusion 9, paragraph 2, on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *ibid.*, p. 43.

[53] Para. (12) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *ibid.*, p. 47.

D. The relative weight to be given to judicial decisions and teachings for the determination of rules of international law

49. The Commission has referred to the value or relative weight to be given to decisions of courts and teachings. In some topics, the Commission has highlighted the characteristics of certain bodies when assessing the legal significance of their decisions, giving a particular relevance to the work of the International Court of Justice and to its own work.

Observation 13

The Commission has recognized the special significance of the decisions of the International Court of Justice as the principal judicial organ of the United Nations.

50. The Commission has given special significance to the decisions of the International Court of Justice. In the commentary to the conclusions on identification of customary international law, it was noted that:[54]

> Express mention is made of the International Court of Justice, the principal judicial organ of the United Nations whose Statute is an integral part of the Charter of the United Nations and whose members are elected by the General Assembly and Security Council, in recognition of the significance of its case law and its particular position as the only standing international court of general jurisdiction.

51. In the draft conclusions on identification and legal consequences of peremptory norms of general international law, the Commission referred to the use of subsidiary means for the determination of the peremptory character of norms of general international law, referring to "decisions of international courts and tribunals, in particular, of the International Court of Justice".[55] The Commission added in the commentary that the explicit reference to the decisions of the International Court of Justice was particularly relevant as:[56]

> First, it is the principal judicial organ of the United Nations and its members are elected by the main political organs of the United Nations. Second, it remains the only international court with general subject-matter jurisdiction…When the International Court of Justice has pronounced itself expressly on peremptory norms of general international law (*jus cogens*), its decisions have been even more influential.

Observation 14

The Commission has suggested criteria to assist in identifying the value to be given to judicial decisions as subsidiary means for the determination of rules of customary international law.

52. The Commission has set out a number of factors to be taken into consideration when using a court decision as subsidiary means:[57]

> Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is

[54] Para. (4) of the commentary to conclusion 13 on identification of customary international law, (footnote 12 above), p. 109.

[55] Draft conclusion 9, para. 2, on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (footnote 11 above), p. 43.

[56] See also para. (4) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *ibid.*, pp. 44–45.

[57] Para. (3) of the commentary to conclusion 13 on identification of rules of customary international law (footnote 12 above), p. 109.

considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. The value of such decisions varies greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in subsequent case law. Other considerations might, depending on the circumstances, include the nature of the court or tribunal; the size of the majority by which the decision was adopted; and the rules and the procedures applied by the court or tribunal. It needs to be borne in mind, moreover, that judicial pronouncements on customary international law do not freeze the law; rules of customary international law may have evolved since the date of a particular decision.

Observation 15

The Commission has suggested criteria to be taken into account when using national court decisions as subsidiary means in the determination of rules of general international law.

53. The Commission called for caution "when seeking to rely on decisions of national courts as subsidiary means for the determination of rules of customary international law". It added that:[58]

> national courts operate within a particular legal system, which may incorporate international law only in a particular way and only to a limited extent. Their decisions may reflect a particular national law perspective. Unlike most international courts, national courts may sometimes lack international law expertise and may have reached their decisions without the benefit of hearing argument advanced by States.

54. In the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) the Commission has noted in the commentary that when the decisions of national courts are used as subsidiary means, "the weight to be accorded to such national decisions will be dependent on the reasoning applied in the particular decision".[59]

55. As dealt with in subsection B above, national judicial decisions may also be used not as subsidiary means, but as State practice when assessing the evidence for the constituent elements of rules of customary international law. The Commission has indicated that in this circumstance, "[d]ecisions of national courts will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law".[60] In the context of identification of peremptory norms of general international law (*jus cogens*), the Commission has noted that when the decisions of national courts are used as State practice, their relevance concerns whether it evidences the position of such State in particular and not a broader assessment of the norm as one of peremptory nature.[61]

[58] Para. (7) of the commentary to conclusion 3 on identification of customary international law, (footnote 12 above), p. 96.

[59] Para. (5) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (footnote 11 above), p. 45.

[60] Para. (5) of the commentary to conclusion 3 on identification of customary international law, (footnote 12 above), pp. 95–96.

[61] Para. (6) of the commentary to conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (footnote 11 above), p. 44.

Observation 16

In its consideration of subsidiary means, the Commission has made particular reference to the weight to be ascribed to its own outputs.

56. In the commentary to the conclusions on identification of customary international law, the Commission referred to the special value of its own work in the examination of the existence of a rule of customary international law.[62]

> The output of the International Law Commission itself merits special consideration…a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate, as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification; the thoroughness of its procedures (including the consideration of extensive surveys of State practice and opinion juris); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the state reached in its work, and above all upon States' reception of its outputs.

57. In the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission noted in the commentary that its own work "may thus also contribute to the identification of peremptory norms of general international law (*jus cogens*)".[63]

Observation 17

The Commission has set out characteristics to be considered when determining the weight to be ascribed to teachings in the identification of rules of international law.

58. In the commentaries to the conclusions on identification of customary international law, the Commission has set out some characteristics to be taken into account when considering the weight to be given to teachings for the identification of rules of customary international law. The Commission noted a:[64]

> need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies…First, writers sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). In doing so, they do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual viewpoints of their authors. Third, they differ greatly in quality.

The Commission further concluded that in the final analysis of such materials, "it is the quality of the particular writing that matters rather than the reputation of the author; among the factors to be considered in this regard are the approach adopted by

[62] Para. (2) of the commentary to part Five of the articles on identification of customary international law (footnote 12 above), pp. 104–105.

[63] Para. (10) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (footnote 11 above), pp. 46–47.

[64] Para. (3) of the commentary to conclusion 14 on identification of customary international law (footnote 12 above), p. 110.

the author to the identification of customary international law and the extent to which his or her text remains loyal to it".[65]

59. The Commission has emphasized that the weight to be given to teachings in their use as subsidiary means to determine the peremptory character of a norm of general international law (*jus cogens*) "will vary greatly depending on the quality of the reasoning and the extent to which they find support in State practice and in the decisions of international courts and tribunals".[66]

Observation 18

On occasion, the Commission has attached less weight to the works of expert bodies and scholars than to the decisions of international courts and tribunals.

60. In the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission noted in the commentary that teachings, including collective works, carried less weight in the determination of the acceptance and recognition by States of the peremptory nature of a norm of general international law. It also indicated some factors to assess the weight to be given to such materials:[67]

> The use of the phrase "may also" in paragraph 2 [of draft conclusion 9], in contradistinction to the word "are" which is used to qualify decisions of international courts and tribunals in paragraph 1, *indicates that less weight may attach to works of expert bodies and scholars in comparison to judicial decisions.* The relevance of these other subsidiary means depends on various factors, including the reasoning of the works of writings, the extent to which the views expressed are accepted by States and the extent to which such views are corroborated either by other forms of evidence listed in draft conclusion 8 or decisions of international courts and tribunals. (emphasis added)

Observation 19

The Commission has indicated that a pronouncement of an expert treaty body may be indirectly relevant for the interpretation of the treaty from which it derives its authority.[68]

61. The conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties distinguished the weight of the practice of States parties and the authority of courts and expert treaty bodies:[69]

> Subsequent agreements or subsequent practice under article 31, paragraph 3 (a) and (b), are "authentic" means of interpretation because they are expressions of the understanding of the treaty by the parties themselves. The authority of international courts, tribunals and expert treaty bodies derives from other sources, including from the treaty that is to be interpreted. *Judgments and other pronouncements of international courts, tribunals and expert treaty bodies,*

[65] Para. (4) of the commentary to conclusion 14 on identification of customary international law *ibid*, p. 110.

[66] Para. (12) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (footnote 11 above), p. 47.

[67] See para. (7) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *ibid.*, pp. 45–46.

[68] Conclusion 13, paragraph 2 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), p. 25.

[69] Para. (11) of the commentary to conclusion 3 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *ibid.*, p. 32.

however, may be indirectly relevant for the identification of subsequent agreements and subsequent practice as authentic means of interpretation if they reflect, give rise to or refer to such subsequent agreements and practice of the parties themselves. (emphasis added)

III. The Commission's use in practice of judicial decisions and teachings

62. The present section provides observations based on a review of the Commission's actual use of judicial decisions and teachings in its outputs since 1949. As emphasized in the introduction to the present memorandum, except in those instances dealt with in section II above where the Commission set out its conceptual approach to the use of subsidiary means, the Commission has generally not stated expressly whether any particular reference in its work to judicial decisions or teachings was in fact a use of such materials as subsidiary means within the meaning of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. The current section, consistent with the overall methodology followed in the memorandum, takes a broad approach by presenting examples of references to judicial decisions and teachings without the Secretariat taking a view on whether the Commission was or was not relying on these materials as subsidiary means within the meaning of Article 38, paragraph 1 (d).

63. The section is divided into three subsections. Subsection A sets out examples of the Commission's approach to the use of judicial decisions and teachings. Subsection B focuses on examples where the Commission has used judicial decisions and teachings to determine rules of treaty law, customary international law and general principles of law. Subsection C sets out examples of the Commission's use of judicial decisions and teachings when considering broader questions, including the nature of the international legal system and interactions among sources and rules of international law.

A. Use of judicial decisions and teachings in the practice of the Commission

64. The present subsection considers: first, the Commission's overall approach to the use of judicial decisions and teachings; second, the Commission's use of judicial decisions; and third, the Commission's use of teachings.

1. The Commission's approach to the use of judicial decisions and teachings

Observation 20

The nature and extent of the Commission's reliance on judicial decisions and teachings vary depending on the nature of the topic under consideration.

65. The judicial decisions and teachings that are available and useful for the Commission to rely on for determining rules of international law vary according to the nature of the topic with which the Commission is dealing and the means by which the law has developed in that area.

66. In the unilateral acts of States topic, for example, the Commission relied primarily on International Court of Justice decisions to determine the content of the guiding principles since the law had developed through inter-State practice and International Court of Justice decisions arising from that practice. The Commission described the commentaries to the Guiding Principles subsequently adopted by the

Commission as "…explanatory notes reviewing the jurisprudence of the ICJ and pertinent State practice".[70]

67. In the State responsibility topic, by contrast, where the Commission was considering the basic rules of international law concerning the responsibility of States for their internationally wrongful acts, a wide range and volume of materials were available, including Permanent Court of International Justice and International Court of Justice cases, arbitral awards, the decisions of regional human rights courts, the pronouncements of expert treaty bodies, claims commission cases, national judicial decisions and teachings, as the basis for the Commission's work.[71]

68. In the diplomatic protection topic, where the State may exercise its right to pursue international claims against other States on behalf of its injured nationals, provided they have exhausted domestic remedies, the Commission again considered relevant rules and principles identified by the Permanent Court of International Justice and the International Court of Justice,[72] together with a range of decisions of other courts and tribunals and teachings relevant to its determination of the rules and principles contained in the articles. These included decisions and advisory opinions of regional human rights courts, arbitral awards, claims commission and conciliation commission cases, domestic case law, and related writings.[73]

69. In the Commission's work on the topic on international liability in case of loss from transboundary harm arising out of hazardous activities, which dealt with issues of transboundary injury and damage, including to the environment, caused by hazardous activities, and the related questions of prevention, liability and compensation, there are numerous multilateral treaties, declarations and other such international instruments, regulations and resolutions of international organizations that are relevant to the topic. The Commission based its work to a great extent on those various instruments, but Permanent Court of International Justice and International Court of Justice decisions and a range of other materials were also relied on, often to confirm or support rules and principles drawn from such instruments. For example, in the general commentary to the articles on prevention of transboundary harm for hazardous activities, the Commission stated: "Prevention of transboundary harm arising from hazardous activities is an objective well emphasized by principle 2 of the Rio Declaration on Environment and Development (Rio Declaration)[74] and confirmed by the ICJ in its advisory opinion on the *legality of the Threat or Use of Nuclear Weapons*[75] as now forming part of the corpus of international law."[76]

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[70] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook … 2006*, vol. II (Part Two), p. 161, footnote 873.

[71] See the commentaries to the articles on the responsibility of States for internationally wrongful acts (footnote 34 above), para. 77.

[72] See, for example, paras. (3) and (4) commentary to article 1 articles on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 27.

[73] See, for example, paras. (6) and (7) of the commentary to article 4, para. (3) of the commentary to article 6, and para. (3) of the commentary to article 7 on diplomatic protection, *ibid*, p. 30 and pp. 33–34.

[74] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. 1: Resolutions adopted by the Conference, resolution 1, annex I.

[75] *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226 at pp. 241–242, para. 29.

[76] See para. (3) of the general commentary to the articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two), p. 148.

Observation 21

The Commission has relied on judicial decisions and teachings in the context of both codification of international law and its progressive development.

70. Many of the Commission's topics have involved aspects of both codification of international law and its progressive development. The Commission has relied on judicial decisions and teachings in the course of its work in both contexts.

71. The principles on protection of the environment in relation to armed conflicts provide a recent example where the Commission relied on a range of materials in the commentaries, including judicial decisions and teachings, to support its formulation of the principles, which contain "provisions of different normative value, including those that reflect customary international law, and those containing recommendations for its progressive development"[77] and in which several principles "refer to existing customary or treaty-based obligations".[78]

72. Principle 3, for example, which contains the overall duty to enhance the protection of the environment in relation to armed conflicts, is acknowledged in the commentary as having aspects of existing obligations under customary and treaty-based law and aspects that go beyond such obligations.[79] The commentary to paragraph 1 of principle 3, as well as referring to the relevant provisions of the 1907 Hague Regulations, the 1949 Geneva Conventions and the 1977 Additional Protocols thereto, refers variously to the *Military and Paramilitary Activities in and against Nicaragua* International Court of Justice case, the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* International Court of Justice advisory opinion, the International Committee of the Red Cross (ICRC) *Study of Customary International Humanitarian Law*, the ICRC *Guidelines on the Protection of the Natural Environment in Armed Conflict* and the ICRC commentaries on the 1949 Geneva Conventions and the 1977 Additional Protocols.[80]

73. These judicial decisions and teachings are cited to support, variously, the customary international law obligations to disseminate the law of armed conflict to armed forces,[81] and for States, to the extent possible, to exert their influence to prevent and stop violations of the law of armed conflict.[82] The same teachings, but not the judicial decisions, are then also referred to in support of paragraph 2 of principle 3, which, as stated in the commentary thereto, extends in some respects to voluntary measures, and therefore beyond the customary and treaty-based obligations of States.[83]

74. A nuance of difference in the Commission's reliance on supporting materials in the above example is thus that aspects of the principle that are characterized as reflecting existing legal obligations (*lex lata*) are supported primarily by references

[77] Para. (3) of the General commentary, principles on protection of the environment in relation to armed conflicts, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), p. 97.

[78] Para. (4) of the commentary to principle 3, principles on protection of the environment in relation to armed conflicts, *ibid.*, p. 101.

[79] Para. (11) of the commentary to principle 3, principles on protection of the environment in relation to armed conflicts, *ibid.*, p. 104.

[80] Para. (1) to (10) of the commentary to principle 3, principles on protection of the environment in relation to armed conflicts, *ibid.*, pp. 101–104, footnotes 345–360.

[81] Para. (5), footnote 347 of the commentary to principle 3, principles on protection of the environment in relation to armed conflicts, *ibid.*, p. 101.

[82] Para. (6), footnote 351 of the commentary to principle 3, principles on protection of the environment in relation to armed conflicts, *ibid.*, p. 102.

[83] See paragraphs (11) to (13), footnotes 361 to 363 of the commentary to principle 3, principles on protection of the environment in relation to armed conflicts, *ibid.*, pp. 104–105.

to treaty provisions and decisions of the International Court of Justice, whereas those aspects that go beyond existing legal obligations (*de lege ferenda*) are supported primarily by teachings.[84]

75. A further illustration of the above approach concerns the articles on the protection of persons in the event of disasters, in which the commentaries to articles 4 (Human dignity) and 5 (Human rights) rely not only on core international instruments, including the Charter of the United Nations, the 1948 Universal Declaration of Human Rights and the 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, and relevant non-binding international instruments, but also on a number of publications and other documents that may be regarded as "teachings", including the International Federation of Red Cross and Red Crescent Societies Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, the *Institut de droit international* resolution on humanitarian assistance and the Office for the Coordination of Humanitarian Affairs ("Oslo") Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief.[85]

76. Paragraph (2) of the commentary to article 5 of the same topic stated that the reference to "human rights" encompasses those rights that are established in treaty law and customary international law, whereas the broader best practices included in the various non-binding instruments and teachings identified in the commentary served to contextualize the application of existing human rights obligations to the specific situation of disasters. The article adopted by the Commission indicated "the broad field of human rights obligations, without seeking to specify, add to or qualify those obligations".[86]

77. Although the examples above may be illustrative of a certain tendency in the Commission's approach, that is, to rely primarily on treaty provisions, other international instruments and international judicial decisions when codifying existing international law, it is important to acknowledge that this does not amount to a uniform practice in the Commission's work in the absence of an applicable international instrument or judicial decision, as is demonstrated by the Commission's commentary to article 3 (general principle) of the articles on the effects of armed conflicts on treaties. The Commission, in this article, which is described as one of overriding significance, establishing the general principle of legal stability and continuity, relied entirely on national judicial decisions (from the United Kingdom and the United States) and on teachings, including a 1985 resolution of the *Institut de droit international* on the effects of armed conflicts on treaties, *Oppenheim's International Law*, and McNair on *The Law of Treaties*, to determine the existence of

[84] This approach is demonstrated also, for example, in paragraph (4) of the commentary to principle 4 concerning the designation of protected zones, where the Commissions relies, *inter alia,* on the ICRC *Guidelines on the Protection of the Natural Environment in Armed Conflict* and the *San Remo Manual on International Law Applicable to Armed Conflicts* to illustrate the types of environmental area that may fall within the scope of the principle, see paragraph (4) of the commentary to principle 4 of the principles on protection of the environment in relation to armed conflicts, *ibid.*, p. 106. See also paragraph (11) of the commentary to principle 8 concerning human displacement, where the Commission relies variously on publications of UNHCR, OHCHR, UNEP and the International Organization for Migration in support of a broad interpretation of the terms "location" and "transit" in relation to the areas where measures should be taken to prevent, mitigate and remediate harm to the environment, see paragraph (11) of the commentary to principle 8 of the principles on protection of the environment in relation to armed conflicts, *ibid.*, p. 120.

[85] See generally the commentaries to articles 4 and 5 on the protection of persons in the event of disasters, *Yearbook ... 2016*, vol. II (Part Two), pp. 32–35.

[86] Paragraph (2) of the commentary to article 5 on the protection of persons in the event of disasters, *ibid.*, p. 34.

a legal rule: “it has become evident that, under contemporary international law, the existence of an armed conflict does not *ipso facto* put an end to or suspend existing agreements”.[87]

78. In the commentary to article 10 of the articles on the effects of armed conflicts on treaties, however, the Commission was able to rely on Article 43 of the Vienna Convention on the Law of Treaties and on a *dictum* in the *Military and Paramilitary Activities in and against Nicaragua* International Court of Justice case to determine that customary international law obligations continue to apply independently of treaty obligations that are terminated or suspended.[88]

2. The Commission’s reliance on judicial decisions

Observation 22

Among the judicial decisions that it has relied on, the Commission has placed particular significance on Permanent Court of International Justice and International Court of Justice decisions.

79. This particular significance can be seen, first and foremost, in the fact that Permanent Court of International Justice and/or International Court of Justice decisions have been referred to in most of the topics considered by the Commission since 1949.

80. The particular significance of these decisions can also be seen in the prominence and weight attached to them in the Commission’s commentaries, including those on some of its foundational works, including the articles on the responsibility of States for internationally wrongful acts and the articles on the law of treaties.

81. In the commentary to article 1 of the articles on the responsibility of States for internationally wrongful acts, for example, the Commission relied on Permanent Court of International Justice and International Court of Justice cases as the basis for the basic principle underlying the articles as a whole that every internationally wrongful act of a State entails the international responsibility of that State.[89] In the commentary to the same articles, Permanent Court of International Justice case law was cited in support of the general obligation of States to make full reparation for the injury caused.[90]

82. In the commentary to article 6 of the articles on the law of treaties, the Commission referred to Permanent Court of International Justice case law for the established position that heads of State, heads of government and ministers of foreign affairs are entitled to represent the State without producing an instrument of full

[87] Paras. (2) of the commentary to article 3 on the effects of armed conflicts on treaties, with commentaries (footnote 35 above), p. 112.

[88] Paras. (1) and (2) of the commentary to article 10 on the effects of armed conflicts on treaties, *ibid.*, p. 116.

[89] Para (2) of the commentary to Article 1 of the articles on the responsibility of States for internationally wrongful acts (footnote 34 above), para. 77, citing the *Phosphates* in *Morocco* case, 1938 P.C.I.J., Series A/B, No. 74, p. 10 at p. 28; the *Corfu Channel* case, Merits, Judgment, *I.C.J. Reports 1949*, p. 4, at p. 23; the *Military and Paramilitary activities in and against Nicaragua* case *(Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 142, para. 283, and p. 149, para. 292; and the *Gabcíkovo-Nagymaros Project* case *(Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 38, para. 47.

[90] Para (1) of the commentary to article 31 of the articles on the responsibility of States for internationally wrongful acts (footnote 34 above),para. 77, citing the *Factory at Chorzow* case, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; and *ibid.,* Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29. 1938 P.C.I.J., Series A/B, No. 74, p. 10 at p. 28

powers.[91] Permanent Court of International Justice case law was also relied on in the commentary to article 15 for the position that a State that has signed a treaty has an obligation not to frustrate its object before ratification.[92]

83. In the topic unilateral acts of States, the Commission regarded key aspects of the guiding principles as "inspired" by decisions and dicta of the International Court of Justice, guiding principle 1 in particular being "…very directly inspired by the dicta in the judgments handed down by the ICJ on 20 December 1974 in the Nuclear Tests case". [93] The Commission in this topic, in effect, regarded the relevant International Court of Justice passages as statements of established international law. In its commentary to guiding principle 4, for example, the Commission relied on the following International Court of Justice statement in the Armed Activities on the Territory of the Congo judgment on jurisdiction and admissibility: "…in accordance with its consistent jurisprudence […] it is a well-established rule of international law that the Head of State, the Head of Government and the Minister of Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments".[94]

Observation 23

The Commission has on many occasions regarded Permanent Court of International Justice and International Court of Justice decisions as statements of existing international law and relied directly on the text of those decisions to formulate provisions, or based its formulations closely thereon.

84. In many of its topics, the Commission has determined that a decision of the Permanent Court of International Justice or the International Court of Justice is a statement of, or a reflection of, existing international law,[95] and has formulated articles, conclusions, principles, etc., by reproducing text from such decisions or closely basing its formulations thereon.

85. In the articles on the law of the sea, the Commission noted in the commentary that some of the rules formulated in the first reading text were modified to follow the

[91] Para (2) of the commentary to article 6 of the articles on the law of treaties (footnote 21 above), para. 38, *Legal Status of Eastern Greenland* case, P.C.I.J, (1933) Series A/B, No. 53, p. 71.

[92] Para (1) of the commentary to article 15 of the articles on the law of treaties (footnote 21 above), para. 38, *Certain German* Interests *in Polish Upper Silesia* case, P.C.I.J (1926), Series A, No. 7, p. 30.

[93] Para.(2) of the commentary to guiding principles applicable to unilateral declarations of States capable of creating legal obligations (footnote 70 above), p. 162, *referring* to *Nuclear Tests, (Australia v France),* Judgment, I.C.J. Reports 1974, p. 253 and *Nuclear Tests (New Zealand v France), ibid* p. 457.

[94] Para. (1) of the commentary to guiding principle 4 applicable to unilateral declarations of States capable of creating legal obligations, *ibid*, p. 163, referring to *Armed Activities* on *the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)), Jurisdiction and Admissibility,* Judgment, I.C.J Reports 2006, p. 28.

[95] For example, para. (1) of the commentary to article 4 on the law of the sea, noted that: "The Commission was of the opinion that, according to the international law in force, the extent of the territorial sea is measured either from the low-water line along the coast, or, in the circumstances envisaged in article 5, from straight baselines independent of the low-water mark. This is how the Commission interprets the judgement of the International Court of Justice rendered on 10 December 1951 in the Fisheries Case between the United Kingdom and Norway." (footnote 37 above), pp. 266–267.
See also, para. (11) of the commentary to article 27 of the law of treaties, *Yearbook …1966*, Vol. II, p. 220. ("Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law.")

findings of the International Court of Justice in the *Fisheries* case.[96] In the same articles, the Commission "also included a clause formally prohibiting interference with passage through straits used for navigation between two parts of the high seas. The expression 'straits normally used for international navigation between two parts of the high seas' was suggested by the decision of the International Court of Justice in the Corfu Channel Case".[97]

86. In the articles on the responsibility of States for internationally wrongful acts, there are many examples of provisions being based on decisions of international courts and tribunals, in particular, the Permanent Court of International Justice and the International Court of Justice. For example, the Commission recalled that the two elements of an internationally wrongful act of a State "were specified, for example, by the PCIJ in the *Phosphates in Morocco* case"[98] linking international responsibility with "an act being attributable to the State and described as contrary to the treaty right[s] of another State". The Commission also referred to such elements in the International Court of Justice decision in *United States Diplomatic and Consular Staff in Tehran* case.[99]

87. In the same articles, the Commission also noted that the conformity with provisions of domestic law "in no way precludes conduct being characterized as internationally wrongful is equally well settled. International decisions leave no doubt on the subject, in particular, the PCIJ expressly recognized the principle in its first judgment, in the *S.S. Wimbledon* case",[100] and mentioned that the International Court of Justice and numerous arbitral tribunals had also referred to and applied the principle.[101] In article 51, the Commission noted that it had reproduced the language of the *Gabčíkovo-Nagymaros Project* case in relation to the effect of countermeasures.[102]

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[96] Para. (2) to article 5 on the law of the sea (footnote 37 above), p. 267, concerning straight baselines, indicates *that* "[t]he Commission interpreted the Court's judgement, which was delivered on the point in question by a majority of 10 votes to 2, as expressing the law in force; it accordingly drafted the article on the basis of this judgement. …". *Ibid*, at pp. 267–268. In para. (4) of the commentary to the same article, it is noted that at its seventh session in 1955, "…the Commission made a number of changes designed to bring the text even more closely into line with the Court's judgement in the above-mentioned Fisheries Case".

In para. (1) of the commentary to article 7, concerning bays, *Ibid*., at p. 269, the Commission noted that "In adopting this provision, the Commission repaired the omission to which attention had already been drawn by The Hague Codification Conference of 1930 and which the International Court of Justice again pointed out in its judgement in the Fisheries Case."

[97] In para. (3) of the commentary to article 17, *ibid*., at p. 273.

[98] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28.

[99] Para. (2) of the commentary to article 2 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 34, referring to United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 117–118, para. 226; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 54, para. 78.

[100] Para. (3) of the commentary to article 3 on the responsibility of States for internationally wrongful acts (footnote 34 above), pp 36–37, referring to S.S. *"Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 15, at, pp. 29–30

[101] *Ibid.*, para. (4) of the commentary to article 3 on the responsibility of States for internationally wrongful acts, at p. 37. citing *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 55, at p. 67; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* p. 12, at pp. 34–35, para. 57; and *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports* 1989, p. 15, at p. 51, para. 73.

[102] Para. (1) of the commentary to article 51 on the responsibility of international organizations for internationally wrongful acts, *Yearbook… 2011*, vol. II (Part Two), p. 94 ("The text of the present article is identical to article 51 on the responsibility of States for internationally wrongful acts It reproduces, with a few additional words, the requirement stated by the International Court of Justice in *the Gabcíkovo-Nagymaros Project* case, that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question".)

88. Also in the articles on the responsibility of States for internationally wrongful acts, the Commission indicated in the commentary that "the terminology of the breach of an international obligation of the State [as an element of responsibility] is long established and is used to cover both treaty and non-treaty obligations", referring to the decisions of the Permanent Court of International Justice and the International Court of Justice, which had used similar language and having the same meaning.[103]

89. A further example is the obligation of a State to make reparations as a consequence of the commission of a wrongful act, as well as the forms in which such reparation may take place. The Commission relied expressly on the formulation of the Permanent Court of International Justice judgment in the *Factory at Chorzów* case to frame a general rule:

> The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" through the provision of one or more of the forms of reparation set out in chapter II of this part.[104]

90. Additionally, in the same topic, the Commission referred to the *Barcelona Traction* case in article 48, noting that under paragraph 1 (b) of such provision, "States other than the injured State may invoke responsibility if the obligation in question was owed 'to the international community as a whole'". The provision intends to give effect to the statement by the International Court of Justice in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole".[105] The Commission referred to the judgment, where the Court had indicated that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".[106]

91. In the articles on the non-navigational uses of international watercourses, the Commission indicated in the commentary that the wording of paragraph 2 of article 17, concerning negotiations "is inspired chiefly by the judgment of the ICJ in the *Fisheries Jurisdiction* (United Kingdom v. Iceland) case and by the award of the arbitral tribunal in the *Lake Lanoux* case".[107]

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[103] Para. (7) of the commentary to article 2 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 35, referring to *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; and ibid., Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29. *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184; *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair*, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990), p. 251, para. 75.

[104] Para. (3) of the commentary to article 31 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 91, citing *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; and ibid., Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.

[105] Para. (8) of the commentary to article 48 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 127.

[106] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3., at p. 32, para. 33.

[107] See para. (3) of the commentary to article 17 on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 116, referring to *Fisheries Jurisdiction cases (United Kingdom v. Iceland) (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 3 and 175, and *Lake Lanoux Arbitration*, UNRIAA, vol. XII (Sales No. 63.V.3), pp. 281 *et seq*.

92. In the articles on the nationality of natural persons in relation to the succession of States, for example, the commentary emphasized that the requirement of an "effective" link between the individual and the State was intended "to use the terminology of the ICJ in the *Nottebohm* case".[108]

93. In the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, the Commission closely based its guiding principles on the essential elements of *dicta* in the International Court of Justice *Nuclear Tests* cases. The wording of guiding principle 1, which contains the foundational rule for the topic that public declarations made by States that manifest the will to be bound may create legal obligations, was "…very directly inspired by the dicta in the judgments handed down by the ICJ on 20 December 1974 in the *Nuclear Tests* case".[109] Similarly, the wording of guiding principles 2 and 3 concerning the capacity of States to undertake such legal obligations through unilateral declarations and the determination of the legal effects of such declarations were respectively "acknowledged by" and "inspired by" passages in the International Court of Justice judgments in the *Nuclear Tests* cases.[110] The provisions of guiding principle 7 concerning the requirement that a declaration be stated in clear and specific terms, and that in case of doubt concerning its legal scope, it is to be interpreted in a restrictive manner, were also based closely on International Court of Justice dicta in the *Nuclear Tests* cases.[111]

94. In the guide to practice on reservations, the Commission noted in the commentary that:[112]

> (12) This is the reason why guideline 1.3.1 does not reproduce the text of article 32 of the 1969 and 1986 Vienna Conventions and, without alluding directly to the preparatory work, merely calls for account to be taken of the intention of the author of the statement. *This wording draws directly on that used by the International Court of Justice* in the case concerning *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court: The Court will…interpret the relevant words of a declaration including a reservation contained therein in a natural and responsible way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. (emphasis added)

95. In the articles on the effect of armed conflicts on treaties, the Commission stated in the commentary that "customary international law continues to apply independently of treaty obligations",[113] relying on the dictum of the International

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[108] Para. (5) of the commentary to article 19 on the nationality of natural persons in relation to succession of States, *Yearbook…1999*, vol. II (Part Two), p. 40.

[109] Para. (1) of the commentary to guiding principle applicable to unilateral declarations of States capable of creating legal obligations, *ibid*, p. 162, and the *Nuclear Tests* cases, (footnote 70 above), pp. 267–268, paras. 43 and 46, and pp. 472–473, paras. 46 and 49.

[110] Guiding principle 2, Commentary paragraph (1), and Guiding principle 3, Commentary paragraph (1), guiding principles applicable to unilateral declarations of States capable of creating legal obligations, *ibid,* p. 162, *Nuclear Tests* cases, *supra* footnote 93, pp. 269–270, para. 51, and pp. 474–475, para. 53.

[111] Guiding principle 7, Commentary paragraphs (1) and (2), guiding principles applicable to unilateral declarations of States capable of creating legal obligation, *ibid,* p. 165, referring to *Nuclear Tests* cases, *supra* footnote 93, p. 267, para. 43, and pp. 269–270, para. 51; and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)), Jurisdiction and Admissibility,* Judgment, I.C.J Reports 2006, pp. 28–29, paras. 50 and 52.

[112] Para. (8) of the commentary to guideline 4.4.3. of the guide to practice on reservations (footnote 21 above), p. 60.

[113] Para. (2) of the commentary to article 10 on the effects of armed conflicts on treaties (footnote 35 above), p. 116.

Court of Justice in the *Military and Paramilitary* activities case indicating that "[t]he fact that the above-mentioned principles [of customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions".[114]

96. In the articles on the prevention and punishment of crimes against humanity, the Commission recalled in the commentary a decision of the International Court of Justice[115] noting that "when engaging in measures of prevention 'it is clear that every State may only act within the limits permitted by international law'". The Commission thus "included a clause indicating that any measures of prevention 'must be in conformity with international law'".[116]

97. In the commentary to the guidelines on the protection of the atmosphere, the Commission emphasized that "Another departure from the 1979 Convention is the addition of the word 'significant' before 'deleterious'" and "…underlined that the term 'significant' has been used in the jurisprudence of the International Court of Justice, including in its 2015 judgment in Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (Judgment, I.C.J. Reports 2015, p. 665, at paras. 104–105 and 108; see also paras. 153, 155, 156, 159, 161, 168, 173, 196 and 217".[117]

98. In the same guidelines, the Commission built on the language of the International Court of Justice in its judgment in the *Gabčíkovo-Nagymaros Project* case, in which it referred to the "need to reconcile environmental protection and economic development".[118]

99. In the first reading of the articles on immunity of State officials from foreign criminal jurisdiction, the Commission indicated that it "found preferable to use the phrase 'acts performed, whether in a private or official capacity', following the wording used by the International Court of Justice in the Arrest Warrant Case".[119]

100. The preamble to the principles on the protection of the environment in relation to armed conflicts "borrows language from the Advisory Opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, which emphasizes that environmental factors are to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict, for instance with respect to the assessment of what is necessary and proportionate in the pursuit of legitimate military objectives".[120]

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[114] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1984*, p. 392, at p. 424, para. 73

[115] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J.* Reports *2007*, p. 43, at p. 221, para. 430.

[116] Para. (4) of the commentary to article 4 on the prevention and punishment of crimes against humanity, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), p. 57.

[117] Paragraph (9) of the commentary to guideline 9 on the protection of the atmosphere (footnote 39 above), pp. 41–42.

[118] *Paragraph* (5) of the commentary to paragraph 2 of guideline 5 on the protection of the atmosphere, *ibid.*, pp. 31–32.

[119] Para. (8) of the commentary to article 4 on immunity of foreign state officials from foreign criminal jurisdiction, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), p. 224, citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 22, para. 55.

[120] Para. (6) of the preamble to the guidelines on the protection of the environment in armed conflict (footnote 77 above), p. 97.

Observation 24

On many occasions, the Commission has relied on Permanent Court of International Justice and International Court of Justice decisions to inform or provide the rationale for provisions without necessarily basing its formulations thereon.

101. The Commission has relied on Permanent Court of International Justice and International Court of Justice decisions to inform and underpin its work on almost all topics. It has sometimes referred, for example, to its work being "consistent" with the jurisprudence of the International Court of Justice,[121] or inspired by it.[122]

102. In the articles on the responsibility of States for internationally wrongful acts, for example, the Commission indicated in the general comment to chapter V on the circumstances precluding wrongfulness that such circumstances do not annul or terminate the obligation in question, rather they provide a justification for non-performance while the circumstance in question subsists. There is a distinction between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The Commission noted that: "[t]his distinction emerges clearly from the decisions of international tribunals",[123] in particular, the *Gabčíkovo-Nagymaros Project* International Court of Justice case. This distinction underlies the articles of chapter V, but is reproduced only in the commentary.

103. This was also the case, for example, when the Commission stated that the *Nuclear Tests* cases "…show that a unilateral commitment by a State can come through a series of declarations with the same general thrust, none of which might, in isolation, have bound the State".[124] This determination is limited to the commentaries and not expressly stated in the guiding principles on unilateral declarations.

104. In the articles on diplomatic protection, a Permanent Court of International Justice decision was relied on in the commentary as the basis for the principle that it

[121] Para. (9) of the Commentary to guideline 1.5.3. on reservations to treaties (footnote 21 above), p. 74. ("These observations are consistent with the jurisprudence of the International Court of Justice and, in particular, its judgment of 4 December 1998 in the Fisheries Jurisdiction case between Spain and Canada.")

[122] See, for example, para. (7) of the commentary to principle 9 on the protection of the environment in armed conflicts (footnote 77 above), p. 122–123. ("Paragraph 1 of the draft principle is furthermore inspired by the judgment of the International Court of Justice in the *Certain Activities (Costa Rica v. Nicaragua)* case, in which the Court found that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself".)
See also para. (5) of the commentary to principle 19 on the protection of the environment in armed conflicts, *ibid.*, p. 161. ("The reference to environmental considerations is drawn from and inspired by the Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*.")

[123] Paras. (2) and (3) of the general comment to chapter V of the articles on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 71, citing Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990), p. 251, para. 75. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7,at p. 63, para. 101; see also page 38, para. 47.

[124] Para. (3) of the commentary to guiding principle 5 applicable to unilateral declarations of States capable of creating legal obligations (footnote 70 above) p. 164, referring to the Nuclear *Tests* cases, *supra* footnote 93, p. 269, para. 49, and p. 474, para. 51.

is for each State to decide who are its nationals.[125] This principle informs the text of article 4, but is not reproduced in the article itself.

105. In the commentary to the articles on prevention of transboundary harm from hazardous activities, the Commission relied on the International Court of Justice advisory opinion in the *Namibia* case, where the Court found that "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", as part of the rationale underlying article 1, without reproducing that rule as part of the articles.[126]

Observation 25

The Commission has, on occasion, relied on the output of the International Court of Justice as the authoritative basis to support the objective of a topic.

106. In the commentary to the articles on prevention of transboundary harm from hazardous activities, the Commission relied on the International Court of Justice advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, together with Principle 2 of the Rio Declaration, to confirm that the objective of the topic, prevention of transboundary harm from hazardous activities, is an objective "forming part of the corpus of international law".[127]

Observation 26

On some occasions, the Commission has relied on Permanent Court of International Justice and International Court of Justice decisions as authoritative bases to demonstrate or recognize that there has been a development in international law.

107. In the articles on diplomatic protection, for example, the Commission relied on Permanent Court of International Justice and International Court of Justice decisions in the commentary to demonstrate that international law had developed from the position in 1924 (the Permanent Court of International Justice *Mavrommatis* case) where States were regarded, by taking up the claims of their nationals, to be asserting their own rights,[128] to the current position (the *LaGrand* and *Avena* International Court of Justice cases) where international law recognizes the existence of certain rights, as a matter of either existing treaty or customary international law, aimed at the protection of individuals.[129]

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[125] Para. (2) of the commentary to article 3 on diplomatic protection (footnote 72 above), *Nationality Decrees Issued in Tunis and Morocco (French Zone),* Advisory Opinion, P.C.I.J. Reports, Series B, No. 4, 1923, p. 6, at p. 24.

[126] Para. (14) of the commentary to article 1 on Prevention of Transboundary Harm from Hazardous Activities (footnote 76 above), p. 151, referring to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 54, para. 118.

[127] Para. (3) of the general commentary to the articles on prevention of transboundary harm from hazardous activities, *ibid.*, p. 148, referring to *Legality of the Threat or Use of Nuclear Weapons,* I.C.J. Reports 1996, p. 226 at pp. 241–242, para. 29.

[128] Para. (3) of the commentary to article 1 on diplomatic protection (footnote 72 above), p. 27, referring to *Mavrommatis Palestine Concessions,* Judgment No. 2, 1924, PCIJ, Series A, No. 2, p. 12.

[129] Para. (4) of the commentary to article 1 on diplomatic protection, *ibid*, p. 27, referring to *LaGrand (Germany v United States of America)* Judgment, I.C.J. Reports 2001, p. 466 at pp 493–494, paras. 76–77; and *Avena and Other Mexican Nationals (Mexico v United States of America),* Judgment of 31 March 2004, I.C.J. Reports 2004, p. 12, at pp. 35–36, para. 40.

108. In the articles on the responsibility of States for internationally wrongful acts the Commission indicated in the commentary that the Permanent Court of International Justice had articulated the role of compensation in international law,[130] and noted that in addition to the International Court of Justice, other tribunals like the International Tribunal for the Law of the Sea, the Iran-United States Claims Tribunal, human rights courts and other bodies and arbitral tribunals constituted under the International Convention on the Settlement of Investment Disputes and States and Nationals of Other States have developed rules and principles "in assessing compensation" which "can be seen as manifestations of the general principle stated in article 36".[131]

109. In the commentaries to the guidelines on the protection of the atmosphere, the Commission noted that in the *Pulp Mills* case it was "indicated that an environmental impact assessment had to be undertaken where there was a risk that the proposed industrial activity may have a 'significant adverse impact in a transboundary context, in particular on a shared resource'".[132]

110. In the commentaries to the guidelines on the protection of the environment in armed conflicts, the Commission referred to the *Gabčíkovo-Nagymaros* Project to indicate that "[i]n light of the development of the legal framework for the exploitation and conservation of natural resources, environmental considerations and sustainability are to be seen as integral elements of the duty to safeguard the capital" in the context of occupation. In particular, the Commission referred to the interpretation given to the treaty in such case, where the Court noted that "the Treaty is not static, and is open to adapt to emerging norms of international law".[133]

Observation 27

It is rare for the Commission to indicate expressly that it disagrees with an International Court of Justice decision.

111. A prominent example of the Commission expressly taking a different position to the International Court of Justice is to be found in the commentary to article 48 of the articles on the responsibility of States for internationally wrongful acts, concerning the invocation of responsibility by a State other than an injured State. The Commission referred to the "much-criticized decision" of the 1966 judgment of the International Court of Justice in the *South West Africa, Second Phase*, case "from which article 48 is a deliberate departure".[134] In doing so, the Commission laid the foundation for the inclusion in the articles of the concept of *erga omnes* obligations, and accordingly the right of third States (i.e. other than the injured State) enjoying a legal interest in the performance of such obligations to invoke the responsibility of the wrongdoing State.

[130] Para. (3) of the commentary to article 36 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 99.

[131] Para. (6) of the commentary to article 36 on the responsibility of States for internationally wrongful acts, *ibid.*, pp. 99–100.

[132] Para. (4) of the commentary to guideline 4 on the protection of the atmosphere (footnote 39 above), p. 29–30.

[133] Para. (7) of the commentary to principle 20 on the protection of the environment in relation to armed conflicts (footnote 77 above), pp. 168.

[134] Para. (7) of the commentary to article 48 on the responsibility of States for internationally wrongful acts, (footnote 34 above), ft. 725

Observation 28

In its work, the Commission has taken the decisions of a range of dispute settlement bodies, both judicial and non-judicial, into consideration.

112. The Commission has often referred extensively to the decisions of regional courts[135] and tribunals, arbitral tribunals, domestic courts, claims commissions[136] and sometimes to the decisions of conciliation commissions.[137]

113. In the commentary to article 1 on the responsibility of States for internationally wrongful acts, for example, the Commission cites arbitral awards and conciliation commission cases that have "repeatedly affirmed" the principle that every internationally wrongful act of a State entails the international responsibility of that State.[138] The Commission further referred to the *Rainbow Warrior* arbitration, in which the arbitral tribunal had stressed that "any violation by a State of any obligation of whatever origin gives rise to State responsibility".[139] In the commentary to article 13, the Commission included "the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case…", which was an arbitral award.[140]

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[135] Para. (5) of the commentary to principle 5 on the protection of the environment in armed conflicts (footnote 77 above), p. 109, noting that para. 1 of such principle "builds on the jurisprudence of regional courts and tribunals, referring to the case law of the Inter-American Court of Human Rights and the African Court on Human and People's Rights concerning the protection of indigenous communities.

[136] See, for example, para. (1) of the commentary to article 3 on the expulsion of aliens, *Yearbook…2014*, vol. II (Part Two), p. 27, noting that the right of expulsion "has been recognized in particular in a number of arbitral awards and decisions of claims commissions and in various decisions of regional courts and commissions", referring among others, to decisions of the Mexican Claims Commission, the Mixed Claims Commission Italy-Venezuela, Mixed Claims Commissions Belgium-Venezuela and the Iran-United States Claims Tribunal.
See also, para (6) of the commentary to article 20 on the expulsion of aliens that noted that while the issue of the property rights of enemy in time of armed conflict is not addressed specifically in such provision "[i]t should be noted that the issue of property rights in the event of armed conflict was the subject of extensive discussion in the Eritrea-Ethiopia Claims Commission", *ibid., p. 57.*
See also references to the work of the United Nations Compensation Commission at the principles on the protection of the environment in armed conflicts, for example, at para. (6) of the commentary to principle 9 (footnote 77 above)*, pp. 122–123.*

[137] See for example, para. (8) of the commentary to guideline 2.9.8. of the guide to practice on reservations, referring to the decision regarding delimitation of the border between Eritrea and Ethiopia, decision of 13 April 2002, Permanent Court of Arbitration, United Nations, Reports of International Arbitral Awards, vol. XXV (United Nations publication, Sales No. E/F.05.V.5), p. 111, para. 3.9, noting that "it is particularly difficult to determine when and in what specific circumstances inaction with respect to an interpretative declaration is tantamount to consent", (footnote 21 above), p. 197.

[138] Paragraph (2) of the commentary to article 1 of the articles on the responsibility of States for internationally wrongful acts (footnote 34 above), para. 77, citing the *Claims of Italian nationals resident in Peru* cases, UNRIAA, vol. XV (Sales No. 66. V.3) pp. 399–411; and the *Dickson Car Wheel Company* case, (USA v United Mexican States) UNRIAA, Vol. IV, (Sales No. 1951.V.1) p. 669 at p. 678 (1931).

[139] Paragraph (2) of the commentary to article 1 of the articles on the responsibility of States for internationally wrongful acts, *ibid.*, para. 77, citing *Case concerning the difference between New Zealand concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair,* UNRIAA Vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

[140] Para. (1) of the commentary to article 13 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 57, citing *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928).

114. In the commentary to the articles on diplomatic protection, the Commission cited an advisory opinion of the Inter-American Court of Human Rights in support of its conclusion that "[t]oday, conventions, particularly in the field of human rights, require States to comply with international standards in the granting of nationality".[141] The Commission relied on that same advisory opinion and doctrine to add that States enjoy a "margin of appreciation" in the granting of nationality[142] and that there is a presumption in favour of the validity of such granting of nationality.[143] Decisions of the European Commission and Court of Human Rights were relied on in the same topic in support of a broad approach to the remedies under domestic law that must be exhausted, including administrative remedies, before the State of nationality may take up a claim on behalf of its national.[144] The essential question is whether the remedy in question "…gives the possibility of an effective and sufficient means of redress".[145]

115. In the commentaries to the articles on prevention of transboundary harm from hazardous activities, the Commission relied on the arbitral award in the *Trail Smelter* case as "highlighting" the "well-established principle of prevention", which was later reiterated in Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration, and in General Assembly resolution 2995 (XXVII) of 15 December 1972.[146] In the commentaries to the principles on the allocation of loss in case of transboundary harm arising out of hazardous activities, an arbitral award was relied on to support the view that the polluter pays principle does not form part of customary international law.[147] The *Trail Smelter* arbitration was again relied on as the origin of "[t]he basic principle that a State should ensure payment of prompt and adequate compensation for hazardous activities…".[148]

116. In the context of the articles on diplomatic protection, claims commission cases were relied upon to support the Commission's conclusions in a number of respects. These include certain aspects of the rules concerning claims by dual nationals[149] and

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[141] Para. (6) of the commentary to article 4 on diplomatic protection, (footnote 72 above), p. 30, citing the Advisory Opinion of the Inter-American Court of Human Rights on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica,* (Advisory Opinion OC-4/84 of 19 January 1984, Series A, No.4, para. 38).

[142] Para. (7) of the commentary to article 4 on diplomatic protection, *ibid*, p. 30, citing the Advisory Opinion of the Inter-American Court of Human Rights on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica,* ibid, at paras. 62–63.

[143] *Oppenheim's International Law,* 9th edition, vol. I, Peace, R. Y. Jennings and A. D. Watts (eds), Harlow, Longman, 1992, p. 856.

[144] Paras. (3) to (5) of article 14 on diplomatic protection (footnote 72 above), pp. 44–45, citing *De Becker v Belgium, Application No. 214/56, Decision of 9 June 1958,* European Commission and Court of Human Rights, Yearbook of the European Convention on Human Rights 1958–1959, p. 238.

[145] Para. (4) of the commentary to article 1 on diplomatic protection (footnote 72 above), p. 45, citing *B. Schouw Nielsen v Denmark, Application No. 343/57, Decision of 2 September 1959,* European Commission and Court of Human Rights, *Yearbook of the European Convention on Human Rights 1958–1959,* p. 438, referring to a 1954 Resolution of the *Institut de Droit International,* vol. 46, (1956), p. 364.

[146] Para. (4) of the general commentary to the articles on prevention of transboundary harm from hazardous activities (footnote 76 above), p. 148, citing *Trail Smelter,* UNRIAA, vol. III, (Sales No. 1949. V.2), pp. 1905 *et seq*.

[147] Para. (14) of the commentary to principle 3 on the allocation of loss in the case of transboundary harm arising out of hazardous activities *Yearbook … 2006*, vol. II (Part Two), p. 75, citing the *Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the protection of the Rhine from Pollution by Chlorides of 3 December 1976, Arbitral Award of 12 March 2004,* UNRIAA, vol. XXV (Sales No. E/F.05.V.5) p. 312, paras. 102–103.

[148] Para. (6) of the commentary to principle 4, on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *ibid,* p. 75, citing *Trail Smelter* (footnote 146 above).

[149] See para. (3) of the commentary to article 7 on diplomatic protection, (footnote 72 above), p. 3, citing *Mathison, Stevenson* (British-Venezuelan Mixed Claims Commission), *Brignone and Miliani,* (Italian-Venezuelan Mixed Claims Commission) cases, UNRIAA, vol. IX, (Sales No. 59.V.5), pp. 485 and 494, and vol. X (Sales No. 60.V.4) pp. 542 and 584 respectively.

claims by corporations.[150] In respect of the dual national aspects, the Commission also cited an Italian-United States Conciliation Commission case in support of the rule that the State of "predominant" nationality can bring proceedings against a State of a claimant's other nationality. This case is described by the Commission as the "starting point" for the customary rule to this effect.[151]

117. In the commentaries to the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the Commission relied on decisions of the United Nations Compensation Commission in support of a broad interpretation of "environmental damage" and the payment of compensation for damage to natural resources without commercial value.[152] The United Nations Compensation Commission was a subsidiary organ of the Security Council established in 1991 under Security Council resolution 687 (1991) to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's invasion and occupation of Kuwait.[153] It was not a judicial body, but consisted of panels of Commissioners who reviewed and evaluated claims submitted by governments, international organizations, companies and individuals. In the same topic, the Commission referred to the United Nations Compensation Commission and other internationally established claims tribunals as possible models for the procedures envisaged in the principles.[154]

118. The Commission relied on domestic case law, for example, in each of the diplomatic protection, transboundary harm, allocation of loss and responsibility of international organizations topics. In diplomatic protection, domestic case law was relied on to support the Commission's conclusion that there is some obligation on the State of nationality, however limited, to protect its nationals abroad when they have been subjected to serious human rights violations. This underlay the Commission's formulation in article 19 to the effect that the State "should" exercise diplomatic protection in appropriate cases.[155]

119. In the transboundary harm context, domestic case law was "recalled" by the Commission in support of an approach which weighed in an equitable manner the absolute injury caused to the neighbouring State against the advantage gained by the State hosting the hazardous activity. This approach underlay the Commission's drafting of Article 10, which compares the importance of the activity in terms of its

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[150] Paras. (1) to (3) of the commentary to article 10 on diplomatic protection, *ibid*, p. 39, citing the *Orinoco Steamship Company Case,* American-Venezuelan Mixed Claims Commission, UNRIAA, vol. IX, p. 180.

[151] Para. (3) of the commentary to article 7 on diplomatic protection, *ibid*, p. 34–35, citing the *Mergé claim,* Italy-United States Conciliation Commission, 10 June 1955, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 236.

[152] Para. (18) of the commentary to principle 2 on the allocation of loss in the case of transboundary harm arising out of hazardous activities (footnote 147 above), p. 69, citing the report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims, (S/AC.26/2005/10).

[153] Security Council resolution 687 (1991) of 3 April 1991 (S/RES/687 (1991)) and see also the website of the UN Compensation Commission at https://uncc.ch.

[154] See para. (11) of the commentary to principle 6 on the allocation of loss in the case of transboundary harm arising out of hazardous activities (footnote 147 above), p. 88. The other international claims tribunals referred to in these Commentaries are the Iran-United States Claims Tribunal and the Marshall Islands Nuclear Claims Tribunal.

[155] Para. (3) of the commentary to article 2 on diplomatic protection (footnote 72 above), p. 3, citing the *Rudolf Hess case,* ILR, vol. 90 (1992), p. 387; *Abbasi and Juma v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, Decision of the Supreme Court of Judicature-Court of Appeal (Civil Division) of 6 November 2002, ILM, vol. 42 (2003), p. 358; *Kaunda and Others v President of the Republic of South Africa and Others*, Constitutional Court Decision of 19 and 20 July 2004 and 4 August 2004, The South African Law Reports 2005, p. 235.

social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected.[156] In the work on the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, domestic case law was relied on, for example, to illustrate that it is difficult for any particular individual to demonstrate standing to make a claim in the context of damage to the environment per se,[157] and on the other hand, to support the position that earlier reluctance to accept liability for damage to the environment, except where that damage is linked to property or injury to persons, is gradually disappearing.[158]

120. In the commentaries to the draft Code of Crimes against the Peace and Security of Mankind, the Commission referred to domestic judicial decisions concerning the question "whether the laws of war imposed on an army commander a duty to take such appropriate measures as were within his power to control the troops under his command and prevent them from committing acts in violations of the laws of war".[159]

121. In the commentary to article 62 on the same project, the Commission referred to the positions expressed by judges in domestic cases in support of the view that States members of an international organization cannot generally be regarded as internationally responsible for internationally wrongful acts of the organization.[160]

122. During the first reading of the articles on the immunity of State officials from foreign criminal jurisdiction, the Commission referred to decisions of national courts that have categorized certain acts as being performed in an official capacity, and thus would be covered by immunity.[161]

Observation 29

The Commission has often taken into account the meaning given to particular terms by international courts and tribunals.

123. The Commission has frequently taken account of the decisions of international courts and tribunals where they shed light on the meaning to be given to particular terms that the Commission is considering. In the articles on the responsibility of

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[156] Para. (3) of the commentary to article 10 on prevention of transboundary harm from hazardous activities (footnote 76 above), p. 162, citing *Streitsache des Landes Wurttemberg und des Landes Preussen gegen das Land Baden (Wurttemberg and Prussia v Baden), betreffend die Donauversinkung,* German Staatsgerichtshof, 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116, appendix pp. 18 et seq.

[157] Para. (14) of the commentary to principle 2 on the allocation of loss in the case of transboundary harm arising out of hazardous activities (footnote 147 above), p. 68, citing *Burgess v M/V/ Tamano,* opinion of 27 July 1973, United States District Court, Maine, Federal Supplement, vol. 370 (1973), p. 247.

[158] Para. (8) of the commentary to principle 3 on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *ibid,* citing *Blue Circle Industries PLC v Ministry of Defence,* The All England Law Reports 1998, vol. 3, p. 385; and *Merlin and another v British Nuclear Fuels PLC,* The All England Law Reports 1990, vol. 3, p. 711.

[159] Para. (2) of the commentary to article 6 of the code of crimes against the peace and security of mankind, *Yearbook…1996*, vol. II (Part Two), p. 17, referring to the *Yashamita case* at the United States Supreme Court, the *German High Command Trial* and the *Hostages Trial* at the United States Military Tribunal.

[160] Para. (4) of the commentary to article 62 on the responsibility of international organizations for internationally wrongful acts (footnote 102 above), p. 100, referring to the view of the majority opinions in the British courts in the litigation concerning the international Tin Council, citing *Maclaine Watson and Co. Ltd. v. Department of Trade and Industry; J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and others, and related appeals, Judgment of 27 April 1988, England, Court of Appeal*, ILR, vol. 80, p. 109.

[161] Para. (31) of the commentary to article 2 on the immunity of State officials from foreign criminal jurisdiction (footnote 119 above), p. 212, referring to decisions of national courts in France, Germany, Italy, the United States, and the United Kingdom.

States for internationally wrongful acts, for example, the Commission referred to the case law of the Inter-American Court of Human Rights in the commentary, which "has interpreted 'forced or involuntary disappearance' as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for".[162]

124. In the articles on the responsibility of international organizations, the Commission referred to the use of the terms "organ" and "agent" in the commentary. It stated that, "the International Court of Justice, when addressing the status of persons acting for the United Nations, considered relevant only the fact that a person had been conferred functions by an organ of the United Nations".[163] Later in the commentary, the Commission added that what was said by the International Court of Justice "with regard to the United Nations applies more generally to international organizations, most of which act through their organs (whether so defined or not) and a variety of agents to which the carrying out of the organization's functions is entrusted".[164]

125. In the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission stated in the commentaries that the general rule on "subsequent practice in the application of a treaty" had been formulated by the Iran-United States Claims Tribunal, which had determined that such practice must be "…a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of the treaty".[165]

126. In the commentaries to the articles on the prevention and punishment of crimes against humanity, the Commission referred to the interpretation of the terms "widespread" and "systematic" in the definition of "crimes against humanity" in the jurisprudence of the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.[166] Other examples in the same articles concern the interpretation of some of the elements of international crimes in the jurisprudence of these tribunals.[167]

Observation 30

On occasion, the Commission has referred to separate or dissenting opinions that expressed a view or explained in further detail the reasoning of a court or tribunal in a particular decision.

127. The Commission has sometimes referred to the separate or dissenting opinions of judges where these assist in understanding the decision of the court or tribunal in question or its underlying reasoning. In the commentary to the articles on the responsibility of States for internationally wrongful acts, for example, the Commission referred to a dissenting opinion of Judge Schwebel in support of the position that the

[162] Para. (4) of the commentary to article 14 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 60, citing Blake, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998).

[163] Para. (2) of the commentary to article 6 on the responsibility of international organizations, (footnote 102 above), p. 55.

[164] *Ibid*., para (4) of the commentary to article 6 on the responsibility of international organizations.

[165] Para. (9) of the commentary to conclusion 5 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), p. 40, citing, among others, Iran-United States Claims Tribunal, *United States of America et al. v. Islamic Republic of Iran et al.*, Award No. 108-A-16/582/591-FT, *Iran-United States Claims Tribunal Reports*, vol. 5 (1984), p. 57, at p. 71.

[166] Paras. (10) to (16) of the commentary to article 2 on the prevention and punishment of crimes against humanity (footnote 116 above), pp. 31–34.

[167] See, for example, paras. (19)–(29) of the commentary to article 2, paragraphs 1 and 2, on prevention and punishment of crimes against humanity (footnote 116 above), pp. 34–38.

doctrine of "clean hands" has been invoked principally in the context of admissibility of claims before international courts and tribunals, though rarely applied.[168]

128. In the final report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), the Commission referred to dissenting and separate opinions to decisions at the International Court of Justice which addressed the typology of treaties containing the "*aut dedere aut judicare* formula".[169]

129. Separate opinions of International Court of Justice judges were referred to in the commentaries to the articles on diplomatic protection, for example, in favour of an exception that would allow the State of nationality of shareholders in a corporation to claim against the State of incorporation when that State is responsible for the injury to the corporation.[170] The Commission, however, decided on an exception that was more limited in scope.[171] In the same topic, the Commission referred to a dissenting opinion of Judge Oda in the *Elettronica Sicula S.p.A* International Court of Justice case as supporting reliance on "the general principles of law concerning companies" rather than municipal law to ensure the rights of foreign shareholders in circumstances where the company is incorporated in the wrongdoing State.[172]

130. The Commission referred to a separate opinion of Judge Alvarez in the *Corfu Channel* case in its commentaries to the articles on the protection of persons in the event of disasters, who stated that "[b]y sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them".[173] Another reference to separate opinions of judges of the International Court of Justice is found in the final report of the Study Group on fragmentation of international law, which referred to the views of various judges in the *Oil Platforms* case[174] concerning the application of article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties to the 1955 treaty

[168] See para. (9) to the commentary to Chapter V and fn 319, articles on the responsibility of States for internationally wrongful acts, (footnote 34 above), para. 77, referring to the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v United States of America) Merits, Judgment, I.C.J. Reports 1986*, p. 14 at pp. 392–394.

[169] Final report of the Study group on the obligation to extradite or prosecute (*aut dedere aut judicare*), *Yearbook ... 2014*, vol. II (Part Two), p. 95, para. 11. ("(11) In his separate opinion in the judgment of 20 July 2012 of the International Court of Justice in the case concerning Questions relating to the Obligation to Prosecute or Extradite, Judge Yusuf also addressed the typology of "treaties containing the formula *aut dedere aut judicare*" and divided them into two broad categories.")

[170] Para. (10) of the commentary to article 11 on diplomatic protection (footnote 72 above), p. 41, referring to the separate opinions of Judges Fitzmaurice, Jessup and Tanaka in the *Barcelona Traction*, *Light and Power Company Limited*, *Second phase*, Judgment, I.C.J. Reports 1970, p. 3 at p. 48.

[171] Article 11, paragraph (b) on Diplomatic Protection, *ibid*, p. 42.

[172] Para. (4), footnote 162, of the commentary to article 12 on diplomatic protection, *ibid*, p. 43, citing *Elettronica Siculca S.p.A (ELSI), Judgment, I.C.J. Reports 1989*, p. 15.

[173] Paragraph (4) of the commentary to article 10, articles on the protection of persons in the event of disasters (footnote 85 above), para. 49, citing the separate opinion of Judge Alvarez in the *Corfu Channel* case, Merits, Judgment, *I.C.J. Reports 1949*, p. 39 at p. 43.

[174] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161, at pp. 278–279 (separate opinion of Judge Buergenthal), 326–34 (separate opinion of Judge Simma), 236–240 (separate opinion of Judge Higgins), 261 (separate opinion of Judge Koojimans).

of Amity, Economic Relations and Consular Rights between Iran and the United States.[175]

Observation 31

On occasion, the Commission has referred to judicial decisions to recall the practice of States in their pleadings, or referred directly to such pleadings before an international tribunal on a particular point of law.

131. The Commission has also referred to statements of States before international courts and tribunals, or the decisions of international courts and tribunals reflecting the views and practice of States in relation to a specific point of law.[176] For example, in the articles on the law of treaties, the Commission considered "[t]hat the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted; for the Court itself in the *Reservations to the Genocide Convention* case spoke of 'very great allowance' being made in international practice for 'tacit assent to reservations'".[177]

132. In the same topic, the Commission indicated that "[t]he most illuminating indications as to the attitude of States regarding the principle [of *rebus sic stantibus*] are perhaps statements submitted to the Court in the cases where the doctrine has been invoked", and referred to the positions of States in cases before the Permanent Court of International Justice.[178]

133. In the commentary to article 12 on the succession of States in respect of treaties, the Commission referred to the pleadings of Thailand and Cambodia in the *Temple of Preah Vihear* case, referring to the "position taken by the parties on the question of succession in their pleadings on their preliminary objections filed by Thailand". The Commission then noted that "both parties seemed to have assumed that, in the case

[175] Final report of the study group on the fragmentation of international law (footnote 23 above), p. 93, paras. 455–457. The Commission had also referred to the separate opinions of judges when referring to article 103 of the United Nations Charter, *ibid*., p. 74, para 356, referring, for example, Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of 28 November 1958, I.C.J. Reports 1958, p. 55, at p. 107 (separate opinion of Judge Moreno Quintana); South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 319, at p. 407 (separate opinion of Judge Jessup); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 99 (separate opinion of Judge Ammoun); Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985, p. 192, at pp. 232–233 (separate opinion of Judge Ruda).

[176] See also, observation 17 of the report on the Formation and evidence of customary international law, Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat, 14 March 2013, Document A/CN.4/659, p. 26, citing, among others, para. (10) of the commentary to article 5 on the non-navigational uses of international watercourses (footnote 107 above), p. 98 (including "decisions of international courts and tribunals" in its "survey of all available evidence of the general practice of States, accepted as law"). See also para. (4) of the commentary to article 39 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 110 (relying on the Delagoa Bay Railway and the S.S. "Wimbledon" cases as evidence of "State practice" with respect to "[t]he relevance of the injured State's contribution to the damage in determining the appropriate reparation").

[177] Para. (23) of the commentary to articles 16 and 17 on the law of treaties (footnote 21 above), p. 208, citing *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J, Reports 1951*, p. 15, at p. 21.

[178] Para. (4) of the commentary to article 59 on the law of treaties, *ibid.*, p. 257, referring to the pleadings of France in the *Nationality Decrees issued in Tunis and Morroco* case of China in *Denunciation of the Treaty of 2 November 1865 between China and Belgium*, and France in the *Free Zones of Upper Savoy and the District of Gex* case.

of a newly independent State, there would be a succession not only in respect of the boundary settlement but also of treaty provisions ancillary to such settlement".[179]

134. In the work on the articles on the most-favoured-nation clause, adopted in 1978, the Commission referred to the views of States before the International Court of Justice concerning the meaning of the most-favoured-nation clause, referring to the pleadings of the United States in the case concerning *Rights of Nationals of the United States of America in Morocco*.[180]

135. In the commentaries to the articles on the responsibility of international organizations for internationally wrongful acts, the Commission referred to the invocation of *force majeure* to exclude wrongfulness of conduct in proceedings before international administrative tribunals. While such pleas were rejected, the tribunals recognized the invocability of *force majeure*.[181]

136. In the same project, the Commission noted that "[t]he view that member States cannot generally be regarded as internationally responsible for the internationally wrongful acts of the organization has been defended by several States in contentious cases", referring to a written comment submitted by Germany mentioning that it "had advocated the principle of separate responsibility before the European Commission of Human Rights (M. & Co.), the European Court of Human Rights (Senator Lines) and the [International Court of Justice] (Legality of Use of Force) and [had] rejected responsibility for reason of membership for measures taken by the European Community, NATO [North Atlantic Treaty Organization] and the United Nations".[182]

Observation 32

The Commission has observed that decisions of international tribunals may, despite their lack of formal precedent value, influence decision-making by other international tribunals.

137. In an analysis of multiple arbitral decisions in the final report of the Study Group on Most-Favoured-Nation clause, the Commission stated that:[183]

> While tribunals have noted that there is no formal precedential value in decisions of other tribunals, the desire for consistency clearly has had an influence on decision-making.

3. Teachings of the most highly qualified publicists

Observation 33

The Commission has referred to writings and the views of publicists to indicate that there is support for a particular approach to a rule of international law contained in its work.[184]

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[179] Para. (7) of the commentary to article 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 198.

[180] Para. (21) of the commentary to article 10 on the Most Favoured Nation clauses (footnote 41 above), p. 37.

[181] Para. (4) of the commentary to article 23 on responsibility of international organizations for internationally wrongful acts (footnote 102 above), p. 73, referring to *Fernando Hernández de Agüero v. Secretary General of the Organization of American States*, Judgment No. 24 of 16 November 1976, para. 3 (OAS, Sentencias del Tribunal Administrativo, Nos. 1–56 (1971–1980), p. 282), and at the International Labor Organization, *Barthl case*, Judgment No. 664 of 19 June 1985, para. 3.

[182] Para. (3) of the commentary to article 62 on the responsibility of international organizations for internationally wrongful acts (footnote 102 above), p. 100.

[183] Final report of the Study Group on the Most Favored Nation Clause, *Yearbook…2015*, vol. II (Part Two), p. 109, para. 135.

[184] See for example, para. (9) of the commentary to article 16 on Succession of States in respect of State Property, Archives and Debts with commentaries 1981, *Yearbook…1981*, vol. II, (Part Two), p. 46 ("The foregoing rule conforms to the opinions of publicists, who generally take the view that the predecessor State, having completely ceased to exist, no longer has the legal capacity to own property and that its immovable property abroad should therefore pass to the successor State or States").

138. The Commission has referred in multiple instances to the views of writers in support of its interpretations and its determination of rules. In the commentaries to the articles on the responsibility of States for internationally wrongful acts, for example, the Commission referred to the views of writers in support of the statement: "[t]hat every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before and since article 1 was first formulated by the Commission."[185] In the commentaries to the same articles, the Commission referred to the views of writers to support the rule contained in article 13 that for the responsibility of the State to exist, the State must have been bound by the obligation at the time of occurrence of the wrongful act. The Commission noted that "[i]nternational law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed".[186]

139. In the same topic, the Commission referred to the use of necessity as a ground to preclude wrongfulness of an international conduct. While the subject had been debated over time, the Commission noted that "[d]uring the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea".[187]

140. In the articles on diplomatic protection, for example, writings were referred to in the commentaries in support of the Commission's conclusion that there is a presumption in favour of the validity of a State's granting of nationality.[188]

141. In the commentaries to the articles on the prevention of transboundary harm from hazardous activities, the Commission further relied on writings in support of its "suggestion" that, given the development of human rights law, public participation in decision-making about hazardous activities is a growing right under national law as well as international law.[189] The Commission also relied on writings in support of its statement that the need to develop contingency plans for responding to possible emergencies is well recognized, and also as a source of information concerning reviews of such contingency plans established by international organizations and other relevant bodies.[190]

See also, para. (2) of the commentary to guideline 2.2.4 on reservations to treaties (footnote 21 above), p. 112, where the Commission noted that the rule that the expression of consent to be bound to a treaty is the last time when a reservation may be formulated "is unanimously recognized in legal writings".

[185] Para. (3) of the commentary to article 1 of the articles on responsibility of States for internationally wrongful acts, (footnote 34 above), p. 33, footnote 48 and 49.

[186] Para. (4) of the commentary to article 13 on the responsibility of States for internationally wrongful acts *ibid*., p. 58.

[187] Para (13) of the commentary to article 25 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 83.

[188] Para. (7) of the commentary to article 4 on diplomatic protection (footnote 72 above), p. 30, referring to *Oppenheim's International Law,* 9th edition, vol. I, Peace, R. Y. Jennings and A. D. Watts (eds), Harlow, Longman, 1992, p. 856.

[189] Para. (10) of the commentary to article 13 on prevention of transboundary harm from hazardous activities (footnote 76 above), p. 166, referring to T. M. Franck, "Fairness in the international legal and institutional system: general course on public international law", *Recueil des cours…, 1993-III* (Dordrecht, Martinus Nijhoff, 1994) vol.240, p. 110; and D. Craig and D. Ponce Nava, "Indigenous peoples' rights and environmental law", *UNEP's New Way Forward: Environmental Law and Sustainable Development,* Sun Lin and L. Kurukulasuriya, eds (UNEP1995), p. 259.

[190] Paras. (1) and (2), commentary to article 16 on the prevention of transboundary harm from hazardous activities, *ibid*, p. 158, referring to E. Brown Weiss, "Environmental disasters in international law", *Anuario Juridico Interamericano,* 1986 (OAS, Washington D.C. 1987), pp. 141–169; and B. G. Ramcharan, *The International Law and Practice of Early-Warning and Preventive Diplomacy: The Emerging Global Watch* (Dordrecht, Kluwer, 1991), chapter 7 (The Practice of Early Warning: Environment, Basic Needs and Disaster-Preparedness), pp. 143–168.

142. The Commission relied extensively on writings in the commentary to the principles on the allocation of loss in the case of transboundary harm for hazardous activities, including to support the Commission's conclusion that "it is recognized that the State has, under international law, duties of prevention, and these entail certain minimum standards of due diligence", referring in particular to writings which state that there is ample authority in treaties, case law and State practice for regarding the articles on the prevention of transboundary harm as codifying existing customary international law.[191] Writings were relied on in support of the Commission's conclusion that claims are not commonplace in situations where transboundary harm takes place through gradually accumulated adverse effects because of difficulties of establishing a causal link with the hazardous activity.[192]

Observation 34

On occasion, the Commission has sought to make it clear that it was not following the approach taken in various writings.

143. For example, in the work on the guide to practice on reservations to treaties, the Commission indicated that it "chose not to use in this guideline the term 'agreements in simplified form', which is commonly used in French writings but does not appear in the Vienna Conventions".[193]

144. In the commentary to the articles on diplomatic protection, writings were referred to as providing "some support" for the view that where a national dies before the official presentation of a claim, the claim may nevertheless continue because it has assumed a "national character".[194] In view of contrary claims commission decisions, however, the Commission concluded that there was an inconclusiveness of authorities that made it unwise to propose a rule on this matter.[195]

Observation 35

In some topics, the Commission has referred to writings to provide background information concerning the area of the law in question and its development.

145. In the articles on the responsibility of States for internationally wrongful acts, the Commission referred to the notion of continuing wrongful acts, mentioning in the commentary that such a concept was introduced to international law by a writer and used by international tribunals:

> The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel. It has been

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[191] Para. (9) and footnote 306 of the general commentary to the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (footnote 147 above), p. 60, referring to P. W. Birnie and A. E. Boyle, *International Law and the Environment,* 2nd ed. Oxford University Press, 2002, p. 113.

[192] Para. (7) of the commentary to principle 1 on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *ibid* p. 63, referring to P. Wetterstein "A proprietary or possessory interest: A *condition sine qua non* for claiming damages for environmental impairment?", in P. Wetterstein (ed), *Harm to the Environment: the Right to Compensation and Assessment of Damage,* Oxford, Clarendon Press, 1997, pp. 29–54, at p. 30; and H. Xue, *Transboundary Damage in International Law,* Cambridge University Press, 2003, pp. 19–105 and 113–182.

[193] Para. (4) of the commentary to guideline 2.2.2. on reservations to treaties (footnote 21 above), p. 109.

[194] Para. (14) of the commentary to article 5 on diplomatic protection (footnote 72 above), p. 33, referring to E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* New York, The Banks Law Publishing Co., 1922, p. 628.

[195] Para. (14) of the commentary to article 5, on Diplomatic Protection, *ibid,* p. 33, referring to the *Eschauzier claim, (Great Britain v United Mexican States),* Decision of 24 June 1931, UNRIAA, vol. V (Sales No. 1952.V.3), p. 209.

repeatedly referred to by ICJ and by other international tribunals. For example, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963".[196]

146. In the articles on prevention of transboundary harm from hazardous activities, writings were referred to extensively by the Commission in the commentary as reference works concerning the large number of multilateral treaties in this field, categorizing them by reference to the areas of the environment protected and by particular threats and hazards.[197] Other references to writings informed the topic generally, including on the fundamental point that an invocation of the articles by an affected State does not necessarily imply that the activity itself is prohibited under international law;[198] and that in such a case, State responsibility could be engaged to implement obligations, including through invoking any civil liability of the operator.[199] Writings are again referred to by the Commission in this topic by way of information about various principles applicable in the field of environmental law and their development, including the precautionary principle and the polluter pays principle, and to support the Commission's position that there is a need for States to review their obligations of prevention of transboundary harm in a continuous manner so as to keep abreast of the advances in scientific knowledge and new requirements of environmental protection.[200]

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[196] Para. (7) of the commentary to article 14 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 60, citing "H. Triepel, Völkerrecht und Landesrecht (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula "situations or facts prior to a given date" used in some declarations of acceptance of the compulsory jurisdiction of ICJ.", and *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, p. 37, para. 80. See also pages 36–37, paras. 78– 79.

[197] Para. (5) of the general commentary to the articles on prevention of transboundary harm from hazardous activities (footnote 76 above), p. 149, referring to E. Brown Weiss, D. B. Magraw and P. C. Szasz, *International Environmental Law: Basic Instruments and References,* Dobbs ferry, N.Y. Transnational, 1992; P. Sands, *Principles of International Environmental Law,* vol. 1: *Frameworks, Standards and Implementation,* (Manchester University Press, 1995); L. Boisson de Chazournes, R. Desgagné and C. Romano, *Protection internationale de l'environnement: recueil d'instruments juridiques,* (Paris, Pedone, 1998); and C. Dommen and P. Cullet, eds, *Droit international de l'environnement, Textes de base et références* (London, Kluwer, 1998).

[198] Para. (6), footnote 866, of the commentary to article 1 on prevention of transboundary harm from hazardous activities, *ibid*, p. 150, referring to M. B. Akehurst, "International liability for injurious consequences arising out of acts not prohibited by international law", NYIL, 1985, vol. 16, pp. 3–16; A. E. Boyle, "State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?", International and Comparative Law Quarterly, vol. 39 (1990), pp. 1–26; and K. Zemanek, "State responsibility and liability", *Environmental Protection and International Law*, W. Lang, H. Neuhold and K. Zemanek, eds (London, Graham and Trotman/Martinus Nijhoff, 1991, p. 197.

[199] Para. (6), footnote 867, of the commentary to article on prevention of transboundary harm from hazardous activities, *ibid*, p. 150, referring to P-M. Dupuy, *La responsibilité internationale des États pour les dommages d'origine technologique et industrielle* (Paris, Pedone, 1976); F. Bitar, *Les mouvements transfrontières de déchets dangereux selon la Convention de Bâle: Étude des régimes de responsabilité* (Paris, Pedone, 1997); and P-M Dupuy, *"Où en est le droit international de l'environnement à la fin du siècle?",* RGDIP, vol. 101, No. 4 (1997), pp. 873–903.

[200] Paras. (7) and (10), footnotes 925 and 929, of the commentary to article 10 on prevention of transboundary harm from hazardous activities, *ibid*, p. 163, referring to H. Hohmann, *Präventive Rechtspflichten und prizipien des modernen Umweltvölkerrechts zwischen Umweltnutzung und Umweltschutz* (Berlin, Duncker und Humblot, 1992), pp. 406–411; J. Cameron, "The status of the precautionary principle in international law", *Interpreting the Precautionary Principle,* T. O'Riordan and J. Cameron, eds. (London, Earthscan, 1994), pp. 262–289; G, Haffner, "Das Verursacherprinzip", *Economy-Fachmagazin* No. 4/90 (1990), pp. F23–F29; and H. Smets, "The polluter-pays principle in the early 1990s", *The Environment after Rio: International law and Economics,* L. Campiglio *et al,* eds (London, Graham and Trotman/Martinus Nijhoff, 1994), p. 134.

Observation 36

In some situations, the Commission has taken account of the interpretation of treaty provisions by expert treaty bodies in the formulation of its own texts.

147. In various texts, the Commission has referred to interpretations made by expert treaty bodies, including the Human Rights Committee,[201] the Committee against Torture[202] and the Committee on Economic, Social and Cultural Rights.[203]

148. In the commentary to the articles on the prevention and punishment of crimes against humanity, the Commission referred to the work of the Human Rights Committee on several points, including the right to truth,[204] and the right to a fair trial, noting that "the Human Rights Committee has found the right to a fair trial to be a 'key element of human rights protection' and a 'procedural means to safeguard the rule of law'. Consequently, article 11, paragraph 1, refers to fair treatment 'including a fair trial'".[205]

149. In certain topics, the Commission has referred to the work of expert treaty bodies and the interpretation that they have given to treaty provisions. For example, in the articles on the expulsion of aliens, the Commission referred in the commentary to the guidelines developed by the Committee against Torture when considering claims arguing that expulsion of aliens to particular States was contrary to the Convention against Torture.[206]

150. On occasion, the Commission has drawn upon developments by treaty bodies in the interpretation of instruments. In the draft Code of Crimes against the Peace and Security of Mankind, the Commission included in the proposed definition of the crime of genocide "imposing measures intended to prevent births within the group", noting in the commentary that the phrase "imposing measures" was used to indicate the

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[201] See, for example, para. 6 of the commentary to article 18 on the expulsion of aliens (footnote 136 above), p. 40, where the Commission noted that "[t]he criterion of "fair balance" also seems compatible with the approach taken by the Human Rights Committee for the purpose of assessing whether expulsion measures are in conformity with article 17 of the International Covenant on Civil and Political Rights."

[202] Para. (3) of the article 8 on the prevention and punishment of crimes against humanity (footnote 116 above), p. 88, indicated that such provision "requires that the investigation be carried out whenever there is "reasonable ground to believe" that the offence has been committed. According to the Committee against Torture, such a belief arises when relevant information is presented or available to the competent authorities but does not require that victims have formally filed complaints with those authorities."

[203] See, for example, para. (3) of the commentary to article 11 on the Protection of Persons in the Event of Disasters (footnote 85 above), p. 47, referring to General Comment no. 12 of the Committee on Economic, Social and Cultural Rights concerning the right to adequate food, 12 May 1999, E/C.12/1999/5.
Para. (14) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, (footnote 26 above), p. 112.
See also, para. (11) of the commentary to principle 10 on the protection of the environment in armed conflict (footnote 77 above), pp. 130–131, referring to the decisions that have drawn a link between environmental degradation and human health at Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), *Official Records of the Economic and Social Council, 2001, Supplement No. 2* (E/2001/22-E/C.12/2000/21), annex IV, para. 30.

[204] Para. (24) of the commentary to article 12 on the prevention and punishment of crimes against humanity (footnote 116 above), pp. 109–110, referring to the right to information or the right to truth in the decisions of the Human Rights Committee "as a way to end or prevent the occurrence of psychological torture of families of victims of enforced disappearances or secret executions."

[205] Para. (5) of the commentary to article 11 on the prevention and punishment of crimes against humanity, *ibid.*, p. 99, citing Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second session, Supplement No. 40* (A/62/40), vol. I, annex VI, para. 2.

[206] Paras. (2) to (4) of the commentary to article 24 on the expulsion of aliens (footnote 136 above), p. 48–49.

necessity of an element of coercion, citing article II, subparagraph (d), of the Convention on the Prevention and Punishment of the Crime of Genocide and the work of the Committee on the Elimination of Discrimination against Women.[207]

151. In the commentary to the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission referred to the use of the pronouncements of expert treaty bodies by the International Court of Justice,[208] and various regional human rights courts "as an aid for the interpretation of treaties that they are called on to apply". The Commission added that domestic courts have also made use of such materials, noting that "while not being legally binding on them as such", they nevertheless "deserve to be given considerable weight in determining the meaning of a relevant right and determination of a violation".[209]

152. In the commentary to the articles on the protection of persons in the event of disasters, the Commission referred, for example, to various general comments by the Committee on Economic, Social and Cultural Rights in the context of the duty of cooperation among States.[210]

Observation 37

The Commission has referred to the works of private expert bodies in the consideration of several topics.[211]

153. The Commission has relied on the work of private expert bodies to varying extents. In multiple topics, the Commission has referred to the work of such bodies in the development of its own work. For example, in the following topics:

- Law of treaties[212]
- Nationality of natural persons in relation to the succession of States[213]

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[207] Para. (16) of the commentary to article 17 of the code of crimes against the peace and security of mankind (footnote 159 above), p. 46 citing *Report of the Committee on the Elimination of Discrimination against Women (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38* (A/47/38)), chap. I, para. 22).

[208] Para. (21) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), p. 86.

[209] Para. (22) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *ibid.*, pp. 86–87.

[210] Paragraph (2) of the commentary to article 7 on the protection of persons in disasters (footnote 85 above), para. 49, referring in fn. 84 to general comment nos. 2, 3, 7, 14 and 15 of the Committee on Economic, Social and Cultural Rights.

[211] See para. (7) of the commentary to draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (footnote 11 above), pp. 45–46. ("The paragraph lists, as examples of other subsidiary means, the works of expert bodies and teachings of the most highly qualified publicists of the various nations, also referred to as scholarly writings.")

[212] The articles on the law of treaties noted in para. (1) of the commentary to article 28 that "[i]n 1956, the Institute of International Law adopted a resolution in which it formulated, if in somewhat cautious language, two articles containing a small number of basic principles of interpretation." (footnote 21 above), p. 218.
References to the Harvard Draft on the law of treaties are found in para. (3) of the commentary 3 to guideline 2.2.1 from the guide to practice on reservations to treaties (footnote 21 above), p. 108.

[213] See for example, para. (4) of the commentary to article 26 on nationality of natural persons in relation to the succession of States, *Yearbook…1999*, vol. II, part two, p. 46, mentioning that the rule that the successor State shall attribute its nationality to persons concerned habitually resident in its territory, noting that "an analogous provision regarding the case of separation was included in in paragraph (b) of article 18 of the Draft Convention on Nationality prepared by Harvard Law School", referring to Harvard Law School, Research in International Law. I. Nationality, Supplement to the American Journal of International Law, vol. 23 (Cambridge, Mass., 1929), p. 13.
The text referred to the resolution of the International Law Institute concerning conflict of laws in relation to nationality (naturalization and expatriation), *Annuaire de I'Institut de droit international,* vol. 15, part II (1896), pp. 270–271), at para. (2) of the commentary to article 12 on the nationality of natural persons in relation to the succession of States, *Yearbook…1999*, vol. II, part two, p. 46.

- Most-favoured-nation clauses in treaties[214]
- Prevention and punishment of crimes against diplomatic agents and other internationally protected persons[215]
- Responsibility of States for internationally wrongful acts[216]
- Law of the non-navigational uses of international watercourses[217]
- Fragmentation of international law[218]
- Law of transboundary aquifers[219]

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[214] In the articles on most-favoured-nation clauses, the Commission referred several times to the work concluded by the Institute of International Law in 1936. See, for example, para. (2) of the commentary to article 16 (footnote 41 above), p. 42 ("The rule proposed in the article applies to most-favoured-nation clauses irrespective of whether they belong to the unconditional type or take the form of a clause conditional upon any form of compensation, in particular reciprocal treatment. The rule was formulated in paragraph 2 of the resolution adopted by the Institute of International Law at its fortieth session, in 1936…").

[215] See, for example, footnote 473 to the para. (3) of the commentary of article 7 on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook… 1972*, vol. II, p. 319, referring to "...article 2 of the convention on extradition prepared by the Research in International Law of the Harvard Law School (Supplement to the American Journal of International Law, Washington D.C. (January and April 1935), vol. 29, Nos. 1 and 2, p. 21)".

[216] See, for example, para. (5) of the commentary to article 50 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 123, noting that "The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience", citing *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

[217] See para. (12) of the commentary to article 2 on the law of the non-navigational uses of international watercourses (footnote 107 above), p. 92, at footnote 184referring to the New York resolution, adopted in 1958 by ILA, Report of the Forty-eighth Conference, New York, 1958 (London, 1959), annex II, p. 99, The Helsinki Rules on the Uses of the Waters of International Rivers Report of the Fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 484 et seq.; reproduced in part in A/CN.4/274, pp. 357 et seq., para. 405). See the Salzburg resolution adopted by the Institute of International Law, at its Salzburg session in 1961, entitled "Utilization of non-maritime international waters (except for navigation)" (Annuaire de I'Institut de droit international (Basel), vol. 49, part II (1961), pp. 381–384), and the Athens resolution adopted by the Institute of International Law, at its Athens session in 1979, entitled "The pollution of rivers and lakes and international law" (ibid., vol. 58, part II (1980), p. 196). A private group of legal experts, the InterAmerican Bar Association, adopted a resolution in 1957 dealing with "every watercourse or system or rivers or lakes ... which may traverse or divide the territory of two or more States ... referred to hereinafter as a 'system of international waters'" (Inter-American Bar Association, Proceedings of the Tenth Conference held at Buenos Aires from 14 to 21 November 1957 (2 volumes) (Buenos Aires, 1958), pp. 82–83; reproduced in A/5409, p. 208, para. 1092.)
See also para. (5) of the commentary to article 24 on the law of the non-navigational uses of international watercourses, *ibid.*, p. 126, referring to the resolution on international regulations regarding the use of international watercourses (Madrid resolution) (on which article 5 of the Declaration of Montevideo was based) adopted by the Institute of International Law at its Madrid session, in 1911 (Annuaire de I'lnstitut de droit international, 1911 (Paris), vol. 24, p. 366), reproduced in A/5409, p. 200, para. 1072.

[218] See final report of the study group on fragmentation (footnote 23 above), p. 88, para. 431, referring to the Resolution of the Institute of International Law on the interpretation of treaties, Annuaire de l'Institut de droit international, vol. 46 (Session of Granada), pp. 364–365.

[219] See para. (5) of the general comment ("The Commission also held an informal meeting in 2004 with the Water Resources Law Committee of the International Law Association and wished to acknowledge its comments on the Commission's draft articles adopted on first reading, as well as its appreciation of the International Law Association Berlin Rules of 2004."), and para. (1) of the commentary to draft article 2 on the law of transboundary aquifers with commentaries, *Yearbook ... 2008*, vol. II (Part Two), p. 25.

- The responsibility of international organizations[220]
- Succession of States in respect of State property[221]
- Expulsion of aliens[222]
- The effects of armed conflicts on treaties[223]
- The protection of persons in the event of disasters[224]
- Subsequent agreement and subsequent practice in relation to the interpretation of treaties[225]

[220] The articles on the responsibility of international organizations referred to a resolution of the Institute of International Law entitled "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties", at para. (5) of article 62 (footnote 102 above), p. 100.
The Commission also referred to a draft suggested by the Committee on Accountability of International organisations of the International Law Association. (Report of the Seventy-first Conference Held in Berlin, 16–21 August 2004, London, 2004, p. 200.) See para. (1) of the commentary to article 14, (*Yearbook… 2011*, vol. II (Part two), p. 69., para. (8) of the commentary to draft article 7 (*Yearbook… 2011*, vol. II, part two, p. 57), commentary 7 to draft article 8 (*Yearbook… 2011*, vol. II, part two, p. 61), commentary to article 11 (Yearbook… 2011, vol. II, part two, p. 64), para. (7) of the commentary to article 45, *Yearbook… 2011*, vol. II, part two, p. 87.

[221] See para. (27) of the commentary to draft article 31 on succession of States in respect of State Property, Archives and Debts with commentaries, *Yearbook…1981*, vol. II, part two, p. 76, referring to ILA, Report of the Fifty-fourth Conference, held at The Hague, 23rd–29th August 1970 (London, 1971), p. 108.
See also para. (7) of guideline 5.1.1 of the guide to practice on reservations to treaties (footnote 21 above), p. 329. ("This presumption [in favour of the maintenance of the predecessor State's reservations] had already been proposed by Mr. D. P. O'Connell, Rapporteur of the International Law Association on the topic "The Succession of New States to the Treaties and Certain Other Obligations of their Predecessors", one year before Sir Humphrey Waldock endorsed the concept.")

[222] Para. (2) of the commentary to article 5 on the expulsion of aliens (footnote 136 above), p. 29, referring to the Règles internationales sur l'admission et l'expulsion des étrangers [International Regulations on the Admission and Expulsion of Aliens], adopted on 9 September 1892 at the Geneva session of the Institute of International Law, art. 30.

[223] Para. (2) of the commentary to article 3 on the effects of armed conflicts on treaties (footnote 35 above), p. 111, footnote 407, referring to Institute of International Law, *Yearbook*, vol. 61, Part I, Session of Helsinki (1985), pp. 8–9.

[224] See Para. (6) of the commentary to article 3 on the protection of persons in the event of disasters (footnote 85 above), p. 30, referring to the element of "widespread loss of life" inspired by the 1995 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, at *International Review of the Red Cross*, vol. 36 (1996), No. 310, annex VI.
See also para. (4) of the commentary to article 3 on the protection of persons in the event of disasters, *ibid.*, p. 29, referring to the resolution on humanitarian assistance adopted by the Institute of International Law, *Yearbook*, vol. 70 Part. II, Session of Bruges (2003), p. 263.

[225] See, for example, para. (11) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), p. 84. ("Pronouncements of expert treaty bodies may, however, give rise to, or refer to, a subsequent agreement or a subsequent practice …. This possibility has been recognized by States, by the Commission and also by the International Law Association and by a significant number of authors.")

- Protection of the environment in armed conflict[226]
- Protection of the atmosphere[227]

154. In its work on the law of the sea, the Commission referred to the work of private expert bodies and collective efforts by scholars. Some examples in that regard can be found in the law of the sea, in issues such as the use of the flag[228] and piracy.[229]

155. Other topics with references to work concluded by private expert bodies concerned diplomatic protection, to support the basic proposition that a State may not exercise diplomatic protection in respect of a person against another State of which that person is also a national. The Commission described the relevant Harvard draft convention and resolution of the *Institut de droit international* as "codification endeavours" and "codification proposals".[230] The Commission did not consider, however, that these codification endeavours carried sufficient weight to require a "genuine or effective link" between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national.[231]

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[226] Referring to the work of the Institute of International Law concerning the use of force, para. (3) of the commentary to guideline 20 on the protection of the environment in relation to armed conflicts (footnote 77 above), p. 167 (footnote 784. As summarized by the Institute of International Law, "the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population". See Institute of International Law, Yearbook, vol. 70, Part II, Session of Bruges (2003), pp. 285 et seq.; available from www.idi-iil.org, Declarations, at p. 288.); and to the ICRC Guidelines on the Protection of the Natural environment, at para. (4) of the commentary guideline 4, *ibid*, p. 106. ("Most recently, the ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict recommended that areas of particular environmental significance or fragility could be designated as demilitarized zones.")

[227] Para. (6) of the commentary to guideline 1 on the protection of the atmosphere (footnote 39 above), p. 21, referring to the Cairo resolution (1987) of the Institute of International Law (*Institut de droit international*) on "Transboundary Air Pollution". See also para. (1) of the commentary to guideline 9 on the protection of the atmosphere, referring to "draft article 10 (on interrelationship) of resolution 2/2014 on the declaration of legal principles relating to climate change of the International Law Association, Report of the Seventy-sixth Conference held in Washington D.C., August 2014, p. 26; S. Murase (Chair) and L. Rajamani (Rapporteur), Report of the Committee on the Legal Principles Relating to Climate Change, ibid., pp. 330–378, at pp. 368–377", p. 39, footnote 131.

[228] Para. (2) of the commentary to article 29 concerning the law of the sea (footnote 37 above), p. 279. ("On this principle, the Institute of International Law, as long ago as 1896, adopted certain rules governing permission to fly the flag. At its seventh session the Commission deemed these rules acceptable in slightly amended form, while realizing that, if the practical ends in view were to be achieved, States would have to work out more detailed provisions when incorporating these rules in their legislation.")

[229] See para. (1) of the commentary to article 38 on the law of treaties, (footnote 21 above), p. 282. ("In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.")

[230] Para. (3) of the commentary to article 6, and para. (2) of the commentary to article 7 on diplomatic protection, (footnote 72 above), pp. 33–34, referring to paragraph 5 of article 23 of the 1960 Harvard draft convention on the international responsibility of States for injuries to aliens, reproduced in L.B. Sohn and R. R. Baxter, "Responsibility of States for injuries to the economic interests of aliens", AJIL, vol. 55, No. 3 (July 1961), p. 548; and article 4(a) of the resolution on the national character of an international claim presented by a State for injury suffered by an individual adopted by the Institute of International Law at its Warsaw session in 1965, *Tableau des résolutions adoptées (1957–1991),* Paris, Pedone, 1992, p. 56 at p. 58.

[231] Para. (3) of the commentary to article 6 on diplomatic protection, *ibid.*, pp. 33–34.

Observation 38

In some topics, the Commission has resorted to formulations inspired by or drawing upon the work of specialized private expert bodies.[232]

156. In the draft statute for an international criminal court, the Commission noted in the commentary that "while prison facilities would continue to be administered by the relevant national authority, the terms and conditions of imprisonment should be in accordance with international standards, notably the Standard Minimum Rules for the Treatment of Prisoners".[233] Such a document was first prepared by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955.

157. The commentary to the articles on the non-navigational uses of international watercourses referred to measures by States which may have a "significant adverse effect" upon other watercourse States, and relied for the definition of this term on a set of principles of conduct that had been adopted by the Governing Council of the United Nations Environmental Programme.[234]

158. In the principles on the allocation of loss, the International Law Association's prior work is relied on to support "significant" as being the threshold for transboundary damage caused by hazardous activities.[235]

159. In the commentary to the articles on the effects of armed conflicts on treaties, the Commission indicated that article 16, concerning the independence of obligations derived from the decisions of the Security Council in accordance with the Charter of the United Nations "has the same function as article 8 of the 1985 resolution of the Institute of International Law. The Commission decided to present the provision in

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[232] See, for example, para. (1) of the commentary to article 4 on the nationality of natural persons in relation to the succession of States, *Yearbook…1999*, vol. II, part two, p. 28, referring to the Report of the experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation (Council of Europe (Strasbourg, 2 April 1996), document DIR/JUR(96)4), para. 54.

See also the Final report of the Study group on the obligation to extradite or prosecute (*aut dedere aut judicare*) (footnote 169 above), p. 97, para. 18, footnote 447, referring, among others, to the Report of the African Union-European Union Technical *ad hoc* expert group on the Principle of Universal Jurisdiction (8672/109/Rev.1).

See also, para. (2) of the commentary to article 19 on the expulsion of aliens (footnote 136 above), p. 41, where the Commission referred to "the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in the annex to General Assembly resolution 43/173 of 9 December 1988."

See also reference to the report requested by the Secretary-General of the United Nations to the Office of the Coordination of Humanitarian affairs, at para. (9) of article 13 on the protection of persons in the event of disasters (footnote 85 above), p. 51.

[233] Para. (2) of the commentary to article 59 of the draft statute for an international criminal court, Yearbook…1994, vol. II, part two, p. 67, footnote 111, referring to the first version of the rules: *First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August–3 September 1955* (United Nations publication, Sales No. 1956.IV.4), annex I, pp. 67–73.

[234] Para. (2) of the commentary to article 12 on the law of the non-navigational uses of international watercourses (footnote 107 above), p. 111, referring to The "Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious *utilization* of natural resources shared by two or more States", adopted by the Governing Council of UNEP in 1978 (decision 6/14of 19 May 1978), define the expression "significantly affect" as referring to "any appreciable effects on a shared natural resource and [excluding] *de mini- mis* effects" (UNEP, *Environmental Law: Guidelines and Principles,* No. *2, Shared Natural Resources* (Nairobi, 1978)).

[235] Article X of the Helsinki Rules on the Uses of the Waters of International Rivers, International Law Association, Report of the Fifty-second Conference, Helsinki, 1966, London, 1967, p. 496; and article 16 of the Berlin Rules on Equitable Use and Sustainable Development of Waters, Report of the Seventy-first Conference, Berlin, 16–21 August 2004, London, 2004, p. 334.

the form of a ‘without prejudice’ clause instead of the formulation adopted by the Institute which was cast in more affirmative terms”.[236]

160. In the commentary to the articles on the protection of persons in the event of disasters, the Commission indicated that subparagraph (e) of article 3 stated that the formulation is based on the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (also known as the Oslo Guidelines).[237] In the same articles, the Commission referred on a few occasions to other instruments developed by private expert bodies such as the Guiding Principles on the Right to Humanitarian Assistance adopted by the Council of the International Institute for International Humanitarian Law, the Guiding Principles on Internal Displacement,[238] the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance,[239] and the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters.[240]

161. In the same topic, the Commission noted in article 6 that “[t]he specific phrasing of ‘particularly vulnerable’ is drawn from article 4, paragraph 3 (a), of the IFRC [International Federation of Red Cross and Red Crescent Societies] Guidelines, which refer to the special needs of ‘women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses’”.[241] The Commission also indicated that guidance on measures at the national level to facilitate external assistance can be found in other instruments “such as the 2007 IFRC Guidelines and the related 2013 Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance”.[242]

162. In the commentaries to the principles on the protection of the environment in armed conflict the Commission noted that in principle 10, concerning the duty of due diligence by business enterprises, there are elements “inspired by the concept of ‘conflict-affected and high-risk areas’ used in the OECD [Organisation for Economic Co-operation and Development] Due Diligence Guidance for Responsible Supply Chains of Minerals,[523] as well as in the conflict minerals regulation of the European Union”.[243] The Commission further indicated that “the reference to ‘operating in or from their territories’ follows the standard phrase in the OECD Due Diligence Guidance”,[244] among other examples. In the same work the Commission also referred to “the parameters of ‘human rights due diligence’, as explained in the Guiding

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[236] Para. (1) of the commentary to article 16 on the effects of armed conflicts on treaties (footnote 35 above), pp. 118–119.

[237] Para. (24) of the commentary to article 3 on the protection of persons in the event of disasters (footnote 85 above), p. 32.

[238] Guiding Principles on Internal Displacement, 11 February 1998, E/CN.4/1998/53/Add.2, annex.

[239] Para. (6) of the commentary to article 4 on the protection of persons in the event of disasters, *ibid.*, pp. 33–34.

[240] Para. (2) of the commentary to article 5 on the protection of persons in the event of disasters, *ibid.*, p. 34, footnote 59, citing the 9 Inter-Agency Standing Committee, IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (Washington, D.C., The Brookings–Bern Project on Internal Displacement, 2011).

[241] See also, para. (7) of the commentary to article 6 on the protection of persons in the event of disasters, *ibid*., at p. 36.

[242] Para. (3) of the commentary to article 15 on the protection of persons in the event of disasters, *ibid.*, p. 54.

[243] Para. (6) of the commentary to principle 10 on the protection of the environment in relation to armed conflicts (footnote 77 above), p. 127.

[244] Para. (8) of the commentary to principle 10 on the protection of the environment in relation to armed conflicts, *ibid.*, pp. 128–129.

Principles on Business and Human Rights…", and to the *OECD Guidelines for Multinational Enterprises*.[245]

Observation 39

On occasion, the Commission has sought to make it clear that it was not following the approach taken by private expert bodies.

163. There have been instances where the Commission has referred to the outputs of private expert bodies, but has expressly taken a different approach. In the work on the articles on diplomatic protection, for example, the Commission made some references to the work of the International Law Association, including in the context of the exercise of diplomatic protection on behalf of dual nationals,[246] where the Commission did not follow the International Law Association's approach.[247]

164. In the commentaries to the articles on the protection of persons in the event of disasters, the Commission noted existing approaches to the definition of disasters in the Tampere Convention as well as in the 2007 Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of the International Federation of Red Cross and Red Crescent Societies. However, the Commission decided to change the emphasis "to the earlier conception of 'disaster' as being a specific event".[248]

Observation 40

The Commission has frequently referred to its own prior work.

165. The Commission routinely reviews and refers back to its prior work. For example, in the consideration of topics related to international criminal law, the Commission has often referred to its prior work on the Nuremberg principles and the Nuremberg judgment. In the commentaries to the draft Code of Crimes against the Peace and Security of Mankind, the Commission noted in 1951 that article 1, concerning the principle of individual responsibility for crimes under international law, was contained in the Charter and the judgment of the Nuremberg Tribunal, referring to the formulation of the Nuremberg Principles, stating that "any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment".[249]

166. In 1996, the Commission again referred to the statement from the judgment and the work of the Commission in the Nuremberg Principles, noting "that individuals can be punished for violations of international law",[250] or that "individuals have

[245] Para. (10) of the commentary to principle 10 on the protection of the environment in relation to armed conflicts, *ibid.*, p. 130, referring to Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex), and the OECD, "Environment and the OECD Guidelines for Multinational Enterprises. Corporate tools and approaches". Available at https://oecd.org/env/34992954.pdf

[246] *"The changing law of nationality of claims" interim report*, International Law Association, Report of the sixty-ninth Conference, London, 2000, p. 646, para. 11; confirmed in the final report adopted at the 2006 International Law Association Conference in Toronto, Report of the Seventy-second Conference, London 2006.

[247] Para. (4) of the commentary to article 7 on diplomatic protection, (footnote 72 above), p. 35.

[248] Para. (3) of the commentary to subparagraph (a) of article 3 of the articles on the protection of persons in the event of disasters (footnote 85 above)), p. 29.

[249] Commentary to article 1 of the code of crimes against the peace and security of mankind, found in the commentary to the first reading of the text, *Yearbook…1951*, vol. II, part two, p. 135, referring to Principle I of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, *Yearbook…1950*, vol. II, para. 97.

[250] See, para. (7) of the commentary to article 1 of the code of crimes against the peace and security of mankind (footnote 159 above), pp. 17–18.

international duties which transcend the obligations of obedience imposed by the individual State".[251]

167. In the articles on crimes against humanity, the Commission referred in the commentaries to the Nuremberg Principles,[252] concerning general rules of criminal accountability of individuals under international law. Moreover, the Commission also referred to the 1954 draft Code of Offences against the Peace and Security of Mankind and the 1996 draft Code of Crimes against the Peace and Security of Mankind, among other topics, to refer to the fact that the criminal offence was committed by a person holding an official position does not exclude substantive criminal responsibility.[253]

168. In its work on the use of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission noted that it had previously "addressed the question of the relevance of pronouncements of expert treaty bodies under human rights treaties with respect to reservations".[254]

169. Many such references to the Commission's own work have been to the work on the responsibility of States for internationally wrongful acts, referred to, for example, in cases of unlawful expulsion in the articles on the expulsion of aliens.[255]

170. In work on the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission relied on some of its previous outputs. For example, at draft conclusion 17, concerning the relationship between such norms and obligations *erga omnes,* the Commission indicated that the "wording is based on the Commission's articles on responsibility of States for internationally wrongful acts, in which obligations *erga omnes* are described as including those obligations which 'arise under peremptory norms of general international law'".[256]

171. Furthermore, the Commission decided to include in an annex "a non-exhaustive list of norms previously referred to by the Commission as having peremptory character". The Commission emphasized that it was including "by reference to previous work of the Commission, the types of norms that have routinely been identified as having peremptory character, without itself, at this time, making an

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[251] Para. (11) of the commentary to article 1 of the code of crimes against the peace and security of mankind, *ibid.*, p. 18.

[252] See para. (2) of the commentary to article 6 on the prevention and punishment of crimes against humanity *ibid.*, p. 67.

[253] See paras. (28) and (29) of the commentary to article 6 on the prevention and punishment of crimes against humanity, *ibid.*, p. 76.

[254] Para. (23) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to treaty interpretation (footnote 26 above), p. 87.

[255] See para. (2) of the commentary to article 30 of the Principles on the Expulsion of Aliens (footnote 136 above), p. 57. It was noted that "The fundamental principle of full reparation by the State of the injury caused by an internationally wrongful act is stated in article 31 of the articles on State responsibility, while article 34 sets out the various forms of reparation, namely restitution (article 35), compensation (article 36) and satisfaction (article 37)."

[256] Para. (4) of the commentary to conclusion 17 on identification and legal consequences of peremptory norms of general international law (*jus* cogens), A/77/10, pp. 66–67, citing para. (7) of the general commentary to Part Two, chapter III, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 111–112.
A similar example can be found in the commentary to conclusion 19, where the Commission noted that "Paragraph 1 of the draft conclusion, which is based on article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts, provides that States shall cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*)", para. (2) of the commentary to conclusion 19, *ibid*., pp. 70–71, referring to para. (3) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts, (footnote 34 above), p. 114.

assessment of those norms".[257] The Commission thus referred to its previous work in the commentaries to the articles on the law of treaties, the articles on the responsibility of States for internationally wrongful acts and the final report of the Study Group on fragmentation of international law.[258]

Observation 41

The Commission has referred to certain types of teachings of the most highly qualified publicists as reflecting the practice of States.

172. In certain situations, the Commission has referred to the work of private expert bodies as reflecting the practice of States, such as publications by treaty depositaries providing information on ratifications, declarations, reservations, etc., by States.[259]

173. Other examples include scholarly publications comprising compilations of domestic court decisions. For instance, in the work on the articles on jurisdictional immunities of States and their property, the Commission referred to compilations of decisions of national courts and noted that State practice on the treatment of constituent units and political subdivisions of federal States had not been uniform.[260]

174. In the commentaries to the articles on the prevention and punishment of crimes against humanity, the Commission referred to the practice of States as well as a study published by the International Committee of the Red Cross and noted that "[b]ased on a detailed analysis of State practice, as well as of international and national jurisprudence, the 2005 ICRC study on Customary International Humanitarian Law formulated a general standard for war crimes…"[261] and that "[d]raft article 6, paragraph 3, uses similar language to express a general standard for addressing command/superior responsibility in the context of crimes against humanity".[262]

[257] Para. (3) of the commentary to draft conclusion 23 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/77/10, p. 85.

[258] See ibid. paras. (7) to (14) at pp. 86–88.

[259] See, for example, para (3) of the commentary to guideline 1.5.1 in the guide to practice on reservations to treaties, (footnote 21 above), p. 69, footnote 270 citing the ICRC publication entitled "Geneva Conventions of 12 August 1949 for the Protection of War Victims– Reservations, declarations and communications made at the time of or in connection with ratification, accession or succession" (DDM/JUR/91/1719-CRV/1).

[260] See, for example, para. (11) of the commentary to article 2 jurisdictional immunities of states and their property, *Yearbook … 1991*, vol. II, Part Two, p. 16, footnote 34, some of the decisions included the practice of France, for example, in Etat de Ceard v. Dorr et autres (1932) (Dalloz, Recueil periodique et critique de jurisprudence, 1933 (Paris), part 1, p. 196 et seq.). See also Dumont v. State of Amazonas (1948) (Annual Digest. . ., 1948 (London), vol. 15, case No. 44, p. 140). For Italy, see Somigli v. Etat de Sao Paulo du Bresil (1910) (Revue de droit international prive et de droit penal international (Darras) (Paris), vol. VI (1910), p. 527). For Belgium, see Feldman v. Etat de Bahia (1907) (Pasicrisie beige, 1908 (Brussels), vol. II, p. 55 or Supplement to AJIL (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 484). See also the case, in the United States, Molina v. Comision Reguladora del Mercado de Henequen (1918) (Hackworth, op. cit., vol. II, pp. 402–403), and in Australia, Commonwealth of Australia v. New South Wales (1923) (Annual Digest. . ., 1923–1924 (London), vol. 2 (1933), case No. 67, p. 161).

[261] Para. (21) of the commentary to article 6 on the prevention and punishment of the crimes against humanity (footnote 116 above), p. 72.

[262] Para. (22) of the commentary to article 6 on the prevention and punishment of the crimes against humanity, *ibid.*

B. Examples of the use of judicial decisions and teachings to determine rules of treaty law, customary international law and general principles of law

175. The present subsection provides further examples of the Commission's reliance in practice on judicial decisions and teachings, but here they are organized into examples where the Commission has done so to determine rules of treaty law, customary international law and general principles of law.

1. Treaties

176. In the commentaries to the articles on the law of treaties, for example, the Commission referred to the case law of national and international courts in support of the existence of certain rules of treaty interpretation. It noted that "statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts".[263] In the same project, the Commission also highlighted that "the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law".[264]

177. In the commentary to the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission referred to the methods and approaches of international courts to treaty interpretation. For example, it indicated that the jurisprudence of the International Court of Justice and other international courts and tribunals, including the Dispute Settlement Body of the World Trade Organization, "demonstrates that subsequent practice which fulfils all the conditions of article 31, paragraph 3 (b), of the 1969 Vienna Convention is not the only form of subsequent practice by parties in the application of a treaty that may be relevant for the purpose of treaty interpretation".[265]

Observation 42

The Commission has noted that some of the terms used in its work on the law of treaties may have their scope more precisely defined in the decisions of courts and tribunals.

178. In the commentary to the articles on the law of treaties, the Commission stated that:[266]

> (2) Fraud is a concept found in most systems of law, but the scope of the concept is not the same in all systems. In international law, the paucity of precedents means that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept. In these circumstances, the Commission considered whether it should attempt to define fraud in the law of treaties. *The Commission concluded, however, that it would suffice to formulate the general concept of fraud*

[263] Para. (8) of the commentary to article 28 on the law of treaties (footnote 21 above), p. 218.
[264] Para. (11) of the commentary to article 27 on the law of treaties, *ibid.*, p. 220.
[265] Para. (25) of the commentary to conclusion 3 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), pp. 36–37. In paras. (26) to (32) of the same commentary, the Commission provided examples from the World Trade Organization, the ICJ, the European Court of Human Rights, the Inter-American Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia, and the Human Rights Committee.
[266] Para. (2) of the commentary to article 46 on the law of treaties (footnote 21 above), p. 244.

> *applicable in the law of treaties and to leave its precise scope to be worked out in practice and in the decisions of international tribunals*. (emphasis added)

Observation 43

> **The Commission has referred to the jurisprudence of courts and tribunals when analysing the relevant factors to be considered in the context of treaty interpretation.**[267]

179. When considering the clarification of the terms of a treaty by interpretative declaration in the commentary to the guide to practice on reservations to treaties, the Commission reviewed various decisions of international tribunals and concluded that:[268]

> It is therefore clear from practice and doctrinal analyses that interpretative declarations come into play only as an *auxiliary* or complementary means of interpretation, corroborating a meaning revealed by the terms of the treaty considered in the light of its object and purpose. As such, they do not produce an autonomous effect: when they have an effect at all, interpretative declarations are associated with another instrument of interpretation, which they usually uphold. (emphasis added)

180. In its work on the most-favoured-nation clause, in 2015, the Commission stated that it was giving effect to what was decided by the International Court of Justice in a case concerning a treaty containing a most-favoured-nation clause, noting that most-favoured-nation treatment does not change the effect of treaties in respect of third States:

> …MFN treatment is not an exception to the general rule of the effect of treaties *vis-à-vis* third States…. In other words, the right of the beneficiary State to MFN treatment arises only from the MFN clause in a treaty between the granting State and the beneficiary State and not from a treaty between the granting State and the third State. *Thus, no jus tertii is created. In this regard, the Commission was giving effect to what had already been decided by the International Court of Justice in the Anglo-Iranian Oil Co. case*.[269] (emphasis added)

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[267] Para. (15) of the commentary to conclusion 2 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), p. 22 ("The jurisprudence of different international courts and tribunals nevertheless suggests that the nature of the treaty may sometimes be relevant for the interpretation of a treaty." Citing decisions WTO Panels and the Appellate Body, for example, seem to emphasize more the terms of the respective WTO-covered agreement (for example, WTO Appellate Body, *Brazil – Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, para. 45), whereas the European Court of Human Rights and the Inter-American Court of Human Rights highlight the character of the Convention as a human rights treaty (for example, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I, para. 111; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, Inter-Am. Ct. H.R. Series A No. 16, para. 58).

[268] Para. (31) of the commentary to guideline 4.7.1 of the guide on reservations to treaties (footnote 21 above), pp. 322–323.

[269] Final report of the Study Group on Most Favoured Nation clause (footnote 183 above), p. 94, para. 14.

Observation 44

The Commission has determined that the pronouncements of expert treaty bodies may potentially reflect the agreement of the parties concerning the interpretation of treaties, or be used as supplementary means for the interpretation of treaties.

181. On a number of occasions the Commission has addressed the relevance of the pronouncements of expert treaty bodies, [270] particularly in the context of the interpretation of treaties.[271]

182. In particular, in the commentary to the conclusions on subsequent agreements and subsequent practice in the interpretation of treaties, the Commission stated that such pronouncements "may give rise to, or refer to, a subsequent agreement or subsequent practice by parties…under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body".[272] Nevertheless, the relevance of such materials "is subject to the applicable rules of the treaty".[273]

183. The Commission further noted that the pronouncements of expert treaty bodies "cannot as such constitute a subsequent agreement or subsequent practice under article 31, paragraph 3 (a) or (b), since this provision requires an agreement of the parties or subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty".[274] However, they may contain or reflect an agreement of the parties regarding the interpretation of a treaty.[275] This may also be identified by looking at other materials such as "resolutions of organs of international organizations as well as of Conferences of States Parties".[276]

184. In the commentary to the same conclusions, the Commission noted that the interplay between pronouncements of expert treaty bodies and the subsequent practice

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[270] See, for example, in the Final report of the Study group on the obligation to extradite or prosecute (*aut dedere aut judicare*), the study group noted that "the findings of the Committee against Torture and the International Court of Justice in the case concerning Questions relating to the Obligation to Prosecute or Extradite, in relation to a similar provision contained in article 7 of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment, 501 are instructive." (footnote 169 above), pp. 101–102, para. 40.

[271] Para. (3) of commentary to guideline 3.2.3. from the guide to Practice on reservations to treaties (footnote 21 above), p. 239. ("their conclusions are not legally binding, and States parties are obliged only to 'take account' of their assessments in good faith.")
Para. (25) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in the interpretation of treaties (footnote 26 above), p. 88 ("…the extent to which pronouncements of expert treaty bodies contribute to the interpretation of the treaties "under their mandates" will vary, as indicated by the use of the plural.").

[272] Conclusion 13.3. on subsequent agreements and subsequent practice (footnote 26 above), p. 25. ("3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.")

[273] Conclusion 13.2 on subsequent agreements and subsequent practice, *ibid.*, p. 25.

[274] Para. (9) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in the interpretation of treaties, *ibid.*, p. 84.

[275] *Ibid*., at para. (12) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *ibid.* p. 111. It has also noted that it is unlikely that the pronouncement leads to a subsequent agreement or subsequent practice by the parties themselves ("It will often be difficult to establish that all parties have accepted, explicitly or implicitly, that a particular pronouncement of an expert treaty body expresses a particular interpretation of the treaty.").

[276] *Ibid*., at p. 111, para. (13) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

of States may occur in different sequences. A pronouncement might come first "and serve as a catalyst for the subsequent practice of States parties". Alternatively, there may be situations "in which the subsequent practice and a possible agreement of the parties have developed before the pronouncement, and where the pronouncement is only an indication of such an agreement or practice".[277]

185. Furthermore, the Commission, referring to an advisory opinion of the International Court of Justice, has stated that even if a pronouncement of an expert treaty body does not reach the threshold to give rise to a subsequent agreement or subsequent practice by all parties to a treaty, it may amount to supplementary means for the treaty's interpretation.[278] The International Court of Justice had referred to the "constant practice of the Human Rights Committee", which suggested that "pronouncements of expert treaty bodies are to be used in a discretionary way in which article 32 describes supplementary means".[279] The Commission further mentioned the view of certain publicists who had referred to Article 38, paragraph 1 (d), of the Statute of the International Court of Justice "characterizing the legal significance of their pronouncements [of expert treaty bodies] as 'subsidiary means for the determination of rules of law'".[280]

Observation 45

The Commission has noted that the work of "non-State actors" may have value in assessing the subsequent practice of States for the purpose of the interpretation of a treaty provision.

186. In its conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission noted that the work of some non-State actors (in the sense of expert bodies), while not constituting State conduct, may contribute to the assessment of the practice of States to determine the existence of subsequent practice by the State parties to a treaty.[281]

187. In its conclusions on the identification of customary international law, the Commission indicated that:

> The examples of ICRC and the [Landmine and Cluster Munition] Monitor non-State actors can provide valuable information about subsequent practice of parties, contribute to assessing this information and even solicit its coming into being. However, non-State actors can also pursue their own goals, which may

[277] *Ibid*., at p. 86, para. (17) of the commentary to conclusion 13, on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

[278] *Legal Consequences of the* Construction *of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109.

[279] *Legal Consequences of the* Construction *of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109.

[280] Para. (24) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in the interpretation of treaties (footnote 26 above), p. 87, citing C. Chinkin, "Sources", in D. Moeckli and others (eds.), International Human Rights Law, 3rd ed., Oxford, Oxford University Press, 2018, pp. 63–85, at pp. 78–80, as teachings and also possibly judicial decisions; in that direction also: R. Van Alebeek and A. Nollkaemper, "The legal status of decisions by human rights treaty bodies in national law", in H. Keller and G. Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge, Cambridge University Press, 2012, pp. 356–413, at pp. 408 and 410 et seq.

[281] Para. (2) of conclusion 5 on subsequent agreement and subsequent practice in the interpretation of treaties, *ibid.*, p. 25. ("2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty."). See also Para. (15) of the commentary to conclusion 5 on subsequent agreement and subsequent practice in the interpretation of treaties, *ibid.*, pp. 41–42.

be different from those of States parties. Their documentation and their assessments must thus be critically reviewed.[282]

2. Customary international law

188. As referred to in section II of the present memorandum,[283] the Commission expressly addressed the use of subsidiary means for determining rules of customary international law in the articles on the identification of customary international law. In particular, conclusion 13 addressed the decisions of courts and tribunals and conclusion 14 addressed teachings as subsidiary means for the determination of rules of customary international law.[284]

189. In the consideration of the topic, the Commission stated that the identification of customary law rules involves "a careful examination of available evidence to establish their [State practice and *opinio juris*] presence in any given case", as confirmed in the case law of the International Court of Justice which "has repeatedly laid down that 'the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*'".[285]

190. The Commission stressed that while decisions of national courts may be used as evidence of State practice as well as evidence of acceptance as law (*opinio juris*), they "may also serve as subsidiary means (*moyen auxiliaire*) for the determination of rules of customary international law when they themselves examine the existence and content of such rules".[286]

191. The Commission also addressed the use of certain materials that could "contribute to the development and determination of customary international law, but are not practice as such".[287] The Commission noted that various materials, other than "primary evidence of alleged instances of practice accepted as law (accompanied by

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[282] Para. (17) of the commentary to conclusion 5 on identification of customary international law (footnote 12 above), p. 98.

[283] See Observations 2–7, 11 and 13–17 above.

[284] Conclusions 13 and 14 on identification of customary international law (footnote 12 above), p. 91.

> Conclusion 13.
> Decisions of courts and tribunals
> 1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.
> 2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.
> Conclusion 14.
> Teachings
> Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law."

[285] Para. (2) of the commentary to conclusion 2 on identification of customary international law (footnote 12 above), pp. 93–94, referring to *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 122–123, para. 55; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at pp. 29–30, para. 27; and *North Sea Continental Shelf* (see footnote above), at p. 44, para. 77.

[286] Para. (1) of the commentary to conclusion 13 on identification of customary international law (footnote 12 above), p. 109.

[287] Para. (9) of the commentary to conclusion 4 on identification of customary international law, *ibid.*, p. 98 mentioned that:

> "Official statements of the International Committee of the Red Cross (ICRC), such as appeals for and memorandums on respect for international humanitarian law, may likewise play an important role in shaping the practice of States reacting to such statements; and publications of the ICRC may assist in identifying relevant practice. Such activities may thus contribute to the development and determination of customary international law, but they are not practice as such."

opinio juris)" may be consulted in the determination of the existence and content of rules of customary international law. The commentary indicates that:[288]

> These commonly include written texts bearing on legal matters, in particular treaties, resolutions of international organizations and intergovernmental conferences, judicial decisions (of both international and national courts), and scholarly works. *Such texts may assist in collecting, synthesizing or interpreting practice relevant to the identification of customary international law, and may offer precise formulations to frame and guide an inquiry into its two constituent elements*. (emphasis added)

192. In the ascertainment of the elements of customary international law, the Commission has engaged in surveys of evidence, including decisions of international courts and tribunals, and the writings of jurists. Often, such references have been to municipal court decisions as forms of evidence of the practice of States.

193. In 2013, in the course of the Commission's consideration of the identification of customary international law, the Secretariat prepared a study with a similar scope to the current memorandum, analysing elements in the previous work of the Commission that could be particularly relevant to the topic.[289] Some of those observations are reproduced below with updates, as appropriate, including additional references to outputs of the Commission that were finalized after the conclusion of the 2013 study.

Observation 46

> **The Commission has, on occasion, relied on decisions of international courts or tribunals as authoritatively expressing the status of a rule of customary international law.**[290]

194. The Commission has referred on multiple occasions to judgments where international courts and tribunals have expressed that a rule is part of customary international law.

195. In commentaries to the articles on the responsibility of States for internationally wrongful acts, the Commission indicated that the rule that the conduct of a State organ is attributable to the State is part of customary international law, it noted that:

> ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on*

[288] Para. (1) of the commentary to part five of the conclusions on identification of customary international law, *ibid.*, part two, p. 104.

[289] Formation and evidence of customary international law, Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat, 14 March 2013, Observation No. 1, and Observations No. 15-18, Document A/CN.4/659.

[290] The text of this observation reproduces observation 15 of the study on the Formation and evidence of customary international law, Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat, 14 March 2013, Document A/CN.4/659, p. 157. For example, on the question of straight baselines, the Commission interpreted the International Court of Justice judgment in the Fisheries case between the United Kingdom and Norway "as expressing the law in force" and "accordingly drafted the article on the basis of [the] judgment" (paras. (1) to (4) of the commentary to article 5 on the law of the sea (footnote 37 above), pp. 267–268). See also paras. (3) to (5) of the commentary to article 24 (p. 277) (relying on the judgment of the Court in the Corfu Channel case as expressing the customary rule in force with regard to innocent passage through international straits connecting two parts of the high seas) and para. (2) of the commentary to article 23 on the law of treaties (footnote 21 above),, p. 211 (stating that "there is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*" and referring to decisions of the International Court of Justice, the Permanent Court of International Justice and arbitral tribunals).

Human Rights, it said: According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule…is of a customary character.[291]

196. Regarding article 25 concerning necessity as a ground to preclude State responsibility, the Commission noted that the Court in the *Gabčíkovo-Nagymaros Project* case considered "that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation".[292]

197. In the same project, in the commentary to article 44 concerning the admissibility of claims, the Commission relied on the *Elettronica Sicula S.p.A* (*ELSI*) case, where the Court had said that the exhaustion of local remedies rule was an "important principle of customary international law".[293]

198. The Commission indicated that article 14 on diplomatic protection, for example, "…seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection".[294] In doing so, it relied on the recognition of this rule by the International Court of Justice in the *Interhandel* case as "a well-established rule of customary international law" and by a Chamber of the International Court of Justice in the *ELSI* case as "an important principle of customary international law".[295]

199. In the commentary to conclusion 2 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission relied on decisions of the International Court of Justice, the International Tribunal for the Law of the Sea, the Appellate Body of the World Trade Organization, the European Court of Human Rights, the Inter-American Court of Human Rights, the Court of Justice of the European Union and arbitral tribunals constituted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States that have "acknowledged" that "the rules set forth in articles 31 and 32 [of the Vienna Convention on the Law of Treaties] reflect customary international law".[296] At

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[291] Para. (6) of the commentary to article 4 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 40, referring *to Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 87, para. 62, where the ICJ referred to articles on State responsibility, article 6, now embodied in article 4.

[292] Para. (11) of the commentary to article 25 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 82, citing *Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 40, para. 51.

[293] Para. (4) of the commentary to article 44 on the responsibility of States for internationally wrongful acts, *ibid.*, p. 121, citing *Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, at p. 42, para. 50.

[294] Para. (1) of the commentary to article 14 on diplomatic protection (footnote 72 above), p. 44.

[295] Para. (19) of the commentary to article 14 on diplomatic protection, *ibid*, p. 44, referring to *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 6, at p. 27; and *Elettronica Siculca S.p.A (ELSI), Judgment, I.C.J. Reports 1989*, p. 15 at p. 42, para. 50.

[296] Para. (4) of conclusion 2 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), p. 27, citing, among others, *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at p. 46, para. 65 (1969 Vienna Convention, art. 31); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at p. 237, para. 47; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 174, para. 94; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999, p. 1045, at p. 1059, para. 18 (1969 Vienna Convention, art. 31).

paragraph (5) of the commentary to the same conclusion 2, the Commission added that "[t]he International Court of Justice has recognized that paragraph 4 of article 33 [of the Vienna Convention on the Law of Treaties] reflects customary international law", relying on the *LaGrand* case, and referring to decisions of other international tribunals.[297]

200. In the commentaries to the principles on protection of the environment in relation to armed conflicts, the Commission stated that the Martens Clause[298] and the principle of proportionality[299] are part of customary international law, relying on the *Legality of the Threat or Use of Nuclear Weapons* International Court of Justice advisory opinion. In the commentaries to the same principles, the Commission noted that the International Tribunal for the Former Yugoslavia considered that the "prohibition against reprisals against civilian populations constitutes a customary international law rule 'in armed conflicts of any kind'".[300]

Observation 47

Teachings have often been considered by the Commission in the identification of rules of customary international law.[301]

201. In certain cases, the Commission has taken into account "an overall assessment of the weight of opinion [of publicists] in support of a particular rule. Such

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For other tribunals, the Commission referred, among others, to *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area, case No. 17, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at para. 57; Award in Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, United Nations, Reports of International Arbitral Awards (UNRIAA), vol. XXVII (sales No. E/F.06.V.8), pp. 35–125, at para. 45 (1969 Vienna Convention, arts. 31–32); WTO Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline (US-Gasoline), WT/DS2/AB/R, adopted 20 May 1996, Section III, B (1969 Vienna Convention, art. 31, para 1); Golder v. the United Kingdom, No. 4451/70, 21 February 1975, Series A No. 18, para. 29; Witold Litwa v. Poland, No. 26629/95, 4 April 2000, ECHR 2000-III, para. 58 (1969 Vienna Convention, art. 31); The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, 24 September 1982, Inter-Am. Ct. H.R. Series A No. 2, para. 19 (by implication, 1969 Vienna Convention, arts. 31–32); and National Grid plc v. Argentine Republic, decision on jurisdiction (UNCITRAL), 20 June 2006, para. 51 (1969 Vienna Convention, arts. 31–32).

[297] Para. (5) of conclusion 2 on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), p. 27, citing *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 502, para. 101.

[298] Para. (1) of the commentary to principle 12 of the principles on protection of the environment in relation to armed conflicts (footnote 77 above), p. 137, referring to *Legality of the Threat or Use of Nuclear Weapons,* I.C.J. Reports 1996, p. 226, at p. 259, para. 84.

[299] Para. (4) of the commentary to principle 14 of the principles on protection of the environment in relation to armed conflicts, *ibid.*, p. 145, referring to *Legality of the Threat or Use of Nuclear Weapons,* I.C.J. Reports 1996, p. 226, at p. 242, para. 30.

[300] Para. (8) of the commentary to principle 15 of the principles on protection of the environment in relation to armed conflicts, *ibid.*, p. 148, citing *Prosecutor v. Duško Tadic*, case No. IT-94-1-A72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2 October 1995, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, p. 353, at pp. 475–478, paras. 111–112.

[301] This observation is the equivalent of observation 18 of the study on the Formation and evidence of customary international law, Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat, 14 March 2013, Document A/CN.4/659, p. 25.

assessment appears to have been based on both quantitative and qualitative aspects".[302]

202. In certain cases, the Commission has relied on the writings of jurists when identifying and assessing State practice,[303] or providing support for the existence of a rule of customary international law. For example, in the commentaries to the principles on the protection of the environment in relation to armed conflicts, the Commission noted that the principle of proportionality of armed attacks is "considered a rule of customary international law, applicable in both international and non-international armed conflict", referring to the work of the International Committee of the Red Cross

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[302] Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat, 14 March 2013, Document A/CN.4/659, p. 26, para. 32, citing as examples para. (2) of the commentary to articles 11 and 12 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 197 ("The weight of opinion amongst modern writers supports the traditional doctrine … In general, however the diversity of the opinions of writers makes it difficult to find in them clear guidance as to what extent and upon what precise basis international law recognizes that treaties of a territorial character constitute a special category for the purposes of the law applicable to succession of States."). Para. (8) of the commentary to article 49 on the law of treaties (footnote 21 above), p. 247 ("[T]he great majority of international lawyers to-day unhesitatingly hold that Article 2, paragraph 4, …, authoritatively declares the modern customary law regarding the threat or use of force."), para. (2) of the commentary to article 53, p. 251 ("Some jurists … take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties. A number of other jurists, however, take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties."), para. (1) of the commentary to article 57, pp. 253–254 ("The great majority of jurists recognize that a violation of a treaty by one party may give rise to a right in the other party …") and para. (1) of the commentary to article 59, p. 257 ("Almost all modern jurists, however reluctantly, admit the existence in international law of the principle with which this article is concerned …"); para. (9) of the commentary to article 17 on the succession of States in respect of State property, archives and debts, *Yearbook ... 1981*, vol. II (Part Two), p. 46 ("The foregoing rule conforms to the opinions of publicists, who generally take the view that …"); para. (3) of the commentary to article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 211 ("The majority of writers take the view, supported by State practice, …"); para. (15) of the commentary to article 15 on the succession of States in respect of treaties, Yearbook … 1974, vol. II (Part One), p. 213 ("Considerable support can be found among writers and in State practice for the view that general international law does impose an obligation …"); and para. (1) of the commentary to article 3 on the expulsion of aliens, (footnote 136 above), p. 27 ("[The right to expel] is uncontested in practice as well as in case law and the legal writings."). See also para. (10) of the commentary to article 5 on the non-navigational uses of international watercourses (footnote 107 above), p. 98 (referring in general terms to "the views of learned commentators") and paras. (3) to (5) of the commentary to article 32 on the law of treaties (footnote 21 above), pp. 228–229 (finding that the division of opinion among jurists "was primarily of a doctrinal character" and "would be likely to produce different results only in very exceptional circumstances").

[303] See para. 33, citing para. (3) of the commentary to article 32 on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 94 (citing an example of relevant State practice found in an article by R. L. Buell in the Political Science Quarterly); para. (3) of the commentary to article 15 on the succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), p. 211 (citing The Law of Treaties by A. D. McNair and quoting a statement by the United Kingdom on Finland's position vis-à-vis its predecessor's treaties); para. (2) of the commentary to article 18 on diplomatic protection, (footnote 72 above), p. 52 (citing writings of jurists in support of the proposition that "there is support in the practice of States, in judicial decisions and in the writings of publicists, for the position that the State of nationality … may seek redress for members of the crew of the ship who do not have its nationality"; and para. (10) of the commentary to article 5 on the non-navigational uses of international watercourses (footnote 107 above), p. 98 (including "the views of learned commentators" in "[a] survey of all available evidence of the general practice of States, accepted as law").

on customary international law.[304] In the same commentaries, the Commission referred to judicial decisions and the customary law study of ICRC in support of the existence of another rule of customary international law:[305]

> The ICRC study on customary international humanitarian law found that parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. The International Criminal Tribunal for the Former Yugoslavia has also considered that the prohibition against reprisals against civilian populations constitutes a customary international law rule "in armed conflicts of any kind". The present draft principle is intended to apply in all armed conflicts irrespective of classification.

3. General principles of law

203. The Commission is considering in its current programme of work the topic general principles of law in the context of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. The Commission has not finalized a first reading of the topic at the time of preparation of the present memorandum.[306] Nevertheless, the Commission has provisionally adopted some draft conclusions with commentaries.

204. The commentary to draft conclusion 3, provisionally adopted by the Commission at its seventy-third session, refers to judicial decisions and teachings. The commentary to subparagraph (a) of the draft conclusion states: "that general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice include those derived from national legal systems is established in the jurisprudence of courts and tribunals and teachings, and is confirmed by the *travaux préparatoires* of the Statute."[307]

205. The commentary to subparagraph (b) of the same draft conclusion, provisionally adopted by the Commission at its seventy-third session, states that the subparagraph "refers to the general principles of law that may be formed within the international legal system. The existence of this category of general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, appears to find support in the jurisprudence of courts and tribunals and teachings. Some members, however, consider that Article 38, paragraph 1 (c), does not encompass a second category of general principles of law, or at least remain sceptical of its existence as an autonomous source of international law".[308]

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[304] Para. (4) of the commentary to principle 4 on the protection of the environment in armed conflicts (footnote 77 above), p. 145, referring to Henckaerts and L. Doswald-Beck (eds.), Customary International Humanitarian Law, vol. I, Rules (Cambridge, Cambridge University Press, 2005), rule 14, p. 46.

[305] Para. (8) of the commentary to principle 15 on the protection of the environment in relation to armed conflicts, *ibid.*, p. 148, referring to Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, ibid.*, Rule 148, p. 526, and related practice. See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict, para. 94.

[306] In his second report, the Special Rapporteur on general principles of law, Mr. Marcelo Vasquez Bermudez had addressed the relationship of general principles of law and the other sources of international law, and proposed two draft conclusions referring to the decisions of courts and tribunals, and to teachings, which could be used as subsidiary means for the determination of general principles of law (proposed draft conclusions 8 and 9), A/CN.4/741, pp. 53–56.

[307] Paragraph (2) of the commentary to draft conclusion 3 on general principles of law of the draft conclusions and commentaries, provisionally adopted by the Commission at its seventy-third session, *Official Records of the General Assembly, seventy-third session, Supplement No. 10* (A/77/10), para. 149.

[308] Paragraph (3) of the commentary to draft conclusion 3 on general principles of law of the draft conclusions and commentaries provisionally adopted by the Commission at its seventy-third session, *ibid*, para. 149.

C. The Commission's use of judicial decisions and teachings when considering broader questions, including the nature of the international legal system and interactions among sources and rules of international law

206. On certain occasions, the Commission has used judicial decisions and the writings of publicists as a basis for the consideration of broader issues concerning the sources of international law, interactions among the sources and/or their role within the international legal system. The present section covers a limited number of situations where the Commission has used subsidiary means when referring to such broader matters.

207. The Commission has previously addressed the interrelationship between obligations arising from treaties, customary international law and unilateral acts, for example, in the commentaries to the articles on the responsibility of States for internationally wrongful acts. In doing so, it relied on a number of judicial decisions and arbitral awards in support of article 12 concerning the "*Existence of a breach of an international obligation*" and the Commission's conclusion that "the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State".[309]

208. In relation to the same article, relying on an international arbitral award, the Commission added: "there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*… As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the 'civil' and 'criminal' responsibility as is the case in internal legal systems".[310]

209. In the commentaries to the articles on the effect of armed conflicts on treaties, the Commission stated that "customary international law continues to apply independently of treaty obligations",[311] relying on the dictum of the International Court of Justice in the *Military and Paramilitary Activities* International Court of Justice case indicating that "[t]he fact that the above-mentioned principles [of customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions".[312]

210. The Commission made a similar point, also relying on the *Military and Paramilitary Activities* International Court of Justice case, in the commentaries to its draft conclusions on peremptory norms of general international law (*jus cogens*),

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[309] Paragraph (4) of the commentary to article 12, articles on the responsibility of States for internationally wrongful acts (footnote 34 above), p. 55, referring to Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, at p. 95, para. 177; North Sea Continental Shelf, Judgment, I.C.J, Reports 1969, p. 3, at pp. 38–39, para. 63; *Dickson Car Wheel Company* (U.S.A.) v. United Mexican States, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931); and *Rainbow Warrior* affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 251, para. 75.

[310] Paragraph (5) of the commentary to article 12, articles on the responsibility of States for internationally wrongful acts (footnote 34 above), referring to *Rainbow Warrior, ibid* p. 251, para. 75.

[311] Para. (2) of the commentary to article 10 on the effects of armed conflicts on treaties (footnote 35 above), p. 116.

[312] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1984*, p. 392, at p. 424, para. 73

when considering a possible situation where a reservation is entered to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*). The Commission noted that:[313]

> The rule reflected in this paragraph of draft conclusion 13 flows from the normal operation of international law. It derives, in particular, from the fact that the treaty provision reflecting a peremptory norm of general international law (*jus cogens*) has, in accordance with the jurisprudence of the International Court of Justice, an existence separate from the underlying peremptory norm.

211. In the commentary to the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, the Commission applied a dictum of the International Court of Justice in the *Fisheries Jurisdiction* case as authority for the application of the rules of treaty interpretation set out in article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties by analogy to unilateral declarations, such that priority consideration must be given to the text of the unilateral declaration, which best reflects the intentions of its author. The application of the rules of treaty interpretation may only apply analogously, however, to the extent compatible with the sui generis character of unilateral declarations.[314]

212. In a similar reliance on treaty law by analogy, the Commission cited the *Armed Activities on the Territory of the Congo* case in support of the application by analogy of article 53 of the Vienna Convention on the Law of Treaties to determine that a unilateral declaration would be invalid in the event that it is in conflict with a peremptory norm of general international law (*jus cogens*).[315]

213. In the commentary to the articles on prevention of transboundary harm from hazardous activities, the Commission relied on a dictum in the International Court of Justice *Nuclear Tests* case, together with Article 2, paragraph 2, of the Charter of the United Nations and articles 26 and 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, to determine that the principle of good faith is "…[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source".[316] The Commission further relied on doctrine to support the conclusion that this dictum implies that the principle of good faith applies also to unilateral acts[317] and "[i]ndeed, the principle of good faith covers 'the entire structure of international relations'".[318]

214. In the guiding principles applicable to unilateral declarations of States, the Commission relied on the International Court of Justice *North Sea Continental Shelf*

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[313] Para. (2) of the commentary to draft conclusion 13 on identification and legal consequences of peremptory rules of general international law (*jus cogens*) (footnote 11 above), pp. 54–55.

[314] Para. (3) of the commentary to guiding principle 7 applicable to unilateral declarations of States capable of creating legal obligations (footnote 70 above), p. 165, citing *Fisheries Jurisdiction (Spain v Canada)*, *Jurisdiction of the Court,* Judgment of 4 December 1998, I.C.J Reports 1998, p. 432, at p. 453, para. 46. The unilateral declaration in issue in this case concerned acceptance of the ICJ's jurisdiction.

[315] Para. (3) of the commentary to guiding principle 7 applicable to the unilateral declarations of States capable of creating legal obligations, *ibid* p. 165, citing *Armed Activities on the Territory of the Congo (New Application: 2002), (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility,* Judgment, I.C.J. Reports 2006, p. 6 at p. 33, para. 69.

[316] Para. (2) of the commentary to draft article 4 on prevention of transboundary harm from hazardous activities (footnote 76 above), p. 155, citing *Nuclear Tests, (Australia v France),* Judgment, I.C.J. Reports 1974, p. 253 and *Nuclear Tests (New Zealand v France), ibid.,* p. 457.

[317] Para. (2) of the commentary to article 4 on the prevention of transboundary harm from hazardous activities, *ibid*, pp. 155–156, citing M. Virally, *"Review essay: good faith in public international law",* AJIL, vol. 77, No. 1 (1983), p. 130.

[318] Para. (2) of the commentary to article 4 on the prevention of transboundary harm from hazardous activities, p. 156, citing R. Rosenstock, *"The declaration of principles of international law concerning friendly relations : a survey",* AJIL, vol. 65 (1971), p. 734, and R. Kolb, *"La bonne foie en droit international public: contribution à l'étude des principes généraux de droit",* (Paris, Presses Universitaires de France, 2000).

case as an authoritative account of how a rule of law came into being under more than one source. A unilateral declaration by the United States concerning its continental shelf (the 1945 "Truman Proclamation") could not itself bind third parties, but gave rise to a process of State practice that resulted in a new rule of customary international law emerging, which was subsequently codified in the provisions of a multilateral convention (the 1958 Geneva Convention on the Continental Shelf).[319]

215. Apart from the above particular examples, broader matters concerning the international legal system and interactions among rules of international law relevant to the current section of the present memorandum were systematically addressed in the final report of the Study Group on fragmentation of international law, which refers to a significant volume of writings of publicists and also judicial decisions.[320]

216. In relation to the *lex specialis* principle, for example, the study group referred to the *Military and Paramilitary Activities* International Court of Justice case when concluding that "in practice treaties often act as *lex specialis* by reference to the relevant customary law and general principles".[321] Further, "…application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will…continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter".[322]

217. In formulating its conclusion concerning the application of "systemic integration",[323] the study group relied on a claims commission case in support of the conclusion that "the parties [to a treaty] are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms",[324] and on an International Court of Justice case in support of the conclusion that "in entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law".[325]

218. In a final example drawn from the study group's conclusions, International Court of Justice case law was relied on in support of the conclusion that Article 103 of the Charter of the United Nations, which determines that the obligations of Member States under the Charter prevail in the event of a conflict with their obligations under any other international agreement, "extends not only to the Articles of the Charter but also to binding decisions made by United Nations organs such as the Security Council".[326]

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[319] Para. (2) of the commentary to guiding principle 9 applicable to unilateral declarations of States capable of creating legal obligations, (footnote 70 above), p. 165, citing *North Sea Continental Shelf,* Judgment, I.C.J. Reports 1969, p. 3, at pp. 32–33, para. 47 and p. 53, para. 100.

[320] Fragmentation of international law: Difficulties arising from the diversification and expansion of international law, *Yearbook …2006,* vol. II, part two p. 175. At p. 176, para. 239, the Commission took note of the conclusions of the Study Group.

[321] Conclusion (5) of the Conclusions of the work of the Study Group on fragmentation of international law, *Yearbook …2006,* p. 178, referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits Judgment, I.C.J. Reports 1986, p. 14 at p. 137, para. 274.

[322] Conclusion (9) of the Conclusions of the work of the Study Group on fragmentation of international law, *Yearbook …2006,* p. 178, referring to *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J Reports 1996, p. 226.

[323] Conclusion (19) of the conclusions of the work of the Study Group on fragmentation of international law, *Yearbook …2006,* p. 180.

[324] *Georges Pinson,* French-Mexican Claims Commission, UNRIAA vol. V (Sales No. 1952 v.3) p. 327 at p. 422.

[325] *Right of Passage Over Indian Territory, Preliminary Objections,* Judgment of 26 November 1957, I.C.J. Reports 1957, p. 125.

[326] Conclusion (35) of the Conclusions of the work of the Study Group on fragmentation of international law, *Yearbook …2006,* p. 182, referring to the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States), Provisional Measures,* Order of 14 April 1992, I.C.J. Reports 1992, p. 114 at p. 126, para. 42.

IV. The use of judicial decisions and teachings in the methods of work of the Commission

219. The Commission has routinely referred to judicial decisions and teachings in various aspects of its methods of work, without necessarily referring to them as subsidiary means in the sense of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

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The Commission routinely includes extensive references to judicial decisions and teachings in various aspects of its methods of work.

220. This has been evident in the work of the Commission since its inception. Some reports of special rapporteurs, for example, have included extensive reviews of decisions of national and international courts and the approaches taken by various international tribunals.[327] Extensive references to judicial decisions and teachings have also featured recently in the issues papers submitted by the co-chairs of study groups[328] and in the reports of study groups.[329]

221. The practice of special rapporteurs including bibliographies as part of their reports, comprising judicial decisions and writings of a multilingual and cross-regional nature, has existed for decades. Recent examples include bibliographies prepared in the context of the work on identification of customary international law, the provisional application of treaties, protection of the environment in armed conflicts and sea-level rise in relation to international law.[330]

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[327] See for example, second report of the Special Rapporteur on Crimes Against Humanity, *Yearbook…2016*, vol. II, part two, pp. 149–170. See also for example, the first report of the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties (footnote 26 above), pp. 16–37.
Other reports have elaborated on recent developments of international tribunals and writings of publicists on specialized topics, see for example, first report on protection of the environment in relation to armed conflicts by Marja Lehto, special rapporteur, A/CN.4/720.

[328] See, for example, First issues paper by Bogdan Aurescu and Nilufer Oral, 28 February 2020, A/CN.4/740; and Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, 19 April 2022, A/CN.4/52.

[329] See Final report of the study group on the fragmentation of international law (footnote 23 above); Final report of the Study group on the obligation to extradite or prosecute (*aut dedere aut judicare*) (footnote 169 above), p. 92; Final report of the Study Group on the Most Favored Nation Clause (footnote 183 above), p. 91.

[330] See the fifth report of the Special Rapporteur on identification of customary international law, A/CN.4/717/Add.1, Annex II. See also the Fifth Report of the Special Rapporteur on Provisional Application of Treaties, A/CN.4/718/Add.1, Annex I; and see the Annex to Chapter V of the 2021 Annual Report of the Commission, A/76/10, at p. 87, Selected bibliography concerning provisional application of treaties. See also Third Report of the Special Rapporteur Marja Lehto on protection of the environment in armed conflicts, A/CN.4/750/Add.1, and First issues paper on sea-level rise in relation to international law by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, A/CN.4/740/Add.1, containing a selected bibliography related to the law of the sea aspects of sea-level rise; and Second issues paper on sea-level rise in relation to international law by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law, containing selected bibliography related to (i) statehood issues and (ii) issues related to the protection of persons affected by sea-level rise, A/CN.4/752/Add.1.

222. The Commission has regularly requested Member States, and, more recently, international organizations and other actors, for information on judicial decisions and teachings in its consideration of topics.[331]

223. The Commission has also requested the Secretariat to prepare studies and surveys of decisions of international courts and tribunals, including arbitral tribunals, which could be relevant for the Commission's work. In 1963, for example, the Commission requested the Secretariat to prepare "a digest of the decisions of international tribunals in the matter of State Responsibility".[332] An initial report was submitted in 1964, with a supplementary report in 1969,[333] and a report focused on judicial decisions concerning *force majeure*.[334] Further examples include studies by the Secretariat requested by the Commission in relation to most-favoured-nation clauses,[335] customary international law[336] and general principles of law,[337] to name but a few.

224. In the consideration of some topics, the Commission has analysed decisions of international courts and tribunals as its primary focus. In the context of the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, for example, the General Assembly directed the International Law Commission "to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal".[338]

225. The final report of the Study Group on fragmentation of international law indicated that it discussed the relationship between special and general law, "especially by reference to the practice of international courts and tribunals", carrying out an extensive analysis of various judicial decisions across areas of international law.[339]

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[331] See, for example, the request of the Commission at its 73rd session in relation to the topic Sea-level rise in relation to international law, A/77/10, para. 25, p. 7. ("The Commission would welcome any information that States, international organizations and other relevant entities could provide on their practice, as well as other pertinent information concerning sea-level rise in relation to international law, and reiterates its requests made in chapter III of its reports on the work of its seventy-first (2019) and seventy-second (2021) sessions.")

[332] Digest of the decisions of international tribunals relating to State Responsibility, by the Secretariat, *Yearbook… 1964*, vol. II, p. 132–171.

[333] Supplement, prepared by the Secretariat, to the "Digest of the decisions of international tribunals relating to State responsibility", *Yearbook…1969*, vol. II, pp. 101–113.

[334] "Force majeure" and "fortuitous event" as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine, *Yearbook…1978*, vol. II, pp. 61–228.

[335] Decisions of national courts relating to the most-favoured-nation clause: digest prepared by the Secretariat, *Yearbook…1973*, vol. II, p. 117–153.

[336] Memorandum by the Secretariat on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, A/CN.4/691 requested by the Commission at its sixty seventh, (*General Assembly, Official Records, Seventieth Session, Supplement No*. 10, A/70/10), para. 61.

[337] Memorandum by the Secretariat, General Principles of Law, A/CN.4/742, requested by the Commission at its seventy-first session (*General Assembly, Official Records, Seventy-Fourth Session, Supplement No*. 10, A/74/10), para. 286.

[338] General Assembly Resolution 177 (II), 21 November 1947. See however, that the Commission noted that "In the course of this consideration the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law. The conclusion was that since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph (a) of resolution 177 (II) was not to express any appreciation of these principles as principles of international law but merely to formulate them." *Yearbook … 1950*, vol. II, p. 374, para. 96.

[339] Final report of the study group on fragmentation of international law (footnote 23 above), p. 12, para. 20.

226. The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) considered useful for its work a wide range of materials, including a survey prepared by the Secretariat of multilateral conventions relevant to the topic, "and the judgment of 20 July 2012 of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*".[340]

227. The Study Group on Most-Favoured-Nation clause noted in its *final* report that it "sought to identify factors that have appeared to influence investment tribunals in interpreting MFN clauses and to determine whether there were particular trends".[341]

[340] Final report of the Study group on the obligation to extradite or prosecute (*aut dedere aut judicare*) (footnote 169 above), p. 93, para. 5. The report of the study group also noted that: "The Commission views the judgment of the International Court of Justice in the case concerning Questions relating to the Obligation to Prosecute or Extradite to be helpful in elucidating some aspects relevant to the implementation of the obligation to extradite or prosecute." *ibid.*, pp. 96–97, para. 15.

[341] Final Report of the Study Group on Most Favoured Nation clauses (footnote 183 above), p. 103, para. 92.