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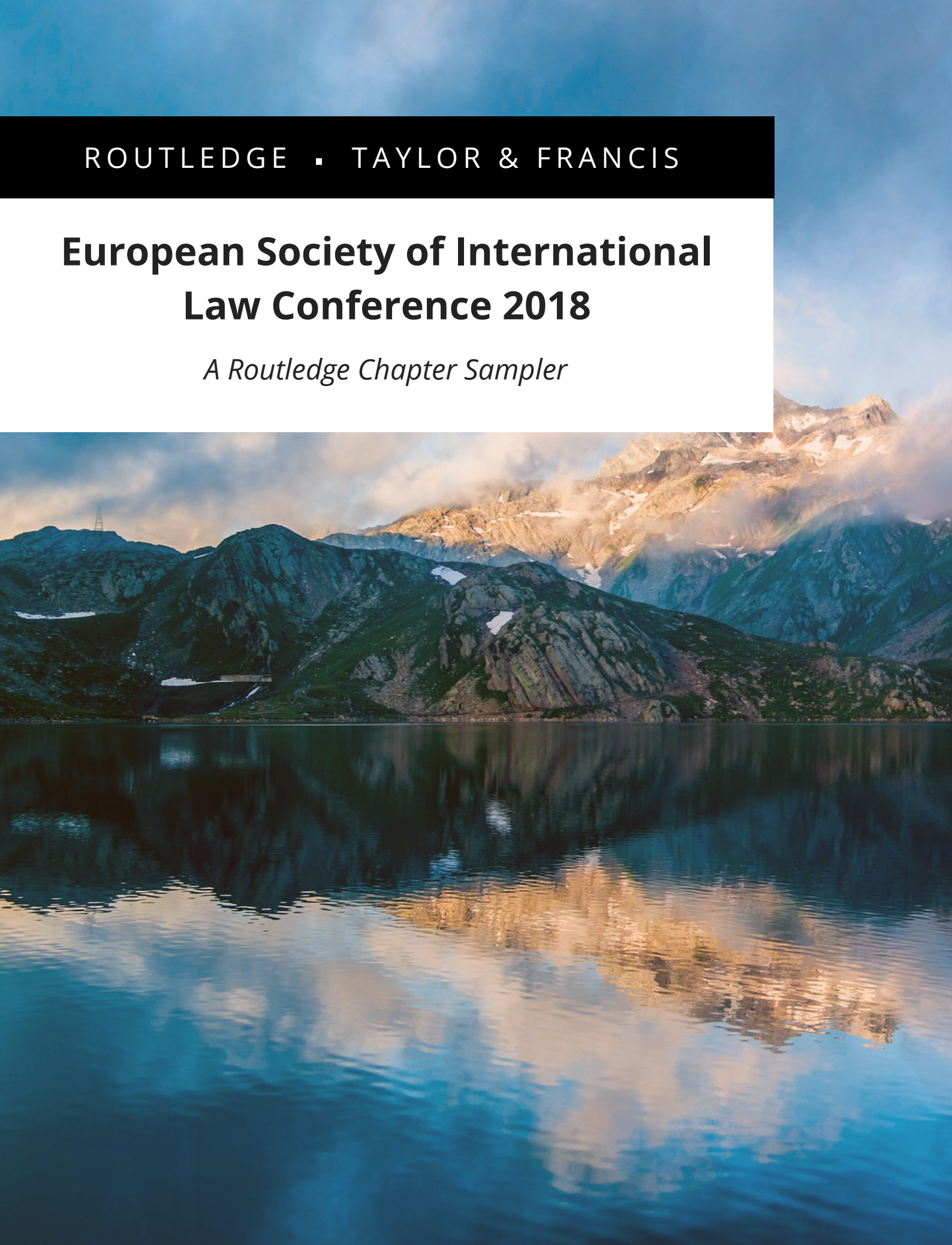

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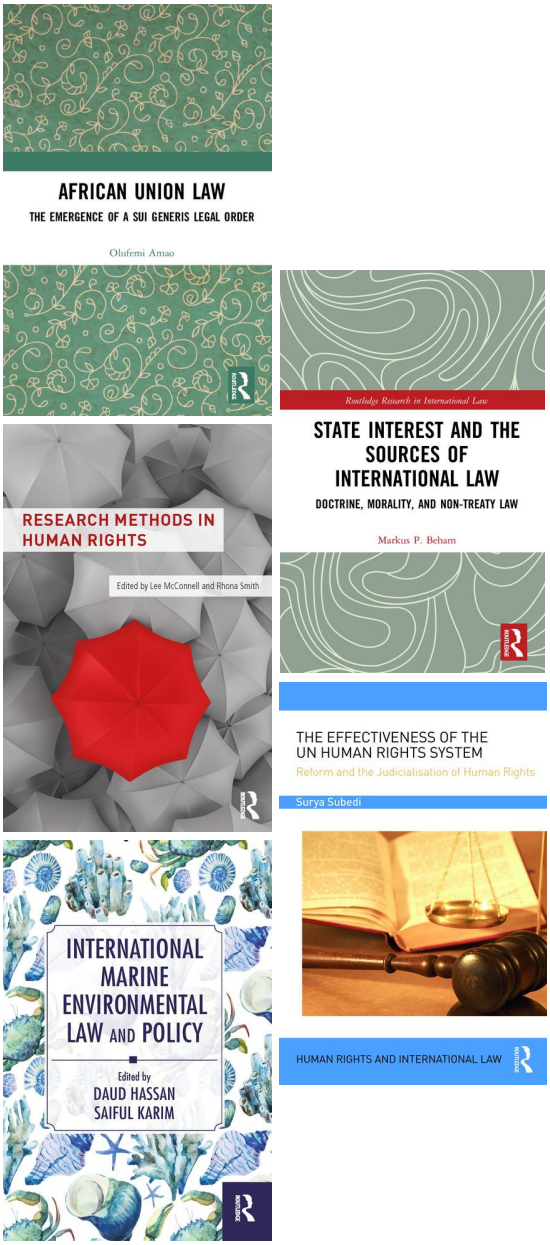

6 Peace, security, the rule of law and African Union law

Introduction

This chapter discusses the AU legal framework for ensuring peace, security and respect for rule of law in Member States and across the continent. The chapter will be less focused on the political and historical aspects of these issues, which have been widely covered in the literature over the years.[1] The long history of dictatorships, authoritarian governments and conflicts in many Member States have caused the AU to prioritise the areas of rule of law, peace and security in its legal order. This focus is also necessary because critical issues such as economic development and human rights cannot be properly addressed without sustained peace, security and rule of law. There is recognition that these areas are crucial to the overall success of the legal order emerging from closer integration in the African Union. The steps taken to improve peace, security and the rule of law have led to the emergence of new norms and standards with significant implications for Member States. These norms and standards are reflected in major instruments of the AU. The main norms in this respect include the norm of non-indifference, democratic constitutionalism, human rights, right to protect and prevention of unconstitutional change of government. The chapter also discusses the significant role of the African Peace and Security Architecture (APSA) in this context.[2] The APSA provides the broad legal basis for AU involvement in peace building and post-conflict reconstruction across the continent.

Background: the OAU and the non-interference norm

As stated in Chapter 2, the predecessor organisation to the AU, the OAU, was established with the aim of safeguarding African States' interests in the process

1 See, for example, A. Jeng, *Peacebuilding in the African Union: Law, Philosophy and Practice* (Cambridge University Press, 2012); I. Badmus, *The African Union's Role in Peacekeeping: Building on Lessons Learned from Security Operations* (Palgrave Macmillan, 2015); P. Williams, 'The peace and security council of the African union: evaluating an embryonic international institution', (2009) 47 (4) *The Journal of Modern African Studies* 603; A. Abass (ed.) *Protecting Human Security in Africa* (Oxford University Press, 2010).

2 See, generally, A. Lins de Albuquerque, *The African Peace and Security Architecture (APSA) – Discussing the Remaining Challenges* (FOI, 2016).

of independence by promoting unity of purpose and the complete elimination of colonialism in Africa. This was necessitated by the post-1945 legal order, which 'obligated the OAU to be structured upon the principles of sovereignty, non-interference and territorial integrity'.[3] Understandably, and because of its limited purpose, the OAU adopted the principle of non-interference in the internal affairs of Member States and respecting the sovereignty of each Member State. The OAU, therefore, had severely limited scope to scrutinise or challenge Member States' internal policies or activities that might pose threats to peace, law and order in its early days.[4]

Frequent conflicts since the achievement of independence and, in particular, the genocidal war in Burundi and Rwanda between 1993 and 1994, challenged the OAU's approach to peace and security.[5] Nonetheless, the OAU continued to define its priority as mainly conflict prevention due to its fundamental norm of non-interference and because it saw the United Nations as having the primary responsibility for peace and peacekeeping globally.[6] However, this position became increasingly untenable, as the UN was reluctant to take the lead in resolving major African conflicts. The regional economic communities (RECs) had to take up responsibility for intervening in these conflicts. For instance, in conflict situations in Liberia, Sierra Leone and Guinea-Bissau, the Economic Community of West African States (ECOWAS) had to take responsibility for responding to the conflicts. A similar approach was taken by the Southern African Development Community (SADC) in relation to the conflicts in Lesotho and the Democratic Republic of the Congo (DRC) in 1988.[7]

This is not to say that the OAU had no impact on the evolution of the AU legal order on peace and security. It has been argued that the OAU's main contribution was in setting general and broad norms and standards on peace and security, but it was ineffective in clarifying and enforcing them.[8] However, ironically, the OAU's most fundamental norm was the norm of non-interference in Member States' affairs. As noted earlier, the non-interference norm hindered the OAU's ability to be proactive in activities that may impact Member States. Some of the OAU's significant standard-setting instruments include the Convention

3 *Supra*, Jeng, 180.

4 U. O. Umozurike, 'The Domestic Jurisdiction clause in the OAU Charter', (1979) 78 (311) *African Affairs* 197–202, 205–209 (examining the foundation of the OAU's non-interference policies); P. D. Williams, 'From non-intervention to non-indifference: the origins and development of the African Union's security culture' (2007) 106 (423) *African Affairs* 252, 271 (the author observed that 'the [OAU's] traditional response to *coups d'etats* was official indifference').

5 P. D. Williams, 'The Peace and Security Council of the African Union: evaluating an embryonic international institution' (2009) 47 (4) *The Journal of Modern African Studies* 603–626.

6 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. Under Chapter VII of the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security.

7 *Supra*, Williams.

8 B. Moller, 'The African Union as security actor: African solutions to African problems?' *Crisis Working Papers Series No. 2* – Working Paper No. 57 (August 2009) 6.

for the Elimination of Mercenaries (1985), which was put in place in response to the involvement of foreign mercenaries and private companies in wars in Africa;[9] the OAU Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes (1990);[10] the African Nuclear Weapon Free Zone Treaty – The Pelinda Treaty (2009);[11] the Bamako Common Africa position on Small Arms (2000);[12] and the Convention on the Prevention and Combating of Terrorism (2002).[13] Apart from standard and norm setting, the OAU also attempted to improve its conflict prevention and management capacity, although with little effect (see the discussion on the OAU Mechanism for Conflict Prevention, Management and Resolution below). In this regard, it engaged in a limited number of military peace-keeping activities with minimal impact.

Arguably, an area where the OAU had some impact is in relation to responding to military coups and violent changes of government. In its later years, the OAU showed a willingness to condemn and challenge unconstitutional changes of government in Member States.[14] For example, although the OAU charter did not contain specific provisions to enable the OAU to promote democracy, at its Thirty-Fifth Ordinary Session it decided to condemn the coup d'état in Sierra Leone in 1997 and encouraged its Member States to refrain from recognising the military regime.[15] Moreover, in 1999, in its 'Algiers Decision', the OAU demonstrated its evolving attitude towards unconstitutional change of government by referring to international standards on democracy and calling for the restoration of constitutional order in all Member States.[16] However, the OAU failed to put in

9 Organisation of African Unity, *OAU Convention for the Elimination of Mercenarism in Africa*, 3 July 1977, CM/817 (XXIX) Annex II Rev. 1, available at: https://au.int/sites/default/files/treaties/7768-treaty-0009_-_oau_convention_for_the_elimination_of_mercenarism_in_africa_e.pdf, accessed 25 November 2017.

10 *Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World* (OAU Doc. AHG/Decl.1 (XXVI)), adopted at the 26th Ordinary Session of the Assembly of Heads of State and Government held in Addis Ababa, Ethiopia, 11 July 1990.

11 African Union, *African Nuclear-Weapon-Free Zone Treaty*, 11 April 1996, available at: https://au.int/sites/default/files/treaties/7777-treaty-0018_-_the_african_nuclear-weapon-free_zone_treaty_the_treaty_of_pelindaba_e.pdf, accessed 25 November 2017.

12 Organisation of African Unity, *Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons* (2000), available at: https://2001-2009.state.gov/t/ac/csbm/rd/6691.htm, accessed 16 December 2017.

13 Organisation of African Unity, *OAU Convention on the Prevention and Combating of Terrorism*, 1 July 1999, available at: https://au.int/sites/default/files/treaties/7779-treaty-0020_-_oau_convention_on_the_prevention_and_combating_of_terrorism_e.pdf, accessed 25 November 2017.

14 R. Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press, 2004) 17–21, 78–79; K. O. Kufuor, 'The OAU and the recognition of governments in Africa: analyzing its practice and proposals for the future', (2011) 17 (2) *American University International Law Review* 369, 375; *supra*, Williams, 273.

15 Decision AHG/Dec.141 (XXXV), adopted during the Thirty-fifth Ordinary Session of the Assembly.

16 Available at: http://archive.au.int/collect/auassemb/import/English/AHG%20Decl%201-2%20XXXV_E.pdf, accessed 13 January 2018.

place any specific policy instrument or enforcement process to follow as standard response to unconstitutional change of government.[17] Apart from this, on many other peace and security challenges the OAU struggled to cope. The failure or lack of capacity of the OAU to respond adequately to these challenges was part of the reason why the AU and its legal order were established.

Ascertaining the legal and normative underpinnings of the AU legal order on peace and security: from the OAU to the AU

The legal underpinnings in the area of peace and security have emerged gradually over the years from the time of the OAU to the AU. The developments have taken various forms but are slowly coalescing into substantial, though not always coherent, standards. These underpinnings are found in a variety of instruments and pronouncements by the AU and its predecessor, the OAU. With regards to the OAU's contribution, a significant instrument is the 1990 OAU Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World.[18] This declaration represented a significant landmark in the OAU's approach to democracy, peace and security, human rights and development within Africa, hitherto considered to be the exclusive preserve of Member States or the United Nations. The declaration emphasises that peace and security are preconditions for the achievement of other goals, such as development and democratisation. It noted that the continent would be unable to achieve its development objectives without sustained peace and stability in Africa. This declaration paved the way for the creation of the OAU Mechanism for Conflict Prevention, Management and Resolution in 1993 as the central OAU organ for peace and security.[19] The goals of the mechanism were to anticipate and prevent potential conflicts that could lead to war, undertake peace-making and peace-building efforts and to undertake peace-making and peace-building activities post conflict. However, there is a general consensus that the Mechanism achieved very little because of the limitations placed on it by the weak capacity of the OAU itself to address these issues.[20] This Mechanism was initially meant to

17 P. D. Williams, 'The African Union's emerging security culture: options for U.S. policymakers', CSIS Online Africa Policy Forum, July 2007; E. Y. Omorogbe, 'A club of incumbents? The African Union and coups d'état', (2011) 44 (1) *Vanderbilt Journal of Transnational Law* 123, 127.

18 *Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World* (OAU Doc. AHG/Decl.1 (XXVI)), adopted at the 26th Ordinary Session of the Assembly of Heads of State and Government held in Addis Ababa, Ethiopia, 11 July 1990.

19 M. Vogt and M. Muyangwa 'An assessment of the Mechanism, which was informed by the now completed OAU/IPA Joint Task Force on Peacemaking and Peacekeeping in Africa', (2000), available at: www.ipinst.org/wp-content/uploads/publications/oau_conflict_1993_2000.pdf, accessed 8 January 2018.

20 Ibid.

be incorporated into the AU framework as its peace and security organ. However, following a review, the decision was made to establish a new Peace and Security Council.[21] The transition from the OAU to the AU transformed the framework for the AU peace and security framework with the introduction of key legal and policy instruments, including the Constitutive Act of the African Union, the AU Protocol on the Establishment of the Peace and Security Council (PSC Protocol)[22] and the Common African Defense and Security Policy (CADSP).[23]

The CADSP, initiated by Nigeria, is one of the three projects, alongside Libya and Gaddafi's quest for pan-African Unity and South Africa's project for an African renaissance, that led to the creation of the AU itself.[24] The CADSP takes a holistic approach to the identification and elaboration of the concept of security in the African context. This approach is taken because of the complexities of the causes of conflict in the continent and the need to take a multi-pronged approach by emphasising 'human security, based not only on political values but also on social and economic imperatives'.[25] The human security dimension is significant because it is now embedded in the AU approach. From that perspective, according to the CADSP, poverty, inequitable distribution of resources and corruption are considered major threats to peace, security and stability in Africa. The principles and values underlying the CADSP therefore include the promotion of social justice to ensure balanced economic development. The social justice underpinning of the policy predates the CADSP. One of the building blocks of the policy is the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA)[26] security regime. The inspiration for the development of the regime can be traced to lessons learnt from the European experience at the Helsinki Conference on Security and Co-operation in Europe (CSCE).[27] Notably, the CSSDCA's commitment to social justice as part of the security regime is elaborated in the Memorandum of Understanding on Security, Stability, Development and Cooperation.[28] Therefore, although the CSSDCA's main focus is on security issues, it recognises the interdependence between development, peace, security,

21 African Union, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 9 July 2002, available at: www.peaceau.org/uploads/psc-protocol-en.pdf, accessed 16 December 2017.

22 Ibid.

23 Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) Solemn Declaration (AHG/Decl.4 (XXXVI), 2000.

24 *Supra*, Moller, 7.

25 Supra, African Union, *Protocol Relating to the Establishment of the Peace and Security Council*, 2002; African Union, *Solemn Declaration on the African Common Defence and Security Policy*, 2004; *supra*, Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA).

26 Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA) Solemn Declaration (AHG/Decl.4 (XXXVI), 2000.

27 Conference on Security and Co-operation in Europe (Final Act Helsinki 1975); see also D. J. Galbreath, *The Organization for Security and Co-operation in Europe* (OSCE) (Routledge, 2007).

28 Decision on the Conference on Security, Stability, Development and Cooperation (CSSDCA) AHG/DEC. 175 (xxxviii).

human rights and democracy.[29] The key significance of the CADSP is in setting the tone for the norms and standards on peace and security by anchoring it on the idea of human security.

African Peace and Security Architecture (APSA) and its role in norm creation

The APSA is the umbrella term for the AU's main mechanism for promoting peace and security in Africa.[30] As Berhe correctly observed, the APSA combines the norms and structures that are at the foundation of the AU's approach to peace and security.[31] The APSA has two interconnected layers. The first layer comprises its constituent institutions, which include the Peace and Security Council, the Panel of the Wise, the Continental Early Warning System, the African Standby Force, the African Capacity for Immediate Response to Crises and the Peace Fund. The African Union Commission, through its chairperson, assisted by the AU Commissioner for Peace and Security, also plays a significant role in this regard. The second layer comprises the eight regional economic communities (RECs) recognised by the AU and two regional mechanisms (RMs) that play important roles in the achievement of APSA objectives.[32] In relation to the second layer, the rules governing the relationship between the AU's APSA and the regional bodies is codified in the Constitutive Act, the PSC Protocol and an MOU: Memorandum of Understanding on Cooperation in the Area of Peace and Security between the AU, RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern and North Africa.[33] The Abuja Treaty establishing the African Economic Community also made reference to the relationships.[34]

Article 16 (1) of the PSC Protocol states that the AU has 'the primary responsibility for promoting peace, security and stability in Africa' and also states that the modalities of the partnership between AU institutions and regional mechanisms shall be determined by the comparative advantage of each and the prevailing circumstances. It is further provided in the MOU that the partnership should be exercised in accordance with the principles of subsidiarity, complementarity and comparative advantage.[35] However, these principles were not expatiated upon

29 W. Zartman, 'Security, stability, development and cooperation in Africa: a regional expression of a global policy network in formation', (2002) *The Johns Hopkins University*; African Union, *Solemn Declaration on the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA)* (Doc. AHG/Decl.4 (XXXVI)), Lomé: African Union, 10–12 July 2000.

30 *Supra*, Lins de Albuquerque, 7.

31 M. G. Berhe, 'The norms and structures for African peace efforts: The African Peace and Security Architecture', (2017) 24 (4) *International Peacekeeping* 661.

32 *Supra*, Lins de Albuquerque, 7–8.

33 *Memorandum of Understanding (MOU) on Cooperation in the Area of Peace and Security between the AU, RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern and North Africa*, available at: www.peaceau.org/uploads/mou-au-rec-eng.pdf, accessed 16 December 2017.

34 Articles 4 and 6.

35 *Supra*, MOU, Article IV.

in the MOU. Nevertheless, the consensus among scholars on the implication of the provision is that conflict should be dealt with at the regional level in the first instance by relevant REC or RMs. If that option is not feasible or possible, then the AU's institutions will have the responsibility to act.[36] The rationale behind this thinking is the fact that REC/RMs are closer in proximity to conflicts and may have a better understanding of the background and context of situations. This possibility thus places them at a better comparative advantage in dealing with the situation than the continental body. However, the problem with the provisions here is in relation to how the process is triggered and administered. There are two pertinent questions that remain ambiguous. In a situation of conflict, do the regional organisations have the independent mandate to act or do they require authorisation or consent from the AU? Furthermore, does the AU have the authority to determine the modus operandi of regional institutions in the deployment of military or other personnel? It has been argued that, based on Article XX of the MOU, AU authorisation is needed before the regional mechanisms can be utilised in peace operations.[37] This, it is argued, would follow a similar pattern to the AU relationship with the UN Security Council, which requires such authorisation by the UN at the international level. Even though Article 16(1) of the PSC Protocol states that the AU has 'the primary responsibility for promoting peace, security and stability in Africa', Article 17(1) of the Protocol acknowledges that the UN Security Council 'has the primacy of authority for international peace and security'.[38] In addition, the PSC 2005 Roadmap states that 'the AU will seek UN Security Council authorisation of its enforcement actions'.[39] However, there is no consensus on this issue, hence the potential for tension between the AU and the regional mechanisms in this area.[40]

The Peace and Security Council (PSC) is central to the AU legal framework for peace and security. The PSC was established by the Protocol Relating to the Peace and Security Council of the African Union (the PSC Protocol).[41] It should be borne in mind that the PSC Protocol itself was adopted under the power conferred on the AU Assembly in Article 5(2) of the Constitutive Act to establish other organs in addition to those mentioned in the Act. The PSC is the highest authority and a standing organ of the AU charged with the prevention, management and resolution of conflicts. The framework was put in place as a direct

36 See *supra*, Lins de Albuquerque, 24; Laurie Nathan *et al.*, *African Peace and Security Architecture (APSA) 2014 Assessment Study Final Report* (FOI, The Total Defense Research Institute (name translated from Swedish) 16 April 2015).

37 *Supra*, Lins de Albuquerque, 25.

38 *Supra*, United Nations, Chapter VII; J. I. Levitt, 'The Peace and Security Council of the African Union: The known unknowns', (2003) 13 (1) *Transnational Law & Contemporary Problems* 110.

39 African Union, *Roadmap for the Operationalization of the African Standby Force*, experts' meeting on the relationship between the AU and the Regional Mechanisms for Conflict Prevention, Management and Resolution, Addis Ababa, AU doc.EXP/AU-RECS/ASF/4(i).

40 *Supra*, Lins de Albuquerque, 26.

41 Available at: https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union, accessed 16 December 2017.

response to conflicts and, in particular, the genocide that occurred in parts of the continent in the 1990s. Its structure is modelled loosely on the UN Security Council. As stated previously, the PSC, working with other regional arrangements, has the remit to promote peace, security and stability in the AU.[42] The PSC's core functions include the conduct of early warning and preventive diplomacy, facilitation of peace-making activities, establishment of peace-supporting activities and, in certain situations, recommendation of intervention in Member States' internal affairs in order to promote peace, security and stability. In addition, the PSC also works to support peace-building and post-conflict reconstruction, humanitarian actions and disaster management.[43] However, it is important to emphasise that its main legal power is the ability to recommend intervention in a Member State's internal affairs under Article 4 of the Constitutive Act.

'Non-indifference' norm

From a strictly legal standpoint the Constitutive Act is fundamental to the AU legal order. It has been suggested that the African Union's peace and security framework, as framed under the Constitutive Act, is embedded in three distinct but organically interrelated paradigms.[44] These are, first, the 'non-indifference' concept in Article 4, second, norm formulation and, third, social integration and interdependence. According to Jeng, these principles are derived from the Constitutive Act's transformative and peace-building approaches.[45] The norm formulation paradigm underscores the promotion of common values that are considered important for common identity and for advancing collective interest, as discussed in Chapter 2. The social integration and interdependence paradigm relates to steps put in place to deepen integration and to make recourse to conflicts less attractive, similar to the EU experience. However, from the legal perspective, the non-indifference concept in Article 4 of the Constitutive Act is the most important paradigm. According to Jeng,

> The codification of Article 4 as a template in the 'law' of the African Union is, in this sense, a reflection of past institutional and normative inadequacies and an expressed intention to depart from them. Perhaps nothing less could have been expected from an organisation that envisions an integrated Africa.[46]

The Constitutive Act provides a list of fundamental principles in Article 4 that includes respect for democratic principles, human rights, the rule of law and good

42 A. Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart Publishing, 2004).

43 See, generally, Article 7 PSC Protocol.

44 *Supra*, Jeng, 182.

45 Ibid.

46 *Supra*, Jeng, 182.

governance, the condemnation and rejection of impunity and political assassination and the rejection of unconstitutional change of government. The scope of Article 4 was widened by a Protocol amending the Act in 2003.[47] Under Article 4(h), the AU has the power to intervene in a Member State's affairs and use force if necessary in 'grave circumstances', such as war crimes, genocide and crimes against humanity. In theory, this provision enables the AU to unilaterally use force to address unconstitutional change of government if the act leading to the change or its consequences involve war crimes, crimes against humanity or genocide. The Protocol mentioned above expanded the scenario to include serious threat to legitimate order in a Member State and the need to restore peace and stability to the Member State upon the recommendation of the AU's Peace and Security Council. This expansion, while generally welcomed, has been criticised by several scholars for its broadness.[48] Nonetheless, Article 4(h) as amended shows that by the adoption and subsequent ratification of the Constitutive Act, Member States have willingly surrendered certain sovereign powers to the AU.[49] The means and methods of implementation appear to be left to the AU under the Act. The ceding of sovereignty in this area is one of the strongest indications of the emerging *aquis* in the continent that underpins the non-indifference approach in the new legal order.

In addition to Article 4(h), Article 4(j) gives AU Member States the ability to request AU intervention 'to restore peace and security'. The implication of this provision is that a Member State's government can, on its own volition, request intervention in its internal affairs in the event of an unconstitutional change of government. These provisions reinforce the objectives of the AU, as stated in Article 3 of the constitution, which include political cooperation, promotion and protection of human rights and commitment to democratic values.

As a side note, the extensive legal powers vested in the AU prima facie may conflict with the powers of the UN Security Council to authorise military action to restore peace and security at the international level. However, as Jeng correctly argued, this is not necessarily so. According to Jeng,

> the legal basis for the Constitutive Act could be situated in Article 52 of the UN Charter. The provision empowers regional organisations to perform functions of a peace enforcement nature. To the extent that the Constitutive Act is a product of a multilateral treaty, with Article 4 intervention seeking the kind of regional peace and stability alluded to in the UN Charter, it falls outside the remit of Article 53(1) of the Charter. This prevails so far so far as the pertinent multilateral treaty was freely negotiated and adopted by state parties.[50]

47 *Protocol on the Amendment to the Constitutive Act of the African Union*, Maputo, Mozambique, 11 July 2003.

48 E. Baimu and K. Sturman, 'Amendment to the African Union's right to intervene: a shift from human security to regime security' (2003) 12 (2) *African Security Review* 37, 42.

49 *Supra*, Jeng, 182.

50 Ibid, 182–184.

Norm on unconstitutional change of government

Closely linked to the above is the norm on unconstitutional change of government. This norm is one of the major normative developments under the AU legal order. The evolution of the norm has a direct link with the AU and its predecessor, the OAU, and their concern for the threat posed by unconstitutional change of government (UCG) to peace and security in the continent. Historically, UCG is perceived as a threat to peace and security and, likewise, a threat to the rule of law across the continent. For instance, there were 88 successful military coups in Africa between 1952 and 2012, which created instabilities in several Member States.[51] As correctly observed by Dersso, the norm on unconstitutional change of government distinguished the AU peace and security order from similar regional and international peace and security arrangements[52] because of the high degree of interventionary power it accorded the AU and its relevant institutions. As Dresso observed, 'the norm on UCG expresses a normative position for defending efforts at establishing and upholding democratic rule from the threat of military coups or other illegal change or seizure of power'.[53] Because of the link between unconstitutional change of government and peace and security, the norm is conceptualised as a peace and security instrument.

The ban on unconstitutional change of government emerged from the collective architecture of the AU peace and security framework. It is predicated on the AU's broad definition of 'peace and security'. The Lomé Declaration is fundamental in this context.[54] Its preamble states that UCG is a threat to peace and security and 'constitutes a very disturbing trend and serious setback to the ongoing process of democratisation in the Continent'.[55] Under the Lomé Declaration, UCG is defined to include military coup d'état against a democratically elected government, intervention by mercenaries to replace a democratically elected government, replacement of democratically elected governments by armed dissident groups and rebel movements, and the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections. The definition was expanded by the African Charter on Democracy, Elections and Governance in 2007, in Article 25(5), to include '[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government'.[56] More recently, unconstitutional change of government has been designated a crime and included as one of the

51 I. K. Souare, 'The African Union as a norm entrepreneur on military coups d'etat in Africa (1952–2012): an empirical assessment', (2014) 52 (1) *Journal of Modern African Studies* 69.

52 S. A. Dersso, 'Defending constitutional rule as a peacemaking enterprise: the case of the AU's ban of unconstitutional changes of government', (2017) 24 (4) *International Peacekeeping* 639.

53 Ibid. 640.

54 Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI).

55 Ibid.

56 African Union, *African Charter on Democracy, Elections and Governance* (2007), available at: www.achpr.org/instruments/charter-democracy, accessed 16 December 2017.

crimes over which the African Court of Justice and Human Rights has jurisdiction.[57] Article 28E(f) of the Malabo Protocol also added to the definition by providing that unconstitutional change of government includes '[a]ny substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors'.[58]

The norm not only bans unconstitutional change of government but, significantly, it is also supported by an enforcement regime that has constitutional status because it is contained in the AU Constitutive Act. The norm has played a significant role in the decline of the practice of unconstitutional change of government in the continent in recent years. It is notable that the enforcement of the norm has achieved a level of consistency over the years.[59] As discussed in Chapter 3, the AU Constitutive Act provides for the imposition of sanctions against a Member State whose de facto 'government' has assumed office through unconstitutional means.[60] Furthermore, according to Article 23(2), a Member State's failure to comply with decisions and policies of the AU may lead to imposition of sanctions such as denial of transport and communication links and other political and economic measures. The economic dimension is important because, as discussed in Chapter 5, economic integration, especially at the regional level, has somewhat advanced in recent times. It has been correctly observed that this approach represents a significant move away from the practice of non-interference under the OAU to the non-indifference norm of the AU.[61] The provisions underscore the strengthening of the legal framework of the emergent AU legal order.

It is also worth noting that in 2009 the PSC adopted the Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Change of Government in Africa.[62] This framework included the decision to create a sanctions committee for the AU aimed at monitoring implementation of the PSC's sanctions policy.[63] However, despite this, the AU's capacity to monitor compliance of sanctions remains limited, and its record of imposing sanctions is largely restricted to 'medium-sized' States found to have violated the norm.[64]

57 *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Malabo Protocol) available at https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights, accessed 16 May 2018.

58 Ibid.

59 *Supra*, Dersso, 639.

60 Article 30.

61 *Supra*, Jeng, 183.

62 Peace and Security Council, *Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa*, PSC/PR/2(CCXIII)/Assembly/AU3XIV, 17–19 December 2009, available at: www.peaceau.org/en/article/ezulwini-framework-for-the-enhancement-of-the-implementation-of-measures-of-the-african-union-in-situations-of-unconstitutional-changes-of-government-in-africa-ezulwini-kingdom-of-swaziland-17-19-december-2009, accessed 16 December 2017.

63 Ibid.

64 S. Straus, 'Wars do end! Changing patterns of political violence in sub-Saharan Africa', (2012) 443 (111) *African Affairs* 179–201.

The PSC practice has been to impose measures and sanctions against any Member State in which a coup occurs, even if the Member State has not ratified the PSC Protocol. One such example is when the PSC imposed sanctions on Mauritania in 2005, even though it had not yet ratified the Protocol (Mauritania signed the Protocol in May 2003 and ratified it in July 2008). The PSC also imposed sanctions on Guinea in 2009 (Guinea signed the Treaty in July 2002 and ratified it in 2017).[65] It has also worked with RECs and the UN in addressing unconstitutional change of government. For example, following the unexpected coup d'état in Mali in March of 2012, in July of the same year the PSC authorised the regional organisation, the Economic Community of West African States (ECOWAS), to intervene and return governmental control to civilian rule.[66] The mandate of ECOWAS as authorised by the PSC set three main objectives: first, to ensure the security of the transitional institutions; second, the restructuring and reorganising of the Malian security and defence forces; and third, restoring state authority over the northern part of Mali and combating terrorism and criminal networks. These steps were taken in coordination with the United Nations. The United Nations Security Council Resolution (UNSCR) 2071 on Mali validated the presence of international forces in Mali.[67] Following this resolution, ECOWAS leaders agreed to deploy 3,300 soldiers, provided mainly by Nigeria, Niger and Burkina Faso, to Mali to intervene in the Member State.[68] The involvement of ECOWAS, one of the regional economic communities, shows the important role that RECs play in this context. At the moment the commitment of Member States to various RECs within their regions appears stronger than to the AU itself.[69]

Human rights as a norm

The importance of human rights standards and their fundamental significance in the AU legal orders are discussed in Chapters 7 and 8. In addition, the African Charter has an important provision that forms part of the legal underpinnings of AU law on peace and security. Article 23 of the Charter introduced the peoples' right to peace and security into the Africa legal order.[70] The article provides inter alia that '[a]ll peoples shall have the right to national and international peace and security'. The right applies at both the domestic national level and the international level. The African Commission has considered and

65 *Supra*, Omorogbe, 123, 127; *supra*, Williams (2009) 603.

66 African Union, *Strategic Concept for the Resolution of the Crises in Mali*, available at: www.peaceau.org/uploads/psc-strategic-concept-24-10.pdf, accessed 17 December 2017.

67 United Nations Security Council Resolution (UNSCR) 2071 was unanimously adopted on 12 October 2012.

68 A. Vines, 'A decade of African Peace and Security Architecture', (2013) 89 (1) *International Affairs*, 89–109.

69 A.-F. Musah, 'West Africa: governance and security in a changing region', *Africa Program Working Paper* (International Peace Institute, February 2009) 17–18, available at: www.ipinst.org/2009/02/west-africa-governance-and-security-in-a-changing-region, accessed 17 December 2017.

70 See Chapter 8.

applied Article 23 in its jurisprudence. The Commission found violations of the provision in *Malawi African Association and Others* v. *Mauritania*[71] and in *Democratic Republic of Congo* v. *Burundi, Rwanda, Uganda*[72] (these cases are discussed in Chapter 8). The African Commission held in the latter case that Article 23 is a mandated standard that Member States must observe and falls within the remit of the Commission to uphold.[73]

Responsibility to protect as an AU norm

The responsibility to protect norm has its roots in the report of the International Panel of Eminent Personalities (IPEP) set up by the OAU in the aftermath of the Rwanda genocide in 1994.[74] The report was the result of an independent inquiry conducted by an international panel. One of the key recommendations from the panel was stated in the following terms:

> Since Africa recognizes its own primary **responsibility to protect** the lives of its citizens, we call on: a) the OAU to establish appropriate structures to enable it to respond effectively to enforce the peace in conflict situations; and b) the international community to assist such endeavors by the OAU through financial, logistic, and capacity support. (Emphasis added.)

This concept is part of the driving force behind the continent's move from the norm of non-interference to the norm of non-indifference. This responsibility also informed the introduction of the right of the AU to intervene in Member States' affairs under Article 4(h) of the Constitutive Act. Furthermore, the Ezulwini Consensus, adopted in 2005, also acknowledged this responsibility as an integral part of the AU norm.[75] The norm is now globally acknowledged and has been adopted by international organisations such as the United Nations.

Democratic constitutionalism: the rule of law and good governance

Articles 4(m) and (p) of the Constitutive Act underscore the AU approach to the norm of democratic constitutionalism. Article 4(m) affirms the 'respect for democratic principles, human rights, the rule of law and good governance', and Article 4(p) supports the norm on unconstitutional change of government by

71 *Malawi African Association and Others* v. *Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97,196/97 and 210/98 (2000).

72 *Democratic Republic of Congo* v. *Burundi, Rwanda, Uganda*, 33rd Ordinary Session, 15–29 May 2003, Niamey, Niger.

73 Ibid. paragraph 68.

74 African Union, *Rwanda: The Preventable Genocide*, July 2000, available at: www.refworld.org/docid/4d1da8752.html, accessed 17 December 2017.

75 *Supra*, Peace and Security Council, *Ezulwini Framework*.

the 'condemnation and rejection of unconstitutional changes of governments'. Article 4(p) has been used as the legal basis for the suspension of Member States for violation of the norm on unconstitutional change of government until constitutional order is restored, usually through transparent democratic elections.

Various other instruments, such as the African Charter on Human and Peoples' Rights[76] and the AU Convention on Preventing and Combating Corruption,[77] also have provisions espousing democratic constitutionalism. Given the importance of the issues connected to the norm, the Member States decided to adopt a comprehensive instrument to govern this area. The African Charter on Democracy, Elections and Governance (ADC)[78] entered into force in 2012 and expands on the AU Constitutive Act. The Charter uniquely establishes democracy and peoples' participation as fundamental rights of individual citizens. By adopting the Charter, the AU consolidated all past commitments made in relation to democracy and governance in one instrument. The objective of the charter is to change the political culture across the continent to one that allows for democratic, free and fair elections conducted fairly and transparently.

The main goal of the ADC is the encouragement and promotion of democracy, the rule of law and human rights in Africa.[79] The ADC is the first binding instrument adopted by Member States of the AU that attempts to comprehensively address all of the elements necessary for the establishment of liberal democracies in the continent. The ADC contains a number of provisions regarding unconstitutional change of government. As previously mentioned, it widens the scope of 'unconstitutional change of government' by providing that it includes any amendments to the constitution or legal instruments of a Member State infringing on the principles of democratic change of government.[80] It is notable that some Member States of the AU are reluctant to ratify the ADC because of the Charter's expansive provisions regarding the promotion of democracy.[81] Despite this reluctance, the success of democracy in some Member States may serve as a model for uncommitted States going forward.[82] It is noteworthy that the African

76 OAU, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982), available at: www.achpr.org/files/instruments/achpr/banjul_charter.pdf, accessed 24 November 2017.

77 African Union, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003. Entered into force on 5 August 2006.

78 African Union, *African Charter on Democracy, Elections and Governance* (2007), available at: www.achpr.org/instruments/charter-democracy, accessed 16 December 2017.

79 Ibid.

80 S.-A. Elvy, 'Towards a new democratic Africa: the African Charter on Democracy, Elections and Governance', (2013) 27 (1) *Emory International Law Review* 41, 43.

81 Ibid.

82 Ibid. See also M. Hilgers, 'Evolution of political regime and evolution of popular political representations in Burkina Faso', (2010) 4 (9) *African Journal of Political Science and International Relations* 350–359.

Court applied the provisions of the instrument in *The matter of Actions Pour la Protection des Droits de l'Homme (APDH)* v. *Republic of Côte D'Ivoire*.[83]

The New Partnership for Africa's Development (NEPAD) initiative is also worth mentioning in this context.[84] The NEPAD is an initiative of African leaders with the support of the European Union. It was established in 2001 by five principal founding member countries: South Africa, Nigeria, Algeria, Egypt and Senegal. The central goals of NEPAD are to promote peace, security and human rights and to foster the creation of democratic institutions throughout the African continent. Though, strictly speaking, it is an initiative outside of the AU legal order, it resonates with some of the core issues on security, rule of law and peacekeeping.[85] However, NEPAD is a non-binding instrument, and therefore Member States are not legally obligated to comply with the provisions of the NEPAD. This has remained a significant flaw in the design of the initiative.[86]

The members of NEPAD introduced a Declaration on Democracy, Political, Economic and Corporate Governance (Democracy Declaration) in 2002.[87] The NEPAD Democracy Declaration acknowledges that in order to achieve socio-economic development in Africa, the AU must promote democracy and good political governance in African states. The Declaration specifically reaffirms the AU's commitment to the promotion of democracy and the protection of human rights associated with democracy including, but not limited to, equality of all citizens before the law, the right to form and join political parties and trade unions, and the inalienable right of the individual to participate in free and fair elections.[88] Another outgrowth of NEPAD is the African Peer Review Mechanism (APRM), a voluntary self-governing instrument introduced by the AU Member States in 2003. The core mandate of the instrument is to drive conformity in governance values, code and standards, including in the spheres of peace, security and rule of law. The mechanism invites Member States to examine and assess each other's political and economic governance, assist each other in problem solving and encourage the adoption of better practices.

83 *The matter of Actions Pour la Protection des droits de l'Homme (APDH)* v. *Republic of Côte D'Ivoire*, Application 001/2014 (2016).

84 African Union, *New Partnership for Africa's Development*, 9–11 July 2001, AHG/Dec. 1–11 (XXXVII), AHG/Decl.1–2 (XXXVII), available at: http://archive.au.int/collect/auassemb/import/English/2001%20AHG%20Dec%20160-170%20(XXXVII)%20_E.pdf, accessed 26 November 2017.

85 *Supra*, Jeng, 191.

86 K. D. Magliveras and G. J. Naldi, *The African Union (AU)* (Wolters Kluwer, 2013) 93–327.

87 *Declaration on Democracy, Political, Economic and Corporate Governance*, Annex 1, O.A.U. Doc. AHG/235 (XXXVIII) (July 8 2002), available at: www.chr.up.ac.za/chr_old/hr_docs/arpm/docs/book2.pdf, accessed 17 December 2017.

88 See R. Ngamau, 'The role of NEPAD in African economic regulation and integration (2004) 10 *Law and Business Review of the Americas* 515, 520–521, 536; S. A. Djoyou Kamga, 'Human rights in Africa: prospects for the realisation of the right to development under the new partnership for Africa's development' 255–256 (June 2011) (LLD thesis, University of Pretoria), available at: https://repository.up.ac.za/handle/2263/25141,accessed 17 December 2017.

Another relevant instrument in this context is the African Convention on Preventing and Combating Corruption (Corruption Convention) of 2003.[89] Recognising that corruption is rampant within Member States and that it has seriously hindered the establishment of democratic institutions and economic development in African countries, Member States of the AU adopted the Corruption Convention.[90] The Convention establishes a number of principles aimed at combating corruption and promoting democracy in Africa. The Corruption Convention provides that Member States must: condemn and reject acts of corruption; respect human rights, as well as democratic principles and institutions; and ensure socio-economic development by promoting social justice.[91] Some of the key provisions of the Convention guarantee access to information and participation of civil society and the media in monitoring the implementation of the Convention. Remarkably, the Convention makes illegal the use of funds acquired through illicit and corrupt practices for political party financing in Member States. Similar to the ADC, as a legal instrument, the provisions of the Convention are mandatory and binding on Member States that have ratified it.

It is noteworthy that the Convention brings the private sector, including foreign companies, within its remit. The AU recognised that corrupt practices in the private sector have socio-economic consequences for society and may, for instance, lead to violations of human rights.[92] The AU has therefore used the opportunity provided by the Convention to address this problem. Article 1 defines the 'Private Sector' as 'the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government'. This definition includes all kinds of private entities such as partnerships, small to medium enterprises and multinational corporations.[93] The provisions in Articles 1, 4(1) (e) and (f) and 11 directly place responsibility on States to regulate the activities of corporations in the areas covered by the Convention. In particular, Article 11 provides that

> State Parties undertake to:
>
> 1 Adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the **private sector**.

89 African Union, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003. Entered into force on 5 August 2006.

90 Ibid.

91 Ibid. Article 3.

92 O. Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Routledge Taylor & Francis, 2011).

93 I. Carr, 'Corruption in Africa: is the African Union Convention on Combating Corruption the answer?' (2007) 2 *Journal of Business Law* 111.

2 Establish mechanisms to encourage participation by **the private sector** in the fight against unfair competition, respect of the tender procedures and property rights.
3 Adopt such other measures as may be necessary to prevent **companies** from paying bribes to win tenders. (Emphasis added.)

The Convention provides for a follow-up mechanism in Article 22. The Article establishes an Advisory Board of 11 members elected by the AU Executive Council for a term of two years, renewable once. The board has a broad range of responsibilities. For instance, paragraph 5 (1) of the Article provides that the board shall 'collect information and analyse the conduct and behaviour of multi-national corporations operating in Africa and disseminate such information to national authorities designated under Article 18 (1) hereof'.[94] The board is required to submit a report to the Executive Council on a regular basis on the progress made by each State Party in complying with the provisions of the Convention.

Conclusions

The challenges to rule of law and democracy in the continent, as well as the recent increase in mobile insurgency, such as the activities of the Lord's Resistance Army, Al-Qaeda in the Islamic Maghreb, Al-Shabaab and Boko Haram and continuing separatist group activities in Senegal, Libya, Angola and Mali,[95] make it imperative for the AU and its legal order to robustly address the issues of peace and security to effectively respond to the challenges and foster stability in the continent. This chapter has shown that steps taken to date have led to the development of notable norms. Significantly, the AU has moved away from the OAU's non-interference norm to the non-indifference norm. Furthermore, the AU facilitated the emergence of new norms, including the norms on unconstitutional change of government, human rights, the right to protect and democratic constitutionalism. In the future the focus of the AU should be on expatiating on these norms and ensuring their effective implementation and application across the continent.

94 Article 18 (1) of the AU Convention provides as follows:

> In accordance with their domestic laws and applicable treaties, State Parties shall provide each other with the greatest possible technical cooperation and assistance in dealing immediately with requests from authorities that are empowered by virtue of their national laws to prevent, detect, investigate and punish acts of corruption and related offences.

95 I. Salehyan, *Rebels without Borders: Transnational Insurgencies in World Politics* (Cornell University Press, 2009).

2 Non-Treaty Sources

The title of this book speaks of non-treaty law. Rather than the immediate notion of an "unwritten" source that might spring to mind,[1] the term "non-treaty" seeks to emphasize the delineation between "consensual" and "non-consensual",[2] "unconsciously"[3] created manifestations of international law; what Robert Ago would call a formation "spontanée": Without a formal process.[4] The idea is that such non-consensual law is generated through social interaction or largely domestic processes, as opposed to the voluntary formation of will at the international level. The following chapter seeks to convey this particular understanding of non-treaty law.

A On the "Sources" of International Law

The term "source" itself, "figurative and highly ambiguous",[5] is problematic for a variety of reasons:[6] the failure of Article 38 of the STATUTE OF THE

1 Although it is true that they have no "authentic wording". See Ulrich Fastenrath, 'Relative Normativity in International Law', 4 *European Journal of International Law* (1993) 316. See also Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15/3 *European Journal of International Law* (2004) 524–525 and 552.

2 For the characterization of the sources of customary international law and general principles of law as non-consensual see James Leslie Brierly, 'The Basis of Obligation in International Law', in Hersch Lauterpacht and Humphrey Waldock, *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (Oxford: Clarendon Press, 1958) 18. See on this dichotomy also Koskenniemi, *From Apology to Utopia, supra* n. 2, Chapter 1, *passim*.

3 Dixon, *supra* n. 75, Chapter 1, at 26.

4 Robert Ago, 'Science Juridique et Droit International', 90 *Recueil des Cours de l'Académie de Droit International de La Haye* (1953) 929–945. See also Gihl, *supra* n. 75, Chapter 1, at 83:

> We are therefore driven to the conclusion that no source of law in a formal, that is to say proper, sense for international customary law can be pointed to. International customary law simply exists, and that indeed is quite sufficient.

5 Hans Kelsen, *Principles of International Law,* 2nd edn (New York: Holt, Rinehart and Winston, 1966) 437.

6 On the problem of the terminology "source" see *id., Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*

INTERNATIONAL COURT OF JUSTICE to distinguish between rights and obligations[7] or the confusion regarding the character of the sources of international law as "formal" and "material" or what is even meant by one or the other.[8] As these

(Tübingen: J.C.B. Mohr [Paul Siebeck], 1920) 105–107; *id., supra* n. 5, at 437–438; Max Sørensen, *Les Sources du Droit International. Etude sur la Jurisprudence de la Cour Permanente de Justice Internationale* (Copenhagen: Einar Munksgaard, 1946) 13–14; more recently, Gennady M. Danilenko, *Law-making in the International Community* (Developments in International Law, Vol. 15; Dordrecht: Martinus Nijhoff, 1993) 23; Godefridus H.V. van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer, 1983) 57–60, confirmed by Karol Wolfke, *Custom in Present International Law*, 2nd edn (Developments in International Law, Vol. 14; Dordrecht: Martinus Nijhoff, 1993) xv, fn. 8.

7 However, the distinction is rather superficial and of little added value to the present question. See on this Alain Pellet, 'Article 38', in Karin Oellers-Frahm, Christian J. Tams, Christian Tomuschat, and Andreas Zimmermann (eds), *The Statute of the International Court of Justice. A Commentary,* 2nd edn (Oxford: Oxford University Press, 2012) 761, para. 85.

8 See on this distinction George Abi-Saab, 'Les Sources du Droit International: Essai de Déconstruction', in Manuel Rama-Montaldo (ed.), *El Derecho Internacional en un Mundo en Transformacion. Liber Amicorum en Homenaje al Professor Eduardo Jiménez de Aréchaga / Le Droit International Dans un Monde en Mutation. Liber Amicorum en Hommage au Professeur Eduardo Jiménez de Aréchaga / International Law in an Evolving World. Liber Amicorum in Tribute to Eduardo Jiménez de Aréchaga* (Montevideo: Fundación de cultura universitaria, 1994) 30–32; Danilenko, *supra* n. 6, at 16–29; Pierre-Marie Dupuy, 'A Propos de l'Opposabilité de la Coutume Générale: Enquête Brève sur l' "Objecteur Persistant"', in *Le Droit International au Service de la Paix de la Justice et du Développement. Mélanges Michel Virally* (Paris: Éditions A. Pedone, 1991) 54–58; Shaw, *supra* n. 88, Chapter 1, at 51; Hugh Thirlway, 'The Sources of International Law', in Malcolm D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2010) 96–97; Raphael M. Walden, 'Customary International Law: A Jurisprudential Analysis', 13 *Israel Law Review* (1978) *passim*. For a general discussion on the distinction between formal and material sources in Article 38 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE see, for example, Gerald G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in Frederik M. Van Asbeck (ed.), *Symbolae Verzijl. Présentées au Professeur J. H.W. Verzijl à l'Occasion de son LXX-ième Anniversaire* (La Haye: Martinus Nijhoff, 1958) 153–176, reprinted in Koskenniemi (ed.), *supra* n. 2, Chapter 1, at 57–80. See also the critique thereof by Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971) 264–268. The problem goes further, of course, once one tries to justify the existence of the secondary rule: "The Statute [of the International Court of Justice] is in fact a material source of the secondary rule that treaties make law, but not a formal source of that rule". See Thirlway, *supra* n. 8, at 97. See also the comment by Martti Koskenniemi:

> It is impossible to pretend that the realist critiques concerning the indeterminacy of treaty interpretation, or the circularity and fluidity of custom and general principles would not have devastated formalism's credibility as a theoretical articulation of the business of law-application.

See *id., supra* n. 2, Chapter 1, at xxiv.

issues have been widely discussed elsewhere and would reach far beyond what is necessary or practical for the present argument, the term "source" is understood here simply as any conceivable appearance of the law,[9] the "outward manifestation" of a rule.[10]

To follow H.L.A. Hart's terminology, these manifestations might be referred to as, in a sense, the "secondary rules" of international law,[11] to which one must look in order to identify substantive law. However, as opposed to providing a blueprint for the creation of "primary rules", they only reveal in which guise they will appear.[12]

9 See also Bruno Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Schriften zum Völkerrecht, Vol. 23; Berlin Duncker & Humblot, 1972) 24, who speaks of "Erscheinungsformen des Rechts". For a comprehensive discussion see Maarten Bos, 'The Hierarchy Among the Recognized Manifestations ("Sources") of International Law', 25/3 *Netherlands Law Review* (1978) 337 *et passim*. See further the definition of sources by the American Law Institute that points to such an understanding:

> § 102. Sources of International Law (1) A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; (c) by derivation from general principles common to the major legal systems of the world. (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted. (4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

See American Law Institute, *Restatement of the Law. The Foreign Relations of the United States. Volume 1* (St. Paul: American Law Institute Publishers, 1987), further referred to simply as *Restatement of the Law (Third)*.

10 What Georges Scelle calls the "manifestation extérieure, le fait perçu et probant, l'élément captable et utilisable". See *id.*, 'Essai sur les Sources Formelles du Droit International', in Charles Appleton (ed.), *Recueil d'Études sur les Sources du Droit en l'Honneur de François Gény. Tome III. Les Sources des Diverses Branches du Droit* (Paris: Sirey, 1934) 400.

11 See Thirlway, *supra* n. 8, at 96. See also D'Amato, *supra* n. 8, at 41–44; Danilenko, *supra* n. 6, at 28. See, however, Hart's own determination of a society based on custom as one of "primary rules of obligation" alone. *Id., The Concept of Law* (Oxford: Oxford University Press, 2012) 91.

12 As Alain Pellet writes in his commentary to Article 38 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, the provision lists the "'formal' sources of international law, *i.e.* the manifestations of the rights and obligations of States". See *id., supra* n. 7, at 757, para. 78. See also *ibid.*, at 774, para. 111.

1 Article 38 of the Statute of the International Court of Justice

The sources of international law are given, though "not *eo nomine*"[13] and non-exhaustively[14] in the first paragraph of the "famous – or infamous –"[15] Article 38 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE.[16]

This provision is not itself intended to be an enumerative list of the sources of international law, but a guideline for the International Court of Justice regarding which sources to look to in deciding the cases brought before it.[17] In any case, the catalogue with its origins in the STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE[18] has "stood the test of time".[19] Of course, "States can agree on international law being made in any way they wish",[20] but the categories contained in this catalogue seem

13 Hugh Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Leiden: A.W. Sijthoff, 1972) 36.

14 Most prominently, acts and documents of international organizations and unilateral acts of states, both now considered sources in their own right, are omitted. See Dixon, *supra* n. 75, Chapter 1, at 23–25.

15 Pellet, *supra* n. 7, at 733, para. 1.

16 The first paragraph reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) 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.

17 See Ian Brownlie, *Principles of Public International Law*, 7th edn (Oxford: Oxford University Press, 2008), at 5, who also states that the provisions "represent the previous practice of arbitral tribunals, and Article 38 is generally regarded as a complete statement of the sources of international law". See also Dixon, *supra* n. 75, Chapter 1, at 23; Pellet, *supra* n. 7, at 748, para. 55, 759, para. 80, and accompanying footnotes; Thirlway, *supra* n. 8, at 98–99.

18 See Article 38 of the STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE:

> The Court shall apply: 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States; 2. International custom, as evidence of a general practice accepted as law; 3. The general principles of law recognized by civilized nations; 4. 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.

See also Pellet, *ibid*., at 738–745, paras 17–50; Thirlway, *ibid*., at 98.

19 Jennings, *supra* n. 3, Chapter 1, at 331.

20 Louis B. Sohn, 'Sources of International Law', 25/1 *Georgia Journal of International Law* (1995–1996) 406.

to comprise what states and, in turn, courts find to be the conceivable forms in which this happens.[21]

2 Acceptance and Reception in the Literature

On review of the literature, Article 38 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE "is widely recognised as the most authoritative and complete statement as to the sources of international law",[22] "the cornerstone of positivist approaches to international law",[23] and "there is no serious contention that the provision expresses the universal perception as to the enumeration of sources of international law".[24] It may be viewed as "the criteria which international law uses in order to distinguish rules belonging to it".[25]

Other observers such as Jean D'Aspremont have described it as "misguidedly elevated into the overarching paradigm of all source doctrines in

21 As Edwin Borchard writes,

> [t]he classification of sources under Article 38 is mainly, it is believed, directory or possibly even academic in character; and the classification would be applied by any court even if not so specified, unless the treaty or compromise expressly barred the court from considering anything but treaties.

See *id*., 'The Theory and Sources of International Law', in Appleton (ed.), *supra* n. 10, at 356.

22 Shaw, *supra* n. 88, Chapter 1, at 50. See Kammerhofer, *supra* n. 1, at 541, in particular fn. 93; Maurice Mendelson, 'The Formation of Customary International Law', 272 *Recueil des Cours de l'Académie de Droit International de La Haye* (1998) 364. Cf., however, Daniel Bethlehem, 'The Secret Life of International Law', 1/1 *Cambridge Journal of International and Comparative Law* (2012) 23–24, who gives a realist practitioner's perspective on the sources of international law:

> It seems to me that in fact there is a rather smaller subset of what constitutes the law and legal obligation than Article 38 of the Statute suggests. In practice, this comprises, first, treaties, namely, the text of the treaties. Second, there are principles of customary international law that have been declared by courts or by other authoritative bodies. By courts I mean both international courts and national courts. By other authoritative bodies, I mean, although with a question mark, bodies such as the treaty monitoring bodies in Geneva. Third, there are binding decisions of the UN Security Council. And fourth, perhaps, although a smaller category, there are binding decisions of other international organisations. In reality, everything else does not constitute law.

23 Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law', 37 *Yale Journal of International Law* (2012) 111.

24 Shaw, *supra* n. 88, Chapter 1, at 50. See also Danilenko, *supra* n. 6, at 34–36, listing a wide range of state practice and judicial decisions to support the proposition; Kammerhofer, *supra* n. 1, at 541, in particular fn. 96.

25 Gihl, *supra* n. 75, Chapter 1, at 73.

international law", while recognizing its value as a "handy toolbox for international lawyers in need of a list of sources of international law" and "the lens through which law-identification in international law has been – almost exclusively – construed".[26] Martti Koskenniemi has referred to sources doctrine "as a kind of user's manual; a practical checklist that professional lawyers have recourse to as part of their professional task and self-image".[27]

3 Two or Three "Main" Sources?

The three "main" sources are given in *litterae* (a) through (c) of Article 38(1) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE as treaties, customary international law, and general principles of law. While there is little doubt that the first two stand on an equal footing, the legal status of general principles has been the subject of heated debate ever since the drafting of Article 38 of the STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE.[28]

a Hierarchy

While there is no inherent hierarchy within the sources listed in Articles 38(1) (a) through (c),[29] general principles of law have been seen as "[u]ne source

26 D'Aspremont, *supra* n. 217, Chapter 1, at 149. See also Pellet, *supra* n. 7, at 760, para. 82 and 845, para. 281.

27 Koskenniemi, 'Introduction', *supra* n. 2, Chapter 1, at xiii.

28 See on the origin of Article 38 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE *supra* n. 18.

29 At least with regard to the relationship between treaties and customary international law. See Pellet, *supra* n. 7, at 841, para. 270, and 844, para. 278; Thirlway, *supra* n. 8, at 114. See also the Analytical Study of the Study Group of the International Law Commission on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (13 April 2006), at 166, para. 324, and Report of the Study Group of the International Law Commission on 'Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law', U.N. Doc. A/CN.4/L.702 (18 July 2006), at 20, para. 31. Cf., however, Antonio Cassese:

> One should not be misled by this provision into believing that treaties override customary rules. In fact, the sources of international law are listed in Article 38 in the order in which they should be used by the Court. Treaties being special *ratione personae* and possibly even *ratione materiae vis-à-vis* customary rules, the Court should look into them before resorting to customary rules, if any.

Antonio Cassese, *International Law,* 2nd edn (Oxford: Oxford University Press, 2005), at 156, fn. 7. See on this also Sørensen, *supra* n. 6, at 237–250; Mark E. Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Martinus Nijhoff Publishers, 1985) 35, para. 85.

subsidiaire ou supplétive",[30] "complimenting custom and treaty law",[31] which are "obviously"[32] the "two most important",[33] "two main orthodox",[34] "the two",[35] "principal",[36] "primary",[37] or "main"[38] sources, with general principles of law standing "firmly in third place",[39] as they "largely disappear behind the two other […] being transitory in nature",[40] functioning as a "fall-back source of law in the event that no treaty and no customary rule could be found to apply",[41] "only […] resorted to in the rather exceptional cases where the dispute can be settled neither on the basis of treaties nor custom".[42] However, it has also been pointed out that such a view of Article 38(1)(c) of the STATUTE would violate the general principle of law *ut res magis valeat quam pereat*,[43] as this would not give the wording of Article 38 sufficient effect.

b Practice of the International Court of Justice

The ICJ itself has been found to apply the sources listed in Article 38(1) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE "in successive order and has organized a kind of complementarity between them".[44] This approach had already been envisaged in one of the original drafts.[45] As Cassese wrote with

30 Abi-Saab, *supra* n. 8, at 33.
31 Shaw, *supra* n. 88, Chapter 1, at 87–88.
32 Brownlie, *supra* n. 17, at 5.
33 Cassese, *supra* n. 29, at 183; *verbatim* Thirlway, *supra* n. 8, at 97.
34 Jennings, *supra* n. 93, Chapter 1, at 4.
35 Kontorovich, *supra* n. 118, Chapter 1, at 863.
36 Thirlway, *supra* n. 13, at 31.
37 D'Amato, *supra* n. 8, at 4; Guzman, *supra* n. 91, Chapter 1, at 116.
38 Guzman, *ibid*., at 116; Klabbers, *supra* n. 94, Chapter 1, at 180; Pellet, *supra* n. 7, at 844, para. 278. See also Louis Le Fur, 'La Coutume et les Principes Généraux du Droit Comme Sources du Droit International Public', in Appleton (ed.), *supra* n. 10, at 372:

> La convention et la coutume priment les principes généraux: mais s'il n'y a pas de règle coutumière ou conventionelle applicable au litige, le juge peut et doit se référer aux principes généraux pour y chercher la solution des conflits que les Etats lui soumis. Les principes généraux viennent donc compléter les autres sources du droit.

39 Shaw, *supra* n. 88, Chapter 1, at 88.
40 Pellet, *supra* n. 7, at 848, para. 288. See also *ibid*., at 850, para. 295, and 852, para. 300.
41 Thirlway, *supra* n. 8, at 114.
42 Pellet, *supra* n. 7, at 844, para. 278.
43 Tomuschat, *supra* n. 127, Chapter 1, at 314, fn. 283.
44 Pellet, *supra* n. 7, at 841, para. 270. On the question of application see further *ibid*., at 841–844, paras 270–279, and 850, para. 296.
45 See the Permanent Court of International Justice, *Advisory Committee of Jurists, Procés-verbaux of the Proceedings of the Committee, 16 June-24 July 1920, with Annexes* (Van Langenhuysen Brothers: The Hague, 1920) 306. See on the origins of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE also *supra* n. 18.

regard to the application of the sources contained in Article 38 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE:

> Resort to these sources must be made based on specialty; that is, one should first look for the most specific provision applicable to a particular case and, if it is lacking, fall back on the more general rule. Thus, one must first look for a treaty or a source deriving from a treaty; failing an applicable rule, one should search for a customary rule or a general principle of international law. Only at that stage, if no relevant rule or principle can be found, may one apply general principles of law recognized by the domestic legal orders of States. This particular category of general principles makes up what one may term a "*subsidiary source*".[46]

He goes as far as arguing for a subsidiary application of general principles of law in relation to "general principles of international law" even.[47] Of course, this argument misses the conceivable possibility that customary international law could constitute *lex specialis* in relation to a treaty.

Although there are instances in which judges of the International Court of Justice have protested such an interpretation,[48] up until today, there has been no decision before the Court in which it has explicitly based its reasoning on general principles of law.[49] The same held true for its predecessor, the Permanent Court of International Justice.[50] Both courts, however, referred to the existence of such principles and applied principles generally considered to be general principles of law.[51] Additionally, "the [International] Court [of

46 Cassese, *supra* n. 29, at 183. He at least concedes that general principles "may be termed '*primary*', in that they are contemplated by general 'constitutional' rules". See *ibid.* as well as *infra* n. 65 and accompanying text. See on the subsidiarity of general principles of law also Max Sørensen, 'Principes de Droit International Public. Cours Général', 101 *Recueil des Cours de l'Académie de Droit International de La Haye* (1960-III) 34. With regard to the STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE see Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna: Julius Springer, 1926) 67.

47 See Cassese, *supra* n. 29, at 194.

48 See, *e.g.*, *Case Concerning Right of Passage over Indian Territory* (Portugal *v.* India), Dissenting Opinion of Judge Moreno Quintana, ICJ Reports 1960, p. 88, at 90.

49 See Brownlie, *supra* n. 17, at 17; Jonathan I. Charney, 'Universal International Law', 87/4 *American Journal of International Law* (1993) 537; Koskenniemi, 'Introduction', *supra* n. 2, Chapter 1, at xxi; *id.*, 'General Principles: Reflexions on Constructivist Thinking in International Law', in *id.* (ed.), *supra* n. 2, Chapter 1, at 362; Pellet, *supra* n. 7, at 833, para. 253, 839, para. 265, and 850, para. 295; Thirlway, *supra* n. 8, at 108–109; Tomuschat, *supra* n. 127, Chapter 1, at 311.

50 See Sørensen, *supra* n. 6, at 138–152. See Charney, *ibid.*, at 537; Koskenniemi, 'General Principles', *ibid.*, at 362. For a history of the application of general principles of law prior to their "formal" inclusion into the catalogue of sources of law see Simma and Verdross, *supra* n. 50, Chapter 1, at 380–382, §§ 597–98.

51 See, for example, *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland *v.* Albania), Judgment of 9 April 1949 (Merits), ICJ Reports 1949, p. 4, at 22. See also the instances of case law, including of the Permanent Court of

Justice] has frequently made reference to 'principles' without feeling a need to classify them under any other category of formal sources".[52]

B Customary International Law

1 Law of a Primitive Society

While having been replaced by treaties as the primary source of international law,[53] customary international law – also referred to as "usages[54] generally accepted as expressing principles of law"[55] or "general international law"[56] – is still considered to be "the foundation stone of the modern law of nations",[57] "the most basic source of rules to govern the activities of States",[58] the "oldest"[59] and "original source"[60] of international law, or even an "unquestioned authority",[61] "at the heart of what we mean by international law",[62] necessarily taking a primordial place among the different categories of legal norms.[63]

International Justice, mentioned by Cassese, *supra* n. 29, at 192–193; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law. Volume 1. Peace. Introduction and Part 1,* 9th edn (London: Longman, 1996) 37–38, fn. 5; Koskenniemi, 'General Principles', *ibid.*, at 362. See further Pellet, *supra* n. 7, at 833–834, para. 253, and 838–839, paras 265–266.

52 Koskenniemi, 'Introduction', *supra* n. 2, Chapter 1, at xxi. See Pellet, *ibid.*, at 835–836, para. 259, and 838–839, paras 265–266.

53 See Dixon, *supra* n. 75, Chapter 1, at 30. However, Kelsen held that "conventional law is inferior to the customary law" due to the fact that treaties based their validity on the customary principle of *pacta sunt servanda*. See Kelsen, *supra* n. 5, at 114.

54 See, however, Brownlie, *supra* n. 17, at 6, who insists on a strict division between the terms "custom" and "usage", the latter representing specifically "a general practice which does not reflect a legal obligation". On the confusion of terminology more generally see Wolfke, *supra* n. 6, at xv–xxi.

55 See, *e.g.*, *The Case of the S.S. 'Lotus'* (France *v.* Turkey), Judgment of 7 September 1927, PCIJ Series A. – No. 10, p. 4, at 18.

56 See, for example, reference throughout the *Fisheries Case* (United Kingdom *v.* Norway), Judgment of 18 December 1951, ICJ Reports 1951, p. 116.

57 Dixon, *supra* n. 75, Chapter 1, at 30.

58 Thirlway, *supra* n. 13, at 2.

59 Jennings and Watts, *supra* n. 51, at 25, §10. See also van Hoof, *supra* n. 6, at 85.

60 Paul Guggenheim, 'Contribution à l'Histoire des Sources du Droit des Gens', 94 *Recueil des Cours de l'Académie de Droit International de La Haye* (1958-II) 36; *verbatim* Jennings and Watts, *ibid.*, at 25, §10.

61 Koskenniemi, 'Introduction', *supra* n. 2, Chapter 1, at xx.

62 D'Amato, *supra* n. 8, at xii. For an earlier appraisal of customary international law in this respect see, *e.g.*, Elfried Härle, *Die allgemeinen Entscheidungsgrundlagen des Ständigen Internationalen Gerichtshofs. Eine kritisch-würdigende Untersuchung über Artikel 38 des Gerichtshof-Statuts* (Völkerrechtliche Monographien 10; Berlin Verlag von Franz Vahlen, 1933) 4: "Die internationale Gewohnheit ist die bedeutendste und umfassendste Rechtsquelle, auf die sich ein internationaler Richter berufen kann, um für den konkreten Fall eine rein rechtliche Entscheidung zu finden". See also Fidler, *supra* n. 74, Chapter 1, at 198.

63 See Sørensen, *supra* n. 46, at 35, writing that it "prend forcément une place primordiale parmi les differentes catégories de normes juridiques".

Malcolm Shaw summarizes the generation and legitimacy of custom within a community:

> In any primitive society certain rules of behaviour emerge and prescribe what is permitted and what is not. Such rules develop almost subconsciously within the group and are maintained by the members of the group, by social pressures and with the aid of various other more tangible implements. They are not, at least in the early stages, written down or codified, and survive ultimately because of what can be called an aura of historical legitimacy. […] It is regarded as an authentic expression of the needs and values of the community at any given time.[64]

For Antonio Cassese, the authority of customary international law rested on a "constitutional" rule, lying "at the very apex of the legal order", namely that of "*consuetudo est servanda*".[65] This idea of customary international law as the *Grundnorm* of international law can be traced back to Kelsen himself together with a row of other prominent authors.[66] To paraphrase Georg Friedrich Puchta, customary international law is, in a way, the expression of the collective spirit of the international community.[67]

But customary international law has also been described as "the most cumbersome"[68] of the sources of international law, "wrapped in mystery and

64 Shaw, *supra* n. 88, at 51–52. On such categorizations of international law see also Hans Morgenthau and Kenneth W. Thompson, *Politics Among Nations: The Struggle for Power and Peace*, 6th edn (New York: Alfred A. Knopf, 1985) 295:

> International Law is a primitive type of law resembling the kind of law that prevails in certain preliterate societies, such as the Australian aborigines and the Yurok of northern California. It is a primitive type of law primarily because it is almost completely decentralized law.

See also Simpson, *supra* n. 53, Chapter 1, at 77, comparing international law with the "indigenous customary law in Australia and Canada". See also the beautifully written analogy used by Maurice Mendelson:

> Imagine a large island, inhabited by about two hundred families or clans. Fortune has not smiled equally on all of them. […] I need hardly explain that our imaginary island is the Earth, and that the two hundred clans are States.

See *id.*, *supra* n. 22, at 165–168.

65 Cassese, *supra* n. 29, at 183.

66 For more on this in detail see Gihl, *supra* n. 75, Chapter 1, at 62, in particular fn. 5.

67 See Georg Friedrich Puchta, *Das Gewohnheitsrecht. Erster Theil* (Erlangen: Palm'sche Verlagsbuchhandlung, 1828) 144–145.

68 Van Hoof, *supra* n. 6, at 85. For earlier examples of such statements see, *e.g.*, Heinrich, *supra* n. 102, Chapter 1, at 277:

> Das Gewohnheitsrecht gehört zu den schwierigsten Kapiteln der Rechtsquellenlehre. Das erklärt sich aus zwei Gründen: zunächst daraus, dass kein im

illogic".[69] More caricature than scholarly appraisal, it has had to put up with the characterization as an "amorphous but formidable jelly-fish".[70] Some have gone so far as to conclude that customary international law "is, quite literally, what states make of it".[71]

2 Theories on Custom

There is insufficient space here to give a full review of the bookshelves of theories of customary international law and their countless repetition in textbooks and articles trying to come up with ever-new solutions.[72] As Stefan Talmon holds, "[t]here are probably few topics in international law that are more over-theorized than the creation and determination of custom".[73] The obligatory accounts of prominent positions are to be found in the dozens of books and articles on the subject cited throughout this book.[74] And it is doubtful that a repetition of these would bring much clarity:

> Rahmen der Theorie der Rechtsquellen erörtertes Problem so eng mit grundlegenden erkenntnistheoretischen Fragen unserer Wissenschaft zusammenhängt wie gerade die Lehre vom Gewohnheitsrecht, und sodann daraus, dass kaum eine zweite rechtswissenschaftliche Spezialfrage so stark mit einer geradezu ins Uferlose gehenden Literatur belastet erscheint.

See also Fidler, supra n. 74, Chapter 1, at 198:

> CIL stands at the heart of modern international law while generating frustration and frictions in its identification and application. CIL appears indispensable and incomprehensible. In the contemporary international system, is CIL, to steal a phrase from Winston Churchill, a riddle inside a mystery wrapped in an enigma?

69 D'Amato, *supra* n. 8, at 4.

70 Eduardo Jimenéz de Aréchaga, 'International Law in the Past Third of a Century', 159 *Recueil des Cours de l'Académie de Droit International de La Haye* (1978) 9. See also Pierre-Marie Dupuy, 'Théorie des Sources et Coutume en Droit International Contemporain', in Rama-Montaldo (ed.), *supra* n. 8, at 51.

71 See Dixon, *supra* n. 75, Chapter 1, at 31.

72 For a very concise presentation of theories on customary international law see Petersen, *supra* n. 141, Chapter 1, at 294–297. For a historical appraisal see Kadens and Young, *supra* n. 185, Chapter 1, at 888–906.

73 Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion', 26/2 *European Journal of International Law* (2015) 429.

74 See also *supra* ns 88–89 in Chapter 1 as well as the International Law Association, 'Final Report on Formation of Customary (General) International Law' (2000) <www.ila-hq.org/en/committees/index.cfm/cid/30>, which, due to personal unity, relies very much on Mendelson, *supra* n. 22. See on this also van Hoof, *supra* n. 6, at 85:

> The confusion and divergence of opinion which were said to prevail with respect to the doctrine of sources in general, reign supreme as far as customary international law is concerned. This is generally acknowledged and it has

> The theory of customary international law is one of the big mysteries of international law scholarship. Every student of international law knows what customary law is. And yet, nobody knows what it actually is.[75]

There is little agreement beyond the two-element theory,[76] as most recently confirmed by the International Law Commission,[77] although even that consensus is doubtful.[78] The two elements are inferred from the wording of Article 38(1) (b) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE[79] and regarded as "the modern",[80] "most commonly cited",[81] and "most authoritative definition"[82] of "meta-custom"[83] "by a near-unanimous orthodoxy",[84] even if it represents "a real cliché".[85]

Some even *a priori* deny the value of customary international law as a true source of international law:[86] It has been pointed out that the grounds for its authority remain unclear[87] and formal procedures for its formation are

> become almost customary to start off a discussion of the nature of customary international law with some kind of lamentation signaling to the reader that he is about to embark upon an extremely intricate and complex subject.

75 Niels Petersen, Review of 'Brian D. Lepard, *Customary International Law. A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010)', 21 *European Journal of International Law* (2010) 795.

76 See Kadens and Young, *supra* n. 185, Chapter 1, at 909; Koskenniemi, *From Apology to Utopia*, *supra* n. 2, Chapter 1, at 410; Simma and Verdross, *supra* n. 50, Chapter 1, at 346–347, § 551. See also American Law Institute, *supra* n. 9, at 30, §102, Reporter's Notes, para. 2: "No definition of customary law has received universal agreement […]". For a systematic categorization of doctrinal views see Simma and Verdross, *ibid.*, with further references. See also Simma, *supra* n. 31, Chapter 1, at 32–34, with further analysis of these categorizations at 34–38. See on the disagreement with regard to non-treaty sources in general Bodansky, 'Prologue to a Theory of Non-Treaty Norms', *supra* n. 2, Chapter 1, at 121.

77 See Michael Wood, 'Second Report on Identification of Customary International Law', U.N. Doc. A/CN.4/672 (22 May 2014), at paras 3(a) and 21.

78 See *supra* n. 91, Chapter 1, for example.

79 See Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge: Cambridge University Press, 2013) at 33.

80 *Ibid.*, at 32.

81 Guzman, *supra* n. 91, Chapter 1, at 123.

82 Cassese, *supra* n. 29, at 156. See also Guzman, *ibid.*, at 123.

83 See Tams, *supra* n. 87, Chapter 1, at 52–54.

84 Koskenniemi, *From Apology to Utopia*, *supra* n. 2, Chapter 1, at 410.

85 Luigi Condorelli, 'Customary International Law: The Yesterday, Today, and Tomorrow of General International Law', in Antonio Cassese (ed.), *Realizing Utopia. The Future of International Law* (Oxford: Oxford University Press, 2012) 148.

86 See, *e.g.*, Julio A. Barberis, 'La Coutume est-elle une Source de Droit International?', in *Le Droit International au Service de la Paix de la Justice et du Développement. Mélanges Michel Virally* (Paris: Éditions A. Pedone, 1991) 43–52.

87 See also Somek, *supra* n. 33, Chapter 1, at 171, citing Kammerhofer, *supra* n. 1, at 550, who discusses the theoretical issues related to customary international law as the *Grundnorm* of international law, cited in *supra* ns 65–66.

absent.[88] Those that accept it are unsure of its content.[89] One thing seems to be sure: "Customary international law is full of mysteries".[90]

As to the nature of customary international law, there exist, basically, two opposing positions: the voluntarists and the empiricists.[91] Countless nuances and attempts to reconcile these two or deconstruct one or the other are to be found throughout the literature. If the voluntarists are correct, customary international law is consensual law.

Before turning to those two opposing positions, it will be useful to recall the simple formula that every student of international law has memorized at one stage or other: Customary international law consists of state practice and *opinio iuris*. After all, it is also the starting point for any analysis under the empirical view.[92]

3 State Practice

The first, objective or "material"[93] element of customary international law is "general"[94] state practice, also referred to by its Latin term *usus* or *diurnitas* respective *diuturnitas*. It has been considered "the main *differentia specifica* of that kind of international law".[95]

This element has come under particular "attack" following the *Nicaragua* judgment of the International Court of Justice,[96] which puts an emphasis on the subjective element,[97] in particular by drawing on decisions of international organizations in determining customary international law.[98]

88 See Fastenrath, *supra* n. 1, at 318. See Somek, *ibid*., at 171 and 173; Wolfke, *supra* n. 6, at 52.
89 See Wolfke, *ibid*., at xiii.
90 Klabbers, *supra* n. 94, Chapter 1, at 179.
91 See *supra* n. 90, Chapter 1. Of course, there are a number of alternative explanations such as rational choice theory, for example. See *supra* n. 91, Chapter 1.
92 See Ago, *supra* n. 4, at 951:

> Un ordre juridique est une réalité objective dont l'existence se constate dans l'histoire et au regard de laquelle la tâche, que l'on a, est de la connaître, et non pas de la "fonder" sur des faits ou sur des principes idéaux. L'existence de l'ordre juridique international, en particulier, est une donnée qui ne peut se trouver démontrée qu'à la suite d'un examen scientifiquement objectif de la réalité empirique.

93 Koskenniemi, *supra* n. 72, Chapter 1, at 89.
94 See Cassese, *supra* n. 29, at 156.
95 Wolfke, *supra* n. 6, at 40–41.
96 Jan Klabbers characterizes *Nicaragua* as "the leading case on […] the formation of customary international law", an unfortunate misnomer considering the dogmatic inconsistency of the argument made by the Court. See *id., supra* n. 94, Chapter 1, at 188.
97 See on this *infra* n. 160 and accompanying text.
98 See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986

It is, supposedly, the sum of factual behavior of states, making the determination of customary international law an inductive, "upstream"[99] assessment. Thereby, what is referred to as state practice in the context of the formation of customary international law is, in the first instance, indistinguishable from generally legally insignificant behavior such as simple comity, *courtoisie*, diplomatic protocol, or friendship without any additional qualification.[100] It is simply any form of physical manifestation of the abstract entity of the state.

a What Constitutes State Practice?

In this sense, each and every act – or even omission – of a state may qualify as an instance of state practice.[101] As Jennings and Watts emphasize,

> practice of states […] embraces not only their external conduct with each other but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic dispatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.[102]

One of the problems associated with this is that, of course, not all of these documents may be publicly available.[103]

Still, authors have tried to demonstratively list examples to illustrate the vastness of possible sources for the determination of state practice. Dixon gives a number of generic categories as examples of state practice[104], such as:

> actual activity (acts and omissions), statements made in respect of concrete situations or disputes, statements of legal principle made in the abstract (such as those preceding the adoption of a resolution in the General Assembly), national legislation and the practice of international organisations.

(Merits), ICJ Reports 1986, p. 14, at 99–104, paras 188–195, and 105–108, paras 202–205. See Cannizzaro and Palchetti, *supra* n. 100, Chapter 1, at 3.

99 Pellet, *supra* n. 7, at 813, para. 211.

100 See also *infra* pp. 70 *et seq.*

101 For a critique of narrower views of what constitutes state practice, in particular of Anthony D'Amato, Karl Strupp, and Hugh Thirlway, see Akehurst, *supra* n. 50, Chapter 1, at 1–10.

102 See Jennings and Watts, *supra* n. 51, at 26, §10.

103 Akehurst, *supra* n. 50, at 13:

> Much of the evidence of State practice is hidden in unpublished archives. Consequently one can never prove a rule of customary law in an absolute manner but only in a relative manner – one can only prove that the majority of the evidence *available* supports the alleged rule.

Cf., however, Mendelson, *supra* n. 32, Chapter 1, at 195.

104 Dixon, *supra* n. 75, Chapter 1, at 31.

Brownlie points more specifically to

> diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, *e.g.* manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly

as "material sources of custom".[105]

Shaw lists "administrative acts, legislation, decisions of courts and activities on the international stage, for example treaty-making" and suggests to "read the newspapers, consult historical record, listen to what governmental authorities are saying and peruse the many official publications" as well as "memoirs of various past leaders, official manuals on legal questions, diplomatic interchanges and the opinions of national legal advisors".[106] Past the legal entity of the state itself, "one may note resolutions in the General Assembly, comments made by governments on drafts produced by the International Law Commission, decisions of the international judicial institutions, decisions of national courts, treaties and the general practice of international organisations".[107] Furthermore, Shaw lists a number of instances in which non-physical claims have constituted state practice.[108] So basically, one can assume that each and every activity (including the absence thereof) within the context of an official state function counts toward state practice. It is simply "what states actually do".[109] Categorizations or attempts at a taxative enumeration seem absent in awe of a sheer incomprehensible amount of eligible material.

The International Court of Justice itself has included "administrative acts or attitudes", "legislation", "acts of the judiciary" and "treaties".[110] In the *Jurisdictional Immunities* case, in order to determine the existence of immunity under customary international law, for example, it considered

> judgments of national courts faced with the question of whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law

105 Brownlie, *supra* n. 17, at 6–7.
106 Shaw, *supra* n. 88, Chapter 1, at 58.
107 *Ibid.*
108 *Ibid.*, at 59.
109 *Ibid.*, at 53.
110 See Pellet, *supra* n. 7, at 815–816, para. 217. For another list of examples drawn upon by the Court see Tams, *supra* n. 87, Chapter 1, at 67–68.

Commission and then in the context of the adoption of the United Nations Convention.[111]

The International Law Commission, too, has arrived at a broad number of materials that may serve as evidence of state practice.[112] It is truly difficult to imagine anything produced within the periphery of a state organ – understood in the widest possible sense – that would not constitute evidence of state practice.[113]

b Three Characteristics of State Practice

In the absence of a taxative list of the physical manifestations of states, jurisprudence and doctrine have determined a number of characteristics that are relevant in assessing state practice: Scope, quality, and time.

I SCOPE

Following the number of states involved in the practice and, consequently, the geographical scope of its application, doctrine differentiates between "universal",[114] "general"[115] or "ordinary",[116] "particular",[117] "of a limited geographical

111 *Jurisdictional Immunities of the State* (Germany *v.* Italy; Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, p. 99, at 123, para. 55. See also the analysis undertaken by the Court throughout the following paragraphs.

112 See Report of the International Law Commission on Ways and Means for Making the Evidence of Customary International Law More Readily Available', *Yearbook of the International Law Commission* (1950-II), U.N. Doc. A/CN.4/Ser.A/1950, at 368–372, paras 33–78.

113 Cf. Wolfke, *supra* n. 6, at xv, fn. 6, arguing that state practice concerning dispute resolution is of little value, as "states as a rule use all possible arguments to this end". The issue, in particular with regard to international arbitration and in light of the relationship between party and counsel, is controversial.

114 See, *e.g.*, Dixon, *supra* n. 75, Chapter 1, at 32.

115 See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada *v.* United States of America), Judgment of 12 October 1984 Given by the Chamber Constituted by the Order Made by the Court on 20 January 1982, ICJ Reports 1984, p. 246, at 300, para. 114; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986 (Merits), ICJ Reports 1986, p. 14, at 22, para. 23. This is either used synonymously with "universal", see, *inter alia*, Maarten Bos, 'The Identification of Custom in International Law', 25/3 *German Yearbook of International Law* (1982) 43; Thirlway, *supra* n. 8, at 106, or may also sometimes be used to indicate the existence of persistent objectors to the rule, as opposed to universal application, as in the teaching of the Section for International Law and International Relations of the Department of European, International and Comparative Law of the University of Vienna. See the passage on the persistent objector theory *infra* iii. The "Persistent Objector" Theory.

116 Shaw, *supra* n. 88, Chapter 1, at 65.

117 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986 (Merits), ICJ Reports 1986, p. 14, at 105, para. 199. See also Danilenko, *supra* n. 6, at 10;

scope",[118] "regional",[119] "local"[120] or "special",[121] and even "bilateral"[122] customary international law.

In order for universal or general customary international law, *i.e.* such as is binding upon all states, to emerge, practice needs to be "common to a significant number of states",[123] "generally […] adopted",[124] or at least include the "States concerned".[125] "Regional" custom may even require all states involved to set state practice.[126] At the other end of the spectrum, Antonio Cassese held – in what may be deemed quite a cynical, though undoubtedly pragmatic, approach to legal theory – that universal participation in the formation of customary international law was never necessary, as

> is evidenced by the fact that no national or international court dealing with the question of whether a customary rule had taken shape on a certain matter has ever examined the views of all States of the world.[127]

However, this does not necessarily validate the view.

Josef L. Kunz, 'The Nature of Customary International Law', 47/4 *American Journal of International Law* (1953) 662.

118 Pellet, *supra* n. 7, at 829, para. 243.

119 Pellet, *ibid.*, at 829, para. 244; Shaw, *supra* n. 88, Chapter 1, at 65. See, for example, the *Colombian-Peruvian Asylum Case* (Colombia *v.* Peru), Judgment of 20 November 1950, ICJ Reports 1950, p. 266.

120 Brownlie, *supra* n. 17, at 11, who equalled it with "bilateral" customary international law; Dixon, *supra* n. 75, Chapter 1, at 32–34; Thirlway, *supra* n. 8, at 106–107, for whom it is synonymous with "special" custom, also explicitly including bilateral customary international law within the category.

121 D'Amato, *supra* n. 8, at 233–263; Guzman, *supra* n. 91, Chapter 1, at 159; Thirlway, *supra* n. 8, at 106–107.

122 See Danilenko, *supra* n. 6, at 10; Pellet, *supra* n. 7, at 831, para. 247. See, for example in this regard, the *Case Concerning Right of Passage over Indian Territory* (Portugal *v.* India), Judgment of 12 April 1960 (Merits), ICJ Reports 1960, p. 6. For an example of earlier practice see Wolfke, *supra* n. 6, at 12–13 and Peter Haggenmacher, 'La Doctrine des Deux Éléments du Droit Coutumier Dans la Pratique de la Cour Internationale', 90 *Revue Général du Droit International Public* (1986) 40–43 suggesting the example of *Free City of Danzig and International Labour Organization*, Advisory Opinion of 26 August 1930, PCIJ Series B – No. 18, p. 4. Cf., however, the issue concerning the legal personality of Danzig as of international character Karol Wolfke, *ibid.*, at 13, fn. 59.

123 Dixon, *supra* n. 75, Chapter 1, at 32.

124 *Fisheries Case* (United Kingdom *v.* Norway), Judgment of 18 December 1951, ICJ Reports 1951, p. 116, at 128.

125 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at 44, para. 76. See on the difficulty of identifying the states "specially affected" Danilenko, *supra* n. 6, at 95–96.

126 See Danilenko, *ibid.*, at 94.

127 Cassese, *supra* n. 29, at 162.

Intermingling considerations of international relations theory, Shaw adds that "some correlation with power" is also part of the equation.[128] Along the lines of this notion, Charles de Visscher made the illustrative allegory of a gradually worn path:

> The slow growth of international custom has been compared to the gradual formation of a road across vacant land. To begin with, the tracks are many and uncertain, scarcely visible on the ground. Then most users, for some reason of common utility, follow the same line; a single path becomes clear, which in turn gives place to a road henceforth recognized as the only regular way, though it is impossible to say at what precise moment the latter change took place. […] Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.[129]

Following this view, a select number of powerful states that are particularly affected by a certain issue could equally create customary international law that is universal in scope. One might only think of the state practice of the official – and maybe also unofficial – nuclear powers with regard to such issues.[130]

128 Shaw, *supra* n. 88, Chapter 1, at 57. See also Rosalyn Higgins, 'The Identity of International Law', in Cheng (ed.), *supra* n. 93, Chapter 1, at 43; Oscar Schachter, 'The Nature and Process of Legal Development in International Society', in Johnston and Macdonald (eds), *supra* n. 81, Chapter 1, at 751; de Visscher, *supra* n. 32, Chapter 1, at 155. One prominent example was the inability of non-capital-exporting states to effectively engage in a diverging compensation practice in cases of lawful expropriation in what was deemed the "new international economic order". See Scharf, *supra* n. 79, at 39–40. For an extensive study on the issue see Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 2004).

129 De Visscher, *supra* n. 32, Chapter 1, at 155. This analogy seems to have been drawn from earlier works dealing with custom in municipal law. See Wolfke, *supra* n. 6, at 55.

130 A notion that has, of course, also been criticized, in particular in the context of newly independent states. Cf. Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?', 55 *American Journal of International Law* (1961) 881:

> But custom is limited in its operation to states which either were its birthplace or adopted it. […] To argue from this semblance of universality of any branch of international law that it is really universal and as such must be treated as automatically binding on new members of the international community involves, in the writer's view, the assumption of an analogy between this community and a club. Today's international community is supposed in this argument to be merely an expanded version of the old, just like a club which does not necessarily cease to be the same old club because of an enlargement of its membership. This, like most analogies, seems superficial and misleading. A club is a community within a community and presupposes the existence of a larger community within which alone it can function. The club may have its own rules for the guidance of its members but these must be consistent with the laws of the larger community. The international

II QUALITY

With regard to the quality – or density – of practice, jurisprudence has held that state practice must be "constant and uniform"[131] or "both extensive and virtually uniform".[132] However, in making this determination, it is seemingly sufficient if there is "substantial, rather than complete, consistency".[133] This consistency is "built upon repetition".[134]

At the same time, the existence of conflicting state practice plays a role in determining "how much" of it is needed for the formation of a rule of customary international law.[135] It has also been suggested that the necessary quality of practice is relative to the corresponding *opinio iuris*.[136] The level of quality or density may also depend on the active or passive nature of a norm,

> community, on the other hand, was and is itself a community of communities and instead of itself functioning within a larger community, it has smaller communities of different types coexisting within it. A club may change its identity when structural or other changes, including a change of objectives, dictate the necessity or desirability of a new start. Whether there is a new start or not, the law of the larger community ensures its functioning according to its own rules.

Alexander Somek has called this an "oligarchic form of legislation". See Somek, supra n. 33, Chapter 1, at 173, brackets omitted.

131 *Colombian-Peruvian Asylum Case* (Colombia *v.* Peru), Judgment of 20 November 1950, ICJ Reports 1950, p. 266, at 276. See, interestingly, Dixon, *supra* n. 75, Chapter 1, at 31, who seems to find this phrase in the *Lotus* judgment. The present author has been unable to reproduce this result.

132 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at 44, para. 74.

133 See Dixon, *supra* n. 75, Chapter 1, at 31. See *Fisheries Case* (United Kingdom *v.* Norway), Judgment of 18 December 1951, ICJ Reports 1951, p. 116, at 138:

> The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.

134 Herman Meijers, 'How is International Law Made?', 9 *Netherlands Yearbook of International Law* (1978) 13. See also Gennady M. Danilenko, 'The Theory of International Customary Law', 31 *German Yearbook of International Law* (1988) 13. See, however, Akehurst, *supra* n. 50, Chapter 1, at 12–14.

135 See Akehurst, *supra* n. 50, Chapter 1, at 18:

> The number of States needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule. A practice followed by a very small number of States can create a rule of customary law if there is no practice which conflicts with the rule.

136 See Frederic L. Kirgis, 'Custom on a Sliding Scale', 81/1 *American Journal of International Law* (1987) 149.

i.e. if the state is required to act or simply to refrain from taking action.[137] In other words: "Rules enhancing state sovereignty are often more easily established than rules limiting state sovereignty".[138]

In any case, according to the International Court of Justice in the *Asylum* case, the burden of proof lies with the party relying on the respective rule of customary international law:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. […] [A] Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".[139]

III TIME

Finally, the passage of time has a role to play in the analysis of state practice,[140] although it "is also not decisive".[141] The standard applied seems to be quite open and lax, however, so long as the practice is in itself clear and unequivocal enough, as the International Court of Justice held in the *North Sea Continental Shelf* cases:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; […].[142]

137 See Dixon, *supra* n. 75, Chapter 1, at 32.
138 *Ibid.*, at 32.
139 *Colombian-Peruvian Asylum Case* (Colombia *v.* Peru), Judgment of 20 November 1950, ICJ Reports 1950, p. 266, at pp. 276–277. See Brownlie, *supra* n. 17, at 7 with further references to subsequent jurisprudence. See also the approach taken by the Permanent Court of International Justice in *The Case of the S.S. 'Lotus'* (France *v.* Turkey), Judgment of 7 September 1927, PCIJ Series A. – No. 10.
140 See Pellet, *supra* n. 7, at 817, para. 221. Some states used to assert certain time frames throughout which state practice would need to have taken place. See Scharf, *supra* n. 79, at 7 and 58.
141 Wolfke, *supra* n. 6, at 59.
142 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at 44, para. 74. See Brownlie, *supra* n. 17, at 7.

Pronunciations such as these have opened the door to speculations as to the possibility of a complete absence of the time element in the formation of customary international law in the guise of "instant custom", for example.[143]

As nineteenth-century German jurist Georg Friedrich Puchta already pointed out, the term "practice"[144] implies the element of time.[145] Thus, nuanced approaches have arisen. In an alternative revival to the concept of "instant custom", Michael Scharf uses the term "Grotian Moments" to refer to an accelerated formation of customary international law that has "emerge[d] with unusual rapidity and acceptance",[146] "through acquiescence or endorsement in response to state acts".[147] For him, "a context of fundamental change" may serve as a "third factor" in identifying customary international law.[148]

143 This term was coined in 1965 by Bin Cheng in an article on space law in the *Indian Journal of International Law* referring to the principle of the peaceful use of outer space following the launch of Sputnik 1. See *id.*, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 *Indian Journal of International Law* (1965) 35–40. See also Wolfke, *supra* n. 6, at 60, who mentions the principle of sovereignty over airspace as having arisen "spontaneously at the outbreak of the First World War". Seemingly in agreement with Cheng on the possibility, Shaw, *supra* n. 88, Chapter 1, at 56, although he also points to jurisprudence as to the other temporal extreme. See *ibid.*, at 54, fn. 19, on the pronunciation by Judge Negulesco of the Permanent Court of International Justice. Cf. also Iain MacGibbon, 'Means for the Identification of International Law', in Cheng (ed.), *supra* n. 93, Chapter 1, at 18, fn. 35 and accompanying text; Pellet, *supra* n. 7, at 817, para. 221.

144 "Wiederholung" in German.

145 See Puchta, *Das Gewohnheitsrecht. Zweiter Theil* (Erlangen: Palm'sche Verlagsbuchhandlung, 1837) 104. However, he did allow for the absence of time in the case of tacit agreements:

> Kann der vorliegende Act als eine Beobachtung der ersten Art angesehen werden, als eine stillschweigende Willenserklärung, so beweist schon diese einmalige Beobachtung die Existenz des Rechtssatzes so vollkommen, wie eine ausdrückliche Erklärung. In diesem Fall ist also die gewöhnliche Meinung richtig [dass Gewohnheitsrecht aus nur einem Akt entstehen kann]. Hat aber der Act der Observanz jenen Character nicht, ist er also nur als eine Beobachtung der zweiten Art, als ein bloßes Zeugnis eines bestehenden Rechtssatzes zu betrachten, so gilt auch hier, was von der Erkenntnis des Gewohnheitsrechts anerkannt wird, daß aus einem einzelnen Fall der Uebung noch keineswegs auf das Daseyn einer ihr zu Grunde liegenden Regel geschlossen werden kann, daß dazu vielmehr eine wiederholte gleichmäßige Uebung gehört.

See *ibid.*, at 110. See also Kadens and Young, *supra* n. 185, Chapter 1, at 888–909; Koskenniemi, *From Apology to Utopia, supra* n. 2, Chapter 1, at 450.

146 Scharf, *supra* n. 79, at 5.

147 *Ibid.*, at 8, fn. 29. He sees the insistence on the element of practice as the main distinction between "Grotian Moments" and "instant custom". See *ibid.*, at 219–220.

148 *Ibid.*, at 211. He further holds:

> It can explain the rapid formation of customary rules in times of fundamental change, thereby imbuing those rules with greater authority. It can counsel

At the same time, the proposition that quite the opposite is the case, namely that "custom […] is by definition backward looking and conservative",[149] that "[c]ustomary international law has developed slowly and unevenly, out of action and reaction in practice, rather than systematically or by major leaps",[150] and that "[c]ustomary law properly so-called is based upon the passage of a long period of time, and is accordingly both slow to develop and difficult to change"[151] still persists.

c Practice of International Organizations

As the formulation of Article 38(1)(b) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE suggests, evidence of customary international law is primarily found in the acts of states.[152] However, the practice of international organizations has also been discussed as relevant for the formation of customary international law, although it has generally been held to bear relevance only for the body of law governing the relationship between international organizations and states.[153] This was also the position of the International Law Commission when it held that the "[r]ecords of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations".[154] Of course, the practice of or within international organizations may play an even greater role in the debate on the subjective element of customary international law, *opinio iuris*.[155]

4 Opinio Iuris

The second, subjective or "psychological"[156] element of customary international law is *opinio iuris sive necessitatis* or *opinio iuris et necessitatis*,

> governments when to seek the path of a UN General Assembly resolution as a means of facilitating the formation of customary international law, and how to craft such a resolution to ensure that it is viewed as a capstone in the formation of such customary rules. It can in apt circumstances strengthen the case for litigants arguing the existence of a new customary international rule. And it can furnish international courts the confidence to recognize new rules of customary international law in appropriate cases despite a relative paucity and short duration of state practice.
>
> See ibid., at 214–215.

149 Kadens and Young, *supra* n. 185, Chapter 1, at 909.
150 American Law Institute, *supra* n. 9, at 19.
151 Jennings, *supra* n. 93, Chapter 1, at 6.
152 See Jennings and Watts, *supra* n. 51, at 26, § 10.
153 See Pellet, *supra* n. 7, at 816–817, para. 219, and 828, para. 238; Shaw, *supra* n. 88, Chapter 1, at 59.
154 Report of the International Law Commission on Ways and Means for Making the Evidence of Customary International Law More Readily Available, *supra* n. 112, at 372, para. 78.
155 See the following elaborations, in particular p. 73 *et seq.*
156 Koskenniemi, *supra* n. 72, Chapter 1, at 89.

usually just *opinio iuris* for short. It takes a prominent position within a number of views on the formation of customary international law, both voluntarist and empiricist as well as in the jurisprudence of the International Court of Justice.

But this was not always the case: Early doctrine argued against the consideration of the subjective element in determining what is customary international law.[157] Both Paul Guggenheim and Hans Kelsen proposed customary international law formation without *opinio iuris*; both later revoked this view.[158] Yet even beyond these far away champions of legal scholarship, for a number of judges who delivered dissenting opinions in the *North Sea Continental Shelf* cases, the subjective element could in fact only be inferred from the practice or obvious necessity of the practice itself, as long as there was no evidence to the contrary.[159]

The main purpose of *opinio iuris* is to distinguish mere comity, *courtoisie*, or "friendship" between states from customary international law.[160] According to Shaw, it was first formulated with this purpose in mind by French jurist François Gény in his work "Méthode d'Interprétation et Sources en Droit Privé Positif" in 1899.[161] Its necessity was prominently determined by the Permanent Court of International Justice in the *Lotus* case,[162] paving the way towards the orthodox definition of customary international law.[163] As the International Court of Justice held in the *North Sea Continental Shelf* cases:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a

157 On such views see also Koskenniemi, *From Apology to Utopia, supra* n. 2, Chapter 1, at 411–414.

158 See Simma and Verdross, *supra* n. 50, Chapter 1, at 346, § 550 with the relevant references. See also Alston and Simma, *supra* n. 85, Chapter 1, at 88; Petersen, *supra* n. 141, Chapter 1, at 278.

159 See *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Dissenting Opinion of Vice-President Koretsky, ICJ Reports 1969, p. 155, at 159; Dissenting Opinion of Judge Tanaka, *ibid.*, p. 172, at 177; Dissenting Opinion of Judge Lachs, *ibid.*, p. 219, at 232; Dissenting Opinion of Judge Sørenson, *ibid.*, p. 242, at 246–247. For further views of this sort expressed in the literature see Akehurst, *supra* n. 50, Chapter 1, at 32. See on a critique of this reasoning, however, only with regard to the *Asylum* case, D'Amato, *supra* n. 226, at 54–55.

160 See Akehurst, *supra* n. 50, Chapter 1, at 33–34; Brownlie, *supra* n. 17, at 8, who further lists "fairness" and "morality"; Danilenko, *supra* n. 6, at 99; Dixon, *supra* n. 75, Chapter 1, at 35; Jennings and Watts, *supra* n. 51, at 27, §10, who distinguish custom from "usage"; Wolfke, *supra* n. 6, at 40–41; Scharf, *supra* n. 79, at 48.

161 Shaw, *supra* n. 88, Chapter 1, at 53. See also Mendelson, *supra* n. 32, Chapter 1, at 194. See in more detail on Gény's contribution D'Amato, *supra* n. 8, at 48–49. Cf. Koskenniemi, *From Apology to Utopia, supra* n. 2, Chapter 1, at 415.

162 *The Case of the S.S. 'Lotus'* (France *v.* Turkey), Judgment of 7 September 1927, PCIJ Series A. – No. 10, p. 4, at 28.

163 See *supra* ns 80–82.

> belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.* the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[164]

When is the conviction legal and when does it arise from a sense of necessity? After all, something is not automatically legal, just because it is considered socially necessary.[165] Antonio Cassese takes a temporal view on this differentiation:

> Usually, a practice evolves among certain States under the impulse of economic, political, or military demands. At this stage the practice may thus be regarded as being imposed by social or economic or political needs (*opinio necessitatis*). If it does not encounter strong and consistent opposition from other States but is increasingly accepted, or acquiesced in, a customary rule gradually crystallizes. At this later stage it may be held that the practice is dictated by international law (*opinio juris*). In other words, now States begin to believe that they must conform to the practice not so much, or not only, out of economic, political, or military considerations, but because an international rule enjoins them to do so.[166]

a What Constitutes Opinio Iuris*?*

Similar to state practice, judges and authors have tried to determine a number of manifestations of the *opinio iuris* of states, once more in absence of a categorization or enumerative formula. In looking to these, it becomes quite clear that the borderline between the two elements of customary international law is fluid.

According to the *Nicaragua* judgment, *opinio iuris* may be derived from statements by state representatives, resolutions of international organizations, acts of ratification, or the simple acceptance of a text.[167] In the *Jurisdictional*

164 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at 45, para. 77.

165 See Mendelson, *supra* n. 32, Chapter 1, at 197.

166 Cassese, *supra* n. 29, at 157.

167 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986 (Merits), ICJ Reports 1986, p. 14, at 100, para. 189; Jennings and Watts, *supra* n. 51, at 28, §10.

Immunities case, the International Court of Justice held with regard to immunity that

> [*o*]*pinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.[168]

For James Brierly (or Sir Humphrey Waldock for that matter), "opinion" may be derived from

> diplomatic correspondence; official instructions to diplomatists, consuls, naval and military commanders; acts of state legislation and decisions of state courts, which, we may presume, will not deliberately contravene any rule regarded as a rule of international law by the state; and opinions of law officers, especially when these are published, as they are in the United States.[169]

Malcolm Shaw argues that in addition to the factual existence of such statements, it is necessary that "the acting state will have to confirm" the view that these actually confer legality.[170] The will of a state must become "cognoscible".[171] Antonio Cassese breaks down the formula *opinio iuris sive necessitatis* into requiring either "the conviction that […] practice reflects, or amounts to, law", or that it "is required by social, economic, or political exigencies".[172]

However, as Alain Pellet holds, *opinio iuris* is not to be equated with "an expression of will and is not easily grasped either legally or factually".[173] Similar to state practice,[174] much of what states deliberate is hidden from the public eye, leaving a limited amount of data for scholars to engage with.[175]

168 *Jurisdictional Immunities of the State* (Germany *v.* Italy; Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, p. 99, at 123, para. 55. See the analysis undertaken by the Court throughout the following paragraphs.

169 James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, Humphrey Waldock (ed.), 6th edn (Oxford: Clarendon Press, 1963) 61. For a more extensive analysis of what may or may not count see Mendelson, *supra* n. 22, at 198–209.

170 Shaw, *supra* n. 88, Chapter 1, at 63.

171 Meijers, *supra* n. 134, at 18.

172 Cassese, *supra* n. 29, at 156.

173 Pellet, *supra* n. 7, at 819, para. 224.

174 See *supra* n. 103.

175 See the remark by Georg Schwarzenberger:

> Nothing could be worse than the repetition of quotations from the very limited repertoire of diplomatic notes which are taken over from one textbook

b Implications of Opinio Iuris

Having discussed the possible manifestations of *opinio iuris*, it is still unclear what the legal character of these statements and expressions is. According to Koskenniemi, there are a variety of understandings of the concept present in jurisprudence and doctrine:

1 a collective (national, popular) unconscious;
2 tacit agreement;
3 the belief by a State that something is law;
4 the will by a State that something be law.

In addition, there is a fifth and a much stronger version of this view which grounds the primacy of psychology on the following claim:

5 "law cannot be dissociated from what States will or believe".[176]

Brierly required from states that *opinio iuris* at least meant "a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor".[177] Mendelson characterized the element as a "claim".[178]

c Prominence of the Subjective Element

As has been pointed out, *opinio iuris* takes a prominent position within a number of views on the formation of customary international law. Two related issues, the idea that customary international law may derive from treaties, on the one hand, and from decisions of international organizations, in particular the General Assembly of the United Nations, on the other, have become theoretical debates in their own right.

I TREATIES AS CUSTOMARY INTERNATIONAL LAW

One of the big recurring questions and dogmatic problems in relation to the formation of customary international law has been the effect of the negotiation, signing, and ratification of treaties by states.[179] This was, in particular, fuelled

> into another and rarely supplemented by casual personal excursions of writers into the unknown wilderness of State papers.
>
> See id., supra n. 122, at 35.

176 Koskenniemi, *supra* n. 72, Chapter 1, at 94. See also *id.*, *From Apology to Utopia*, *supra* n. 2, Chapter 1, at 414.
177 Brierly, *supra* n. 169, at 59.
178 Mendelson, *supra* n. 32, Chapter 1, at 201.
179 For a concise overview of possible effects see Antonio Cassese, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law', 3 *UCLA Pacific Basin Law Journal* (1984) 58–67.

by the International Court of Justice finding that customary international law could derive from a treaty provision "of a fundamentally normcreating character such as could be regarded as forming the basis of a general rule of law" in the *North Sea Continental Shelf Cases*.[180]

What we can, thereby, imagine is that universally accepted treaties such as the CHARTER OF THE UNITED NATIONS lead a parallel existence as customary international law, a "*Doppelganger*" or a reflection in a customary mirror,[181] whereby "it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected".[182]

In the *Libya-Malta Continental Shelf* case, the Court again held that multilateral treaties "may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".[183]

There has been extensive discussion on the possibility of parallel existence and cross-fertilization of customary international and treaty law,[184] in particular with a focus on the findings of the International Court of Justice in the *Nicaragua* case.[185] However, the inference of *opinio iuris* is problematic, in so far as the respective rule will primarily be followed as a treaty obligation with the consequence that states might not, thereby, contribute to the formation of customary international law.[186] The *opinio iuris* is simply indistinguishable from the treaty obligation.

Another approach is the inference of *opinio iuris* – or possibly even state practice, depending on one's view of the two elements – from signature or ratification behavior with regard to treaties.[187] This perspective is, however, also quite a paradox in that the creation of a treaty might in fact simultaneously

180 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at 42, para. 72.

181 Abi-Saab, *supra* n. 8, at 45.

182 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at 42, para. 73.

183 *Case Concerning the Continental Shelf* (Libyan Arab Jamahiriya *v.* Malta), Judgment of 3 June 1985, ICJ Reports 1985, p. 13, at 29–30, para. 27.

184 See, *inter alia*, D'Amato, *supra* n. 8, at 103–166; Danilenko, *supra* n. 6, at 137–146 and 156–162; Scharf, *supra* n. 79, at 43–45; Shaw, *supra* n. 88, Chapter 1, at 68–69. For a critical contemporary discussion of D'Amato see Thirlway, *supra* n. 13, at 81–84. See also, generally, Pellet, *supra* n. 7, at 849, para. 292 and accompanying references.

185 Referring to *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986 (Merits), ICJ Reports 1986, p. 14, at 93–97, paras 174–182, see, *inter alia*, D'Amato, *supra* n. 125, at 101–105; Wladyslaw Czapliński, 'Sources of International Law in the Nicaragua Case', 38/1 *International and Comparative Law Quarterly* (1989) 152–156.

186 See also Thirlway, *supra* n. 13, at 90.

187 See Pellet, *supra* n. 7, at 821–823, para. 229, and 849, para. 292; Scharf, *supra* n. 79, at 43; Shaw, *supra* n. 88, Chapter 1, at 68.

support the assumption that there is no, or at least contrary, customary international law on the subject.[188] Why would states feel the need to accede to an existing multilateral treaty, if the obligations already existed under customary international law? Equally, this could lead to an "accession by way of custom"[189] for states that are not party to a treaty.[190]

In the case of bilateral treaties, the need for their creation may arise from the fact that, indeed, no parallel rule of customary international law exists. This is commonly held to be the case, for example, with regard to bilateral investment[191] and extradition treaties.[192] On the opposite side of the spectrum stands the idea that a number of treaties of similar content could be taken together to

188 See *The Mavrommatis Palestine Concessions* (Greece *v.* United Kingdom), Judgment of 30 August 1924, PCIJ Series A. – No. 2, p. 6, at 35. See Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals* (Oxford: Oxford University Press, 2013) 75; Koskenniemi, *supra* n. 72, Chapter 1, at 116–117; *id.*, *From Apology to Utopia*, *supra* n. 2, Chapter 1, at 434–435; Pellet, *supra* n. 7, at 816, para. 218; Wolfke, *supra* n. 6, at 71. See also Scharf, *supra* n. 79, at 43.

189 Wolfke, *supra* n. 6, at 70.

190 As Judge Morelli held in his dissenting opinion in the *North Sea Continental Shelf Cases*:

> In connection with the Convention it may be observed that it was signed by the Federal Republic. This means that the Federal Republic participated in a technical operation which, to the extent of the Convention's avowed purpose of codification, consisted in the establishment of general international law. By its signature the Federal Republic expressed an opinion which, within the limits indicated above, may be qualified as an *opinio juris*. But it was a mere opinion and not a statement of will, which could only be expressed by ratification. For it is only by ratification that the States signatories to a Convention express their will either to accept new rules or, in the case of a codification convention, to recognize pre-existing rules as binding.

See *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Dissenting Opinion of Judge Morelli, ICJ Reports 1969, p. 198, *ibid.*

191 See *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea *v.* Democratic Republic of the Congo), Judgment of 24 May 2007 (Preliminary Objections), ICJ Reports 2007, p. 582, at 615, para. 90:

> The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.

192 See Bruno Simma and Stephan Wittich, 'Das Völkergewohnheitsrecht', in August Reinisch (ed.), *Österreichisches Handbuch des Völkerrechts. Band I – Textteil*, 5th edn (Vienna: Manz, 2013) 41, para. 190.

constitute *opinio iuris*.[193] Other scholars, such as Stephan Schill, have taken alternative views, speaking of the "multilateralization" of bilateral treaties, thereby avoiding the issue of customary international law altogether.[194]

Lifted from the level of black-letter argumentation alone, practice shows that not every treaty is endowed with the same level of legal authority. Myres McDougal pointed out this normative relativity: "Not all multilateral agreements, however deliberate and however much in accord or not in accord with customary law, make law. Many of them are illusions".[195]

II DECISIONS OF INTERNATIONAL ORGANIZATIONS

A second issue are decisions of international organizations, in particular the non-binding recommendations of the General Assembly of the United Nations.[196] They have been recurrently held to contribute to the formation of customary international law as expressions of *opinio iuris*, depending on how they were adopted.[197]

The lines here may be blurred between finding that the vote or acquiescence of a state is an expression of *opinio iuris*[198] and that the decision may function as *opinio iuris* as of itself, be it a recommendation by the General Assembly,[199]

193 See the approach taken by the tribunal in *Mondev International v. United States of America*, Award of 11 October 2002, ICSID Case No. ARB(AF)/99/2, para. 117. See Stephen M. Schwebel, 'Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law', 98 *American Society of International Law Procedures* (2004) 29. See, generally, Wolfke, *supra* n. 6, at 71 with further references.

194 See Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009).

195 McDougal, *supra* n. 155, Chapter 1, at 23.

196 Not decisions within the ambit of Article 17 of the CHARTER OF THE UNITED NATIONS or questions relating to membership, which, of course, have binding force with respect to the organization and its members.

197 See, *e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, at 254–255, para. 70. See Cassese, *supra* n. 29, at 169; Pellet, *supra* n. 7, at 820–821, para. 228; Shaw, *supra* n. 88, Chapter 1, at 63. Cf., however, MacGibbon, *supra* n. 143, at 12–15. For an earlier critical assessment of this debate see Stephen M. Schwebel, 'The Legal Effect of Resolutions and Codes of Conduct of the United Nations', 7 *Forum Internationale* (1985) 1–16, reprinted in Stephen M. Schwebel (ed.), *Justice in International Law. Selected Writings of Stephen M. Schwebel* (Cambridge: Cambridge University Press, 1994) 499–513.

198 See Akehurst, *supra* n. 50, Chapter 1, at 11; Louis B. Sohn, '"Generally Accepted" International Rules', 61 *Washington Law Review* (1986) 1074. Notwithstanding, of course, any state may express its *opinio iuris* during the sessions of the General Assembly, just as it may do so at any other forum. See on the practice of assessing state conviction from voting behavior in the General Assembly also Koskenniemi, *supra* n. 72, Chapter 1, at 115–116.

199 See on this, generally, Pellet, *supra* n. 7, at 820–821, para. 228, and 828, paras 238–239, with further references. For an extensive analysis of the subject in favor of a larger role for General Assembly resolutions, but including extensive

a decision by the Security Council,[200] or the findings of independent treaty bodies such as the Human Rights Committee[201] or the International Law Commission.[202]

The first view does not cause too big a stir within the two-element theory. It is merely important to take into account the full context,[203] whether a state expressed itself in light of the recommendatory character of the resolution[204] or accepted or even supported a binding or non-binding decision as a mere political bargain – maybe it did not "mean it" at all.[205] These considerations

references to both sides of the literature, see Blaine Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)', 58 *British Yearbook of International Law* (1987) *passim*. For another such analysis see Gaetano Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 225 *Recueil des Cours de l'Académie de Droit International de La Haye* (1972-III) *passim*.

200 See on this Olivier Corten, 'La Participation du Conseil de Sécurité à l'Èlaboration, à la Cristallisation ou à la Consolidation de Régles Coutumières', 37/2 *Revue Belge de Droit International* (2004) 552–566 with further references.

201 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, at 179, para. 109. See also Pellet, *supra* n. 7, at 859–860, para. 318.

202 See *Case Concerning the Gabčíkovo-Nagymaros Dam* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, p. 7, at 38–42, paras 47–54. See also Pellet, *ibid*., at 823–824, para. 230.

203 See Koskenniemi, *From Apology to Utopia, supra* n. 2, Chapter 1, at 434–435; Oscar Schachter, 'Alf Ross Memorial Lecture: The Crisis of Legitimation in the United Nations', 50–51 *Nordisk Tidsskrift for International Ret* (1981–1982) 13. See also, on the view that General Assembly resolutions may simply be declaratory of existing law, Krzysztof Skubiszewski, 'Resolutions of the U.N. General Assembly and Evidence of Custom', in Alessandro Migliazza, Fausto Pocar, Pierluigi Lamberti Zanardi, and Piero Ziccardi (eds), *Le Droit International a l'Heure de sa Codification. Etudes en l'Honneur de Roberto Ago / Il Diritto Internazionale al Tempo Della sua Codificazione. Studi in Onore di Roberto Ago / International Law at the Time of its Codification. Essays in Honour of Roberto Ago* (Milan: Dott. A. Giuffré Editore, 1987) 519.

204 See MacGibbon, *supra* n. 143, at 23.

205 See Arangio-Ruiz, *supra* n. 199, at 457, with regard to the General Assembly:

> [N]o one witnessing the actual work of the United Nations escapes the perception that the activities of the Assembly are pervaded to an extreme by the urge of individual governments or groups of governments to get away from every session with as good an "image" as possible. This "image" factor is a very considerable driving force towards the proliferation of proposals, counter proposals and eventually resolutions. As everybody in the United Nations is convinced that recommendations are *per se* not mandatory, States tend to embellish their image by putting forward draft resolutions. Other States tend naturally to support such drafts. And potential or natural opponents are often reluctant to face the risk of tarnishing or spoiling their own image by opposing the proposal openly or by casting a negative vote.

led Stephen Schwebel to speak of a "fake consensus".[206] Maurice Mendelson remarked that "in United Nations practice, the adoption of a resolution 'by consensus' is simply a way of avoiding the expression of deep-seated disagreements".[207] One must look past the mere words to arrive at the actual *opinio iuris*, or, as Oscar Schachter wrote, "[a] strong dose of 'cynical acid' (in Justice Holmes' phrase) may be necessary to assess the actual expectations and conduct of states in relation to a resolution".[208]

Adding to this problem is the fact that expert committees, such as the International Law Commission, are often staffed with independent experts and scholars, whose opinions will sometimes correspond more with their academic track-record than with the position of the nominating state. Should these views still be attributed? The problem is similar to the question of whether arguments made by counsel during proceedings on behalf of a state should count;[209] it would go beyond the scope of this book to attempt an answer. It is only important to be aware of the pitfalls of taking into account decisions of international organizations at face value.

The second view, *i.e.* that the content of such a document may function as *opinio iuris* as of itself, is much more problematic. This is particularly so, if one goes as far as suggesting that non-binding recommendations, as of the General Assembly, may exert some legislative or operative effects;[210] to view them as "'quasi-legislative' activity".[211]

Judge Tanaka, in his separate opinion in the *South West Africa* cases argued that such was the case if accompanied by repetition of similar resolutions.[212] However, while this may sound convincing at first, it is a non-argument, as was shown quite pointedly by Iain MacGibbon:

> For the non-wrangler of tender years at least, a certain reluctance had to be overcome before acceptance was given to the proposition that however

206 Stephen M. Schwebel, 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law', 73 *Proceedings of the American Society of International Law at its Annual Meeting* (1979) 308. See Scharf, *supra* n. 79, at 52.

207 Mendelson, *supra* n. 22, at 387.

208 Schachter, *supra* n. 203, at 14.

209 See also *supra* n. 113.

210 See, *e.g.*, S. James Anaya, 'Customary International Law', 92 *American Society of International Law Proceedings* (1998) 43; Higgins, *supra* n. 128, at 28 and 30–31; Skubiszewski, *supra* n. 203, at 143–156 *et passim*; Sloan, *supra* n. 199, *passim*; Oscar Schachter, 'The Twilight Existence of Nonbinding International Agreements', 71 *American Journal of International Law* (1977), 303–304; Weil, *supra* n. 35, Chapter 1, at 416–417. See further the possible interpretation of the *Tehran Hostages* case *infra* n. 8, Chapter 4 and accompanying text.

211 Oscar Schachter, 'Towards a Theory of International Obligation', in Stephen Schwebel (ed.), *The Effectiveness of International Decisions* (Leiden: Sijthoff, 1971) 11, reprinted in Koskenniemi (ed.), *supra* n. 2, Chapter 1, at 5.

212 See *South West Africa Cases* (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Dissenting Opinion of Judge Tanaka, ICJ Reports 1966, p. 250, at 291–292. See on this also Schachter, *ibid.*, at 13 / 7.

> many times nothing was multiplied by the result was still nothing. The same inexorable result follows in the present context. Mere repetition works no magical change in the legal nature of a resolution. However many times a recommendation is multiplied it is still in the end of the day a recommendation and not a binding legal obligation.[213]

Of course, the broadness of academic opinions also allows for writers that would accept the omission of repetition under certain circumstances.[214]

However, these approaches are not necessarily dogmatically sound. When the Soviet Union expressed that it would "respect the principles enunciated in the draft declaration if it were unanimously adopted" with regard to what would later become the "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space",[215] the better view, if one were to deduct a binding effect from this statement, would be to see it as a unilateral declaration, independent of the resolution itself.[216]

States themselves are not in consensus about the effect of General Assembly resolutions.[217] The better approach "in assessing their legal value" is, therefore, not to focus on "what *they* say, but what *the States* have had to say about them".[218] Of course, as was pointed out already, this correct appraisal might sometimes prove challenging to the observer.[219] However, the alternative view

213 MacGibbon, *supra* n. 143, at 17. See also Weil, *supra* n. 35, Chapter 1, at 417.

214 See, *e.g.*, Akehurst, *supra* n. 50, Chapter 1, at 14, fn. 4, asserting that sometimes "a single resolution, even if it is never repeated may sometimes create such a rule […], provided that there is no practice contradicting the alleged rule", citing the dissenting opinion of Judge Tanaka in the *South West Africa Cases*, who actually says the opposite: "Of course, we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the organization". See *South West Africa Cases* (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Dissenting Opinion of Judge Tanaka, ICJ Reports 1966, p. 250, at 292. See on this also MacGibbon, *supra* n. 143, at 17 with further references in fn. 32.

215 See Cheng, *supra* n. 143, at 34.

216 See also the emphasis on consensus taken in *Texaco v. Libyan Arab Republic*, Award on the Merits of 19 January 1977, 53 *International Law Reports* (1979) 422, at 487–488, para. 84, and 491–492, para. 87. Critical Schachter, *supra* n. 203, at 8.

217 Schwebel, *supra* n. 206, at 308:

> [T]he views of states are profoundly divided on the issues of the impact of General Assembly resolutions on the content of international law. It perhaps suggests that those states and scholars who have liberally construed the powers of the General Assembly and their effects on international law may find it necessary to reconsider their position, for it is hard to ascribe such powers to the General Assembly when leading members of that Assembly challenged them.

See also Scharf, *supra* n. 79, at 307–308.

218 Pellet, *supra* n. 7, at 825, para. 231.

219 See Scharf, *supra* n. 79, at 50–53.

simply omits the framework of international law, specifically the provisions of the CHARTER OF THE UNITED NATIONS, from the equation:

> It may be desirable that there should be an international legislature within or without the United Nations. But it cannot be contended that the Charter itself bound States members to accept such a law-making technique, and since no new source of law can, as we have noted, emerge *ex nihilo*, either amendment of the Charter or developments properly to be regarded as customary law are necessary to bring this about.[220]

In any case, substantive legislative powers of the General Assembly were expressly rejected at the San Francisco conference.[221] The fact that the General Assembly only has recommendatory powers was, after all, also a concession to the fact that a world legislature should not be composed of governments that are not necessarily representative of their peoples.[222] Its powers are "[c]rudely put […] restricted to 'organizational' matters internal to the UN legal order".[223]

d Opinio Iuris *as Consent*

Voluntarists claim that customary international law is grounded in the consent of states.[224] Soviet international law doctrine, most prominently represented by Grigory Tunkin,[225] firmly upheld this view: "[T]he essence of the process of creating a norm of international law by means of custom consists of agreement between States, which in this case is tacit, and not clearly expressed".[226]

220 Thirlway, *supra* n. 13, at 79.

221 See Jorge Castañeda, *Legal Effects of United Nations Resolutions* (Columbia University Studies in International Organization, Number 6; New York: Columbia University Press, 1969) 2–3, also excluding the power of authentic interpretation, see fn. 2 at 196.

222 See Schwebel, *supra* n. 206, at 301.

223 Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', 16/5 *European Journal of International Law* (2006), at 883.

224 For a brief overview of consensualist doctrine in the first half of the twentieth century including Anzilotti, Cavaglieri, Triepel, and Strupp, see Le Fur, *supra* n. 38, at 362–363. For a demonstration of problems relating to the consensualist view see I.M. Lobo de Souza, 'The Role of State Consent in the Customary Process', 44 *International and Comparative Law Quarterly* (1995) 521–539. For critiques of the voluntarist approach see Dupuy, *supra* n. 8, at 257–272; Mendelson, *supra* n. 32, Chapter 1, at 177–208; Mendelson, *supra* n. 22, at 253–267; Thirlway, *supra* n. 13, at 59.

225 See D'Amato, *supra* n. 8, at 188.

226 Grigory I. Tunkin, *Theory of International Law* (London: Wildy, Simmonds & Hill, 2003) 133. See also Danilenko, *supra* n. 134, at 13–14; *id., supra* n. 6, at 75–76, 118–119 *et passim*; Grigory I. Tunkin, 'Co-Existence and International Law', 95 *Recueil des Cours de l'Académie de Droit International de La Haye* (1958-III) 13–14.

However, while Soviet international law doctrine is a relic of history, voluntarism is still alive and well,[227] even if it has lost its once prominent foothold.

In particular, it is still argued with regard to regional or bilateral customary international law. Shaw writes that it requires an "acceptance of both (or all) parties to the rule".[228] Pellet finds that "unlike in the case of general custom, the *opinio juris* attached to them is of a consensualist kind".[229] Anthony D'Amato writes that "[s]pecial custom does indeed require stringent proof of consent or recognition of a practice on the part of the defendant state" as opposed to "general custom".[230] Furthermore, he argues that "we might think of treaties as a highly formal type of 'special custom', or indeed we might view special custom as an informal treaty".[231]

However, the nature of the dispute of the *Rights of Passage* case is more reminiscent of a servitude in domestic law than a tacit agreement. One might also think in analogy to the *North Sea Continental Shelf Cases*, in which the Court narrowed its look to the "States concerned".[232]

Both the Permanent Court of International Justice and the International Court of Justice have added to the confusion by pronouncing on the consensual character of customary international law. In the "unfortunate"[233] *Lotus* case, the Permanent Court held that:

> [i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[234]

227 For recent voluntarist views see José A. Cabranes, 'Customary International Law: What it is and What it is Not', 22 *Duke Journal of Comparative and International Law* (2011–2012) 148–149; Olufemi Elias, 'The Nature of the Subjective Element in Customary International Law', 44 *International and Comparative Law Quarterly* (1995) 502–516; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006) 32 with reference to Paul Guggenheim, 'La Validité et la Nullité des Actes Juridiques Internationaux', 74 *Recueil des Cours de l'Académie de Droit International de La Haye* (1949-I) 108; *id., supra* n. 112, Chapter 1, *passim*. See also Watson, *supra* n. 56, Chapter 1, at 43, who argues that customary international law requires state practice and consent.

228 Shaw, *supra* n. 88, Chapter 1, at 66.

229 Pellet, *supra* n. 7, at 831, para. 246. He, however, acknowledges that this approach was not followed in the cases of the International Court of Justice dealing with regional and bilateral custom. See *ibid*., at 831, para. 247.

230 D'Amato, *supra* n. 8, at 234.

231 *Ibid*., at 250.

232 See *supra* n. 125.

233 Pellet, *supra* n. 7, at 819, para. 225.

234 *The Case of the S.S. 'Lotus'* (France *v.* Turkey), Judgment of 7 September 1927, PCIJ Series A. – No. 10, p. 4, at 18. See also Pellet, *supra* n. 7, at 819, para. 225.

To go even further, the dissenting opinion of Judge Weiss in the *Lotus* case spoke of the requirement of a "*consensus omnium*".[235] As Karol Wolfke pointed out with reference to the International Court of Justice,

> the way in which the Court has applied the element of acceptance of practice as an expression of law entirely confirms the supposition that this element has been considered as an element of the will of states, mainly in the form of presumed acquiescence in the practice, above all, on the part of those states against which the rule was to be applied.[236]

I HISTORICAL DEFINITION OF CUSTOMARY INTERNATIONAL LAW

What are the roots of this view of *opinio iuris* as consent? Most treatises on customary international law begin by stating that the voluntarist view used to prevail up until the early twentieth century, when the two-element theory found its way into the STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE; that until that time customary international law "ultimately rested on consent".[237] It has been held that the view goes as far back as Grotius and Vattel.[238]

Naturally, states, reluctant to acknowledge a source of law that could run contrary to their individual will, would favor the view as it is in line with a conception of absolute sovereignty[239] and, in the words of Robert Ago, the

235 *The Case of the S.S. 'Lotus'* (France *v.* Turkey), Judgment of 7 September 1927, Dissenting Opinion by M. Weiss, PCIJ Series A. – No. 10, p. 40, at 43–44. See Wolfke, *supra* n. 6, at 11.

236 Wolfke, *supra* n. 6, at 24

237 Cassese *supra* n. 29, at 153.

238 See Emer de Vattel, *Le Droit des Gens. Ou Principes de la Loi naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains. Tome 1* (London, 1758) 7, § 25. See on this Verdross, *supra* n. 46, at 54, fn. 1. However, it may be contended that Grotius was not so clear in making this determination:

> Latius autem patens est ius Gentium, id est quod Gentium omnium aut multarum voluntate vim obligandi accepit. Multarum addidi, quia vix ullum [*sic*] ius reperitur extra ius naturale, quod ipsum quoque gentium dici solet, omnibus gentibus commune. Imo saepe in una parte orbis terrarum est ius gentium quod alibi non est, ut de captivitate ac postliminio suo loco dicemus. Probatur autem hoc ius gentium par modo quo ius non scriptum civile, suo continuo et testimonio peritorum. Est enim hoc ius, ut recte notar Dio Chrysostomus […] repertum temporis et usus.

See Hugo Grotius, *De Iure Belli ac Pacis. Libri Tres. In Quibus Ius Naturae et Gentium: Item Iuris Publici Praecipua Explicantur* (Paris, 1625) 10, XIV.

239 See the following passage regarding the formation of customary international law by Härle, *supra* n. 62, at 10:

> Aus diesen Ausführungen geht deutlich hervor, […] daß er [the author Louis Le Fur] einer gewohnheitsrechtlich allgemein entwickelten, von der Mehrheit

presence of custom as an autonomous form of law, independent of the will of the states has been considered a source of embarrassment to views preoccupied with establishing the omnipotence of these governments.[240] Koskenniemi associates the pull of voluntarism with an alleged turn towards positivism:

> Ever since the Grotian tradition became little more than an object of ritualistic invocation in keynote speeches at conferences of learned societies, international lawyers have had difficulty accounting for rules of international law that do not emanate from the consent of the states against which they are applied. […] Once the idea of a natural law is discarded, it seems difficult to justify an obligation that is not voluntarily assumed.[241]

II THE HISTORICAL DEFINITION QUESTIONED

However, a brief sighting of the literature and jurisprudence of the period in question shows that the picture is not so uniform and clear.[242] Georg Friedrich Puchta's 1837 treatise on custom shows that he, indeed, differentiated between custom and tacit agreement.[243]

Antonio Cassese, in his textbook on international law, cites two cases to demonstrate the "traditional view",[244] the 1893 *Fur Seal Arbitration* and an 1825 US Supreme Court case on the prohibition of slavery. The most prominently cited passage in this regard is taken from the oral argument of Sir Charles Russell in the *Fur Seal Arbitration*:

> International law, properly so called, is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules

> der Staatengemeinschaft anerkannten Norm, unter Umständen auch gegen einen dieser Rechtspraxis renitenten Staat effektive Normgeltung zugesteht. Man muß, das darf ruhig zugestanden werden, de lege ferenda diesem für den künftigen Rechtsfortschritt geradezu grundlegenden Prinzip, im Interesse auch der allgemeinen Rechtssicherheit und der Rechtssuniversalität, unbedingt beitreten. Leider sind aber die Staaten und mit ihnen die herrschende Lehre zu solchen Konzessionen noch nicht bereit und halten einstweilen noch mit aller Intransigenz an der absoluten Willenstheorie fest, die wiederum nur als Bestätigung der alles beherrschenden Souveränitätstheorie gelten soll.

240 See Ago, *supra* n. 4, at 936:

> La présence de la coutume comme forme autonome de droit, indépendante de la volonteé des gouvernements des différentes sociétés humaines, a toujours été une cause d'embarras pour les doctrines préoccupées d'établir la toute-puissance de ces gouvernements.

241 Koskenniemi, *supra* n. 36, Chapter 1, at 1946.
242 See *supra* n. 238.
243 See Puchta, *supra* n. 145, at 110.
244 Cassese, *supra* n. 29, at 154, fns 4–5.

> of conduct which shall govern their relations one with another. So far as they have by agreement incorporated into the rules which are to regulate their mutual arrangements, relations and conduct, and so far only, can there be said to be an incorporation of the rules of morality and of justice, as to which nations as well as men differ: so far and so far only can they be said to be incorporated into international law. In other words, international law, as there exists no superior external power to impose it, rests upon the principle of consent. In the words of Grotius, *Placuit ne gentibus?* is [*sic*] there the consent of nations? If there is not this consent of nations, then it is not international law: and I think it is very easy to illustrate that that must be so – that without that consent there cannot be said to be an *imprimatur*, which can give force and efficacy to international law. If it were not so, international law would be in a constant state of flux and uncertainty. […] The law of nations incorporates many principles of ethics and of natural law; but only such as it is agreed shall be incorporated from part of that law. The phrase of Grotius, *placuit ne gentibus*, sums up the only possible and the only true idea of the law of nations; and when text-writers and theorists and diplomatists assert that such and such a usage is recognized by the law of nations, that such and such a usage is opposed to the law of nations, that such and such a right exists under the law of nations, in each case the criterion is not whether the rule so expressed, or the usage or the right so asserted, is humane, or is just, or is moral, the sole question is whether it has received the assent and consent of civilized nations: *placuitne gentibus?*[245]

To support his argument, Russell referred to the findings of the Lord Chief Justice of England, John Duke Coleridge, in the *Franconia* case. A closer look at that particular judgment shows, however, that what Russell invoked here was not as clear as he tried to convey in his oral argument. In fact, agreements as in treaties are seemingly considered distinct from a body of customary international law, and terminology is inconsistent throughout the judgment and within the references.[246]

For example, Chief Baron of the Exchequer, Sir Fitzroy Kelly, differentiated between "treaty, or express agreement" and "some uniform, general, and long-continued usage, evidenced by the actual exercise of such".[247] Judge Lord Chief Justice, Sir Alexander James Edmund Cockburn, held that "assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage".[248]

245 Oral Argument of Sir Charles Russell, Q.C.M.P., Her Britannic Majesty's Attorney-General, on Behalf of Great Britain in the *Fur Seal Arbitration*, printed in Vol. XIII, 8–10.

246 See *R v. Keyn* (1876) L.R. 2 Ex. D. 63 (Court for Crown Cases Reserved) *passim*.

247 See *ibid*., at 151.

248 See *ibid*., at 202.

Such statements show that, indeed, there was a sense of manifestations of the law that were not expressed through mutual agreement *sensu stricto*. Therefore, the *termini technici* of sources doctrine should not be taken at face value, when analyzing historical cases and the literature.[249]

III THE "PERSISTENT OBJECTOR" THEORY

In the *Anglo-Norwegian Fisheries* case, the International Court of Justice developed what doctrine has come to call the "persistent objector" theory,[250] thereby seemingly embracing the voluntarist view. In pronouncing on the applicability of a particular rule regarding coastline delimitation to Norway, the Court came to the conclusion that a state could immunize itself from customary international law if it had initially opposed the application of a particular norm and consequently upheld that position, as an "*initial and sustained* objection".[251]

249 See also Robert Y. Jennings, 'What is International Law and How Do We Tell It When We See It?', in 37 *Schweizerisches Jahrbuch für Internationales Recht* (1981) 66, reprinted in Koskenniemi (ed.), *supra* n. 2, Chapter 1, at 34:

> For evidence of custom, Pitt Cobbett, in a good, popular case book of the period, lists "records of State action", and "Text-writers of Authority". As to what is now called the element of the *opinio juris sive necessitatis*, but was then frankly called consent, or assent, of States, there was no need to attempt to show that "the State in question" had assented to the rule; in the words of Professor Westlake's great text book of 1904, "it is enough to show that the general *consensus* of opinion within the limits of European civilization is in favour of the rule".

250 Dixon, *supra* n. 75, Chapter 1, at 32; Thirlway, *supra* n. 8, at 106–107. Thirlway points out that the same reasoning was already applied by the International Court of Justice in the *Colombian-Peruvian Asylum Case* (Colombia *v.* Peru), Judgment of 20 November 1950, ICJ Reports 1950, p. 266, at 277–278. Brownlie differentiated between the "persistent" and the "subsequent" objector, the latter actually applying to the treatment of the *Fisheries Case* by the International Court of Justice as a case of deviation from the "alleged rules", accompanied by acquiescence on the side of other states. It is not clear, however, how his nomenclature fits his dogmatic reasoning. See *id., Principles, supra* n. 17, at 11–12.

251 Dixon, *supra* n. 75, Chapter 1, at 33. See *Fisheries Case* (United Kingdom *v.* Norway), Judgment of 18 December 1951, ICJ Reports 1951, p. 116, at 131: "In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast". While this finding leaves open the problem of a subsequent objector violating an existing customary international law rule, other states could still acquiesce to such a violation. See Dixon, *supra* n. 75, Chapter 1, at 33 and 36. On this problem see also Gionata Piero Buzzini, 'Les Comportements Passifs des Etats et Leur Incidence sur la Réglementation de l'Emploi de la Force en Droit International Général', in Cannizzaro and Palchetti (eds), *supra* n. 67, Chapter 1, at 79–117, including a methodological study of the problems related to trying to ascertain prohibitive rules or the existence of rules that have been violated through

The "persistent objector" theory is problematic in a number of respects. First, it brings a voluntarist element into the two-element theory that does not properly fit within its basic structure.[252] Second, it reduces the universality of customary international law,[253] which does not *per se* require totality in the number of states participating in its formation:

> Custom is itself a matter of general rather than universal consent, so that a dissenting state cannot free itself by an act of will from the obligations imposed on it by a rule of customary law [...].[254]

The possibility of states dissociating themselves from an emerging rule would diminish the regulatory impact of customary international law as a whole and imply that "absence of agreement justifies exemption".[255] Interestingly enough, in the *North Sea Continental Shelf Cases*, while deliberating on reservations to treaties, the International Court of Justice itself seemingly ruled out the possibility of a "persistent objector":

> [F]or, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; – whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded.[256]

In addition, the "persistent objector" theory seems to ignore the possibility of oral treaties, which would be a much more dogmatically coherent explanation for the phenomenon. Of course, states may object to a rule of customary international law, but this should rather be seen as evidence within the overall assessment of state practice and *opinio iuris*.

silence and abstentions; Corten, *supra* n. 199, Chapter 1, at 131–134; Shaw, *supra* n. 88, Chapter 1, at 63–65.

252 See also Danilenko, *supra* n. 6, at 42; Pellet, *supra* n. 7, at 819–820, paras 225–226.

253 Cf., *e.g.*, Scharf, *supra* n. 79, at 41, who speaks of the "voluntary nature of customary international law".

254 Jennings and Watts, *supra* n. 51, at 24–25. See also Koskenniemi, *From Apology to Utopia, supra* n. 2, Chapter 1, at 443.

255 Thirlway, *supra* n. 8, at 102.

256 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at 39–40, para. 63.

Tomuschat, for one, has pointed out that the pronouncements in both the *Asylum* and the *Anglo-Norwegian Fisheries* cases were merely *obiter dicta*[257] and "[i]n reality, no such general recognition can be perceived";[258] state practice does not support the concept.

Still, it has become part of "[m]ainstream accounts of the principles governing the formation and application of rules of customary international law"[259] and "the principle of the persistent objector is firmly established in the orthodox doctrine on the sources of international law".[260] Even authors that reject the consensual view of custom have recognized the persistent objector theory without offering a coherent theoretical justification.[261] Some have even not shied away from the argument that the option of opting out favors the creation of new customary international law as the "persistent objectors" will not count towards inconsistent practice.[262]

IV *CONTRADICTIO IN SE*

The view that customary international law equates to a tacit agreement violates a number of general principles of law, in particular that of *ut res magis valeat quam pereat*. Article 38(1)(b) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE would be devoid of meaning, a redundant repetition of Article 38(1)(a) of that same treaty which already includes silent agreements in its scope.

Further, the idea that customary international law may be universally applied, even though not all states participated in its formation or had not existed at the time,[263] would violate one of the more fundamental general principles of treaty law *pacta tertiis nec nocent nec prosunt* if understood as a tacit agreement. The voluntary formation of will by two parties cannot, generally, bind a third party.

It has also been pointed out that evidence of *opinio iuris* rarely contains expressions of consent in the contractual sense, making it "largely a matter of imputation".[264] Just because a state undertook a course of action due to its belief in an existing legal obligation does not equate this compliance with consent.

As Max Sørenson pointed out in his treatise on the sources of international law, there is a contradiction between the fact that only a select number of state representatives may bind a state at the level of treaty conclusion,[265] whereas

257 Tomuschat, *supra* n. 127, Chapter 1, at 286–287. See also Koskenniemi, *From Apology to Utopia, supra* n. 2, Chapter 1, at 443.
258 Tomuschat, *ibid*., at 285. See also Stein, *supra* n. 122, Chapter 1, at 459–463.
259 Stein, *ibid*., at 457. See also Koskenniemi, *From Apology to Utopia, supra* n. 2, Chapter 1, at 443.
260 Stein, *ibid*., at 463.
261 See, *e.g*., Wolfke, *supra* n. 6, at 66–67, citing further examples.
262 See Akehurst, *supra* n. 50, Chapter 1, at 26.
263 See Gihl, *supra* n. 75, Chapter 1, at 75.
264 See Fastenrath, *supra* n. 1, at 325.
265 See, nowadays, the enumeration in Article 7(2) VIENNA CONVENTION ON THE LAW OF TREATIES.

each and every organ of the state may contribute to the formation of customary international law.[266]

The originally Soviet argument that states will not follow a rule that has not been consented to[267] does not convince, as it fails to see the holistic nature of a legal system: "It is sufficient to the argument (and nearer to the reality) that consent is given to international law as a system rather than to each and every relationship contained in it […]".[268]

States must accept and consent to the existence of customary international law as a concept, but not each and every rule thereof.

V QUASI-CONSENSUALITY OF *OPINIO IURIS*

Of course, it is clear that states take deliberate decisions to set practice. This implies a "quasi-consensual" element in customary international law. However, it is inherent in state practice, rather than *opinio iuris*. As Antonio Cassese writes, "[t]he main feature of custom is that normally it is not a deliberate lawmaking process. […] The gradual birth of a new international rule is the side effect of State's conduct in international relations".[269]

Necessity, not consent, is what drives initial compliance: "The necessity of the order is thus the point of coincidence where politics and justice may meet and complete each other".[270]

As has been pointed out, if it were otherwise and customary international law a synonym for a silent treaty, the entire subject would become obsolete and could be discussed within the law of treaties under the heading of oral or silent agreements. That would also mean that quite a substantial number of international legal scholars spent their academic lives publishing under the wrong subject heading.

5 Paradoxes of the Two-Element Theory

One issue that has been withheld from the reader so far, is the paradox that is supposedly inherent in the two-element theory. Broken down to an abstract

266 Sørensen, *supra* n. 6, at 87–88.

267 See Danilenko, *supra* n. 134, at 11, citing Tunkin: "Within the international community, the creation of a legal rule requires agreement both as to the content of a rule of conduct and to the recognition of this rule as a legally binding norm of international law".

268 Louis Jaffe, *Judicial Aspects of Foreign Relations. In Particular of the Recognition of Foreign Powers* (Harvard Studies in Administrative Law, Vol. VI; Cambridge: Harvard University Press / Oxford University Press, 1933) 90.

269 Cassese, *supra* n. 29, at 156. Recalling that the subjective element is not just *opinio iuris* but also *necessitatis*, this view could be summed up in the words of Spinoza: "Der Wille kann nicht freie Ursache, sondern nur notwendige heißen". See Baruch de Spinoza, *Ethik* (Berlin Hofenberg, 2014) 32. See also the conclusion of Dupuy, *supra* n. 8, at 272.

270 De Visscher, *supra* n. 32, Chapter 1, at 144.

consideration of the formation of customary international law, the age-old causality dilemma of the chicken and the egg that is the determination of state practice and *opinio iuris* has worried scholars of international law for decades.

a Communis Error Facit Ius?

The first issue concerns the emergence of a new rule of customary international law that might conflict with an already existing one, what has been called the "Walking Dead View" of customary international law.[271] Under this "Freudian construct", each violation of an existing rule could either be the dawn of a new rule and equally be "just that – an unlawful act that does not really purport to establish a new rule".[272]

b Tautology

The second issue concerns the definition of the two-element theory itself: Customary international law consists of two elements, state practice and *opinio iuris.* Thereby, the latter subjective element entails a sense of legal obligation under which the practice occurred.

It even seems that the drafters themselves were unsure where to start, as the wording of Article 38(1)(b) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE is drafted in a "clumsy way"[273] referring to "international custom, as evidence of a general practice accepted as law", whereas it should be worded the other way round or phrased as "evidenced by". Alain Pellet has called this fact "disconcerting", while at the same time "logical".[274] The assumption would be that a legal practitioner must find "a general practice accepted as law as evidence of international custom".[275] That is the essence of the two-element theory.

271 Bederman, *supra* n. 124, Chapter 1, at 35. Here, two general principles of law collide, *ex iniuria ius non oritur* and *rebus sic stantibus.* See also Koskenniemi, *supra* n. 72, Chapter 1, at 129.

272 Bederman, *ibid.*, at 37. See also Enzo Cannizzaro, 'Customary International Law on the Use of Force: Inductive Approach vs. Value-Oriented Approach', in Cannizzaro and Palchetti (eds), *supra* n. 67, at 261.

273 Cheng, *supra* n. 81, Chapter 1, at 514.

274 Pellet, *supra* n. 7, at 813, para. 211.

275 See Danilenko, *supra* n. 134, at 10; *id., supra* n. 6, at 76; Gihl, *supra* n. 75, Chapter 1, at 76; Hans Kelsen, 'Théorie du Droit International Coutumier', I *Revue Internationale de la Théorie du Droit / Internationale Zeitschrift für Theorie des Rechts* (1939) 260; Koskenniemi, *supra* n. 72, Chapter 1, at 90, fn. 18; Simma and Verdross, *supra* n. 50, Chapter 1, at 348, § 552; Wolfke, *supra* n. 6, at 5–8, citing further critics of the draft of Article 38(1)(b) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE; Sienho Yee, *Towards an International Law of Co-progressiveness, Part II. Membership, Leadership and Responsibility* (Leiden: Brill Nijhoff, 2014) 22.

The question is how a state can initiate a form of practice with the corresponding *opinio iuris* at a point in time, at which the rule does not yet exist.[276] What is clear is that there is a Faustian moment, a moment of collective choice, at which states are no longer free to fully deviate from the rule: "In the first we're free, in the second slaves to the act".[277]

In what Richard Falk has called "the most persuasive account of customary international law ever written",[278] Anthony D'Amato called the two-element theory "at worst a harmless tautology":[279]

> For if *we* can say that a state is acting in accordance with its conviction that it is acting in conformity with prevailing international law, then by implication we *already know* what that international law is.[280]

6 Schrödinger's Custom

Emphasis on these paradoxes seems artificial. As evident as the circularity may be, its criticism does not appreciate the dynamic character of customary international law formation that goes hand in hand with the day-to-day affairs of international relations.[281]

While it may be important to be aware of trends within a particular area of law in order to satisfy the rule of law and serve the expectations of its subjects, a concrete assessment will only be necessary whenever the argument that something constitutes customary international law is put forward. Like a snapshot photograph, customary international law is identified at a certain point in time, be it within judicial proceedings or in a scholarly publication:

> One way of dealing with this difficulty [the paradox of customary international law formation] is to ignore it. Often, the "consumer" of legal rules does not need to know when the fruit ripened, but simply whether it is

276 See Somek, *supra* n. 33, at 172:

> *Opinio iuris* asserts that something has already become law without its own contribution even though something can only become law by virtue of being endorsed by it. *Opinio iuris* is hence mistaken not only about what the law is, but also about its own constitutive role. It is perplexingly self-effacing.

See also Kammerhofer, *supra* n. 1, at 534–535.

277 See Johann Wolfgang von Goethe, *Faust. Eine Tragödie* (Tübingen: J.G. Cotta'sche Buchhandlung, 1808) 90: "Das erste steht uns frey, beym zweyten sind wir Knechte". English taken from the 2003 eBook translation by Anthony S. Klein, available at www.poetryintranslation.com/.

278 Richard Falk, 'Foreword' to D'Amato, *supra* n. 8, at viii.

279 See also Dixon, *supra* n. 75, Chapter 1, at 35.

280 D'Amato, *supra* n. 8, at 73. For an earlier critique along similar lines see Kelsen, *supra* n. 275, at 263–265. See also Danilenko, *supra* n. 6, at 81 and 100–102.

281 See Shaw, *supra* n. 88, Chapter 1, at 62. He concedes, however, that such "[c]hange is rarely smooth but rather spasmodic".

> ripe when he comes to eat it, or is still too hard or sour to eat. Indeed (to change the metaphor), to ask a follower of fashion at what point exactly something became the mode is in a sense to miss the point of informal rule-systems.[282]

The moment, in which it becomes clear that new customary international law has formed, may be illustrated by the famous thought experiment of the Austrian physicist Erwin Schrödinger.[283] In his (for animal lovers luckily only theoretical) experimental set-up, a cat is placed in a steel chamber together with a vial of deadly acid that is released the moment an atom from a piece of radioactive material decays. However, it is equally probable that the radioactive material does not decay. Without an observer, there is no knowing whether the atom has decayed. Until that point in time, both the living and the dead cat must be assumed to exist. They are "mixed or smeared" together.[284]

What Schrödinger intended as an illustration of the paradox between reality and theoretical quantum-mechanics may easily be transposed to the problem of customary international law formation. Until an observer is introduced, it is unclear how many states have already set state practice and *opinio iuris* regarding a particular rule; whether there is a breach or a new norm has emerged. The observer in this case may be the judiciary, legal counsel, or a "highly qualified publicist" who will help determine the respective rule.

The formation of customary international law is in constant flux. The paradox that a customary international law rule must first be broken in order for a new norm to emerge follows the Linnaean urge of scholars to sort and categorize their surroundings. But this approach does not do justice to the

282 Mendelson, *supra* n. 32, Chapter 1, at 203.

283 This analogy was first formulated by the author as a helpful illustration of the paradoxical formation of customary international law for law school students in the textbook co-authored with Melanie Fink and Ralph Janik, *Völkerrecht verstehen* (Vienna: Facultas, 2015) 49. Contrary to what some students believe, this is a tribute to Austrian physicist Erwin Schrödinger and not to the TV-series *The Big Bang Theory*.

284 See Erwin Schrödinger, 'Die gegenwärtige Situation in der Quantenmechanik', 23/49 *Die Naturwissenschaften* (1935) 812:

> Man kann auch ganz burleske Fälle konstruieren. Eine Katze wird in eine Stahlkammer gesperrt, zusammen mit folgender Höllenmaschine (die man gegen den direkten Zugriff der Katze sichern muß): in einem Geigerschen Zählrohr befindet sich eine winzige Menge radioaktiver Substanz, *so* wenig, daß im Lauf einer Stunde *vielleicht* eines von den Atomen zerfällt, ebenso wahrscheinlich aber auch keines; geschieht es, so spricht das Zählrohr an und betätigt über ein Relais ein Hämmerchen, das ein Kölbchen mit Blausäure zertrümmert. Hat man dieses ganze System eine Stunde lang sich selbst überlassen, so wird man sich sagen, daß die Katze noch lebt, *wenn* inzwischen kein Atom zerfallen ist. Die ψ-Funktion des ganzen Systems würde das so zum Ausdruck bringen, daß in ihr die lebende und die tote Katze (s. v. v.) zu gleichen Teilen gemischt oder verschmiert sind.

dynamic nature of a set of norms that is largely dependent upon the interaction of states. Following the metaphor of "Schrödinger's custom", until an observer needs to determine what the particular customary rule is in a certain moment in time, customary international law is "mixed or smeared".

However, this should not be mistaken with the identification of an exact point in time, at which a particular norm of customary international law has formed. As Maurice Mendelson has pointedly remarked,

> it makes no more sense to ask a member of a customary law society "Exactly how many of you have to participate in such-and-such a practice for it to become law" than it would to approach a group of skinheads in the centre of The Hague and ask them, "How many of you had to start wearing a particular type of trousers for it to become the fashion – and, indeed, *de rigeur* – for members of your group?" […] The customary process is in fact a continuous one, which does not stop when the rule has emerged, even if one could identify that exact moment. To illustrate the point, I would like to introduce a simile […]. My simile is the building of a house. It is often not easy or even possible to say exactly when a house has been created. Clearly, it is not when the first foundation stone is laid. But it is not when the last lick of paint has been added either. It is problematic at exactly what point we could say "This is a house". Do we have to wait for the roof to go on, for the windows to be put in, or for all of the utilities to be installed? So it is with customary international law.[285]

Rather than the point of formation, the observer will "take a still photograph, so to speak, of the state of the (customary) law at a given moment",[286] the *lex lata*. After all, the relevant question in practice will be the application of a certain rule to a particular set of circumstances, rather than a historic narrative of how a rule has formed.[287] This process is simply a manifestation of the dynamic character of international relations: "In international relations more than elsewhere, the fact precedes its classification".[288]

7 The Man on the Clapham Omnibus

Of course, as has been the meta-theme of this book, international legal scholarship today is driven, to a large extent, by the wish to promote a certain legal policy or lobby an agenda. The need is, therefore, not just to overcome a theoretical paradox, but to reconsider the process of the identification of international law – as it is, not "as you like it".

285 Mendelson, *supra* n. 22, at 173–175. See also *ibid*., at 284.
286 *Ibid*., at 253.
287 See also Scelle, *supra* n. 10, at 400: "Mais la source suppose une nappe souterraine, parfois inconnue ou mal connue, dont l'existence est pourtant indiscutable, puisque les sources sans elle n'existeraient pas".
288 De Visscher, *supra* n. 32, Chapter 1, at 153.

As opposed to the preceding analogy, this issue concerns the integrity and quality of assessment of state practice and *opinio iuris*. Having introduced an observer to identify what is customary international law at a certain point in time, the question is: What do we imagine this observer should look like? Obviously, it cannot be a lobbyist or policy-maker, nor an idealist international lawyer.

So should it be a judicial robot, mechanically processing an empirical algorithm? While this idea of an objective assessment seems attractive *a prima vista*, it is hard to see how this would deliver equitable results; more likely, such a sterile approach to law identification – which ultimately relies on the interaction of states as basic data – might result in a "Bizarro World" picture of international law.

While the finding that the prohibition against torture is not warranted through customary international law may be hard to accept, yet plausible, the fact that states torture with the conviction that they have a legitimate basis for doing so – one must only think of the "ticking time bomb" scenario[289] – should not create a permissive rule allowing torture. The analysis requires an underlying human corrective. It is in the same sense that Andreas Paulus and Bruno Simma speak of the need for an "enlightened positivism".[290]

Instead, it would seem fitting to rely on the proverbial man on the Clapham omnibus. This reasonable "extra-terrestrial observer" is neither an idealist, nor a cynic, neither a revisionist, nor an innovator. He is as little driven by a particular national interest, as by the ideal of the international community as a *civitas maxima*.

Admittedly, this is a "you know it, when you see it" approach, but in combination with the identification of customary international law restricted to a certain point in time it will surely allow for a more grounded assessment of the body of customary international law than any elaborate game theory model or natural law based impulse.

Occam's razor will easily help in the identification of state practice and *opinio iuris*. Such a common-sense appreciation of the obvious will lead to a more honest assessment of what states consider to be the law, to assess the legal *status quo*.[291]

8 Practice of the International Court of Justice

Having recapitulated the basic issues regarding the two-element theory as well as some related questions, such as the effect of treaties and decisions of international organizations or the paradoxes of formation, one cannot ignore the fact that, indeed, much emphasis has been laid on what "the wise old men",[292]

289 See on this, *e.g.*, the case of *Gäfgen v. Germany*, Grand Chamber, Judgment of 1 June 2010, Application No. 22978/05.
290 Paulus and Simma, *supra* n. 34, Chapter 1, at 307.
291 See Paust, *supra* n. 78, Chapter 1, at 149–150.
292 Mendelson, *supra* n. 22, at 167.

to use a less flattering characterization of the judges of the International Court of Justice, have had to say on the formation of customary international law.

This moniker from the seminal lecture on customary international law by Maurice Mendelson at The Hague Academy of International Law has not been chosen here to unnecessarily insult or provoke, let alone portray the International Court of Justice as a "men's only club", but to illustrate that the decisions of the International Court of Justice are lastly dependent on a select group of international legal scholars, be it of great renown, that come together to deliberate on what are basically diplomatic disputes with a select number of core legal issues; diplomacy in legal clothing. Of course, this circumstance also influences their decision-making. As Richard Falk writes in his foreword to Anthony D'Amato's *The Concept of Custom in International Law*:

> Third-party decision-makers, for instance, courts, are influenced by many factors in determining whether or not to validate a claim that an action constitutes a customary norm of international law. These factors include the reasonableness of the claim, the effectiveness of its assertion, past practice, the quantity and quality of protest, the overall attitude of the international community, and the compatibility of the claim with prevailing ideas of justice.[293]

Each of the 15 judges have published widely in the field and, aside from the holding itself, now have the opportunity to pack the decisions with *obiter dicta* reflecting their respective views on international law. They are equally affected by and part of the phenomena described in the introductory chapter of this book.

However, as their role as judges of the Court endows their opinions with great authority that constantly perpetuates itself through reliance on former decisions,[294] notwithstanding Article 59 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE,[295] it is worth dwelling on the issue for a moment. After all, the International Court of Justice has become a *de facto* legislature,[296] at least for the scholars who wait for it to toss them another legal *dictum*. Of course, this cannot be the place here for a comprehensive appraisal of the

293 Falk, *supra* n. 278, at ix.

294 See American Law Institute, *supra* n. 9, at 37, §103, Comment b, pointing out that there is great reliance on past decisions. Karol Wolfke speaks of a "fetishization of precedent in that law" and of Article 38(1)(d) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE as an "acquiescence in a degree of influence on law-creation" in this regard. See Wolfke, *supra* n. 6, at 74–75.

295 See on this also Watson, 'Normativity and Reality', *supra* n. 97, Chapter 1, at 226.

296 Of course, it should be the other way around. See Somek, *supra* n. 106, Chapter 1, at 424: "The validity of a norm, however, does not turn on whether a judge believes it to be valid. On the contrary, once the validity of a norm has been established it has to be recognized by a judge". See, generally, on the International Court of Justice as a law-maker Danilenko, *supra* n. 6, at 253–265.

jurisprudence of the International Court of Justice with regard to customary international law; but some elaboration on its general approach is in order.

The International Court of Justice has failed to embark on any serious analysis of state practice and *opinio iuris*,[297] while at the same time confirming its validity.[298] Thereby, it rules "quasi *ex cathedra*",[299] in the words of Karl Zemanek a luxury only available to international courts and tribunals.[300] Stefan Talmon holds that "[m]ethodology is probably not the strong point of the International Court of Justice".[301]

One of the most prominent decisions in this regard was passed down in the *Nicaragua* case. Here, the International Court of Justice, while reiterating the necessity of state practice and *opinio iuris*,[302] relied solely on the element of *opinio iuris* in determining the prohibition of the use of force under customary international law.[303] Thereby, it relied on General Assembly resolutions, in particular the Friendly Relations Declaration,[304] as a means of determining the

297 Similar to the scholarship that will be presented in the two case examples in Chapter 4. See, most prominently, *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3.

298 See *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at 44, para. 77.

299 Tomuschat, *supra* n. 127, Chapter 1, at 259. See also Koskenniemi, *From Apology to Utopia*, *supra* n. 2, Chapter 1, at 396.

300 See Zemanek, *supra* n. 37, Chapter 1, at 898: "Doch nur internationale Gerichte – insbesondere der Internationale Gerichtshof – können sich mit apodiktischen Behauptungen des Bestandes von Gewohnheitsrecht begnügen". However, he does concede that the *Tadić* decision of the ICTY constitutes an actual effort to establish state practice and *opinio iuris*. See *ibid.*, at 900. For such a domestic decision attempting to comprehensively survey state practice and *opinio iuris* see Hathaway, *supra* n. 33, Chapter 1, at 33, fn. 59. Cf. also the approach of the ICJ in the *Jurisdictional Immunities of the State* (Germany *v.* Italy; Greece intervening), Judgment of 3 February 2012, ICJ Reports 2012, p. 99, at 123, para. 55 *et seq.*

301 Talmon, *supra* n. 73, at 418.

302 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986 (Merits), ICJ Reports 1986, p. 14, at 97–98, paras 183-184. Meron comments that this "emphasis on the need to establish the existence of practice was more in the nature of a verbal protestation than a serious inquiry into the presence of the necessary elements of customary law". Meron, *supra* n. 82, Chapter 1, at 110.

303 See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986 (Merits), ICJ Reports 1986, p. 14, at 98–106, paras 187–201. See on this also Danilenko, *supra* n. 6, at 93–94; Pellet, *supra* n. 7, at 814, para. 214; Tomuschat, *supra* n. 7, Chapter 1, at 259.

304 See General Assembly Resolution. 2625 (XXV), 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations', U.N. Doc. A/RES/25/ 2625 (24 October 1970).

legal *status quo*.[305] It paid mere "lip-service to a traditional doctrine and to the letter of Art. 38 of the ICJ Statute".[306] Listing a number of prominent documents is not sufficient to establish *opinio iuris*.[307] There is no such thing as proof by example.

As Theodor Meron has pointed out, the *Nicaragua* case is merely the culmination of a longer process of decreasing detail with which state practice and *opinio iuris* were analyzed by the Court.[308] Both the International Court of Justice and its *de facto* predecessor institution, the Permanent Court of International Justice, held it sufficient to proclaim the existence of state practice or *opinio iuris* without referring to them, let alone setting out to prove their existence:[309] "Over the years, the ICJ has pulled a number of customary international law 'rabbits' out of its hat".[310] Cases in which both courts have referred to *opinio iuris* have even been singled out as a "'strict scrutiny' approach to *opinio iuris*",[311] as opposed to what Stefan Talmon simply calls the method of "assertion".[312]

A number of other instances saw the Court confirming a "legal *status quo*" that runs parallel to, rather than intersecting, the realities of state practice and *opinio iuris*. In the *Nicaragua* case,[313] the *Oil Platforms* case,[314] the *Wall* advisory opinion,[315]

305 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986 (Merits), ICJ Reports 1986, p. 14, on the Friendly Relations Declaration, in particular at 99–100, para. 188, at 101, para. 191, and at 106, para. 202; invocations of other General Assembly resolutions, *e.g.*, at 103, para. 195, on armed attack, or at 107, para. 203, on non-intervention.

306 Palmisano, *supra* n. 103, Chapter 1, at 207.

307 See Zemanek, *supra* n. 37, Chapter 1, at 900.

308 See Meron, *supra* n. 82, Chapter 1, at 108–113. For an enumeration of instances in which the International Court of Justice pronounced rules as customary international law, mostly without any form of further verification, see Wolfke, *supra* n. 6, at 25–29.

309 See Pellet, *supra* n. 7, at 815, para. 216, and 826–827, paras 235–236 with further references. With regard to the Permanent Court of International Justice see also Sørensen, *supra* n. 6, at 84: "La Cour n'a jamais dans sa pratique attaché une importance décisive aux termes de la stipulation [of Article 38]".

310 Talmon, *supra* n. 73, at 434.

311 Fidler, *supra* n. 74, Chapter 1, at 206. See also Brownlie, *supra* n. 17, at 8–10.

312 See Talmon, *supra* n. 73, at 434 and 437–440.

313 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua *v.* United States of America), Judgment of 27 June 1986 (Merits), ICJ Reports 1986, p. 14, at 103–104, para. 195. See also Scharf, *supra* n. 79, at 183.

314 *Case Concerning Oil Platforms* (Islamic Republic of Iran *v.* United States of America), Judgment of 6 November 2003, ICJ Reports 2003, p. 161, at 195–196, para. 72.

315 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, at 194, para. 139, avoiding the general issue by basing its decision on a distinction between occurrences within the territory of a state from those outside of it.

and the Ugandan *Armed Activities* case,[316] the International Court of Justice positioned itself unfavorable to the possibility of self-defence against non-state actors[317] which had just recently been at the forefront of the discourse in the context of the "Bush doctrine"[318] and which not only the "most highly qualified publicists" endorse,[319] including a number of individual judges of the International Court of Justice,[320] but which also represents constant state practice by states concerned[321] as well as the position of the Security Council of the United Nations.[322]

An "extra-terrestrial observer" should assume that the judgments of the International Court of Justice play a significant role in identifying the legal *status quo*.[323] However, they are seemingly engaged in creating an "international common law".[324] One can now simply assume that something constitutes customary international law by relying on the Court. However, even if a large number of academics and practitioners may have been trained in the common law tradition and have been socialized within its confines, international law is not a genuine common law system, even though it is, admittedly,

316 *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, ICJ Reports 2005, p. 168, at pp. 222–223, paras 146–147.

317 See Scharf, *supra* n. 79, at 185 and 216.

318 See on this Scharf, *supra* n. 79, at 183–210.

319 See, *inter alia*, Ian Johnstone, 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism', 43 *Columbia Journal of Transnational Law* (2004–2005) 370–372; Hanspeter Neuhold, 'Das Gewalt- und Interventionsverbot', in Reinisch (ed.), *supra* n. 192, at 428, para. 1686; Ruth Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense', 99 *American Journal of International Law* (2005) 58 and 61.

320 See also *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Uganda), Separate Opinion of Judge Kooijmans, ICJ Reports 2005, p. 306 at 313–315, paras 25–32, and the Separate Opinion of Judge Simma, ICJ Reports 2005, p. 334, at 335–338, paras 5–15; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Higgins, ICJ Reports 2004, p. 136, at 207, para. 33, and Separate Opinion of Judge Kooijmans, ICJ Reports 2004, p. 219, at 229–230, para. 35.

321 In particular the United States and Israel as well as most recently France with regard to the so-called Islamic State. See also Scharf, *supra* n. 79, at 204–205, citing the practice of Colombia, Ethiopia, Kenya, Russia, Turkey, and the United States together with further references to literature on each instance.

322 See Security Council Resolution 1373, 'Threats to International Peace and Security Caused by Terrorist Acts', U.N. Doc. S/RES/1373 (28 September 2001); Security Council Resolution 1368, 'Threats to International Peace and Security Caused by Terrorist Acts', U.N. Doc. S/RES/1368 (12 September 2001).

323 See, *inter alia*, Cassese, *supra* n. 29, at 160.

324 See William Burnham, *Introduction to the Law and Legal System of the United States* (St. Paul: West, 2011) 327 on the role of common law judges in determining the nature of provisions of the Constitution of the US: "[C]ommon law judges are especially comfortable with judicial law-making".

coming more strongly under its influence.[325] Others have characterized this phenomenon as a "gradual drift into naturalism" by the Court.[326]

Through its stance on the formation of customary international law and, of course, due to its apparent legal authority in doing so, the International Court of Justice has broadly facilitated scholarship turning a blind eye on authoritative proof of state practice and *opinio iuris*. In Alain Pellet's pointed metaphor: "the chrysalis is transformed into [a] butterfly [*sic*] through a process which remains partly mysterious but leads to a globally acceptable result".[327] In expectance of a dogmatically sound assessment of the legal *status quo*, this approach is, of course, hardly tenable. It is a mere "'bootstrap' argument".[328]

Scholarship has willingly embraced this approach, arguing that the International Court of Justice should "bring the process of crystallisation of customary law to a swift conclusion";[329] what Michael Scharf has called supplying the "authoritative gloss".[330] For Martin Dixon, the Court plays a role in "accelerat[ing] the creation of customary law by confirming trends in state practice and by 'discovering' the necessary *opinio juris*".[331] It has even been observed that the International Court of Justice is participating in the mandate of the International Law Commission,[332] *i.e.* "encouraging the progressive development of international law and its codification". However, as the Court itself held in the *South West Africa Cases*: "As is implied by the opening phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it".[333]

325 See Colin B. Picker, 'International Law's Mixed Heritage: A Common/Civil Law Jurisdiction', 41 *Vanderbilt Journal of Transnational Law* (2008) 1102 *et passim*.

326 Rubin, *supra* n. 198, Chapter 1, at 192.

327 Pellet, *supra* n. 7, at 828, para. 240. This phenomenon is not restricted to the International Court of Justice or other tribunals under international law. See, *e.g.*, Justice Scalia's dissenting opinion in *Roper v. Simmons* before the US Supreme Court on its methodology:

> Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound, none was ever entered into evidence or tested in an adversarial proceeding. […] In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends.

See *Roper v. Simmons*, at 616–617 respective 1222.

328 Thirlway, *supra* n. 13, at 43.

329 Dixon, *supra* n. 75, Chapter 1, at 45.

330 Scharf, *supra* n. 79, at 218.

331 Dixon, *supra* n. 75, Chapter 1, at 45.

332 See Pellet, *supra* n. 7, at 866, para. 331.

333 *South West Africa Cases* (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Judgment of 18 July 1966 (Second Phase), ICJ Reports 1966, p. 6, at 48, para. 89.

In the *Gulf of Maine* case the International Court of Justice emphasized an inductive approach, painting a rather "conservative" picture, as opposed to its usual take on the subject:

> A body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.[334]

Again, in the *Nuclear Weapons* advisory opinion, the International Court of Justice almost apologetically showed that it knew better:

> It is clear that the Court cannot legislate [...]. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.[335]

It is unclear, therefore, why it does not practice restraint in determining the legal *status quo*. As Alfred Rubin pointed out in the context of the *Nuclear Tests* case:[336]

See Pellet, *supra* n. 7, at 752, para. 65. See also the *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland *v.* Iceland), Judgment of 25 July 1974 (Merits), ICJ Reports 1974, p. 3, at pp. 23–24, para. 53: "In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down". See Scharf, *supra* n. 79, at 47. This position goes back to the original drafting of Article 38 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE in the context of its predecessor, the Permanent Court of International Justice. See Sørensen, *supra* n. 6, at 32.

334 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada *v.* United States of America), Judgment of 12 October 1984 Given by the Chamber Constituted by the Order Made by the Court on 20 January 1982, ICJ Reports 1984, p. 246, at 299, para. 111. See, however, Talmon, *supra* n. 73, at 418, who argues that the use of the wording "can be" suggests that the Court also considers the deductive method as a valid alternative.

335 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, at 237, para. 18. See also Scharf, *supra* n. 297, at 47.

336 *Nuclear Tests Case* (New Zealand *v.* France), Judgment of 20 December 1974, ICJ Reports 1974, p. 457.

> The loss has been not to international law as a moral, sociological and otherwise persuasive force in world politics, but to the tribunal; the perversion of the substantive positive law by its highest tribunal has led to a loss of authority by that tribunal and a general mistrust of the positive law and its enforcement mechanisms.[337]

9 "Modern" Approaches to the Formation of Custom

Aside from the practice of the International Court of Justice, doctrine has proposed a number of approaches to the formation of customary international law that abandon the restraints of Article 38(1)(b) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE altogether. Increasingly, international practice and scholarship have relied on what has been called a "value-oriented approach" which does not look at state practice and *opinio iuris* but rather "take[s] into account the emerging values and interests of individual states as well as those of the international community as a whole".[338] Louis Sohn writes:

> that the methods of developing new rules of customary international law have greatly changed since the Second World War. These changes have not been imposed on states by any external authority; they are the result of a voluntary acceptance by states of the need to adapt the methods of law-creation to the needs of the rapidly growing and changing world community. Any prior restrictions on the law-creating process were self-made, and they can be changed by the very method that established them in the first place.[339]

Anthea Roberts distinguishes here between the inductively attained "traditional custom" of the two-element theory and deductive "modern custom".[340] Therein, she also includes the approaches favoring the element of *opinio iuris* through consideration of treaties[341] and decisions of international organizations.[342] Philip Alston and Bruno Simma speak of "a product grown in the hothouse of parliamentary diplomacy and all too often 'sold' as customary law before actually having stood the test of time":[343] "This new, radical customary

337 Rubin, *supra* n. 198, Chapter 1, at 195.
338 Cannizzaro, *supra* n. 272, at 248. For an account of this development see also Kennedy, *supra* n. 56, Chapter 1, at 232–239.
339 Sohn, *supra* n. 198, at 1079.
340 See Roberts, *supra* n. 73, Chapter 1, at 758. See also the article by Gunning, *supra* n. 113, Chapter 1. Roberts presents a conciliatory approach she calls the "reflective interpretive approach", which piggy-backs "modern custom" on the dogmatic legitimacy of "traditional custom". See *ibid.*, at 788–791 *et passim*. For further references see William Thomas Worster, 'The Inductive and Deductive Methods in Customary International Law Analysis', 45 *Georgia Journal of International Law* (2013–2014) 449–450, fn. 8.
341 See on this *supra* pp. 74 *et seq.*
342 See on this *supra* pp. 77 *et seq.*
343 Alston and Simma, *supra* n. 85, Chapter 1, at 89.

law has lost the element of retrospection; if its protagonists look back at the past it is a look back in anger, full of impatience with the imperfections and gaps of the old rules".[344]

As Koskenniemi writes in the introduction to his volume, *Sources of International Law*:

> In practice, "custom" has become a generic category for practically all binding non-treaty standards. This is in line with agnosticism about natural principles and general principles as it seems sometimes simply too difficult to argue about such principles within the conventions of legal rhetoric and proof. "Custom" seems both more legitimate in origin and more tangible in application – even if the various standards thus classified as "custom" cannot easily be fitted within the standard theory about the emergence and ascertainment of customary law.[345]

Fidler finds three different perspectives in international legal scholarship on customary international law; first, the "dinosaur perspective" that customary international law is out-dated and a "legal fossil",[346] second, the contrary "dynamo perspective" that customary international law is still "a vital part of modern international law" and "critical to tackling the new circumstances of international relations and to making progress towards a better world",[347] and, third, the "dangerous perspective" that believes that customary international law is prone to "legal and political abuse" and "has been abused at the international and national levels":[348]

> The chief complaint of the dangerous perspective at the level of international law is that the CIL process has been transformed from a conservative, limited international legal process into the international legal equivalent of a wish list for Santa Claus. The number of so-called rules of CIL in today's international law is staggering.[349]

This is indeed a problem. International legal scholarship today is often driven by the wish to promote a certain legal policy or lobby an agenda. With such motivation usually comes a particular view of the functioning of the global community, hand in hand: "Much of the confusion that haunts CIL stems

344 *Ibid*., at 90.
345 Koskenniemi, 'Introduction', *supra* n. 2, Chapter 1, at xxi.
346 See Fidler, *supra* n. 74, Chapter 1, at 216–220.
347 *Ibid*., at 220–224. Further attributes include customary international law "as a progressive, innovative force in contemporary international relations" and as "the 'common law' of mankind because it, and sometimes only it, can accommodate, or create a debate about, urgent concerns of justice and equity in international politics".
348 *Ibid*., at 224–231. He further equates these three views with rationalism, revolutionism, and realism. See *ibid*., at 232–234.
349 *Ibid*., at 224.

from the fact that participants in the debate often fail to make explicit their assumptions about international relations".[350]

10 Assessment

The conflict here is not between "consent and justice-based explanations",[351] but between inductive empiricism and the two. Neither the voluntarist view nor any of the "modern" approaches to customary international law dogmatically convince. Both run counter to the general principle of law *ut res magis valeat quam pereat* if one accepts the catalogue of manifestations of international law in Article 38(1) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE as an expression of state consensus. While a quasi-consensual element pervades customary international law, it cannot simply be equated to a tacit or oral agreement. Equally, as the common saying "hard cases make bad law" illustrates, it cannot be a credible approach to view the formation of customary international law as a railroad switch, dependent on the subject matter.

Of course, it may seem difficult to assess the practice and *opinio iuris* of around 200 legal entities of complex structure and different levels of transparency. Equally, some subject areas may simply produce less state practice or *opinio iuris* than others. The view that the assessment of the two elements should take place on a sliding scale seems appealing here.[352] But this should not lead to a result-oriented assessment of what is essentially an empirical exercise. Sometimes, there might just not be enough, or even too much contrary state practice; all the governmental statements in the world will not make it customary international law. In any case, an assessment must be made.

Considering the number of unpaid interns and junior level associates in law offices around the world, it cannot be too much to expect an analysis, whether practice is "generally […] adopted",[353] at least by the "States concerned",[354] if a party to a proceeding – or a scholar for that matter – wants to base its claim on customary international law.[355] Applying the analogy of "Schrödinger's custom", this is not an impossible effort, in particular if one takes into account the capacity of scholars for repetitive publications.[356]

350 *Ibid.*, at 148.

351 Koskenniemi, *supra* n. 73, Chapter 1, at 52 / 21.

352 See Kirgis, *supra* n. 136, at 149. See Worster, *supra* n. 340, at 451 with further references in fn. 14.

353 *Fisheries Case* (United Kingdom *v.* Norway), Judgment of 18 December 1951, ICJ Reports 1951, p. 116, at 128.

354 *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at 44, para. 76. See on the difficulty of identifying the states "specially affected" Danilenko, *supra* n. 6, at 95–96.

355 For a possible methodological guideline see Worster, *supra* n. 340, at 480–519.

356 See Joseph Weiler, 'On My Way Out – Advice to Young Scholars II: Career Strategy and the Publication Trap', *EJIL: Talk!* (18 February 2016) <www.ejiltalk.org/on-my-way-out-advice-to-young-scholars-ii-career-strategy-and-the-publication-trap/>.

Only following such a sound assessment can customary international law resume its proper place within the manifestations of international law:

> What makes international custom authoritative is that it consists of the resultants of divergent state vectors (acts, restraints) and thus brings out what the legal system considers a resolution of the underlying state interests.[357]

There is still a role to play for customary international law if understood through the two-element theory. It is a manifestation of international law that does not directly spring from the "will" or "consent" of states but reflects their perpetual international relations. Customary international law properly understood does not constitute an "international agreement". States do not voluntarily form a will at the international level but consciously or unconsciously influence its creation through their actions. This also means that custom might not have the same capacity for self-restrictive regulation of conduct as treaties do.

C General Principles of Law

Included within the list of Article 38(1) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE to preclude the possibility of a *non liquet* situation,[358] the "enigmatic"[359] general principles of law "recognized by civilized nations"[360] present a particularly confusing case due both to terminological unclarity[361] and disagreement as to their nature and formal identification.[362] As has been pointed out, it has even been called into question whether they stand on an equal footing with the other two sources of international law.[363] On the other hand, they have been deemed, in the words of Max Sørensen, the cement that assures the cohesion of international law with the domestic legal orders.[364]

357 D'Amato, *supra* n. 124, Chapter 1, at 102.
358 See Pellet, *supra* n. 7, at 832, para. 250; Shaw, *supra* n. 88, Chapter 1, at 69–70; Simma and Verdross, *supra* n. 50, Chapter 1, at 387, § 601; Thirlway, *supra* n. 8, at 108.
359 Jennings, *supra* n. 249, at 71 / 39.
360 See on the concept of "civilization" in international law, generally, Yadh Ben Achour, *Le Rôle des Civilisations dans le Système International (Droit et Relations Internationales)* (Collection de Droit Internationales, Vol. 50; Bruxelles: Editions Bruylant / Editions de l'Université des Bruxelles, 2003).
361 See Danilenko, *supra* n. 6, at 8–10. For an early analysis of the different meanings of "general principles of international law" see Sørensen, *supra* n. 6, at 112–122. See also Wolfke, *supra* n. 6, at 8 in this regard.
362 See Jennings and Watts, *supra* n. 51, at 36, §12 and fn. 1 with extensive references. See Pellet, *supra* n. 7, at 852, para. 300.
363 See *supra* pp. 54 *et seq.*
364 Sørensen, *supra* n. 46, at 16, speaking of "le ciment qui assure la cohésion du droit international avec les ordres juridiques nationaux et qui permet de concevoir

Probably one of the most important applications of general principles of law is the incorporation of the consideration of good faith in the relation between states.[365]

1 Terminology

Terminologically, one must differentiate between the terms "general principles of law" in the sense of Article 38(1) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, "general principles" or simply "principles" of varying meaning, and, finally, "general principles of international law".[366] Koskenniemi distinguishes at least four different meanings of the term "principle":

> 1 Standards common to all (or most) national legal systems. Especially Western scholars have regarded that Article 38(1)(c) refers to such […].
> 2 Standards of international law proper, generated through State practice […].
> 3 Certain basic (or "fundamental") standards of international law. These would cover at least the *jus cogens* principles from which no derogations are allowable […].
> 4 Standards of natural law, applicable in inter-State relations.[367]

Neither the International Court of Justice nor the Permanent Court of International Justice have been very helpful in this regard. For example, in the *Lotus* case, the latter held that "the words 'principles of international law', as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States".[368]

Similarly, in the *Gulf of Maine* case, the International Court of Justice made the pronouncement that:

> the association of the terms "rules" and "principles" is no more than the use of a dual expression to convey one and the same idea, since in this context "principles" clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term

tous les phénomènes juridiques de l'humanité sous un aspect unite". In the words of *The Big Lebowski*, they are the rug that "really tied the room together".

365 See Jennings and Watts, *supra* n. 51, at 38, §12; Pellet, *supra* n. 7, at 836, para. 206.

366 For a historical appraisal of recourse to such principles see Vladimir-Djuro Degan, 'General Principles of Law (A Source of General International Law)', 3 *Finnish Yearbook of International Law* (1992) 7–58.

367 Koskenniemi, 'General Principles', *supra* n. 49, at 363–364.

368 *The Case of the S.S. 'Lotus'* (France *v.* Turkey), Judgment of 7 September 1927, PCIJ Series A. – No. 10, p. 4, at 16.

> "principles" may be justified because of their more general and more fundamental character.[369]

There has been no decision in which either of these bodies has explicitly based its reasoning on general principles of law.[370] However, the International Court of Justice has referred to the existence of such principles and applied them without making an explicit subsumption under the manifestations listed in Article 38(1) of its STATUTE.[371]

The Soviet interpretation of Article 38(1)(c) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE had viewed it as encompassing merely general principles of international law:[372]

> [T]he question arises whether in contemporary conditions of the existence of States not only with different but also with opposed socio-economic systems there can exist normative principles common to socialist law and to bourgeois law. One must say very definitely that normative principles which would be common to the two opposed systems of law, socialist and bourgeois, do not exist.[373]

General principles of international law, rather than being specific rules in and as of themselves, usually refer to "bundles of rights",[374] which are again grounded in treaty or custom.[375] Cassese defines them as

> sweeping and loose standards of conduct that can be deduced from treaty and customary rules by extracting and generalizing some of their most

369 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada *v.* United States of America), Judgment of 12 October 1984 Given by the Chamber Constituted by the Order Made by the Court on 20 January 1982, ICJ Reports 1984, p. 246, at 289–290, para. 79.

370 See *supra* ns 45–46.

371 See *supra* ns 49–50. For a detailed analysis of judicial and state practice see Danilenko, *supra* n. 6, at 178 and 181–186.

372 See Dixon, *supra* n. 75, Chapter 1, at 41; Shaw, *supra* n. 88, Chapter 1, at 70 on the writings of Grigory Tunkin.

373 Tunkin, *Theory*, *supra* n. 226, at 217.

374 Dixon, *supra* n. 75, Chapter 1, at 42.

375 See *ibid.*, at 43. Ian Brownlie gives a very broad definition of "general principles of international law":

> The rubric may refer to rules of customary law, to general principles of law as in Article 38(1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies. […] In many cases these principles are to be traced to state practice. However, they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer *directly* connected with state practice. In a few cases the principle concerned, though useful, is unlikely to appear in ordinary state practice.

See *id.*, *supra* n. 17, at 19.

> significant common points. They do not make up a source proper. Most of them primarily serve the purpose of filling possible gaps or of making a particular construction prevail at any time when two or more interpretations are possible.[376]

He further differentiates two kinds of "general principles of international law":

> At present, in the world community, *two distinct classes of general principles* may be relied upon. First, there are general principles of international law, namely those principles which can be inferred or extracted by way of induction and generalization from conventional and customary rules of international law. Some of these principles have been restated by States in international instruments designed to set out the fundamental standards of behaviour that should govern the relations among members of the international community [...]. Second, there are principles that are peculiar to a particular branch of international law (the law of the sea, humanitarian law, the law of State responsibility, etc.). These principles are general legal standards overarching the whole body of law governing a specific area.[377]

Alan Boyle also speaks of "soft law general principles" as policy goals impacting on "interpretation, application, and development of other rules of law".[378]

2 Identification

As to the nature and formal identification of general principles of law, there are a variety of approaches that can be broadly divided into a comparative law approach, on the one hand, and a natural law approach, on the other. The latter view was originally championed by the Belgian representative, Baron Descamps, in the Advisory Committee of Jurists, which drafted the original wording of what would later become Article 38(1)(c) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, whereas the United States representative Elihu Root and United Kingdom representative Lord Phillimore emphasized the former position.[379] So while one end of the spectrum views general

376 Cassese, *supra* n. 29, at 188.

377 *Ibid.*, at 189, fn. 3.

378 See Alan Boyle, 'Soft Law in International Law-Making', in Malcolm D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2010) 132–134.

379 On the original drafting process of the STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE and the discussion on the scope of general principles of law within the Advisory Committee of Jurists see Maarten Bos, 'The Recognized Manifestations of International Law. A New Theory of "Sources"', 20 *German Yearbook of International Law* (1977), at 33–40; Brownlie, *supra* n. 17, at 16; Cassese, *supra* n. 29, at 190–191; Pellet, *supra* n. 7, at 832–833, paras 250–252; Sørensen, *supra* n. 46, at 17–18. For an early overview of diverging doctrinal approaches see Sørensen, *supra* n. 6, at 123–136; Béla Vitanyi, 'Les Positions de la Doctrine Concernant le Sens de la Notion de Principes Généraux de Droit

principles of law as common rules and principles derived (through a variety of different methods) from the world's (domestic) legal systems,[380] the other extreme views general principles as a means for natural law theory[381] to enter the body of international law.[382]

Of course, there are a number of nuances to each of these views.[383] Schachter identifies five different approaches to the content and scope of general principles of law:

1 The principles of municipal law "recognized by civilized nations".
2 General principles of law "derived from the specific nature of the international community".
3 Principles "intrinsic to the idea of law and basic to all legal systems".
4 Principles "valid through all kinds of societies in relationships of hierarchy and co-ordination".

Reconnus par les Nations Civilisées', 86 *Revue Générale de Droit International Public* (1982) 85–102.

380 See, *inter alia*, Brierly, *supra* n. 169, at 62–63; Cassese, *supra* n. 29, at 191–192, arguing that this view was merely codified by Article 38(1)(c) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, as it was already applied by international tribunals prior to 1921; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953); Dixon, *supra* n. 75, Chapter 1, at 41; Gihl, *supra* n. 75, Chapter 1, at 85–87; Härle, *supra* n. 62 *et seq.*; Jennings and Watts, *supra* n. 51, at 36–37, §12; Hersch Lauterpacht, *Private Law Sources and Analogies of International Law. With Special Reference to International Arbitration* (London: Longmans, Green and Co., 1927) *passim*, however, see also Hersch Lauterpacht, 'Règles Générales du Droit de la Paix', 64 *Recueil des Cours de l'Académie de Droit International de La Haye* (1937-IV) 164; Pellet, *supra* n. 7, at 783, paras 137–139, and 834, para. 254; Jean Spiropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht. Eine Auslegung von Art. 38 3 des Statuts des ständigen Internationalen Gerichtshofs* (Aus dem Institut für internationales Recht an der Universität Kiel. Erste Reihe. Vorträge und Einzelschriften 7; Kiel: Verlag des Instituts für internationales Recht an der Universität Kiel, 1928) *passim*. See further on this view Vitanyi, *ibid.*, at 103–110. Furthermore, seemingly in favor, Meron, *supra* n. 82, Chapter 1, at 88. For a critical view see Jennings, *supra* n. 249, at 71–72 / 40–41. For a conciliatory view see Simma and Verdross, *supra* n. 50, Chapter 1, at 383–384, § 601.

381 For a brief introduction to the distinction and synthesis between natural law and positivism in early legal thought and philosophy see Rubin, *supra* n. 198, Chapter 1, at 6–18.

382 Most prominently Austrian scholar Alfred Verdross in his works, *inter alia*, 'Les Principes Généraux du Droit Comme Source du Droit de Gens', in Appleton (ed.), *supra* n. 10, at 383–388. See on this also Sørensen, *supra* n. 6, at 133–136. See also Verdross' contemporaries Le Fur, *supra* n. 38, at 368–370, and Charles de Visscher, 'Contribution à l'Étude des Sources du Droit International', in Appleton (ed.), *supra* n. 10, 395–396. Cf., however, the more critical Scelle, *supra* n. 10, at 423–426. See also Alston and Simma, *supra* n. 85, Chapter 1, at 102.

383 For example, Arnold Duncan McNair sees them primarily in the work of tribunals and writers. See *id.*, 'The General Principles of Law Recognized by Civilized Nations', 33 *British Yearbook of International Law* (1957) 15.

5 Principles of justice founded on "the very nature of man as a rational and social being".[384]

However, whereas points (1) and (3) can easily be subsumed under the comparative law approach, point (2) seems more reminiscent of what has been referred to as "general principles" or simply "principles" to refer to such defining features of international law as sovereignty, reciprocity, and effectivity.[385] Points (4) and (5) pertain to the natural law approach.[386] For the purpose of the present analysis, it is sufficient to consider general principles of law against the dualist generalization of comparative and natural law.

One view may also be as just seeing Article 38(1)(c) as descriptive of rules originating from either treaty or custom.[387] The majority of scholars, however, argue for a "pre-existing legal validity" of such norms that does "not need to be validated by either custom or treaty to have legal effect".[388] It could just as easily be argued that the opposite is suggested by the introductory clause of Article 38(1) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE "in accordance with international law".[389]

a Comparative Law

Of the two views, that of a comparative analysis of general principles *in foro domestico*, as claimed by Elihu Root and Lord Phillimore, seems to be the prevailing interpretation,[390] be it through mere incorporation of procedural or administrative rules[391] – including the notion of equity[392] – or even substantive norms of international law.[393]

384 Schachter, *supra* n. 6, Chapter 1, at 50. For more on these views see *ibid*., at 50–55, with further references.
385 See *ibid*., at 50–54.
386 See *ibid*., at 54–55.
387 See on this Vitanyi, *supra* n. 379, at 50–85. See Dixon, *supra* n. 75, Chapter 1, at 41.
388 See, for example, Dixon, *supra* n. 75, Chapter 1, at 41; Pellet, *supra* n. 7, at 835, para. 258, and 850, para. 296. See, however, the comment by Lord Phillimore in the drafting committee that "it was through custom that general principles came to be recognised". See Permanent Court of International Justice, *supra* n. 46, at 334.
389 See Wolfke, *supra* n. 6, at 106.
390 See *supra* n. 380. See Danilenko, *supra* n. 6, at 177; Vitanyi, *supra* n. 379, at 113; Zemanek, *supra* n. 99, Chapter 1, at 402. See, in agreement with this view, American Law Institute, *supra* n. 9, at 28, §102, Comment l and 34, §102, Reporter's Notes, para. 7.
391 For examples see Brownlie, *supra* n. 17, at 17–18; Dixon, *supra* n. 75, Chapter 1, at 41; Pellet, *supra* n. 7, Chapter 1, at 836, para. 260; Shaw, *supra* n. 88, Chapter 1, at 71–75.
392 See Brownlie, *supra* n. 17, at 25–26; Dixon, *supra* n. 75, Chapter 1, at 42; Shaw, *supra* n. 88, Chapter 1, at 75–77.
393 See, *e.g., International Status of South-West Africa*, Advisory Opinion of 11 July 1950, Separate Opinion by Sir Arnold McNair, ICJ Reports 1950, p. 146, at

The wording of Article 21(1)(c) ROME STATUTE, "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards", seems to favor the comparative law approach,[394] if one were to acknowledge it as a form of subsequent appraisal of Article 38(1)(c) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE.

However, similarly to the practice of the Permanent Court of International Justice and the International Court of Justice with regard to customary international law, it is hard to find any serious attempt at establishing that a general principle of law is in fact recognized within the principal legal systems of the world.[395]

Some have argued that general principles of law may be viewed as customary international law without the element of state practice.[396] However, this goes past

148–153. For further examples see Brownlie, *supra* n. 17, at 17–18; Dixon, *supra* n. 75, Chapter 1, at 41; Shaw, *supra* n. 88, Chapter 1, at 78. For an extensive, though not exclusive, enumeration of general principles of law see the – outdated but still standard – treatise on the topic by Cheng, *supra* n. 380, *passim*. For an equally seminal account see also Lauterpacht, 'Private Law Sources and Analogies of International Law', *supra* n. 380, Parts II and III. Note that both of these works, of course, also list a broad range of procedural and administrative general principles.

394 See Cassese, *supra* n. 29, at 193; Thirlway, *supra* n. 8, at 109, fn. 37.

395 See Sørensen, *supra* n. 46, at 18:

> On a fait observer, que dans les nombreux cas où cette méthode a été employé on cherche en vain, dans les avis des juges s'est assuré que le principe invoqué était effectivement un principe reconnu par les nations civilisées. Dans les divers cas, les textes des décisions laissent l'impression que le juge s'est basé sur son intuition, probablement inspirée par le ou les systèmes juridiques aves lesquels il était familier.

396 See, *e.g.*, Petersen, *supra* n. 141, Chapter 1, at 292:

> In order to rationalize the legal discourse, the requirement "as recognized by civilized nations" has been introduced. Only those natural law principles that have been widely recognized by the international community as such should enter into legal discourse. The recognition requirement thus already shows that general principles do not necessarily have to be derived from natural law maxims. They rather refer to the implicit consensus of the international community. They are thus distinct from customary international law insofar as they do not require the proof of state practice. The existence of an opinio juris is thus sufficient to establish general principles. This implicit state consensus can be identified by referring to not directly binding declarations of a considerable part of the international community. Such expressions of an opinio juris may be found in resolutions of the U.N. General Assembly or declarations of other representative international bodies and organs. Further, the preambles of multilateral treaties, which are not directly legally binding, may indicate the existence of general principles.

both the considerations within the Committee of Jurists and any credible reading of the wording of Article 38(1) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE. If one chose to understand general principles of law in such a way, Article 38(1)(b) would, in effect, become obsolete, which is not a desirable outcome under the interpretative principle *ut res magis valeat quam pereat.*

b Natural Law

On the other side of the spectrum stands the view represented by Baron Descamps, which was later promoted by Alfred Verdross.[397] It was also embraced by Judge Tanaka in his dissenting opinion to the *South West Africa Cases.*[398]

However, it has been held that even if such natural law principles should apply, they would "have to be 'legalized' by their incorporation into the legal systems of States".[399] As Robert Jennings points out, "the intention of Root's formulation of para. (c) was to limit discretion of Judges, lest they be tempted to impose subjective notions of justice".[400]

3 Excursus: "Civilized Nations"

The subordinate clause "recognized by civilized nations"[401] is particularly controversial.[402] The common consensus seems to be that it has since become "irrelevant and can be ignored",[403] "is nowadays entirely devoid of any particular meaning",[404] or is at least now "out of place"[405] and "inappropriate".[406] In Dixon's assessment "possibly this was meant to exclude consideration of 'primitive' or 'underdeveloped' legal systems, rather than being a reference to the economic or political status of different countries".[407] Sørenson writes that with the establishment of the United Nations as a universal organization, this distinction has become irrelevant.[408] However, it must not necessarily be

397 See *supra* n. 382.
398 See *South West Africa Cases* (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Dissenting Opinion of Judge Tanaka, ICJ Reports 1966, p. 250, at 294–300; Schachter, *supra* n. 211, at 13 / 7.
399 Pellet, *supra* n. 7, at 835, para. 257.
400 Jennings, *supra* n. 249, at 71 / 39. See with regard to this also Sørensen, *supra* n. 6, at 33.
401 Article 38(1)(c) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE.
402 See the particularly fervent criticism of Judge Ammoun in his separate opinion, *North Sea Continental Shelf Cases* (Federal Republic of Germany *v.* Denmark/ Federal Republic of Germany *v.* Netherlands), Separate Opinion of Judge Fouad Ammoun, ICJ Reports 1969, p. 101, at 133–135, para. 33. See also Danilenko, *supra* n. 6, at 177; Vitanyi, *supra* n. 379, at 54–55.
403 Dixon, *supra* n. 75, Chapter 1, at 40.
404 Pellet, *supra* n. 7, at 836–837, para. 261.
405 Thirlway, *supra* n. 8, at 109.
406 Yee, *supra* n. 275, at 23.
407 Dixon, *supra* n. 75, Chapter 1, at 40.
408 See Sørensen, *supra* n. 46, at 20.

viewed as a relic of the idea of colonial superiority. Maarten Bos points out that the term may simply be seen as an expression of "idealism which animated Baron Descamps".[409] Instead of feeling snubbed by the term, one could breathe life into it and see it as a normative safeguard.[410]

4 Assessment

It is really quite impossible to come up with a definitive assessment of general principles of law. As opposed to what Ian Brownlie had to say about *ius cogens*, that "the vehicle does not often leave the garage",[411] they leave the garage quite a lot. But neither the Permanent Court of International Justice nor the International Court of Justice have been willing to stick a label on such instances. The terminological difficulties could just as easily lead to the

409 Bos, *supra* n. 379, at 42.

410 See Ernst-Ulrich Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?', 31 *New York University Journal of International Law and Politics* (1998–1999) 785, arguing that the International Court of Justice should apply "the general principles of international law in light of the human rights jurisprudence of international human rights courts and the U.N. human rights bodies". See also Tomuschat, *supra* n. 127, Chapter 1, at 319:

> What matters are the principles recognized by all those States that seek to abide by standards of civilization respecting human dignity. In sum, the qualification "civilized" is an essential screening element which permits distinctions between States, departing from formalistic reliance on sovereign equality. Unfortunately, it is a fact of life that a State machinery, usurped by a gang of unscrupulous politicians, can turn into an instrument of crime, both internally and externally. According to the law as it stands, even such a State does not forfeit automatically all of its rights under international law. But its legal régime and practice must be left out of consideration in determining the foundations of the international community, translated into legal substance by Article 38 (1) (c) of the ICJ Statute. It is therefore utterly wrong to state that under the auspices of the Charter of the United Nations every State must be acknowledged as a civilized nation.

The subordinate clause could function, for example, to bar rules such as deriving from Islamic *sharia* law that entail cruel, inhuman or degrading punishment, or gross gender inequality from evolving into general principles at the international level. As Max Sørenson points out, general principles may naturally also derive from this body of law. See *id.*, *supra* n. 46, at 22. With regard to the same issue in connection with the similar Article 21(1)(c) of the ROME STATUTE see Beham, *supra* n. 160, Chapter 1, at 359–361. For the wording of Article 21(1)(c) of the ROME STATUTE see *supra* n. 380. Vladimir-Djuro Degan has suggested that the subordinate clause "civilized nations" could be applied as a bar in contexts such as the historical example of a state embracing a national-socialist legal system. See *id.*, *supra* n. 366, at 55–56.

411 See Ian Brownlie, 'Discussion', in Antonio Cassese and Joseph H. H. Weiler (eds), *Change and Stability in International Law Making* (European University Institute, Series A; Berlin Walter de Gruyter, 1988) 110.

assumption that the courts were referring to some other manifestations of international law.

Scholarly appraisals have been equally discouraging about the general principles of law, considering them subsidiary to both treaties and customary international law, mere gap fillers to prevent *non liquet* situations. Others have denied their existence as an autonomous source of international law.

Even if they are looked upon favorably, what kind of manifestation of law should we see in them? Those arrived at through a comparative assessment of the major legal systems of the world or those derived from natural law? In light of the above elaborations, the mainstream view seems to be that they are drawn from the *forum domesticum*. Resort to general principles for the minimum standards of equity and procedure present within the principal legal systems of the world seems credible, while it is hard to imagine how general principles could represent a dignified substitute as a basis of obligation for other substantive rules of international law. Surely, the principle of good faith can be seen as an uncontroversial example of a general principle of law.

2 Human rights based approaches to research

Rhona Smith

Research on human rights issues takes a variety of different forms. The various chapters of this book look at some of the popular options engaged by legal academics as well as social and political scientists when researching human rights. The language of human rights has evolved dramatically since 1948 and the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations. In 1993, member states attending the World Conference of Human Rights in Vienna agreed the Vienna Declaration and World Programme of Action.[1] This emphasised the indivisibility of rights, their interdependence and their interrelatedness as well as linking human rights with democracy, sustainability and development.[2] As the global power shifted with decolonisation tapering off, having been largely achieved, and the ideological divisions of the Cold War easing, human rights discourse gained more prominence. Contemporaneously with technological and travel advancements, human rights concerns became increasingly linked to, and drawn on, in development literature, strategies and practice. Indeed, the current UN Secretary-General, Antonio Guterres, has identified human rights as central to his vision for the UN organisation, emphasising the need for an inclusive approach to conflict prevention, peace and development.[3]

Prioritising the application of human rights became a cornerstone of UN activities in 1997 when the then Secretary-General called upon all UN agencies to mainstream human rights in their activities.[4] This call was, in

1 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993, http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx, accessed 7 February 2017.

2 Vienna Declaration, n1, paras 5, 8–11.

3 Antonio Guterres, Vision, outlined in January 2017, Secretary-General's remarks to the Security Council Open Debate on 'Maintenance of International Peace and Security: Conflict Prevention and Sustaining Peace', https://www.un.org/sg/en/content/sg/statement/2017-01-10/secretary-generals-remarks-security-council-open-debate-maintenance, accessed 7 February 2017.

4 Renewing the United Nations: A Programme for Reform, report of the Secretary General, UN Doc A/51/950, paras 78–79.

effect, rebadged and relaunched in 2013, with former Secretary-General Ban Ki-Moon's Human Rights Up Front initiative.[5] This initiative seeks to ensure that human rights are at the forefront of all UN activities and inform the work. Echoing the UN World Programme for Human Rights Education and the UN Declaration on Human Rights Education and Training,[6] activities should do no harm to human rights and should be delivered in a manner consistent with respect for human rights, and conducive to the implementation of human rights. For development activities, the Millennium Development Goals[7] served as a focal point and led to re-evaluations of the operation of development activities. A growing awareness of the nature of development as cooperation and partnership rather than simple donation was also prominent at this time.[8] Whilst working on the Millennium Development Goals, with real targets and indicators of progress for development goals, each of which in turn linked clearly to human rights, several UN agencies came together to adopt the UN Common Understanding on a Human Rights Based Approach to Development Cooperation (HRBA).[9] The Common Understanding operates as a guide for agencies on how human rights standards and principles can, and should, be put into practice during everyday activities. Ensuring marginalised, excluded and discriminated against peoples are included, and that development interventions reach these people is the main goal.

A human rights based approach to development dramatically changed the nature of development. Rather than a focus on the needs of beneficiaries (e.g. a requirement of clean water was identified so a project was initiated to deliver a clean water supply), a human rights based approach will focus on not only the outcome (e.g. clean water supply), but how that outcome is achieved (coordination with stakeholders, both duty bearers and rights holders). The

5 Human Rights Up Front, Ban Ki-Moon's commitment statement and associated documentation, https://www.un.org/sg/en/content/ban-ki-moon/human-rights-front-initiative, accessed 7 February 2017.

6 UN World Programme for Human Rights Education, proclaimed by General Assembly resolution 59/113 (2004) and the UN Declaration on Human Rights Education and Training, General Assembly resolution 66/137 (2011).

7 UN Millennium Development Goals, adopted World Summit United Nations Millennium declaration, General assembly resolution UN Doc A/RES/55/2, further information and reports on progress available http://www.un.org/millenniumgoals, accessed 17 February 2017.

8 M. Langford, A. Summers and A. Yasmin (eds) *The Millennium Development Goals and Human Rights: Past, Present and Future* (Cambridge: Cambridge University Press, 2013); Philip Alston and Mary Robinson (eds) *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2010) and perhaps slightly controversial, OECD and World Bank (eds) *Integrating Human Rights to Development: Donor Approaches, Experiences and Challenges* (Washington: OECD/WB, 2013).

9 UN Common Understanding on a Human-Rights-Based Approach to Development Cooperation 2003, http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies, accessed 10 February 2017.

language of rights was then employed and development was intended to shift focus to building capacity to secure and protect rights and freedoms whilst simultaneously supporting individuals and groups with claiming rights. Obviously, progress was slow and there is still a reluctance amongst many development agencies in the UN to use the language of human rights due to perceived sensitivities.[10] Consistency of approach was an aim of the Common Understanding, but is arguably yet to be fulfilled. Yet there is ever more operational connections and coordination, especially in countries with multiple agency field presences.

According to the Common Understanding,

> all programmes of development cooperation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international instruments; human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process; Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.[11]

The human rights based approach has been adopted across a number of development agencies outside the UN including the Foreign Ministries of countries such as Sweden.[12] Those involved in programming and reporting will be familiar with the deployment of HRBA in activities and reports, to a greater or lesser extent depending on context.

It is argued that all good research on human rights issues, even when not directly related to programming activities, could and should meet the requirements of a human rights based approach. What does this mean in practice? Well first, human rights research should advance the realisation of human rights, second, research should respect human rights standards and principles, and third, research should ideally contribute to capacity development of duty bearers or rights holders.

10 UNDP in some field offices downplays rights terminology though still works hard delivering on human rights.

11 UN Common Understanding, http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies, accessed 7 February 2017.

12 SIDA Sweden, Human Rights Based Approach at SIDA, http://www.sida.se/English/partners/resources-for-all-partners/methodological-materials/human-rights-based-approach-at-sida, accessed 10 February 2017.

1 Research should advance the realisation of human rights

A HRBA to research should result in research which advances the realisation of human rights. This is normally relatively straightforward as much human rights research aims at deepening understanding of human rights and freedoms, their monitoring and enforcement or their implications in reality. Doctrinal analyses, theoretical analyses, empirical data analyses – all contribute to the understanding of what human rights standards are, what they mean in practice and/or how protection can be strengthened. In development, it is usually necessary for a programme to be directly linked to one or more specific rights or freedoms and the realisation thereof. For research, the more 'blue-sky' and conceptual research can also contribute towards understanding so may be more abstract than would necessarily be the case for development programmes.

A degree of forethought allows the intended beneficiary to be identified. A new theoretical understanding of a particular right could be used to re-conceptualise how a particular culture or legal system deals with violations, for example. The token beneficiary could therefore be a particular community or the state authorities. Naturally, doctrinal analyses can deepen understanding of how law can be used to protect human rights and/or action violations. Lawyers and activists could therefore be notional beneficiaries of this research as they will have stronger legal tools to use when protecting human rights or when advocating for strengthening of laws and policies to better protect human rights and fundamental freedoms.

Quantitative and qualitative approaches can provide strong empirical data supporting findings that respect for human rights is strengthening. For example, measuring progress against the human rights indicators in the UN sustainable development goals can indicate advancements in development and strengthening of human rights in practice

2 Research should respect human rights standards and principles

A human rights based approach to research should ensure that the research does no harm, the golden rule of human rights work. This is particularly important when empirical work and case studies are used. As the chapters on qualitative methods and ethnographical research make clear, researching with and on people, particularly vulnerable peoples, bring specific challenges. Respecting human rights standards can have an impact on sample selection (ensuring the views or experiences of everyone in a group is appropriately represented). Consideration must also be given to free prior informed consent of all participants with due regard to confidentiality of interviewees and/or anonymising data when necessary or requested. In addition, human rights researchers may have additional considerations in the field – ensuring the risk

of reprisals against those being interviewed, translating, and assisting otherwise in the research is minimised and ensuring that the risk of retraumatisation of individuals is minimised. Being guided by respect for human rights principles can also manifest itself in respect for different cultures, so cultural sensitivity, tolerance of differences and awareness of reality is important. Examples can include being sensitive to gender dimensions in interviewing – it is often advisable to have females interviewing female rape victims or victims of violence, for example. Respecting human rights standards can also mean cultural sensitivity – clothes, materials and tools used in the field, for example. All need to be carefully selected for function, to minimise offence and to ensure mutual respect, trust and understanding.

Just as with development, human rights principles can guide the research at all stages – conceptualisation, planning, information/data gathering, analysis and writing up and dissemination. Arguably this can also mean ensuring any outputs meet human rights standards. Consideration may have to be given to the funding of research (if applicable) and the human rights credibility of the dissemination strategy. Few academic researchers do undertake human rights impact studies in advance of planned research and few delve into the background of funders and/or outlets of dissemination. Bias in funded research should be avoided or, at least, acknowledged and its possible impact on the work recognised. The potential for unconscious bias should also be considered as objectively as possible.

A number of guidelines exist to ensure respect for human rights standards and principles. The 1999 Istanbul Protocol and the OHCHR Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[13] for example, is the UN standard for assessing claims of those alleging torture, and reporting such findings to official bodies. Many international professional organisations (e.g. Bar Associations), civil society organisations and non-governmental organisations have their own guidelines for gathering information on human rights violations.

3 Research should ideally contribute to capacity development of duty bearers or rights holders

If research follows a human rights based approach, then it should result in strengthening the capacities of duty bearers and/or the capabilities of rights holders. For many researchers, this is relatively straightforward. Developing an understanding of human rights standards, or the impact of human rights

13 OHCHR, *Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OHCHR: Geneva, Professional training series, No 8/Rev.1 1999), http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf, accessed 17 February 2017.

in reality, monitoring, enforcement and so on can indelibly strengthen capacity of duty bearers or rights holders. Where this becomes important is in dissemination. Most academics are required to produce publications, usually in academic journals. However, for a human rights based approach, the practical impact has to be considered. Can the research achieve greater impact by being repackaged and sent in a policy paper to a government ministry, for example? Could a special procedure mandate holder benefit from having a theoretical approach to a particularly thorny issue outlined? Could the government of state R benefit from a better comparative understanding of the experiences of a particular issue of other states in the region? Many countries are now adopting the language of 'impact' to ensure that academic research translates to making a difference on the ground: translational or transformative work. Securing an impact is undoubtedly a major goal in a human rights based approach. As with all such work, the impact may be incremental and build up progressively. Accordingly, the first piece of work may not produce a major impact but may lead to another piece of work which does have an impact. A holistic approach can be taken of impact but its importance cannot be underestimated in a HRBA to research. A dissemination strategy, or pathway to impact, can be useful to frame and shape the impact of the research. After all, most researchers on human rights ultimately want to make a difference and improve human rights on the ground in some shape or form.

Ultimately the HRBA moves away from the hitherto predominant welfare model approach to development and the key difference lies in the shift from donor/beneficiary conceptualisations to capacity building and partnerships. Rather than giving 'charity' to those deemed poorer or less fortunate (with clear echoes of post-colonialism[14]), human rights discourse is used to frame a moral imperative for actors to build capacity and develop tangible results progressing human rights and freedoms.

Many engaged in human rights research are doing programme evaluations or base line studies. This can be the first exposure to HRBA for legal academics and other non-empirical research trained researchers. The move towards a rights based approach has brought a sharp focus on the tangible results of programmes and other initiatives. Several chapters in this book explain the mechanics, benefits and challenges of relevant methods of research. Twenty-first-century development programming relies heavily on deliverables and tangible outputs. This can be relatively straightforward for some projects, but infinitely more challenging for others. Proving a cultural change towards respect for rights, for example, can be difficult to measure. Similarly, proving a programme of human rights education has changed attitudes is infinitely harder than gathering evidence that the programme has increased knowledge and understanding or developed skills.[15] However,

14 See generally, E. Said, *Orientalism* (London: Routledge and Kegan Paul, 1978).

15 The head, heart and hands of human rights education, for example.

there is a considerable challenge in effecting the shift from recipient of training/programmes/infrastructure to independent capacity for sustainable and progressive use thereof. The sustainable development goals which, as noted, are currently very influential in development work, emphasise sustained results. Rights holders have as much responsibility to build capacity on the nature of their rights and freedoms and develop tools to better claim them and hold states to account as do the states to better respect, protect and promote human rights.

4 Law in context

A human rights based approach to research means researching human rights issues with due consideration as to the surrounding circumstances. This can mean ensuring an appropriate historical, cultural, religious, legal and political understanding of the issues which shape the subject. An understanding of the relevance of individual rights as opposed to group rights differs from state to state. The African Charter on Human and Peoples' Rights, for example, reflects the broad African understanding of collective rights to development, enjoyment of natural resources and international security and peace.[16] The exposition of the corollary of duties to family, community and country, likewise.[17] Development status of a country is also relevant, especially when considering the progressive development of rights and evaluating resource mobilisation. Demographics, geography, religion, legal system (common law, civil law, mixed) and politics remain important to understand when evaluating the human rights situation.

The final chapter of this book reflects on mixing and blending methods. There are undoubtedly benefits to drawing on different approaches as, ultimately, a deeper understanding of human rights will require a holistic understanding of how a situation arose or developed and how it can be addressed. This section notes some of the common approaches which can help illuminate human rights issues in particular contexts. There are of course many other contexts which can be of relevance. As is so often the case, it depends on the particular facts and circumstances of the issue being studied/researched.

4a History

Human rights research can benefit from historical approaches to research. Understanding why things are as they are, learning from past experiences of a situation, identifying trends and providing perspectives on current issues are examples of the richness historical approaches can bring to human rights research. Historical research can empower people – decision makers, for example,

16 Respectively, Articles 22, 21 and 23 African Charter on Human and Peoples' Rights.
17 Duties of every individual are enshrined in Articles 27–29 of the Charter.

can learn from the experiences of predecessors; rights holders can learn from the experiences of others in a similar position. Generally, primary historical sources are first-hand accounts or records of the issue being studied; secondary sources are at least one step removed – the difference between an autobiography and a biography for example.

A better understanding of the evolution of the right, for example, drawing on the travaux preparatoires or other archival material, can help. This can feed in directly to doctrinal approaches, supporting a better understanding of the intention of high contracting parties, and so aiding understanding of the meaning of the particular text. Suzanne Egan discusses a doctrinal approach later in this book.[18] Dominic McGoldrick, Sarah Joseph and Melissa Casten draw heavily on travaux preparatoires and historical context when analysing the International Covenant on Civil and Political Rights and its monitoring mechanism;[19] Manfred Nowak does likewise on the Convention Against Torture.[20] Travaux preparatoires are increasingly pulled together and published[21] as well as being made available and searchable online. The UN website, for example, now contains the early resolutions and documentation of the main organs. Archives of the UN and the League of Nations are being expanded online. This facilitates the accessibility of historical research materials, though in some instances recourse to physical archives may still be needed. Understandings gained from the official record of debates leading to the adoption of major treaties or simply institutional debates on major human rights issues can be useful. So too can national archives, which are increasingly digitalised, and can reveal insights into the specific approaches of states to situations. In many countries, legislation covers the rules on release of national archival material, some of which may be time sensitive or potentially incriminating. However, there is in human rights a more general freedom of information which, though rebuttable on grounds inter alia of national security, can be a useful tool for the researcher.

Post-colonial states may share particular challenges, especially if they share the same former colonial occupier. For example, the legal system may have been left by the colonial power and be progressively tempered by new laws introduced post-independence. Some research on that colonial system

18 Suzanne Egan, 'The doctrinal approach in international human rights scholarship', below.

19 Dominic McGoldrick, *The Human Rights Committee – Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Oxford University Press, 1994); Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights – Cases, Materials, and Commentary* (3rd edn) (Oxford: Oxford University Press, 2013).

20 Manfred Nowak, *The United Nations Convention Against Torture, A Commentary* (Oxford: Oxford University Press, 2008).

21 For example, consider Ben Saul (ed.) *The International Covenant on Economic, Social and Cultural Rights - Travaux Preparatoires* (Oxford: Oxford University Press, 2016) or William Schabas (ed.) *The Universal Declaration of Human Rights: The Travaux Préparatoires* (3 volumes) (Cambridge: Cambridge University Press, 2013).

may assist analysis of the post-colonial system. Gaps in legal protection may be linked to the dawn of independence and change in laws – for example, appeals to the former colonial power supreme court may no longer exist.[22] Understanding this can help the researcher identify potential protection gaps. Many states have undergone dramatic legal and political change at different phases of their history, all exert influences on the present. Consider perhaps the extent to which understanding apartheid allows current challenges in human rights in South Africa to be better understood.

Post-conflict societies may similarly evidence particular challenges traceable to the restoration of peace and the reestablishment of infrastructure, political stability, law and order. Understanding the historical legacy of conflict and any peace and reconciliation process deepens the understanding of the human rights situation, both the imperatives the duty bearers work under and certain expectations of the rights holders. Historical imperatives may have been a factor in the conflict, as indeed may historical political or economic situations. Countries with an historic tradition of slavery, either as slaves or slavers, may approach forced labour, debt bondage and trafficking in a manner shaped by the experiences of slavery in the nineteenth century.

From a legal perspective, an understanding of the legal history of a country may also aid understanding of legal protection, or lack thereof, in a state. States with relatively new legal systems, perhaps introduced post conflict, may have gaps in protection or have disparate, piecemeal laws, depending on how the new legal system was created and drafted. So too, perversely, states with very old established legal systems – there may be gaps as the law has evolved over time and may be applied in situations never envisaged. Applying old laws to modern communications methods such as Whatsapp, Facebook and Twitter as well as the internet is proving problematic in many states. Understanding common law systems may require knowledge of old case law and the evolution of precedent; understanding civil law systems may require understanding of older codified versions of the law to trace the current law; understanding mixed legal systems can help the researcher understand the interaction of the plurality of systems in the state.

The present is in part shaped by the past, and in turn the present will influence the future. Consideration of the implications of the timing of human rights, political or economic development can ensure a more accurate understanding of the situation.

4b Culture

Culture is obviously protected by international human rights laws.[23] However, cultural traditions of a people (or state) may also shape understanding of human

22 See, for example, Statute of Westminster, 1931, from the UK.

23 Article 15, International Covenant on Economic, Social and Cultural Rights; see also the minority provision of article 27, International Covenant on Civil and Political Rights.

rights and freedoms. UNESCO is clear that 'no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor limit their scope'.[24] Cultural traditions can also be viewed through an historical lens, or even through an understanding of religion. Much depends on the right, freedom, community and indeed culture involved. Of course, human rights based research may be aiming at challenging behaviours of rights holders, illuminating the problems with particular cultural practices. Obvious examples include work on combatting female genital mutilation. The Norwegian Ministries action plan draws on culture, history and religion when shaping education and opinion changing towards the practice.[25] Changing the culture towards violence against women and children is another area in which cultural understanding predates successful, if incremental, changes in human rights protection. Understanding cultural perceptions of roles in families, for example, can help the researcher's work develop action plans to effect change. A culture sensitive approach can also secure the researcher access to the relevant actors – for example, working with relevant organisations supporting women and child victims of violence.

Culture can be a dominant factor in many instances of discrimination. In India, Pakistan and several surrounding states, the caste system is regularly implicated in the abuse of human rights. Working on rights issues in the region requires an understanding of the system to better understand the cultural and indeed legal implications of different cases. Similarly, an appreciation of the traditionally 'macho' culture of some Latin American states can aid understanding of how certain practices and laws evolved.

Indigenous people around the world have distinct cultural traditions, many of which are under threat. Their relationship with land and their understanding of who can use land and enjoy usufructory rights reflect this. Understanding this and the historical abuse and misuse of indigenous lands can ensure a more holistic approach by duty bearers to land titling, exploitation of natural resources and such like.[26] Land rights, for example, are indelibly linked to the traditional connections the people have to the land on which they live. Similarly with forestry, mountains and rivers. These traditional connections come to the fore particularly when non-indigenous peoples are proposing land use, e.g. mining, hydroelectric dams, forestry or tourism.

24 UNESCO Universal Declaration on Cultural Diversity, 2001.

25 Norwegian Ministries, *Action Plan for Combating Female Genital Mutilation, Action Plan 2008–2011*, https://www.politi.no/vedlegg/skjema/Vedlegg_668.pdf, accessed 10 February 2017.

26 See, for example, Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge: Cambridge University Press, 2006); James Anaya, *International Human Rights and Indigenous Peoples* (New York: Aspen Publishers, 2009).

Problems can also arise with changes in housing, healthcare or education and indeed with other rights and freedoms.

In a HRBA, understanding culture also has a prominent role when approaching qualitative and ethnographic work. A researcher from a cold northern country turning up in shorts and T-shirt in a tropical country may indicate a lack of respect for the community, or may be deemed friendly and accessible – which depends on an understanding of the cultural context, including possibly the gender of the interviewer/observer and interviewee/observed. Similarly, wearing expensive clothes and carrying a lot of expensive equipment in an area with high poverty levels may be culturally inappropriate. The old adage of 'dress to impress' means very different things in different cultural settings.

Language is a relevant cultural consideration, both when undertaking interviews, and when engaging in human rights discourse. The core international human rights UN instruments are only authentic in the official UN languages; all regional instruments are only authentic in some of the languages spoken within the territory covered by the instrument. This problem is compounded by the fact that some languages do not have the vocabulary for human rights in everyday usage. This can cause diverse problems for the human rights researcher. Even a skilled interpreter may struggle to ensure that questions are correctly understood by the interviewee when the language of human rights is not commonly employed in a particular setting. In a HRBA, supporting right holders and duty bearers requires each to have an understanding of the rights and freedoms at issue. Individuals and communities need to be fully informed of their rights and their right to participate in decisions affecting them. Similarly, duty bearers need to understand what should be done to ensure adequate protection of human rights.

Understanding culture is crucial for sustainable development and therefore progressive realisation and strengthening respect for human rights. The UN sustainable development goals emphasise this. The Rio+20 conference and associated activities were sub-headed 'the future we want'[27] emphasising the need for sustained development. The final outcome document recognised that

> people are at the centre of sustainable development and, in this regard, we strive for a world that is just, equitable and inclusive, and we commit to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all.[28]

27 See General Assembly resolution A/RES/66/288, The Future We Want, endorsing the outcome document of the same name of the United Nations Conference on Sustainable Development.

28 UN Doc A/RES/68/288, annex para 6. The final outcome document and associated materials are available online, https://sustainabledevelopment.un.org/rio20, accessed 10 February 2017.

A cross-cutting cultural understanding can also assist the work of the researcher towards strengthening respect for universal human rights.[29]

4c Religion, ideology and philosophy

Culture is often linked to religion, ideologies and philosophies. Notwithstanding the oft-proclaimed universality of rights, different religions, ideologies and philosophies can offer different prisms through which to understand human rights. Some protagonists argue that human rights draw primarily on a Christian model, though obviously the UN has regularly proclaimed and accepted the universality of all rights and freedoms in core treaties. In states adhering to particular ideologies or state religions, this can shape human rights in the country. For example, Islamic feminist scholars and civil society organisations can contribute towards a rights compatible approach to equality of men and women, or civil society organisations can draw on Christian theologians to strengthen claims for sexual and reproductive rights of women in Roman Catholic countries. The religious imperatives were therefore acknowledged and respected whilst interpreted in a manner consistent with the realisation of human rights. Abdullahi Ahmed An-Na'im, for example, has spoken and written widely on reconciling international human rights standards with the writings of Islam and the implementation of shari'a laws.[30] Other authors too write on human rights and Islam, exploring potential challenges and gaps as well as articulating compatibility.[31] This is of clear benefit to both duty bearers as well as rights holders when, respectively, seeking to ensure international standards are met in a manner consonant with religious tenets or seeking to claim rights and freedoms in a secular environment.

There is growing evidence of some UN treaty bodies taking cognisance of these factors in concluding observations as well as in general comments and recommendations. Obviously, UN treaty bodies comprise independent unpaid experts and therefore even with the work of the committee of chairpersons, there is not necessarily consistency of approach across all committees on such matters. However, there is often a breadth of cultural and religious understanding brought to the table when discussing sensitive matters.

There is literature on the interaction of human rights with different ideologies, religions and so on. As noted above, many authors explore the recognition and implementation of human rights in Islamic doctrine and thence inform the recognition and protection of human rights in Islam. There is also writing

29 See, for example, Abdullah An Na'im (ed.) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992).

30 See for example, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, NY: Syracuse University Press, 1996).

31 See for example, Shahram Akbarzadeh and Benjamin MacQueen (eds) *Islam and Human Rights in Practice: Perspectives Across the Ummah* (Abingdon: Routledge, 2008).

on human rights and Buddhism, and on religions generally.[32] Religion is an important element of culture, so understanding at least the basic tenets of a particular faith is important when considering the intersection of different rights and freedoms. Religious beliefs can impact on approaches to work, family, law and many other interactions.

The Marxist approach to human rights is also well covered in the literature.[33] Different ideologies can emphasise the relative importance of different rights. It was ideological differences which led to the Universal Declaration of Human Rights being divided into two covenants – the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

There is evidence of states increasingly claiming that rights and freedoms have to be given effect in terms of specific country characteristics – China's oft reiterated arguments on human rights with Chinese characteristics, for example. Foreign Minister Hong Lei, speaking at a press conference in 2016, commented

> The Chinese government attaches great importance to promoting and protecting human rights, integrates the universality of human rights with the realities of China, blazes a trail of human rights development with Chinese characteristics and has made notable progress. There is no one-size-fits-all approach for the development of human rights. Every country has the right to advance its human rights cause in light of its national conditions, realities and people's requirements.[34]

This statement links to both philosophy and, of course, development.[35] Diverse positions of states are frequently reiterated in public. Generally, no state refutes human rights. This leads to each state striving to justify its actions (and omissions) in terms of human rights. Over the years, Asian values, Chinese characteristics, African understanding, global south, post-conflict

32 For example, Irene Bloom, J. Paul Martin and Wayne Proudfoot (eds) *Religious Diversity and Human Rights* (New York: Columbia University Press, 1996); Leroy Rouner (ed.) *Human Rights and the World's Religions* (Indiana: University of Notre Dame Press, 1988).

33 For example, L. MacFarlane, 'Marxist Theory and Human Rights' 1982 (17.4) *Government and Opposition* 414; George Brenkert 'Marx and Human Rights' 1986 (24.1) *Journal of the History of Philosophy* 55.

34 See http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1347202.shtml, accessed 7 February 2017. See also comments made by Chinese delegates within universal periodic review at the UN Human Rights Council and before the UN treaty bodies. See also internal discussion in, for example, China Society for Human Rights, *Human Rights Magazine*, 2012, Hainian Liu, 'On Building Theoretical System of Human Rights with Chinese Characteristics', http://www.chinahumanrights.org/CSHRS/Magazine/Text/t20110520_746459.htm, accessed 7 February 2017.

35 Discussed below.

transition have all been argued as evidence of particular approaches to human rights. Obviously, the conceptualisation of universal human rights is predicated on all rights and freedoms applying everywhere.

Other philosophical approaches are covered in the McConnell's chapter below on theory.

4d Legal

Modern human rights are given effect through law. Remedies are available, or should be available, through national law. Although the international regime is the same for all states, the national implementation mechanisms may differ. Whether a state has a monistic or dualistic approach to international law, for example, will shape the manner in which a country gives effect to its treaty obligations. Are international human rights standards accepted by the state directly enforceable in the courts and tribunals of the state? An understanding of the approach of a particular state to international treaties is essential when looking at how rights holders can best claim their rights.

Similarly, an understanding of the justiciability of constitutional rights may help when a programme of research aims to build capacity of rights holders in accordance with the HRBA. Constitutional rights may be directly claimed in courts. However, equally, they may not be justiciable, existing primarily as a restriction on the activities of the state (all, or certain organs). For rights holders, a lack of locus standi to bring complaints based on the constitutional enshrinement of rights can be a major issue, especially when no other national remedies are available for constitutionally enshrined international human rights standards. Using a HRBA necessitates an understanding of the opportunities for challenging the state and seeking remedies.

Civil law and common law countries approach rights and freedoms differently. In common law countries, the language of liberties and freedoms historically predominates. This frequently manifests itself in laws and judgments which focus on examining state interference in the enjoyment of freedoms, a more passive approach. Not interfering with rights and freedoms rather than actively establishing them in law and protecting them. Common law traditions also emphasise case law, with at times lengthy judicial reasoning contained in judgements. In contrast, and simplifying the situation somewhat, many civil law systems display more familiarity with the rhetoric of rights, having a legal system based on codes or similar legal encapsulation of laws and processes. In such systems, the concept of enshrining rights and freedoms then having courts give effect to them is more easily construed. Civil law systems often have less lengthy legal reasoning in decisions, in part due to the reliance on codified laws. Several countries have legal systems drawing primarily, or for specific areas of law (particularly family law), on Islamic precepts. Islamic jurisprudence includes various source of shari'a (religious law) including the Qur'an and Hadith. Of course, there are also mixed

jurisdictions which draw on common law and civil law,[36] traditional and customary systems.[37]

International and regional legal systems can and frequently do develop and use their own vocabulary, meaning that challenges can arise when trying to translate the obligations accepted by a state at the regional or international level into a legally viable, justiciable form in terms of national law. In HRBA this can mean that training of lawyers, law enforcement officers and judicial officers is necessary to foster a common understanding of how national law gives effect to international norms. The duty bearers at all levels need to be aware of the international framework within which many laws are adopted. There are also problems when the legal norms themselves are alien to the culture of a society. Land rights and indigenous peoples have been mentioned above, intellectual property rights can similarly pose problems. Forsyth and Farran discuss the challenges in importing the global intellectual property regime into Pacific Island countries, noting the transplantation of legal ideas and norms and highlighting some of the challenges this causes.[38]

As human rights are usually given effect in the legal systems of states, it is useful to understand that context further. Even an understanding of rights to remedies, the parliamentary/governance, court and administration system can inform applications of human rights in a state. The approach of the state to the rule of law can also be useful when considering how a state reacts to international and regional norms.

4e Economics and development

Considering the stage of development of a particular state or its economical position can be instructive in fostering an understanding of rights priorities and government action (or inaction). This is true not only of economic, social and cultural rights when there is a requirement incumbent on states to ensure rights and freedoms are progressively realised to the maximum of the state's available resources.[39] There are a number of challenges and tensions when addressing development issues.[40] Whilst cost is not a defence to

36 See, for example, Esin Orucu, 'What is a Mixed Legal System: Exclusion or Expansion?' 2008 (12.1) *Electronic Journal of Comparative Law*, http://www.ejcl.org, accessed 17 February 2017.

37 See also, V. Palmer, M. Mattar and A. Koppel (eds) *Mixed Legal Systems, East and West* (Abingdon: Routledge, 2015); S. Farran, E. Orucu and S. Donaln (eds) *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (Abingdon: Routledge, 2014).

38 Miranda Forsyth and Sue Farran, *Weaving Intellectual Property Policy in Small Island Developing States* (Cambridge: Intersentia, 2015).

39 Article 2(1) International Covenant on Economic, Social and Cultural Rights.

40 An interesting report which highlights (from a particular perspective) some issues is The Nordic Trust Fund of the World Bank commissioned report Human Rights and Economics: Tensions and Positive Relationships (Geneva: World Bank, 2012), http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/Report_Development_

non-realisation of accepted human rights standards, a better understanding of economics can help the researcher address cost arguments. For example, when faced with a duty bearer claiming realising a right would be too expensive and therefore not viable, an understanding of the economics of the state and its relative state of development can help the researcher explore options for securing the necessary funds, either through redistribution of budgets or through exploring technical assistance and partnership options. Using a HRBA would mean considering the development of the state and how best to strengthen the capacity of the state to protect actively the rights and freedoms it accepts. A doctrinal approach to human rights standards can help a HRBA researcher better inform the duty bearers of rights and obligations in economic, social and cultural rights. There are arguments that the range of duty bearers is wider for development orientated rights than others – multinational businesses,[41] non-state actors, donor states and such like.[42]

One of the most prominent authors focussing on economics and development is Amartya Sen.[43] His capabilities approach is an economic theory with strong resonance for human rights given it relates to social welfare. This was developed with and by others including Martha Nussbaum,[44] and found support within the UN, influencing the UN Human Development Index.[45] This annual index was created as a summary measure of achievement in key areas of human development. For examples, health is measured by life expectancy at birth; education by average years of schooling. This is a longitudinal measurement as well as a snapshot. It is drawn on in other work by the UN Development Programme (UNDP) including the millennium development goals and now the sustainable development goals.

An awareness of economics and the status of development of a state can also have an impact on understanding the feasibility of a rights holder claiming his or her rights, or even being in a position vulnerable to possible violations

Fragility_Human_Rights.pdf, accessed 17 February 2017. This in itself is controversial as the World Bank has been declared a human rights free zone by the UN Special Rapporteur on extreme poverty and human rights – see for a detailed analysis, Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UN Doc A/70/274, 4 August 2015.

41 The UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Promote, respect, remedy' Framework, annexed to the report of the Special representative of the Secretary-General on Human rights and Business, UN Doc A/HRC/17/31, endorsed by the UN Human Rights Council in Resolution A/HRC/RES/17/4 (2011).

42 Margot Salomon, Arne Tostensen and Wouter Vandenhole (eds) *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Cambridge: Intersentia, 2007).

43 Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 2001); *Commodities and Capabilities* (New York: Elsevier, 1985).

44 Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Boston: Harvard University Press, 2013).

45 See www.hdr.undp.org, accessed 7 February 2017.

of human rights.[46] This context is important when trying to evaluate vulnerability. It can also be a reality indicator when determining the possibility of an individual claiming his or her rights. Lack of money when claiming rights through an expensive court process indicates a problem, for example, and a researcher using HRBA needs to be aware of this if the (or an) objective of the research is to focus on supporting rights holders.

5 Balancing approaches

As the foregoing comments and the following chapters demonstrate, there is almost no limit to the methods which can be used for human rights research. New theories emerge from reflecting on history, reconceptualising the present and developing towards the future. The influential work on the capabilities approach to development by Amartya Sen[47] and Martha Nussbaum alluded to above is an example.[48]

Human rights is inevitably interdisciplinary and research on it can be interdisciplinary or even multidisciplinary. This offers substantial benefits for those seeking to build research. There is as much to be gained by exploring an issue from a range of different perspectives as from integrating a mixed methods approach. For example, exploring the early twenty-first-century challenges of violence against women and children, trafficking in human beings or irregular migration practices could be undertaken using any of the methods in this book, or any number of methods not discussed or only touched upon briefly. Each approach brings its own strengths and weaknesses; each contributes to an understanding of human rights, the capacities and capabilities of rights holders or duty bearers and each can be guided by the principles of human rights embodied in the core instruments. What is important for a HRBA research project is the time and care taken to reflect on the research, its purpose, its conduct and its impact.

What perhaps can be identified as particular (if not unique) to a HRBA research is the end goal of making a tangible difference, whether by influencing government or strengthening the capacities and understanding of rights holders whose rights may be compromised. From the development based human rights approach, the do no harm principle obviously prevails as does the idea of leaving no one behind.[49]

46 Paul Hunt, Manfred Nowak, and Siddiq Osmani, *Human Rights and Poverty Reduction: A Conceptual Framework* (Geneva: OHCHR, 2004), http://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf, accessed 17 February 2017.

47 Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

48 Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (New York: Cambridge University Press, 2000).

49 UN Sustainable Development Goals (www.un.org/sustainabldevelopment/sustainable-development-goals, accessed 17 February 2017), in *UN Transforming our World: the 2030 Agenda for Sustainable Development*, UN Doc A/RES/70/1.

Further reading

UN Common Understanding on Human Rights Based Approaches to Development Co-operation, http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies, accessed 17 February 2017.

4 Effectiveness of the UN Human Rights Council and its challenges

4.1 Introduction

The Human Rights Council, or the Council,[1] is the UN's human rights flagship body with a broad mandate to protect and promote human rights by addressing specifically 'situations of violations of human rights, including gross and systematic violations', as stated in the General Assembly resolution creating the Council in 2005. It is a UN Charter-based political body and is required to be guided by the principles of 'universality, impartiality, objectivity and non-selectivity'. Although the Council is required to protect individuals from abuse, its resolutions on substantive human rights issues are not binding on States. Hence, the Council is often referred to as 'a tiger without teeth'. It was established to replace the former UN Commission on Human Rights and address the 'credibility deficit' that existed in the workings of the Commission. The aim was to create an organ that would be 'better placed to meet the expectations of men and women everywhere'.

In addition to assuming mandates and responsibilities previously entrusted to the Commission, the Council, reporting directly to the General Assembly, has mandates which include making recommendations to the Assembly for further developing international law in the field of human rights, and undertaking a Universal Periodic Review (UPR) of the fulfillment by each of the UN member States' human rights obligations and commitments. The Human Rights Council is an inter-governmental body and has the ability to discuss all thematic human rights issues and situations that require its attention. Its UPR mechanism is unique since it brings the human rights record of each and every member of the UN within its radar.

The hope expressed by Kofi Annan, proposer of the idea of establishing a Human Rights Council to replace the Commission on Human Rights, was that the creation of the new Council 'would accord human rights a more

1 Both the 'Human Rights Council' and 'the Council' are used interchangeably throughout this chapter and the book as a whole for ease of reference.

authoritative position'.[2] However, the question is whether this has indeed been the case. Critics are of the view that history is repeating itself within the new Council with the election of undeserving States as members and the use of the Council for political purposes. Has the Council been able to live up to the expectations of those that devised it? What have been its strengths and weaknesses, and what reform is needed to address the weaknesses? Is the new Council a mere rebranding of the old Human Rights Commission or is there more in it than critics are prepared to accept? Accordingly, this chapter aims to examine the Council's powers, functions, composition, and election and critically assess its workings. In doing so, this chapter will focus on the Council's flagship mechanism – the Universal Periodic Review – and its effectiveness in ensuring compliance by States with their human rights obligations.

4.2 Background to the creation of the Human Rights Council

The Human Rights Council was established by the UN General Assembly on 15 March 2006 through resolution 60/1 and 60/251 to replace the former Commission on Human Rights as part of the process to reform the UN that had begun in the early 2000s when Kofi Annan was the Secretary General of the UN.[3] The Commission on Human Rights was becoming increasingly ineffective primarily due to the politicisation of its activities and the perception of double standards in the selection of States for criticism of their shortcomings in the implementation of international human rights standards. This does not imply that the Commission did not have a glorious past. Established in 1946, the Commission was instrumental in drafting the 1948 Universal Declaration of Human Rights, the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and a number of other international human rights instruments.

The Commission was not established as a body to respond to human rights violations, but to develop an international framework for the promotion and protection of human rights and did this job rather well. Although it refrained from directly responding to human rights violations in UN member States for

2 Kofi Annan, 'In larger freedom: towards development, security and human rights for all', UN Doc.A/59/2005 of 21 March 2005, para.183, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005 (accessed 7 July 2014). This report drew heavily on an earlier report of the UN Secretary General's High level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility* (2 December 2004): UN Doc. A/59/565, http://www1.umn.edu/humanrts/instree/report.pdf (accessed on 7 July 2014).

3 The idea of establishing a Human Rights Council as such in a slightly different context and to replace the Trusteeship Council had been mooted as long ago as 1975 by a high-level group on reforms in the economic and social sectors of the UN; Bertrand Ramcharan, *The UN Human Rights Council* (Routledge, 2011), 29.

the first two decades of its existence partly due to the heightened political environment during the Cold War, the Commission did come up with some innovative mechanisms, such as the special procedures, to respond to human rights violations in individual countries – not necessarily with a view to providing a remedy but at least primarily providing investigative mechanisms. Gradually, the special procedures became the backbone of the activities of the Commission. In the words of Oberleitner: 'It seems remarkable that an accumulation of such *ad hoc* mandates, carried out by a handful of part-time, unpaid academics, constituted the core of the Commission's protective and promotional activities and continues to do so in the Human Rights Council.'[4]

However, due to some inherent and structural problems, the Commission began to lose its credibility in the 1980s and 1990s. While States like Libya and Syria, with a poor human rights record, had managed to have their representatives elected to the Commission's membership, and Libya had been elected to chair the Commission's session in 2003, the US did not win the vote in ECOSOC in that year and was denied a seat in the Commission. It was against this background that Jeanne Kirkpatrick, head of the US delegation to the Commission in 2003, called these developments 'a scandal in Geneva'. Consequently, when the then Secretary General of the UN, Kofi Annan, was leading the efforts to reform the UN in the early 2000s he proposed the creation of the Human Rights Council to replace the Commission, highlighting its weaknesses. Reform of the UN, including human rights machinery, had been on his agenda when he began his tenure as Secretary General in 1997. When he was appointed for a second term of office he sped up the process by appointing an independent High Level Panel charged with reviewing new global security threats in the twenty-first century and the challenges that they presented to the UN. This was also against the backdrop of the 9/11 attacks on America by Al-Qaeda, a non-State terrorist organisation, which invited an assessment of the existing international legal and political order premised on, and governing, relations between States. With the 9/11 attacks the world had entered a new era and the UN had to respond to this new challenge.[5]

Although the report of the High Level Panel rejected the right of pre-emptive use of force claimed by the then American President George Bush and stated that the rules on the use of force enshrined in the Charter of the UN did not require revision, it did seek to establish a connection between different sources

4 Gerd Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Polity Press, 2007), 60.

5 See on the efforts made within the UN to adopt a new comprehensive convention on terrorism in the aftermath of the 9/11 attacks on America: Surya P. Subedi, 'The War on Terror and U.N. Attempts to Adopt a Comprehensive Convention on International Terrorism', in Paul Eden and Therese O'Donnell (eds), *September 11, 2001: A Turning Point in International and Domestic Law?* (Transnational Publishers, Inc. 2005) 207–25.

of threat and insecurity affecting the human rights of hundreds of millions of people around the globe, such as poverty, food insecurity, civil wars and internal conflicts, environmental degradation, and climate change. Accordingly, the High Level Panel stated that these threats and their interconnectedness had to be recognised and appropriate measures be taken to address them.[6]

The UN Secretary General proposed in his Report, *In Larger Freedom*,[7] submitted to the General Assembly in 2005 and designed to implement many of the proposals and ideas behind the report of the High Level Panel, to elevate the new Human Rights Council to become a principal organ of the UN, thereby putting the new Council on the same level as the Security Council or the Economic and Social Council. The idea was to recognize human rights as a major pillar of the UN and accord this pillar a status similar to that accorded to peace and security and development. As Boyle observes, the *In Larger Freedom* report was built on the 'theme of interconnectedness through restating the goals of the United Nations as global security, development and human rights and insisting on their interdependence.'[8] The alternative offered was to make the new Human Rights Council a subsidiary body of the General Assembly.

The proposal of Kofi Annan to establish a Human Rights Council seems to have been inspired by the idea developed and proposed in a report commissioned by the Swiss Ministry of Foreign Affairs in March 2003.[9] This report along with a further report by Professor Walter Kaelin to further develop the idea of a Human Rights Council, also commissioned by the Swiss Ministry of Foreign Affairs, was submitted to the High Level Panel. Although the report of the High Level Panel was focused on the reform of the Commission such as making its membership universal rather than creating a new body altogether to replace it, it did accept, as a 'longer term' vision, the idea of 'upgrading the Commission' to become a 'Human Rights Council' that was no longer subsidiary to the ECOSOC but a Charter body standing alongside it and the Security Council.[10] Thus, the idea of a Human Rights Council to replace

6 Report of the High Level Panel on 'Threats, Challenges and Change, A More Secure World: Our Shared Responsibility', U.N.Doc A/59/565/ (2004), http://www1.umn.edu/humanrts/instree/report.pdf (accessed 7 July 2014).

7 Report of the Secretary General, 'In larger freedom: towards development, security, and human rights for all', U.N. doc. A/59/565 of 21 March 2005.

8 Kevin Boyle, in Kevin Boyle (ed.), *New Institutions for Human Rights Protection* (Oxford University Press, 2009) 20.

9 W. Kaelin and C. Jimenez, *Reform of the UN Commission on Human Rights, Study Commissioned by the Swiss Ministry of Foreign Affairs* (Institute of Public Law, University of Bern, 2003). According to Boyle, the idea of a Human Rights Council was further developed by Professor Kaelin and submitted to the Swiss Government in 2004. Boyle (n. 8) 29.

10 The UN Secretary General's High level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility* (2 December 2004): UN Doc. A/59/565, http://www1.umn.edu/humanrts/instree/report.pdf (accessed 7 July 2014), para 291.

the Commission of Human Rights was conceived in Switzerland, accepted, in principle, by the High Level Panel, concretised by the UN Secretary General, endorsed by the World Summit Conference in 2005 and implemented by the UN General Assembly in 2006.

Kofi Annan's proposal for a new Human Rights Council had the following characteristics: (1) the Council would be a standing body; (2) it would be smaller than the former Commission on Human Rights; (3) it would be elected directly by a two-thirds majority of the General Assembly; (4) it would be based in Geneva in order to permit ease of communications and cooperation with the Office of the High Commissioner for Human Rights (OHCHR) and (5) it would act as a chamber for peer review and a forum for universal scrutiny of human rights records.[11] Annan's proposals had not supported the idea of universal membership of this new body proposed by the High Level Panel. Instead, he had proposed a body smaller than the Commission on Human Rights. He had also not taken forward the recommendation of the High Level Panel that UN members designate as heads of delegation to the Council prominent human rights experts, rather than diplomats seeking to advance narrow national interests.

At the sixtieth session of the UN General Assembly which began in September 2005 and was regarded as the 'World Summit' or the Millennium +5 Summit, a resolution adopted in the form of the 'Summit Outcome' document resolved to create a new Human Rights Council as a subsidiary body of the General Assembly.[12] However, it was a decision largely in principle and a new resolution had to be adopted by the General Assembly spelling out the details required formally to establish such a Council. The General Assembly did so through a resolution adopted in March 2006[13] and the Human Rights Council began its work in June 2006.[14] This resolution was in pursuance of the mandate given to the Assembly by the world leaders at the 2005 World Summit, which had considered the proposals for reform of the UN and resolved, *inter alia*, to strengthen the UN human rights machinery. The world leaders had acknowledged in September 2005 that the three pillars of the United Nations – development, peace and security, and human rights – were interlinked and mutually reinforcing, thereby linking the achievement of the Millennium Development Goals with the strengthening of the UN system of protection and promotion of human rights.

11 Report of the Secretary General, 'In larger freedom: towards development, security, and human rights for all', U.N. doc. A/59/565 of 21 March 2005, U.N. doc. A/59/565 of 21 March 2005, paras 181–83 and Addendum 1: 'Human Rights Council, Explanatory note by the Secretary General – the Secretary General's Proposal' of 14 April 2005.

12 '2005 World Summit Outcome', U.N. doc. A/RES/60/1, 24 October 2005, para 157.

13 A/RES/60/251, adopted 15 March 2006.

14 See Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge, 2013).

Resolution 60/251 was adopted by an overwhelming majority of States: 170 States in favour, four against (Israel, Marshall Islands, Palau, United States), and three abstentions (Belarus, Iran, Venezuela). A further group of six States were absent in the voting.[15] The main objection of the United States to the text of this resolution was that it did not go far enough to exclude some of the world's worst human rights abusers from membership in the new body. The US had preferred the requirement of a two-thirds majority of States in the General Assembly to get elected to the Human Rights Council, which would have made it harder for countries with a poor record of human rights to win seats on the new body. The US had also proposed exclusive criteria to keep gross human rights abusers off the Council. Despite some weaknesses such as those pointed out by the US delegation at the time of voting, resolution 60/251 was adopted establishing the Council. Regarding its mandate, this was outlined in the 2005 World Summit Outcome document adopted by world leaders:

> 158. The Council will be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.
>
> 159. The Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system.

Thus, after nearly 60 years since the adoption of the Universal Declaration of Human Rights, the UN established a Human Rights Council with a mechanism for universal periodic review of *all* members of the organisation.

4.3 The powers and functions of the Council

The main purpose of the Council is to address situations of human rights violations within all member States of the UN and make recommendations on them. It is expected to address situations of on-going violations within States and especially gross and systemic violations. According to General Assembly resolution 60/251,[16] the following are said to be the main functions and powers of the Council:

15 They are as follows: Central African Republic, Democratic People's Republic of Korea, Equatorial Guinea, Georgia, Kiribati, Liberia, Nauru, although Nauru and Georgia subsequently informed the General Assembly that they had intended to vote in favour, GA sixtieth session, A/60/PV.72, 15 March 2006, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/60/PV.72 (accessed 7 July 2014).

16 A/RES/60/251, adopted 15 March 2006.

1. Be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;
2. Address situations of violations of human rights, including gross and systematic violations, and make recommendations on them.
3. Serve as a forum for dialogue on thematic issues on all human rights;
4. Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;
5. Undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; and
6. Make recommendations to the General Assembly for the further development of international law in the field of human rights.

The Council was required to assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaints procedure within 1 year after the holding of its first session. It also was required to develop the modalities and necessary time allocation for the universal periodic review mechanism within 1 year after the holding of its first session. Accordingly, 1 year after starting its work the Council adopted an 'Institution-Building Package' through resolution 5/1 of 18 June 2007 in which it outlined the basic framework for its future work. Accordingly, the Council proposed to implement its mandate through the following mechanisms:

1. Universal Periodic Review system of the human rights situations in all UN Member States.
2. A new Advisory Committee to serve as the Council's 'think tank' providing it with expertise and advice on thematic human rights issues.
3. The revised Complaints Procedure mechanism allowing individuals and organisations to bring complaints about human rights violations to the attention of the Council.
4. Continued close cooperation with the UN Special Procedures established by the former Commission on Human Rights and assumed by the Council.

The Council went on to elaborate upon these mechanisms and outlined the basic features of each of them. In doing so, it provided the rationale behind these mechanisms and their legal bases.

4.4 New features of the Council

The Human Rights Council has a number of new features compared to its predecessor, the Commission on Human Rights. First, while the former Human Rights Commission was a subsidiary organ of the Economic and Social Council of the UN, the new Council was created as a subsidiary organ of the General Assembly, elevating the institutional standing of the Human Rights Council – albeit not elevating it to the status of the Security Council, which would have required amending the Charter of the UN, a much more difficult undertaking.

Second, there is a provision spelling out membership standards, that is, the qualification for membership of the Council. Perhaps for the first time in the history of international diplomatic relations, the resolution of the General Assembly establishing the Council sets out the qualifications required of States seeking to get elected to any international institution. Although the membership of the Council remains open to all UN member States, the General Assembly is required to take into account 'the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto'.[17] In addition, the General Assembly resolution stipulates that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights, be subject to review under the UPR mechanism and fully cooperate with the Council. In summing up these new elements and highlighting the practical difficulties in ensuring their compliance Oberleitner states that:

> These five new elements – members' contribution to human rights, voluntary pledges, the obligation to cooperate, the duty to uphold the highest standards of human rights and the universal periodic review procedures for members – are certainly not the qualitative criteria some States and observers wanted introduced. There are no sanctions for failing to comply with the requirements.[18]

He goes on to add that: 'The proactive elements (the General Assembly's responsibility to choose candidates carefully, their pledges, their anticipated cooperation and their responsibility to uphold the highest human rights standards) lack binding force and any non-fulfillment will remain without consequences.'[19] However, he concludes that 'the attempts to introduce criteria for States' participation in inter-governmental bodies which are no longer in line with traditional legal requirements based on sovereignty as an absolute right

17 Ibid., para 8.
18 Oberleitner, *Global Human Rights Institutions – Remedy or Ritual?* (Polity Press 2007) 64–65.
19 Ibid 65.

must be viewed as an inspiring innovation and a possible example for other institutions to follow.'[20]

Even though the General Assembly has laid out no criteria for assessing the pledges made by the candidate States, some civil society organisations have taken the task upon themselves to scrutinize such pledges. For instance, in anticipation of the Human Rights Council's elections on 12 November 2012, the Geneva-based International Service for Human Rights and Amnesty International held an event to provide the candidate States an opportunity to present their vision for membership of the Council and respond to the question as to how they would realize their pledges and commitments, if elected. Although only 8 of the 18 candidate States chose to participate in the event, it was an interesting exercise in the sense that those eight, including the US, chose to outline their agenda to the public and open themselves to questioning by civil society representatives.[21] Developments like these are somewhat unprecedented and are welcome in that they can lead to a standard practice in future, thereby increasing public accountability and transparency in electing members of the Human Rights Council.

Third, the General Assembly has introduced a universal periodic review mechanism. Under this mechanism *every* member State of the UN, whether they voted in favour of the resolution establishing the Council or not, regardless of the State's size, whether the State has a more established system of democracy or not, would be reviewed by the Council in a 4-yearly cycle. This was quite a notable development in the sense that the resolution subjects States to human rights scrutiny even if they had not consented to it in the first place. The review would be based on objective and reliable information of the fulfillment by each State of its human rights obligations and commitments, and be conducted in a manner that ensures universality of coverage and equal treatment with respect to all States.

Fourth, another novelty in this resolution was that if any member of the Council failed to uphold high human rights standards, it could be suspended by a two-thirds majority vote by Assembly members present at the meeting. As will be seen later, Syria was suspended from its membership of the Council in 2011.

Fifth, a further note-worthy development was that no permanent seat was reserved in the Council for any permanent members of the UN Security Council. Although no provision as such exists with regard to the election to other UN bodies such as the International Law Commission, the five permanent members have secured in practice their representation within that

20 Ibid 66.

21 International Service for Human Rights (ISHR) press release: 'States and NGOs welcome discussion of pledges by Human Rights Council Candidates', 27 October 2012. A copy of this press release is on file with the present author.

Commission.[22] However, by making it clear that no State, whether big or small, can be reelected to the Council's membership immediately after serving for a period of two 3-year terms, the resolution does not allow any permanent member of the Security Council or any other major power to maintain its representation in the Human Rights Council on a continuous basis. This is a notable departure from the practice of electing members of many UN and other international bodies and is arguably liable to make the Human Rights Council more democratic than the Security Council.

Sixth, the Universal Periodic Review is the first UN mechanism which covers *all States* and *all human rights issues*. It is a comprehensive and global mechanism and no State which is a member of the UN is automatically exempted from scrutiny of its human rights record. It must be borne in mind, however, that the process is voluntary and therefore States can choose to not engage with it and there would, arguably, be little in the way of sanction. Even those States which voted against the General Assembly resolution creating the Human Rights and those which abstained or were absent have participated in the review (indeed all UN member States partook in the first UPR cycle). Interestingly, none of the States that did not vote in favour of the Council, or did not vote, has sought to shield itself from public scrutiny by invoking either the principle of State sovereignty or the principle of non-interference in the internal affairs of States under Article 2(7) of the Charter of the UN.

Seventh, the role of non-State actors or civil society organisations has become more prominent within the UN human rights system and certainly more so than in other areas of international activity such as international trade or the environment. International organisations and conferences concerned with international trade and the environment such as the WTO dispute settlement body (DSB) do accept *amicus curiae* briefs from civil society organisations, but little more than this. Further, the *amicus curiae* briefs can to all intents be ignored by institutions such as the DSB in reaching their decisions. But in the UPR within the Human Rights Council, the views of civil society organisation have an important role to play and are part of a formal structure. The reports of civil society organisations on the situation of human rights in the country under review, along with national reports and the compilation of treaty body reports and recommendations prepared by the OHCHR, form the core of the documentation considered during review and their representatives can have their voices heard in the deliberations within the Human Rights Council itself.

4.5 From standard setting to implementation

In establishing the Council, emphasis was placed on implementation of the human rights standards by the Council as opposed to mainly the standard-

22 See International Law Commission membership during the quinquennium 2012–2016, http://legal.un.org/ilc/ilcmembe.htm accessed 14 October 2014.

setting work carried out by its predecessor, the Human Rights Commission. The establishment of the Council heralded a new attempt within the UN system to have a more comprehensive system of implementation of the existing human rights standards through cooperation and a constructive approach and in a non-selective, objective and universal manner designed to ensure that there was equal treatment with respect to all States. This was done against the backdrop of the alleged politicisation of human rights issues by the targeting of a select group of countries for closer scrutiny during the existence of the Human Rights Commission. The establishment of the Council was also an attempt at mainstreaming human rights in the UN system and to provide a more high-profile focal point for discussion of human rights issues of the day.

4.6 Membership of the Council

The Council consists of 47 member States responsible for strengthening the promotion and protection of human rights worldwide. These members would be individually elected by an absolute majority in the General Assembly. The membership in the new Council would be based on equitable geographic representation, and seats would be distributed as follows among regional groups: African Group, 13; Asian Group, 13; Eastern European Group, 6; Latin American and Caribbean Group, 8; and Western European and Others Group, 7. Thus, the distribution of seats in the Council makes it a body tilted towards developing countries and dominated by Asian and African States.

The members of the Council would serve for a period of 3 years and would not be eligible for immediate re-election after two consecutive terms. When electing members of the Council, Member States would take into account the candidate States' contribution to the promotion and protection of human rights and their voluntary pledges and commitments made to this effect and members elected to the Council would be expected to uphold the highest standards in the promotion and protection of human rights, fully cooperate with the Council and be reviewed under the newly introduced universal periodic review mechanism during their term of membership.

4.7 The working methods of the Council

In order to fulfil its human rights protection mandate, the Council has created the following mechanisms, and most innovative of all is its UPR mechanism. It is proposed to examine the effectiveness of these mechanisms and especially the UPR.

4.7.1 Advisory Committee

A new Advisory Committee to assist the Human Rights Council was created as part of the 'institution-building' package of 2007 contained in Resolution

5/1. The Human Rights Council Advisory Committee, often described as the 'think- tank' of the Council, is composed of 18 experts serving in their personal capacity whose function is to provide expertise to the Council in the manner and form requested by it, focusing mainly on studies and research-based advice. The Advisory Committee has no powers to adopt its own resolutions or decisions. In many respects, the Advisory Committee can be regarded as a successor to the former Sub-commission on the Promotion and Protection of Human Rights.

Although the Committee itself is a body consisting of independent experts, its mandate, which comes from the Human Rights Council, could be a political one. For instance, resolution 16/3 of March 2011 of the Council which mandated the Committee to conduct a study on the issue of traditional values of humankind was a divisive resolution led by the Russian Federation; it was adopted with 24 votes in favour, 21 against and 7 abstentions.[23] The Advisory Committee has widely been regarded as an additional bureaucratic layer in the UN system of human rights without any meaningful powers and functions and could thus be abolished altogether without having much detrimental impact on the work of the Human Rights Council itself.

4.7.2 Complaint procedures

An improved mechanism to deal with the complaints of human rights violations was included in the 'institution-building' package of 2007 contained in Resolution 5/1. The improved complaints procedures were built on the old mechanism known as the '1503 Procedures' that existed under the Council's predecessor, the Human Rights Commission.[24] The improved procedure retains the confidential nature of the 1503 procedures with a view to enhancing cooperation with the State concerned. Resolution 5/1 establishes two distinct working groups to examine the communications and to bring to the attention of the Council consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.

The first working group is on communications and the second is on the situation of human rights. The first examines the communications received, including dealing with admissibility issues, and decides on the transmission of the content of such complaints to the individual member of the UN concerned for comments. On the basis of the information and recommendations provided by the first working group, the second working group is entrusted with the

23 'Promoting Human Rights and Fundamental Freedoms through a better understanding of traditional values of Humankind', A/HRC/RES/16/3, 8 April, 2011, http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/124/92/PDF/G1112492.pdf?Open Element (accessed 20 October 2014).

24 Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 as revised by resolution 2000/3 of 19 June 2000.

task of presenting to the Council a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and making recommendations to the Council on the course of action to take, normally in the form of a draft resolution or decision with respect to the situations concerned. Since there are 10 other human rights treaty bodies entitled to entertain individual petitions, this mechanism of the Human Rights Council could be utilised in cases of violations of human rights not covered by the treaty bodies or in the case of States which have not ratified such treaties. However, since the Council itself has no real legal powers there is not much that a victim of human rights violations can expect by way of effective remedy from the Council.

4.7.3 Special procedures

The new Human Rights Council retained the special procedures mechanism with a pledge to review, rationalize and improve the existing mandates, as well as create new ones, on the basis of the principles of universality, impartiality, objectivity, non-selectivity, constructive international dialogue and cooperation, and with a view to enhancing the promotion and protection of all human rights – including civil, political, economic, social and cultural rights, and the right to development. Accordingly, the existing mandates were renewed until the date on which they were to be considered by the Council according to its programme of work. Mandate-holders were asked to continue serving, provided they had not exceeded the 6-year term limit. Through its resolution 5/2 of 18 June 2007 and as part of the 'Institution-Building Package of 2007',[25] the Human Rights Council adopted a Code of Conduct for Special Procedures Mandate-holders on 18 June 2007.

4.7.4 Commissions of inquiry

The Human Rights Council has established a number of commissions of inquiry to investigate violations of human rights and humanitarian law which have helped to document violations of human rights and bring them to the attention of the international community. The content of such reports would help the International Criminal Court or other *ad hoc* international criminal courts in their own investigation and prosecution which can lead to conviction. For instance, the Human Rights Council appointed an Independent International Commission of Inquiry on Syria which concluded in its report of 15 August 2012 that the Syrian Government and the opposition forces had

25 Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, contained in Resolution 5/2; available at http://www.ohchr.org/Documents/HRBodies/SP/CodeofConduct_EN.pdf

perpetrated war crimes and crimes against humanity in Syria. It stated that the evidence showed a State policy to commit war crimes and gross violations of international human rights. In the view of the Commission, the intensity and duration of the conflict, combined with the increased organisational capabilities of anti-Government armed groups, had met the legal threshold for a non-international armed conflict.[26]

A similar report was submitted to the Council by a commission of inquiry into the situation of human rights in North Korea. The Council acted upon the recommendations of the commission and recommended to the General Assembly to take appropriate action, including referring the matter to the International Criminal Court. In turn, the General Assembly itself adopted a resolution, recommending to the Security Council to take appropriate action, including referring the matter to the International Criminal Court. However, since two of the permanent members of the Security Council, China and Russia, did not support the resolution in the General Assembly the likelihood of the Security Council acting on the recommendations of the General Assembly remained slim.

The Human Rights Council may set up fact-finding missions or commissions of inquiry into cases of alleged violations of human rights, but it has no powers to act in any meaningful manner on the findings or recommendations of such missions or commissions. What the Human Rights Council can do is recommend that the Security Council act on such reports including referring the matter to the prosecutor of the International Criminal Court. However, since the Security Council is handicapped by the veto power of the permanent five, there is no guarantee that action will be taken subsequent to the Commission of Inquiry's findings and recommendations. For instance, the UN High Commissioner,[27] as well as a large number of States in the debate in the Human Rights Council's special session on the situation in Syria following the El-Houleh massacre on 25 May 2012, did recommend that the Security Council refer the matter to the International Criminal Court.[28] Yet, the problem was that the Human Rights Council itself failed to make such a call when it concluded its 21st Session on 28 September 2012 (this is in spite of holding four special sessions on Syria – a highly unusual event), and the Security

26 UN Doc. A/HRC/21/50. It was submitted pursuant to Council resolution A/HRC/RES/19/22 of 23 March 2012, which extended the mandate of the Commission established by resolution A/HRC/RES/S-17/1 of 22 August 2011.

27 The High Commissioner did so through a media statement of 7 June 2012 delivered in New York and a statement to the 19th Special Session of the Human Rights Council |on 1 June 2012. This was also echoed in a letter of 28 September sent to the President of the Human Rights Council by a group of prominent human rights organisations, including the International Commission of Jurists and Human Rights Watch. A copy of this letter is on file with the present author.

28 'Council continues its engagement with the situation in Syria', News release of the International Service for Human Rights, Geneva, 3 July 2012.

Council, another UN political body, was unable to act because of the veto power of the permanent five.

It is all the more striking that the Human Rights Council itself failed to make such a call in spite of the report of the Independent International Commission of Inquiry on Syria, a Commission appointed by the Council, which concluded that the Syrian Government and opposition forces had perpetrated war crimes and crimes against humanity in Syria. The Commission determined that 'the intensity and duration of the conflict, combined with the increased organisational capabilities of anti-Government armed groups, had met with the legal threshold for a non-international armed conflict.'[29]

The Commission of Inquiry concluded in its report published on 22 February 2012 that the Government in Syria had 'manifestly failed in its responsibility to protect the population; its forces have committed widespread, systematic and gross human rights violations, amounting to crimes against humanity, with apparent knowledge and consent of the highest levels of the State.'[30] These are significant conclusions that should not be overlooked and ought not only to have prompted the Human Rights Council to make clear recommendations to the Security Council, but also should have triggered the Security Council to take action. However, due to power-politics within the Security Council no noteworthy or credible action was taken against the authorities in Syria nor was the matter referred to the International Criminal Court. The Human Rights Council on its part had to limit itself to adopting resolution after resolution condemning such violations of human rights.

Both the Security Council[31] and the General Assembly[32] did adopt resolutions on Syria but they merely called upon Syria to cease all violence, protect its population and guarantee the freedom of peaceful demonstrations, etc. The British Foreign Secretary, William Hague, indicated in November 2012 that it was important to document the atrocities committed in Syria for future prosecutions, including possible action at the International Criminal Court.[33] Supported by 50 other States, Switzerland wrote to the UN Security Council

29 As quoted in the *News Bulletin of the American Society of International Law*, 24 August 2012, p.1. See also for a report on the situation of human rights in Syria, U.N.Doc. A/HRC/S-17/2/Add.1 of 23 November 2011.

30 As quoted by the UN High Commissioner for Human Rights, Navi Pillay, at the urgent debate on the human rights and humanitarian situation in Syria at the Human Rights Council on 28 February 2012: Media Statement of the OHCHR of 28 February 2012.

31 U.N. Doc. S/2012/77 of 4 February 2012.

32 On 16 February 2012, the general Assembly voted overwhelmingly in favour of a resolution that strongly condemned the continued widespread and systematic human rights violations by Syrian authorities. The resolution was cosponsored by more than 70 States and was passed with 137 votes in favour, 12 against, and 17 abstentions and the content of the resolution is similar to the resolution adopted by the Security Council on 4 February 2012.

33 Press release of the FCO, London of 28 November 2012 (on file with the present author).

in January 2013 asking it to refer the situation in Syria to the International Criminal Court.[34]

Speaking at the UN General Assembly, the UN High Commissioner for Human Rights also encouraged the Security Council to refer the situation to the International Criminal Court.[35] The then High Commissioner reiterated her belief later that, on the basis of evidence gathered from various credible sources, crimes against humanity and war crimes had been, and continued to be, committed in Syria. She went on to add that, 'those who are committing them should not believe that they will escape justice. The world does not forget or forgive crimes like these.'[36]

Addressing the 21st Session of the UN Human Rights Council on 10 September 2012, the High Commissioner reminded member States of the UN that 'when a State fails to protect its population from serious international crimes, the international community is responsible to step in by taking protective action in a collective, timely and decisive manner. The international community must assume its responsibilities and act in unison to prevent further violations.'[37] She reiterated her call for the Security Council to refer the case of Syria to the International Criminal Court and stated that those responsible for human rights violations must eventually be brought to justice. However, nothing much more concrete came out of these calls.

4.7.5 Universal Periodic Review

While the Human Rights Council is the flagship human rights organ of the UN, the Universal Periodic Review (UPR) is the Council's flagship procedure, which emphasizes dialogue and cooperation rather than naming and shaming to promote human rights. It is, relatively speaking, a new and unique inter-governmental political mechanism designed to promote the improvement of human rights at country level. It brings within its public scrutiny the situation of human rights in all members of the UN in a non-selective manner. The core

34 American Society of International Law, News Bulletin, 22 January 2013. Among the States that supported the Swiss Government's letter, two were the permanent members of the Security Council: France and the UK.

35 'States must "act now" to protect Syrian population, Pillay tells the General Assembly', News Release of the OHCHR of 13 February 2012, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11819&LangID=E (accessed 14 October 2014).

36 'Pillay warns of consequences under international law as Syria conflict escalates', New Release of the OHCHR of 27 July 2012, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12393&LangID=E accessed 14 October 2014.

37 'Bearing witness: human rights and accountability in Syria', Media Statement of the OHCHR of 10 September 2012, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12491&LangID=E (accessed 14 October 2014).

of its work is aimed at strengthening State compliance with human rights obligations. It is a universal mechanism and does not replace any of the existing mechanisms, whether treaty bodies or special procedures. Rather, the hope is that the new mechanism will strengthen the existing ones.

More importantly, it gives an unprecedented voice to civil society – making their reports on the human rights record of individual States an integral part of the process. It is a periodic process requiring States to subject themselves to global public scrutiny every 4 years. As stated by Cerna and Stewart, the Universal Periodic Review 'is premised on the idea that there is intrinsic value in a non-selective examination of the human rights record and policies of every member of the United Nations.'[38] Since the UPR mechanism was a new one, the Council identified the following instruments as the basis of the review: The Charter of the United Nations; the Universal Declaration of Human Rights; Human rights instruments to which a State is party; and Voluntary pledges and commitments made by States.[39]

In addition, the Council stated that such a review would also take into account applicable international humanitarian law. However, it did not define the term 'international humanitarian law' nor did it include a list of international humanitarian law related international legal instruments. In the absence of this, one would have to refer to the sources of international law which includes customary law, treaties, general principles of law, decisions of international courts and tribunals and writings of publicists.[40] The objectives of the UPR are as follows:

1. The improvement of the human rights situation on the ground;
2. The fulfillment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State;
3. The enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned;

38 Christina M. Cerna and David P. Stewart, 'The United States before the UN Human Rights Council' (November 2010) 14 (32) *ASIL Insight*, 2.

39 'Institution-building of the United Nations Human Rights Council', Human Rights Council Resolution 5/1, 9th meeting, 18 June 2007, para 1.

40 The statement of the sources of international law contained in Article 38 of the Statute of the International Court of Justice has been widely regarded as the most authoritative statement of the sources of international law. It reads as follows:

> '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. 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. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.'

4. The sharing of best practice among States and other stakeholders;
5. Support for cooperation in the promotion and protection of human rights;
6. The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.[41]

In other words, the objectives of the UPR mechanism are to: (i) ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules, procedures and practices with a view to ensuring fullest possible compliance with the above instruments; (ii) ensure that the State concerned monitors the implementation of the provisions of the human rights treaties ratified by it; (iii) provide an opportunity to the State concerned to demonstrate that it has a policy in place to make sure that individuals, minorities and indigenous groups, etc. are able to exercise their rights enshrined in such treaties and the above-listed international legal instruments; (iv) enable the State to involve other stakeholders, in particular civil society, to make a contribution to policy formulation, implementation and review process; (v) provide an opportunity to the State concerned to evaluate the extent to which progress has been made to implement human rights obligations and what challenges it is facing in this regard; and (vi) facilitate dialogue and information sharing between different national stakeholders within the State, and between member States of the UN, so that all parties and stakeholders develop a better understanding of the issues involved and the strategy needed to address the shortcomings existing in the implementation of human rights obligations of the State concerned.[42]

These objectives are reflected in the procedure for a UPR: every State is required to submit a report of no more than 20 pages outlining the State's efforts to protect and promote human rights. Alongside this report there are two other reports prepared and submitted by the OHCHR – one is a summary of findings and recommendations of human rights treaty-bodies and special procedures and another is a summary of the views of civil society. These three reports are considered together during the review of the State concerned by

41 Resolution 5/1 of 18 June 2007 of the Human Rights Council.

42 The UPR is a cooperative mechanism rather than an adversarial one to be found in the justice systems of the common law countries. It is designed to encourage States to (i) prepare comprehensive data regarding the internal human rights situation, thereby encouraging countries to carry out their own internal audit or stock-taking of the situation of human rights, (ii) prompt and encourage a national dialogue on the situation of human rights, the challenges remaining and the ways and means of addressing the challenges, (iii) submit the national audit report to the Human Rights Council with a view to benefitting from the debate in the Council in terms of the best practice/good practice of other countries and the constructive recommendations made towards the end of the UPR process and (iv) make the whole process transparent, inclusive and participatory.

the Council. The latter two reports serve a very useful purpose in making sure that the reports prepared by States, which often include a positive spin of the situation, are balanced and an objective view of the situation is presented to the Council, and to the participating States. Thus, one of the special features of the UPR mechanism is a strong civil society input. However, civil society representatives are not permitted to contribute to the interactive dialogue – this involves only States that have registered their wish to speak in advance.

The periodicity of the review for the first cycle was 4 years. Accordingly, the first cycle was completed in 2011 and the new cycle began in 2012. A total of 48 States were included in the review each year thereby covering all 193 Members of the UN by the end of 2011. The format of the outcome of the review is a report prepared by the troika,[43] consisting of a summary of the proceedings of the review process, conclusions and/or recommendations, and the voluntary commitments of the State concerned. Regarding the follow-up to the review, the primary responsibility stated to rest in the State concerned and the subsequent review would focus, *inter alia*, on the implementation of the preceding outcome.

4.8 An assessment of the Universal Periodic Review mechanism

4.8.1 Lack of rigour

Although the UPR subjects all member States of the UN to a 4-yearly scrutiny, most States with a dubious human rights record seem to have learned how to 'play the game' within the Human Rights Council. They and their allies seem mainly concerned with 'treading water' during the review and simply with 'getting through' the 3 hours of examination of their report, so that these matters can be shelved again for another 4 years. Many countries were willing to accept most, if not all, of the UPR recommendations. This is most likely because there is no proper mechanism to follow up the extent to which those recommendations accepted are subsequently implemented by the State under review and the State has another 4 years before it will be called upon again to report the progress made. The attitude of States within the Council during the UPR of a given country seems to be divided broadly along developed Western countries and developing countries.

For Western countries, the process is all about the scrutiny of the human rights record of the developing countries. Although Western countries also

43 'Each State review is assisted by groups of three States, known as "troikas", who serve as rapporteurs. The selection of the troikas for each State is done through a drawing of lots following elections for the Council membership in the General Assembly'. 'Basic Facts about UPR', http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx accessed 14 October 2014. The role of the troika is outlined in more detail in Resolution 5/1 of 18 June 2007 of the Human Rights Council, paras 18–24.

submit their UPR reports and participate in the deliberations within the Human Rights Council, the impression is often given that the process is not really for them, because the observance of human rights is fully guaranteed in their countries. What is more, when criticism is made relating to the human rights situation in a country (often one with a poor human rights record) it is all too easy for State representatives to claim that others 'do not understand our culture'[44] in terms of that country's primary concern being its need to develop its economy and have the requisite political stability to do so.

The UPR is a global forum for the discussion of all areas of human rights. It is devised as a means to encourage States to address shortcomings, to ratify additional human rights treaties and relevant optional protocols and to take measures to introduce and implement relevant domestic legislation. However, many States have written their national report as a progress report on the overall situation in the country, including economic and social progress and political changes, rather than confining themselves to presenting a serious analysis of the human rights challenges facing the nation and measures, legal or administrative, taken to promote and protect human rights and to fulfil their obligations under various human rights treaties. In some cases the national reports give the impression of being a propaganda document designed to impress the international community. The same is too often true of the behaviour of States at the UPR working group session at which the State is subject to review by peer States; delegates from 'friendly' countries are keen to congratulate the State under review. It is common to witness in the UPR one repressive government after another queuing up to praise each other's record of improvement of the situation of human rights and manipulate the whole process. In addition, the national reports submitted by many countries for the second cycle of the UPR that began in 2012 gave the impression of the task being a mundane or tedious piece of work to be performed as a matter of routine exercise to satisfy the UPR's formality requirement, rather than being an endeavour with intrinsic value that is part of a wider programme of review.

Although the reports submitted for the second cycle by many States did provide an update on the progress made in implementing the recommendations made in the first cycle, some reports were ritualistic and technical or mechanical, rather than being taken substantively seriously to create a document produced out of a conviction to fulfil an important legal requirement. This attitude runs the risk of diluting the significance of human rights as serious legal rights as well as the work of more serious legal bodies such as the human rights treaty bodies.

44 When the present author submitted his report on the situation of human rights in Cambodia with a set of recommendations in his capacity as the UN Special Rapporteur for human rights for the country, the standard response from the Cambodian Government was that the Special Rapporteur 'does not understand our culture'.

4.8.2 Generality and vagueness of the process

Many of the recommendations of the UPR are not necessarily about human rights but about social, economic and political issues and there are simply too many recommendations to be taken seriously. Most States appear to feel like making a recommendation whether it made sense or not or whether it was something directly related to human rights or not. This has meant that some of the recommendations have been ritualistic and redundant. While most of the recommendations made by Western countries have been about civil and political rights, those made by developing countries have focused predominantly on social, economic and cultural rights. Some States appear to take the exercise seriously and send high level delegations led by a senior member of the government, while others have entrusted the task of leading the delegation to the ambassadors based in Geneva itself. Those that treat the exercise as a legal one, or at least as having importance in legal terms, have sent Ministers of Law or Justice or the Attorney General of the country to lead the delegation, and those who regard it as a political exercise have sent ministers from the Ministry of Foreign Affairs.[45]

4.8.3 Promotion rather than protection of human rights

It is evident from the powers and functions of the Human Rights Council that its focus is on the promotion of human rights through cooperation, rather than on the protection of human rights through enforcement, and this approach is reflected in the mandate and workings of the UPR mechanism.

4.8.4 A common platform for all States

The UPR enables States to say at an international level what they may not wish to say at a bilateral level regarding the situation of human rights in a given country. What is interesting about the UPR is that the human rights records of all 193 States members of the UN, including new democracies as well as well-established democracies such as the UK, US, France and Germany, have been reviewed by the Council, allowing these countries to share their best practices with other countries, and expecting and encouraging those other countries to aspire to implement the same/similar good practices. For instance, the following was the self-reflection of the UK on its second UPR:

> The UK approached its second review in a spirit of openness and welcomed the level of scrutiny it received from member States. While we believe the

45 For instance, the UK delegation to Geneva for the second round of the UPR was led by the Minister for Justice, Lord McNally, rather than a minister from the Foreign Office. This was the case with many other delegations.

> UK has a good human rights record, we have consistently made clear that there is always room for improvement and that we are open to learning from others. In the spirit of cooperation, we took care to respond in writing those member States which raised issues during our interactive dialogue which we were not able to respond during our session.[46]

This, of course, also gives an opportunity to the countries such as Iran, North Korea and Cuba, to criticize the US adding some spice to the UPR process. Some of their criticism concerned the treatment of inmates in Abu Ghraib in Iraq and Guantanamo Bay, the drone killings, and a long legacy of rights abuses within the US itself, especially against its black and ethnic minority populations.

The UPR puts the human rights record of each and every State under an international spotlight, including the record of ratification of human rights treaties by the country concerned. No matter how powerful or big the States were either in terms of their military or political or economic might or geographic or demographic size, all are subject to review and often criticism for their shortcomings. The human rights record of all of the so-called 'Big Five', or P5, the five permanent members of the Security Council has also been under international scrutiny and subject to criticism for certain failings.[47]

As with any of the UN human rights monitoring mechanisms, there is much about the UPR that is far from perfect and a full and detailed assessment of this particular mechanism is beyond the scope of this book, suffice to say that the process does succeed in bringing together into one space the voices of the State under review, the international community at large and civil society.[48] Taken together as a whole, the documentation produced as part of the UPR

46 Foreign & Commonwealth Office, 'Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report (London, April 2013), p.13.

47 For more on the criticism levied at the US, and the treatment of the other permanent five members of the Security Council, during the UPR's first cycle see Rhona Smith, '"To See Themselves as Others See Them": The Five Permanent Members of the Security Council and the Human Rights Council's Universal Periodic Review' (2013) 35 *Human Rights Quarterly*, 1.

48 For critiques of the UPR see for example, Hilary Charlesworth and Emma Larking, *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2015); Edward McMahon, 'The Universal Periodic Review: a work in progress', *Dialogue on Globalization*, September 2012, http://library.fes.de/pdf-files/bueros/genf/09297.pdf, accessed 10 October 2014; Elvira Domínguez Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008), 7(3), *Chinese Journal of International Law*, 721; Nico Schrijver, 'The UN Human Rights Council: A New 'Society of the Committed' or Just Old Wine in New Bottles?' (2007), 20, *Leiden Journal of International Law,* 809; Purna Sen (ed.), *Universal Periodic Review: Lessons, Hopes and Expectations* (Commonwealth Secretariat 2011); Rhona Smith, '"To See Themselves as Others See Them": The Five Permanent Members of the Security Council and the Human Rights Council's Universal Periodic Review' (2013), 35, *Human Rights Quarterly*, 1.

exercise presents a snapshot of the human rights situation of the country concerned.

The UPR presents a forum for leading democracies to demonstrate their record of human rights, outline best practices and to lead the way, at least in procedural terms, by example.[49] For instance, the UK was one of the countries that took the initiative to introduce an update on the implementation of recommendations received and the commitments it made during its UPR review. Furthermore, countries such as China, Cuba and Iran which had long evaded international scrutiny of their human rights records having not ratified some of the core human rights treaties, and countries such as the US which used to assert that since its system of governance was robustly democratic it did not have to submit to the scrutiny of the international community nonetheless engaged with the UPR process and have been subjected to scrutiny by the Council and peer States. Some of the UPR recommendations made to the US asked it to ratify the many core international human rights treaties to which the US was not yet a party, to remove reservations to certain treaties to which the US is a party and to establish a moratorium on the death penalty with a view to abolition.

What was interesting was that the US delegation has been willing to acknowledge imperfections and injustices, to discuss and debate them, and to work through democratic means by which to remedy them. The US expressed its commitment to ratifying core human rights conventions such as the Convention on the Elimination of Discrimination against Women, and the International Convention on the Rights of Persons with Disabilities; combating racial discrimination and racial profiling; addressing torture and ill-treatment and exploring the possibility of setting up a national human rights institution at the federal level. This approach of the Obama administration was in contrast to the stance taken by the Republican administration during the Bush years in which the US administration had decided to boycott the UN Human Rights Council. Some Republican Party leaders were critical of the approach of the Obama administration to work with and within the Council. One of them had

49 This is not to say that no recommendations were made to the UK, US, France and Germany during the UPR. There were. For instance, some of the recommendations made to the UK during the second round of the UPR were as follows: Ratify ILO Convention 189 on domestic workers and the Convention on Migrant Workers; Ensure that migrant workers can retain their overseas worker visa as a safeguard of their rights; Withdraw reservations concerning the Optional Protocol to the Convention on the Rights of the Child on children in armed conflict; Combat prejudices and negative stereotypes leading to racial discrimination or incitement to racial hatred; Adopt legislation to further restrict the detention of terror suspects without charge and ensure that 'secret evidence' is only used in cases where there is a threat to public security; Combat racial profiling within counter-terrorism. For documents relating to the UK's second UPR, see http://www.ohchr.org/EN/HRBodies/UPR/Pages/gbsession1.aspx (accessed 16 October 2014).

the following remarks to make: 'So long as the inmates are allowed to run the asylum, the Human Rights Council will continue to stand in the way of justice, not promote it. The US should walk out of this rogues' gallery and seek to build alternative forums that will actually focus on abuses and deny membership to abusers.'[50]

4.8.5 Inclusiveness of the process

Although the UPR is primarily a political rather than legal process, the mechanism promotes inclusivity; the individual States concerned, civil society organisations, both national and international, and other States with an interest in the situation in the country under review are able to participate in the process. Although the participation of civil society is limited to the submission of a report to the OHCHR some 6–8 weeks prior to review, and presence at side events in Geneva at the time of the review, civil society representatives can be granted observer status to be present in the main auditorium and can pursue informal access to State representatives. Further, many States seem to have taken the process seriously and regarded the process more as legal rather than political. This has been demonstrated by the choice of the leader and/or composition of the delegation of various countries.[51]

4.8.6 Constructive approach

As with the UN approach to human rights in general, the approach of the UPR is cooperative and persuasive; States apply moral and political pressure on their counterparts and the UPR process places the State under review in the international spotlight regarding their record of human rights. This may be one reason why the Russian delegation to the UPR process regarded it as 'the most important instrument of international control in the field of human rights'.[52]

50 Republican political leader from Florida, Ileana Ros-Lehtinen, as quoted in Colum Lynch, 'U.S. gets earful from Human Rights Council, courtesy of Iran, North Korea and Cuba', *Turtle Bay Foreign Policy*, http://turtlebay.foreignpolicy.com, 5 November 2010 (accessed 12 November 2010).

51 See above comments in relation to UK delegation to Geneva. In addition, during the UPR 18th working group session, Afghanistan's delegation was led by Mr Mohammad Qasim Hashimzai, senior adviser to the Ministry of Justice, the New Zealand delegation was led by Ms Judith Collins, Minister for Ethnic Affairs, Ministry of Justice, and the Yemeni delegation was led by Ms Hooria Mashhoyr Ahmed, Ministry of Human Rights, to access the UPR documentation and the individual State reports providing further information regarding the delegations and the recommendations made, see http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx (accessed 16 October 2014).

52 'Report of the Working Group on the Universal Periodic Review: Russian Federation', A/HRC/11/19 of 5 October 2009, 3, http://daccess-ods.un.org/TMP/4688459.03873444.html (accessed 16 October 2014).

The process offers an opportunity not only to States which are critical of the record of human rights in a given country but also to States which are perceived to be friendly to give constructive and friendly advice to improve the situation of human rights. The process provides an opportunity to other States to encourage the State concerned, for example to: ratify the human rights treaties that remain un-ratified, withdraw reservations that may have been made in relation to particular human rights treaties; investigate reports of violations of human rights; adopt specific laws to address specific human rights issues; and take other legislative and administrative measures to fill the gaps where they exist. In other words, the UPR process encourages the member States to perfect their record of human rights.

As Boyle says, the intention from the very outset 'was to institute UPR as a cooperative mechanism to review practice of all States as regards their human rights obligations and commitments'.[53] The UPR process is not, however, helpful in addressing immediate matters of concern, but useful to encourage States to improve their record of human rights in the longer term. As stated by Cerna and Stewart, the UPR provides an opportunity for States to make a routine self-examination and to report to this international review its progress, and receive commendation (as well as criticism), which can motivate improvement in national performance.[54] There is criticism that beyond this, the significance and utility of UPR is limited. This is because, for some observers, the UPR process functions 'largely at a level of generality that frustrates incisive analysis and invites States to indulge in self-congratulatory superficiality',[55] and the process operates largely through a regional prism, reinforcing alliances rather than making objective and rational human rights related statements.[56]

4.8.7 Absence of a follow-up mechanism

The absence of a follow-up mechanism of the recommendations of the UPR is a major handicap for the system. First of all, too many recommendations are made, totaling more than 10,000 by the time eight of the nine UPR sessions had been completed during the first cycle. At the eighth session, an average of 128 recommendations had been issued per country.[57] A report indicated that

53 Kevin Boyle (ed.), *New Institutions for Human Rights Protection* (Oxford University Press, 2009) 5.

54 Christina M. Cerna and David P. Stewart, 'The United States before the UN Human Rights Council' (2010) 14 (32) *ASIL Insight*, 2.

55 Ibid.

56 Edward R. McMahon, 'Universal Periodic Review: a work in progress' (2012) *Dialogue on Globalization*, 24 http://library.fes.de/pdf-files/bueros/genf/09297.pdf (accessed 16 October 2014).

57 See the statement made by Dr Said Hammamoun, Senior Legal Advisor, UPR-Watch, at a conference in Geneva between 22 and 23 November 2010 on 'Improving Implementation and Follow-Up: Treaty-Bodies, Special Procedures, Universal Periodic

only 16 per cent of the recommendations made in the first cycle in 2008 were followed up by reviewing States during the second cycle of review in 2012.[58] This was one reason why the UK led a cross-regional statement at the 19th session of the Human Rights Council in which a commitment was made to make no more than two clear, focused and implementable recommendations to each UN member State when they are under review. The UK-led initiative was supported by 39 countries.[59]

States are free to accept or reject the UPR recommendations and do not have to account for the recommendations accepted either. It is left to the good faith of States to implement them. The recommendations may not be implemented even after accepting them and there is not much the Human Rights Council can do about it except wait for another 4 years for another round of UPR of the country concerned. For instance, nothing much could be done when North Korea rejected most, if not all, of the UPR recommendations made to it on 18 March 2010. Therefore, the verdict of some commentators on the effectiveness of the UPR is not an encouraging one. For instance, Ramcharan states that this process has 'mostly been without significance inside countries'.[60] However, it is too early to come to any definitive view only on the basis of the first and second cycles of UPR. As Rodley says, 'the system is sufficiently new that it may be premature to assume that it has achieved its mature shape'.[61]

The process is political if not politicised. The first round of the UPR demonstrated that States can survive the UPR process relatively unscathed if they are able to orchestrate friendly States to make complimentary remarks. A powerful and well-organised State can also make an attempt to dilute criticism in the civil society report compiled by the OHCHR by flooding the office with submissions from government-organised NGOs praising the national report, as seems to have happened with China's UPR.[62] Without a strong procedure to deal with countries which continue to commit gross violations of human rights, the UPR process runs the risk of being a meaningless paper exercise. Therefore, it remains to be seen whether the UPR process, touted as

Review', organised by the Open Society Justice Initiative, the Brookings Institution's Foreign Policy programme, and UPR-Watch. A copy of the report of proceedings of the conference is on file with the present author.

58 *Human Rights Monitor Quarterly*: Issue 3/212, p.8.

59 Foreign & Commonwealth Office, 'Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report (London, April 2013), 14.

60 Bertrand Ramcharan, *The UN Human Rights Council* (Routledge, 2011) 123.

61 Sir Nigel Rodley, 'The United Nations Human Rights Council, Its Special Procedures, and Its Relationship with the Treaty Bodies: Complementarities or Competition?' in Kevin Boyle (ed.), *New Institutions for Human Rights Protection* (Oxford University Press, 2009) 49–73 at 55.

62 Sonya Sceats with Shaun Breslin, 'China and the International Human Rights System' (Chatham House October, 2012) 14–15. http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/r1012_sceatsbreslin.pdf (accessed 14 October 2014).

an innovative feature of the new Human Rights Council, can produce an objective, informed, and productive assessment of a given State's human rights situation.

4.8.8 Enhancing the universality of human rights

Although a plethora of UN documents declare that the core human rights are universal and almost all States sign up to such declarations, the practice of some States is not conducive to lending universal character to these rights. For instance, Article 26 of the Basic Law of Governance of Saudi Arabia states that 'The State shall protect human rights in accordance with the Islamic Shari'a.'[63] Therefore, the enjoyment of human rights by the citizens of Saudi Arabia depends on Islamic Shari'a. However, when submitting its national report to the Human Rights Council for UPR, Saudi Arabia stated that under the Basic Law 'governmental power is assigned to the judicial, executive and regulatory/legislative authorities. . . . The judiciary shall be an independent authority and, in their administration of justice, judges shall be subject to no authority than that of the Islamic Shari'a in the Kingdom'.[64] This implies that Islamic Shari'a too admits the notion of the separation of powers which constitute the bedrock of democracy.[65]

However, when it comes to actual rights, Saudi Arabia has no legal provision for certain rights, such as freedom of religion, and this country was one of those which did not support the adoption of the Universal Declaration of Human Rights in 1948. Since the report of the Working Group on the Universal Periodic Review[66] did not go beyond recording and summarising the recommendations made by individual States, it was not clear what impact the UPR made on the situation of human rights in the Kingdom and what changes in law and policy the country made in response to the UPR recommendations. The report of the Working Group concludes by stating that the recommendations 'will be examined by Saudi Arabia which will provide responses in due course'.[67] It is therefore left to the State concerned to accept or reject the recommendations made. It is notable that Saudi Arabia has not yet ratified some of the core human rights treaties such as the 1966 International Covenant on Civil and Political Rights and that the UPR did little to change that position.

63 National Report of Saudi Arabia submitted to the Human Rights Council as part of the UPR: A/HRC/WG.6/4/SAU/1 of 4 December 2008, 3.

64 Ibid.

65 It should be noted that Saudi Arabia is described as an autocracy by the Polity IV Project: Political Regime Characteristics and Transitions, 1800–2013, http://www.systemicpeace.org/polity/polity4.htm (accessed 16 October 2014).

66 A/HRC/11/23 of 4 March 2009, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/117/53/PDF/G0911753.pdf?OpenElement (accessed 8 July 2014).

67 Ibid.16.

Unlike the Saudi Arabian position, China on its part stated in its national report for UPR that it 'respects the principle of the universality of human rights and considers that all countries have an obligation to adopt measures continuously to promote and protect human rights in accordance with the purposes and principles of the Charter of the United Nations and the relevant provisions of international human rights instruments, and in the light of their national realities'.[68] Thus, the only qualifying notion in China's support for the universality of human rights was that when implementing human rights 'national realities' had to be taken into account. China did not explicitly invoke Communism or socialism to evade its human rights obligations.

Although China did not spell out what these 'national realities' were, the Chinese report went on to state that, 'given differences in political systems, levels of development and historical and cultural backgrounds, it is natural for countries to have different views on the question of human rights. In particular it is worthy of note that China stated that democracy and the rule of law were being improved in its country, rather than rejecting these as 'Western concepts'. Indeed, China stated that during the three decades of reform and the opening up of the country, it had enacted nearly 250 laws relating to the protection of human rights. The thrust of the Chinese message was not an arrogant one, as is often made out in the populist media, but a positive one designed to plead to the international community to be patient with the process of reform underway. By saying that China was a developing country, the Chinese report was seeking to justify slow progress in improving human rights. The report was candid enough in admitting the shortcomings in the Chinese system and outlined the difficulties and challenges facing the country.

The plea made by China was that it was a developing country and the economic growth that the country had managed to make had taken millions of people out of poverty and the international community should recognize this. Further, the claim was that even if the country had not advanced sufficiently in relation to human rights, it was the first country in the world to meet the poverty reduction target set by the UN Millennium Development Goals.[69] China had signed the 1966 International Covenant on Civil and Political Rights in 1998 and said that 'the relevant departments are carrying out necessary legislative, judiciary and administrative reforms to create the conditions for the early ratification of the ICCPR'.[70]

As with Saudi Arabia, since China had not ratified certain core human rights treaties such as the ICCPR, it could not be questioned regarding breaches of

68 National Report of China to the Human Rights Council as part of the UPR: A/HRC/WG.6/4/CHN/1 of 10 November 2008, 5. http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CN/A_HRC_WG6_4_CHN_1_E.pdf (accessed on 8 July 2014).

69 Ibid., pp. 8–9.

70 Ibid. p. 7.

that treaty's civil and political rights. Having said this, unlike the treaty bodies, whose remit is limited to monitoring implementation of the relevant treaty, the UPR mechanism enables the Human Rights Council to discuss the whole range of human rights issues in the country concerned. Accordingly, other States were able to urge China to ratify certain core human rights treaties such as the ICCPR and to investigate reports of human rights violations[71] even though China said that some of the recommendations of the UPR did not enjoy its support. Explaining the reasons for not accepting some of the recommendations the Chinese delegation stated that it 'was due to complicated factors'.[72] However, China affirmed its readiness to study them further and a key important factor here is China's apparent commitment to the UPR process.

Unlike the Chinese national report, the national report of the Russian Federation was confident and unapologetic.[73] This confidence was based mainly on the fact that Russia had ratified most of the core human rights treaties including the ICCPR, stating that they constituted an integral part of the Russian legal system, applied directly and had supremacy over its national legislation.[74] Further, the report also made it clear that Russia was a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the rulings by the European Court of Human Rights were binding on the Russian Federation, implying that Russia was as good a democracy as any other State. Although China and Russia have often stood in the same camp on many matters of international affairs such as on Syria and opposed the 'Western agenda', regarding human rights, democracy and the rule of law, Russia is much closer to the West than China is. In fact, Russia implied in its remarks made during the UPR that it wanted to be closer and part of the European (meaning Western) and world's legal processes.[75] Therefore, Russia accepted all of the recommendations except one made to it during its UPR at the Human Rights Council.

71 'Report of the Working Group on the Universal Periodic Review: China.' A/HRC/11/25 of 5 October 2009, 27 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/188/55/PDF/G1318855.pdf?OpenElement (accessed 16 October 2014).

72 'Report of the Human Rights Council on its eleventh session', A/HRC/1137 of 16 October 2009, 142.

73 'National Report of the Russian federation to the Human Rights Council as part of the UPR: A/HRC/WG.6/4/RUS/1 of 10 November 2008, http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/RU/A_HRC_WG6_4_RUS_1_E.PDF (accessed 16 October 2014).

74 Report of the Working Group on the Universal Periodic Review: Russian Federation', A/HRC/11/19 of 5 October 2009, 3, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/162/59/PDF/G0916259.pdf?OpenElement (accessed 16 October 2014).

75 'Report of the Working Group on the Universal Periodic Review: Russian Federation', A/HRC/11/19 of 5 October 2009, 4, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/162/59/PDF/G0916259.pdf?OpenElement accessed 16 October 2014.

To conclude, although the UPR is not a perfect mechanism, what has been witnessed thus far is encouraging in the sense that it involves a vibrant and diverse participation of States, national human rights institutions, UN agencies and civil society organisations. For instance, when the UPR of the US took place on 5 November 2010, the State delegation consisted of more than 40 persons (including three secretaries of State – for International organisations; Democracy, Human Rights and Labour; and the Legal Adviser for the State Department); more than 70 NGO representatives from the US came to Geneva to attend the review; and 15 NGO side events on the human rights situation in the US were held.

The review in the Human Rights Council itself attracted a high level of State interest with more than 80 States registering to speak. It was reported that diplomats from several countries, especially those critical of the US, had even spent the night in front of the UN building in Geneva to get on the list of speakers.[76] All in all, the UPR mechanism has acted as a comprehensive audit of the situation of human rights in all 193 members of the UN and has demonstrated that no country has a perfect record of human rights. Each and every State has more to do to live up to the expectations of the international community and the international human rights treaties.

4.9 An assessment of the Human Rights Council

4.9.1 Standard setting

Along with its agenda for implementation, the Human Rights Council has also taken a number of standard-setting measures. For instance, the Council has approved a number of new human rights treaties and guidance documents including the International Convention for the Protection of All Persons from Enforced Disappearances; the Convention on the Rights of Persons with Disabilities; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights establishing a complaints mechanism; Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework'; and the draft Declaration on the Rights of Indigenous Peoples. The latter was approved by the General Assembly despite the opposition from Australia, Canada, and the US. Further, in June 2014 the Council adopted a resolution entitled 'Elaboration of an international legally binding instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights' which provided for the establishment of an open-ended intergovernmental working group that is mandated with

76 'UPR of the United States: no new commitments', News release of the International Service for Human Rights (ISHR), Geneva, 5 November 2010, http://archived2013.ishr.ch/archive-upr/942-upr-of-the-united-states-no-new-commitments (accessed 16 October 2014).

elaborating an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[77]

The Council has also established a subsidiary expert mechanism to provide the Council with thematic expertise on the rights of indigenous peoples and two other forums – one is the Forum on Minority Issues and another one is the Social Forum – to provide a platform for promoting dialogue and co-operation on the respective issues. The breadth of the new instruments undermines the allegation that the UN in general and the Human Rights Council in particular promotes a Western agenda and has a hollow ring to it.

4.9.2 Asserting and expanding its activities

The Council has created a number of country-specific and geographic Special Rapporteurs in Iran,[78] Syria, Belarus, Eritrea, Central African Republic, and the Cote d'Ivoire, reversing the decline in the number of such rapporteurs during the last years of its predecessor – the Commission on Human Rights. There was considerable opposition to the creation of the country mandate on Belarus from countries such as Russia, China and Cuba. However, the Council succeeded in creating such a mandate. As stated by Sceats and Breslin, the Council has flexed its muscle in its approach during its later sessions.[79] Both Libya[80] and Syria have been suspended from the Council for violating the rights of their citizens, an unprecedented development in both international relations and in the practice of the UN.[81]

The Council has held special sessions to address the crisis in Libya and Syria, drawing the world's attention to the atrocities committed by the regime against its own people. The Council has itself also highlighted the urgent situation in the Cote D'Ivoire, Central African Republic, Guinea and Kyrgyzstan. It has also decided to appoint various commissions of inquiry to examine the situation of human rights in places such as Darfur, Eritrea, North Korea, Libya, Sri Lanka, Syria[82] and the Occupied Territories of Palestine.

77 A/HRC/26/L.22 of 26 June 2014.

78 Resolution 16/25 of 21 March 2011 on the situation of human rights in the Islamic Republic of Iran, A/HRC/16/L.33.

79 Sonya Sceats with Shaun Breslin, *China and the International Human Rights System* (Chatham House, 2012) 14–15.

80 The decision to ask the General Assembly to suspend Libya's membership of the Human Rights Council was taken by the Council at a special session on Libya on 25 February 2011.

81 Adopting a consensus resolution on 1 March 2011, the General Assembly acted on the 25 February 2011 recommendation by the Human Rights Council, which had urged the suspension of Libya in its own resolution.

82 For instance, the 17th Special Session of the Human Rights Council held on 22–23 August 2011 passed a resolution setting up an independent commission of inquiry into the situation of human rights in Syria, A/HRC/RES/S-17/1, http://daccess-dds-

The resolution of the Council adopted on 26 March 2014 on Sri Lanka asked the UN High Commissioner for Human Rights to undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in the country during the ethnic conflict.[83] It should also be noted here that the report of some of such commissions have been marred by political controversy during the appointment of members of the commissions, in the submission of their reports, or in their consideration by the Human Rights Council thus exposing the weaknesses caused by the politicisation that is inherent in the Council being a political body. A case in point is the Goldstone report on the Gaza conflict of 2008–2009. Three of the members of the UN fact finding mission wrote a public letter distancing themselves from the remarks of its chairman, Justice Goldstone, in a newspaper article.[84]

In another case relating to the report of the Panel of Inquiry on the flotilla incident of 31 May 2011, a number of UN Special Rapporteurs issued a statement criticising the conclusion of the report (known as the Palmer Report) that Israel's naval blockade of the Gaza Strip was legal. Commenting on the report, Professor Richard Falk, the UN Special Rapporteur for Human Rights in the Occupied Palestinian Territories had the following remarks to make: 'The Palmer Report was aimed at political reconciliation between Israel and Turkey. It is unfortunate that in the report politics should trump the law.'[85]

4.9.3 Politicisation of the Council

The Council is not immune to politicisation of its work and it thereby invites inevitable criticism of bias, ineffectiveness, and pursuing a selective agenda. As Ramcharan asks: 'Can one expect the Human Rights Council to be other than what it is, namely a body in which government members are represented by

ny.un.org/doc/UNDOC/GEN/G11/169/88/PDF/G1116988.pdf?OpenElement (accessed 9 July 2014). The commission was an upgrade on an earlier fact-finding mission of the OHCHR to investigate all alleged violations of human rights in the country in accordance with a resolution of the Council adopted at its 16th Special Session. See pp. 112–115 in this chapter for comment on the outcome of the Syrian Commission of Inquiry and comment made by the then Commissioner for Human Rights, Navi Pillay.

83 'Promoting reconciliation, accountability and human rights in Sri Lanka', 26 March 2014, A/HRC/25/L.1/Rev.1

84 See on the controversy surrounding the Goldstone report on the Gaza conflict of 2008–2009, 'Goldstone report: Statement issued by members of the UN fact-finding mission to Gaza, May–September 2009, *Guardian*, London, 14 April 2011, http://www.theguardian.com/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza (accessed 9 July 2014).

85 'How can Israel's blockade of Gaza be legal? – UN independent experts on the "Palmer Report"', News Release of the OHCHR, Geneva, 13 September 2011, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=11363 (accessed 9 July 2014).

their ambassadors in Geneva whose mission is to protect the interests of their respective governments?'[86] Indeed, not. What is more, many such ambassadors, especially those from countries which are not democracies, represent the interests of the dictators and autocratic rulers of their countries rather than of the people. For instance, the ambassadors of Egypt during the time of Hosni Mubarak or Libya during Colonel Gaddafi's rule represented the interests of these ruling dictators as opposed to the concerns of the people.

In addition, the majority of the State members elected to the Council are from the Asian and African regional groups and many of them belong to cross regional blocs such as the Organisation of the Islamic Co-operation (OIC) and the Non-Aligned Movement (NAM). Although the NAM has lost much of its utility and relevance after the end of the Cold War and the OIC is not necessarily a homogeneous bloc, they do often work to oppose or block initiatives within the Council designed to hold States to account for violations of human rights. The resolution on Sri Lanka in 2009 is indicative here – the Council ended up effectively congratulating the country for ending the internal conflict on the strength of the support it was able to garner mainly from the Asian and African States, rather than holding the government to account for gross human rights violations during the country's internal armed conflict with the Tamils. As Boyle says, such political groupings of States played their role in the work of the former Commission on Human Rights too, 'but in the somewhat reduced size of the Council their dominance is more pronounced'.[87]

The elections to the Council in many cases are becoming a mere formality in which the candidates selected by the party leaders get elected. Regional groups of States have started to run 'closed lists' where the number of candidate States matches the number of seats available for the region concerned, therefore guaranteeing membership of the candidates proposed. There were occasions, especially during the formative years of the Council, when States with a poor record of human rights were rightly defeated in the elections to the Council. Examples were Venezuela (2006), Iran (2006), Belarus (2007), Sri Lanka (2008) and Azerbaijan (2009). In the face of mounting concern, Iran withdrew its candidacy in 2010 and Sudan in 2012.

In the elections to the Council in November 2012, except for Western Europe and Others (in which there were five candidates for three seats) all other regions ran a closed list, not giving any choice for the General Assembly. This practice undermines the credibility of the process, opens the Council's door to 'abuser' States, and frustrates the spirit and the letter of the UN resolution that established the Council. Further, the State members of regional organisations, such as the ASEAN group, seem to support in bloc the candidature of a member within the organisation for election to the Council regardless of its record of

86 Bertrand Ramcharan, *The UN Human Rights Council* (Routledge, 2011), 10.

87 Kevin Boyle in Kevin Boyle (ed.), *New Institutions for Human Rights Protection* (Oxford University Press, 2009) 4.

human rights. An example was the support pledged in October 2012 by other ASEAN members for Vietnam's candidature for election to the Human Rights Council in 2013.[88]

Eventually, in the elections to the Human Rights Council in November 2013 the following Asian countries, with a poor record of human rights of their own, were elected: China, Maldives, Saudi Arabia, and Vietnam. This was the reason that various international human rights organisations expressed their concern at their election as well as the election of Algeria, Cuba and Russia.[89] Although the UN General Assembly resolution establishing the Human Rights Council is replete with references to objectivity, transparency, non-selectivity, and genuine dialogue which is designed to convey the message that the work of the Council should be free of politicisation, the Human Rights Council has become a forum for governments and (inevitably) politics is creeping into the work of the Council just as it did during the time of the Commission on Human Rights.

4.10 The 2011 review of the Council

The resolution of the General Assembly establishing the Human Rights Council (60/251 of 2006) provides in operative paragraph 1 that the Assembly will review the status of the Council within 5 years of the establishment of the same. In addition, in operative paragraph 16 of the resolution, the Assembly also decided that the Human Rights Council will itself review its work and functioning 5 years after its establishment and report to the Assembly. Accordingly, reviews of the work and functioning of the Human Rights Council took place in 2011, culminating in the adoption of resolution 16/21 of 23 March 2011 to the General Assembly in which the Council outlined proposals for reform of some of the human rights protection and promotion mechanisms, which were in turn endorsed by the General Assembly through a resolution of 17 June 2011. Adopting the 'Outcome of the review of the work and functioning of the United Nations Human Rights Council' submitted to the General Assembly, the Human Rights Council had stated that this document would be a supplement to the Institution-Building Package contained in Council resolutions 5/1 and 5/2 of 18 June 2007.[90]

88 'ASEAN back Vietnam's candidacy for Human Rights Council', *Voice of Vietnam*, 30 September 2012, as reported in the *Newsletter of the Asian Society of International Law*, 2012/10 of 17 October 2012 (a copy of this *Newsletter* is on file with the present author).

89 BBC News: Europe, 'Concerns over new UN Human Rights Council members', 13 November 2013. http://www.bbc.co.uk/news/world-24922058?print=true (accessed on 19 November 2013).

90 'Review of the work and functioning of the Human Rights Council', A/HRC/16/L.39, 23 March 2011, http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G11/122/69/PDF/G1112269.pdf?OpenElement (accessed 20 October 2014).

The outcome document did not propose any substantial or significant changes as the majority of developing countries led by Egypt on behalf of the Non-Aligned Movement, China, Pakistan, Philippines and India were not in favour of making major changes to the institutional framework, composition, powers and functions of the Council. The view held by these countries was that the process that they were engaged in was not a reform of the Council but only a review. Thus, the review process was focused on fine-tuning the work and functioning of the Human Rights Council. The Council stated in the outcome document that the second and subsequent cycles of the review should focus on, *inter alia*, the implementation of the accepted recommendations and the developments of the human rights situation in the State under review.

By a recorded vote of 154 in favour, four against (Canada, Israel, Palau, and United States), and no abstentions, the UN General Assembly adopted a resolution endorsing the proposal of the Human Rights Council. Under the terms of the text adopted on 17 June 2011, the Assembly decided to maintain the status of the Council as a subsidiary body of the Assembly.[91] The resolution also stated that the Assembly would consider again the question of whether to maintain the Council's status at an appropriate moment and at a time no sooner than 10 years and no later than 15 years.

Outlining the reasons why the United States had voted against the resolution, the US delegate stated that the review process did not carry out a comprehensive review of the Council to improve its ability to meet its core mission and the process had failed to yield even 'minimally positive' results. According to the US delegate, the Council diminished itself when the worst human rights violators had a seat at its table. The proposals made by the US during the review process included a provision calling on regional groups to run competitive slates and for an interactive dialogue between candidates for Council membership and civil society groups, but none of them had found expression in the final resolution.

A group of prominent human rights organisations such as Amnesty International and Human Rights Watch criticised the outcome document of the Human Rights Council stating that it was disappointing and urged members of the General Assembly to:

1. support the establishment of a public-pledge review mechanism to improve Council members' accountability to their pledges;
2. endorse an annual 'cooperation audit' as a central element of the procedure, where the general Assembly reviews and assesses the state of cooperation with the Council and the special procedures of candidate countries and members of the Council;

91 See Draft Resolution presented by the President of the Human Rights Council 'Review of the work and functioning of the Human Rights Council' http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G11/122/69/PDF/G1112269.pdf?OpenElement (accessed 9 July 2014).

3. define and elaborate the meaning of cooperation, and to set guidelines on how to measure if members are abiding by pledges and commitments; and
4. support measures to guarantee that elections are genuinely competitive and contested, such as prohibiting 'clean slates' with only as many candidates as vacancies.[92]

However, the General Assembly did not act on these suggestions and endorsed the review resolution as submitted by the Council. After the adoption of the Outcome Document on the review of the Human Rights Council by the General Assembly the same international human rights organisations wrote a letter stating that the resolution adopted by the Assembly contained only 'a few technical and bureaucratic changes' and the result overall was 'extremely inadequate and sorely lacking in substance'.[93] Expressing his disappointment at the missed opportunity to reform the Council, Peter Splinter of Amnesty International, compared the review process to an 'elephant giving birth to a cockroach'.[94]

4.11 Conclusions

The Human Rights Council is basically a talking shop on human rights. It does not have much real world impact on human rights. That is what it was designed for and that is the role it has played thus far. Diplomats in Geneva expend a great deal of time and resources conceiving, drafting and negotiating texts, and human rights NGOs expend significant levels of energy and resources lobbying for or against the adoption of such resolutions that have little impact on the ground where human rights violations take place. A large number of resolutions, many of which are repetitive and bloated, are passed in Geneva at every session of the Council with marginal impact outside of the Geneva-based diplomatic-cum-human rights community. One of the reasons for this is that the Council is a body without powers to impose sanctions or to have its decisions implemented. According to Schaefer, the Council has over the past 10 years 'focused increasingly on human rights issues not directly related to gross and systematic violations of human rights. Instead, it has spent the majority of its time, resources, and attention on a growing number of "thematic" human rights topics of political, esoteric or specialized character.'[95] At the same time, it is a more democratic body than the Security Council since no State has a permanent seat or a veto power in the Human Rights Council. However, since it is a

92 A letter of 31 March 2011. A copy of this is on file with the present author.
93 A letter of 21 June 2011. A copy of this is on file with the present author.
94 *The Economist* (London), 5 March 2011, 65.
95 Brett D. Schaefer, 'The Human Rights Council's Failings should Lead to Reassessment', *Bulletin of the Universal Rights Group*, Geneva, August 2015.

political body, the expectations of it and its performance should be measured accordingly. The present author has himself observed the proceedings of the Human Rights Council for several years, during which States would argue for or against a particular resolution for hours not necessarily on the basis of their commitment to human rights but on the basis of their political affiliations and alliances.

The test of the effectiveness of the Council depends upon how real the debate is within the Council. There is a tendency on the part of States with a poor human rights record of their own to crowd the agenda of the Council with broad, vague and general thematic issues rather than on more concrete country-specific situations. According to a study, since the Council's creation 69 per cent of the resolutions it has adopted were on such thematic issues, while only 24 per cent dealt with on-the-ground situations in particular countries.[96]

Having said that it must be noted that such talking shops have their own merits: they maintain dialogue, keep States engaged in the process, promote some degree of cooperation, and bring about some positive changes, however marginal or nominal they may be. For instance, Saudi Arabia is not a party to many international human rights treaties. The treaty bodies created under these treaties cannot require Saudi Arabia to account for its activities to promote human rights in the country. The country has no Special Rapporteur. Thus, in the absence of the UPR there was no venue for the international community to enquire into the progress the country was making to promote and protect human rights. With the introduction of the UPR mechanism, Saudi Arabia has to submit a 4-yearly periodic report on the progress made on the situation of a whole range of human rights issues in the country, including equality for women and other areas covered by specific human rights treaties to which the country is not a party.

The Saudi government promised to implement a large number of recommendations made during both its UPR first round in 2009 and its second in 2014, including the abolition of the notoriously strict guardian system, under which a woman must have a male relative's permission to marry or travel abroad. Even if the Saudi Government was not initially serious in implementing these recommendations it made the promise and the international community, the human rights organisations and the individuals in the country, including women, can ask the government to abide by and implement its promise. According to a report, due partly to this promise made by the Saudi Government, some progress has been made to improve the situation of women and towards granting them equal rights, including the appointment of 30 women to the 150-member Shura Council, an advisory body to the King.[97]

96 Subhas Gujadhur and Toby Lamarque, 'UN Human Rights Council: The Case for Hybrid Resolutions', *URG Insights,* Universal Rights Group, Geneva, 10 November 2014.

97 Carla Power, 'No More Broken Promises' *Time*, 7 April 2014, 33.

Ultimately, since the Human Rights Council is a political body similar to its predecessor, the Council has faced many of the challenges that its predecessor did and has thus been subjected to similar criticisms, including politicisation of human rights. For instance, Freedman states that the Council 'has failed universally to protect and promote human rights, particularly through its ignoring, or being prevented from addressing, many grave human rights situations'.[98] Politics has undermined and discredited some of the work of the Council but it is difficult not to have politicisation in a political body. That is one reason why some commentators have stated that the replacement of the Commission on Human Rights by the Human Rights Council 'was more "make-over" than re-make'.[99]

The desire of the international human rights community was to see a Human Rights Council with fewer members, with stricter criteria for election for States with a poor record of human rights, and with a tougher electoral procedure for electing members to the Council.[100] At the end of the process of establishing the new Council none of these was achieved. One cannot expect that which its structural arrangement is not designed to deliver. Having said that, the UPR itself, the main mechanism of the Council, seems to have had a measure of impact on the situation of human rights in different countries. For instance, a UN report states that one positive side-effect of the introduction of the UPR has been 'increased ratification and, increasingly, more timely reporting by States under the international human rights treaties'.[101] The report goes on to elaborate that in 2000, there were a total of 927 ratifications of the six core international human rights treaties. By August 2011, that is, around the conclusion of the first round of the UPR, this figure had risen to 1,206 ratifications of the nine core international human rights treaties.

The existence of the Human Rights Council and its UPR mechanism become more crucial in the case of States which have not ratified any or many of the core human rights treaties. In that case, they cannot be subjected to scrutiny by the treaty bodies. There is not much the UN High Commissioner for Human Rights can do if the State in question does not accept the field presence of the OHCHR or does not cooperate at all with the office. Nor can the mechanism of special procedures do much if the country concerned has no country-specific mandate holder appointed for the country or even if a country-specific mandate

98 See Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge, 2013) 298.

99 Lord Hannay, '2011 Review of the UN Human Rights Council: Recommendations submitted to the UK Foreign & Commonwealth Office by the United Nations Association of the UK', December 2010, 4.

100 Ibid.; what Lord Hannay has summed up in his report reflects the views of the international human rights community.

101 Report of the Secretary General, 'Measures to improve further the effectiveness, harmonization and reform of the treaty body system', U.N. Doc. A/66/344 of 7 September 2011, 5.

holder is appointed but if the country does not accept, recognize or cooperate with the mandate holder or does not extend any invitations or visa to the thematic mandate holders to visit the country.

The significance of the work of the Human Rights Council and the UPR mechanism becomes more crucial if a State decides to denounce a human rights treaty or its Optional Protocol, for example, as per the actions of Guyana, Jamaica, and Trinidad and Tobago in relation to the Optional Protocol to the ICCPR. As Venezuela did with the American Convention on Human Rights[102] in September 2012, States may denounce a human rights treaty altogether when the treaty body created under it expresses its deep concern regarding gross or systematic or egregious violations of human rights in the country. If a State decided to denounce the Charter of the UN and leave the world organisation it is a different matter, but so long as a State remains a member of the UN it should not escape the scrutiny of the Human Rights Council and will have to subject itself to the UPR mechanism.

It is conceivable that States may refuse to participate in the UPR, which is a voluntary process, and to cooperate with the Human Rights Council. For instance, Israel decided in March 2012 to cut working relations with the Council as it felt it had been singled out for targeted criticism through a series of politically motivated resolutions of the Council. The trigger for this disengagement was the decision of the Council to investigate Jewish settlements in the West Bank.[103] In January 2013, Israel decided to boycott a review of its human rights record by the Council, making it the first country to do so. However, in the first round of the UPR even countries like North Korea participated in the process despite rejecting most, if not all, of the UPR recommendations. Thus, the UPR on the whole has been regarded as a process that is universally accepted, and whilst there was some concern as to whether Israel would engage with the UPR during the second cycle in October 2013, given its boycott of the Human Rights Council, ultimately it did, albeit with strong reservations.[104]

102 See Diego German Mejia-Lemos, 'Venezuela's Denunciation of the American Convention on Human Rights' (2013) Vol.17 (1) *ASIL Insights*, and 'Pillay urges Venezuela to reconsider withdrawal from American Convention on Human Rights', News Release of the OHCHR, Geneva, 11 September 2012.

103 'Israel ends contact with the UN Human Rights Council', BBC News: Middle East, 26 March 2012, http://www.bbc.co.uk/news/world-middle-east-17510668 (accessed on 27 March 2012).

104 'Israel boycotts UN rights council in unprecedented move', BBC News: Middle East, 29 January 2013: http://www.bbc.co.uk/news/world-middle-east-21249431. A joint statement issued by eight Israeli human rights groups said that it was legitimate for Israel to express criticism of the work of the Council and its recommendations, "but Israel should do so through engagement with the Universal Periodic Review, as it has done in previous sessions". This should have been the course of action for Israel since the recommendations of the UPR or the decisions of the Council are not binding. There was no need for Israel to boycott the Human Rights Council process itself.

To conclude, since the powers and functions of the Human Rights Council are geared to the promotion of human rights through cooperation rather than to the protection of human rights through enforcement there is not much that can be expected from the Council in terms of protection and enforcement. Ultimately, what the UN, the international community, and the victims of human rights violations around the globe need in the twenty-first century is an effective international body which can provide effective remedy against violations of human rights and take effective action against States engaged in gross violations of human rights, and the Human Rights Council is not well equipped to do so.[105]

To access documentation relating to Israel and the UPR, go to http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights29October2013pm.aspx, accessed 4 November 2014.

105 Some might argue that this function is addressed elsewhere, for example via the International Criminal Court, however, it is for States to voluntarily accept the ICC's jurisdiction. Further, similar allegations of politicisation at the ICC have been made. For example, see a report on the ICC, 'International Justice: Nice idea, now make it work', *The Economist* (London), 6 December 2014, pp.68–69. There is also the alleged bias against African States since all of the prosecutions at the ICC have been people from Africa. There is a debate taking place in many African countries to withdraw from the Rome Statute and both South Africa and Burundi have already announced their intention to do so.

2

OCEAN GOVERNANCE AND MARINE ENVIRONMENTAL CONSERVATION

Concepts, principles and institutions

Abul Hasanat and Md Saiful Karim

Introduction

The oceans comprise approximately three-quarters of the Earth's surface (United Nations, 2015). Oceans play a crucial role in maintaining the Earth's ecosystem as well as the socio-economic welfare of human beings (United Nations Economic and Social Council, 2016). Oceans 'nurture life and shape the planet's weather and climate' (Sands & Peel, 2012, p. 342). However, oceans are now under serious threat due to excessive fishing, violent fishing practices, ocean acidification, habitat loss, coastal pollution, rise of alien species and climate change (Sands & Peel, 2012, p. 342; Rochette et al., 2015, p. 9). These practices must be mitigated and kept under careful control under a united, strategic and legally binding strategy. A variety of theories, principles, legal instruments and institutions have emerged and are working toward creating a more effective regulatory framework for protecting and preserving the marine environment and living resources. Most of these theories and principles have derived from existing international environmental jurisprudence, and relevant regulatory instruments are being adopted for the sustainable governance of different components of oceans and seas, both on an international and regional level. Although regional mechanisms are generally considered more effective than international mechanisms, some problems are also apparent in domestic implementation of regional environmental legal imperatives. Certain global organisations have long been working toward governance of the marine environment and biodiversity from different perspectives, and certain regional organisations, particularly the bodies operating under various treaties are actively working toward protecting the marine environment in their respective jurisdictions under the mandate and supervision of international institutions such as the International Maritime Organization (IMO) and the United Nations Environment Programme (UNEP), and instruments such as the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).

Global ocean governance and protection of the marine environment: conceptual framework

Marine environmental problems are in many ways transnational and mostly 'complex, multiple, and often overlapping or synergistic' (Spalding et al., 2013, p. 213). Such problems generally attract States' mutual cooperation and commitment, and global initiatives and governing mechanisms (World Commission on Environment and Development, 1987, p. 43). As a concerted response to managing such problems, a series of international and regional instruments – both binding and persuasive – have emerged for the purpose of preserving and protecting the marine environment as a whole. More than 60 years ago, the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (OILPOL Convention, 1954) was adopted with the aim of protecting the sea from pollution by oil discharged from ships. Thereafter, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Convention, 1972)[1] was adopted for controlling and prohibiting the dumping of different hazardous materials, and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73/78)[2] was adopted for preventing marine pollution by ships from accidental or operational discharge of hazardous substances.

In 1982, UNCLOS was adopted a with a desire for

> a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.[3]

Despite having some normative deficiencies, this instrument has provided a 'clear jurisdictional framework' (Churchill, 2015, p. 30) according to which State parties can take domestic policies and actions for the protection of their respective marine environments. In fact, UNCLOS, its annexes, and the implementing Agreement to its Part XI have developed a consolidated and holistic regime for maintaining a balance between the marine interests of different categories of States – coastal, land-locked and geographically disadvantaged (Miles, 1999, p. 1). Usually treated as the 'constitution for the oceans', UNCLOS has laid down the legal and philosophical foundations for an entire domain of laws of the sea and prevails over all prior marine environmental legal instruments (Churchill, 2015, p. 4). In addition, there are a significant number of laws that require enforcement in accordance with the spirit of UNCLOS (Churchill, 2015, p. 4). UNCLOS works as a unifying and flexible legal framework, and hence provides a comprehensive legal avenue for new norms and principles of marine governance to be incorporated within the relevant legal instruments (Spalding et al., 2013, p. 216).

In addition, the Convention on Biological Diversity, 1992 (CBD, 1992), and the United Nations Fish Stock Agreement, 1995, created a legal regime for the

conservation and protection of marine living resources (Chang, 2010, p. 591). In addition, the International Convention for the Regulation of Whaling, 1946 has long contributed to the global protection of whales.

Besides the major treaties on ocean governance presented previously, many international instruments – such as the Convention on the International Trade in Endangered Species of Wild Flora and Fauna, 1973 (CITES, 1973), the Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972 (World Heritage Convention, 1972), the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971, and a number of IMO conventions and protocols – are also playing important roles in the protection of the marine environment and biodiversity. In addition to these global legal tools for the protection of marine environment, UNCLOS has also mandated that States develop regional legal instruments, standards, procedures and practices that are consonant with UNCLOS.[4] Several regional seas conventions and regional fisheries agreements have been adopted according to this UNCLOS mandate.

In dealing with the most pressing problems of human beings, the United Nations Sustainable Development Goals (SDGs) 2030 stress the sustainable use of different resources, and many of the directives are directly or indirectly related to the protection of the environment as a whole. For example, Goal 14 specifically recognises the importance of oceans, seas and marine resources, and calls for their 'careful management'.[5] This goal delineates various 'facts and figures' and provides 14 targets related to the use of marine and coastal resources.[6] In fulfiling the aim of the sustainable use of targeted resources, including the marine environment, the SDGs necessitate a joint effort from all sectors and actors on every level.[7] In fact, most of the binding and non-binding international instruments ultimately reflect the principles of international cooperation and collaboration between States in the governance of local, regional and international marine environments and resources (Chang, 2010, p. 592). An analysis suggests that the legal and political governance of the oceanic environment may be grounded in certain broad concepts such as the 'rule of law, participatory, transparency, consensus-based decision-making, accountability, equity and inclusiveness, responsiveness and coherence' (Chang, 2010, p. 592). Chang (2010, pp. 592, 605) argues that to ensure good marine governance, particularly at the domestic level, people need to be informed of the new law, and it ought to be applied even-handedly and enforced strictly.

Ocean governance and principles of international environmental law

Oceans, seas and coastal areas have transnational and international implications in terms of their preservation and protection. International laws should not be treated merely as a body of rules and principles but embody some well-designed mechanisms and procedures for promoting international relations between and among global communities at large (Crawford, 2012, p. xviii). This governing system in relation to international marine environmental law has been developed through the

incorporation of certain long-standing principles of environmental law in different international legal instruments. For example, UNCLOS has largely embodied general environmental rules and principles for the protection of the ocean and seas in general. Such principles are most often elaborated through the adoption of international policy documents such as the Declaration of the United Nations Conference on the Human Environment, 1972 (Stockholm Declaration, 1972) and certain framework created by international organisations through the development of their resolutions or declarations embracing innovative principles (e.g., UNEP Draft Principles) and by international non-government organisations through the adoption of certain instruments embodying new environmental rules and principles (e.g., the Helsinki Rules on the Use of Waters of International Rivers, 1996) (Paradell Trius, 2000, p. 97). However, some of these principles remain objects of 'considerable uncertainty and disagreement' (Paradell Trius, 2000, p. 94).

Despite this uncertainty and disagreement, the development of such principles is accepted by the international community for three main reasons. First, global social, economic and environmental issues cannot be solved by any specific, binding rules due to their diverse circumstances, and, in such conditions, environmental principles may function for the world's communities as 'general norms' to be followed when designing domestic or regional legal rules and regulations (Paradell Trius, 2000, p. 93). Second, when making international decisions during a period of urgency and utmost necessity, they can provide 'standards or objectives which are expected to be taken into account as international cannons of environmental conduct' (Paradell Trius, 2000, p. 94). Third, due to the principles' 'indeterminacy and abstraction', they can lay down a minimum obligation for States to take appropriate measures according to scientific advancements (Paradell Trius, 2000, pp. 93–94). In line with such arguments, Sands (1995, p. 66) states that 'in the absence of clear, substantive obligations such principles can play an important secondary role in the emerging international law of sustainable development'. In consideration of international environmental instruments and other jurisprudence, Sands and Peel (2012, p. 187) identify the following seven such principles: the State's sovereignty over its natural resources and its duty not to cause transboundary environmental harm; precautionary measures; preventive measures; cooperation; polluter-pays principle; common but differentiated responsibilities and sustainable development. Apart from these well recognised principles, other emerging principles and approaches have been recognised by scholars and institutions.[8]

State sovereign rights over natural resources

The principle of State sovereignty over its natural resources is an 'extension of the sovereignty principle' (Sands & Peel, 2012, p. 191), which conditionally permits States to conduct any activities in their respective territories, including those that have a potentially detrimental environmental effect (Sands & Peel, 2012, p. 191). The Stockholm Declaration, 1972 incorporates this extended principle in the first part of its Principle 21, which affirms the following: 'States have, in accordance with the

Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies'.

The Stockholm Declaration, 1972, had manifest influence on the creation, design and content of UNCLOS. The principle of sovereignty over natural resources was specifically included in Article 193 of UNCLOS, which affirms the following: 'States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment'. While exercising this right, State parties must also consider their general obligations of protecting and preserving the marine environment as enshrined in UNCLOS Article 192. This obligation seems to be a condition precedent to the exploitation of such resources because this obligatory provision comes before that of the right expressed in UNCLOS Article 193. In addition, this right expressed in UNCLOS Article 193 cannot be exercised arbitrarily, as the United Nations General Assembly Resolution 1803 (XXVII) stipulates that the 'rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development of the well-being of the people of the State concerned'.[9]

This principle of State sovereignty also appears in several previous United Nations resolutions adopted after 1952 (Sands & Peel, 2012, p. 191) and in Principle 2 of the Rio Declaration on Environment and Development, 1992 (Rio Declaration, 1992).[10] These United Nations resolutions aim to create a fair balance between States' sovereignty over their natural resources and the 'legal certainty in the stability of investments' (Sands & Peel, 2012, p. 191) made by foreign companies (mainly) in developing States. The principle has been treated by international judicial bodies as a reflection of customary international norms.[11] This principle has also been reflected in a series of international instruments.[12]

Duty not to cause transboundary harm

A State has no right to perform or allow activities within its territory that can injure the interests of other States – this rule is commonly termed the 'no-harm principle'. This principle developed from the principle of the good neighbourliness (Sands & Peel, 2012, p. 197). This principle is frequently used and explained in discourses of environmental protection and environmental justice. The Stockholm Declaration, 1972, incorporated this principle in the second part of its Principle 21, which stipulates that States have the 'responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. The jurisdiction of a State refers also to its domestic territory, which includes marine areas. The no-harm principle is also included in the second part of Principle 2 of the Rio Declaration, 1992.[13] The no-harm principle may appear to impose restrictions indirectly on a State's sovereign right to use its domestic natural resources; however, the violation

of this principle is qualified or conditional. That is, whether a State has infringed this principle is assessed on questions and facts relating to the description, intensity and consequence of the damage, and the category and extent of liability of the State for that damage (Sands & Peel, 2012, p. 196). The no-harm principle was first formally identified in the *Trail Smelter* case,[14] where it was stated:

> Under the principles of international law as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The application of this principle is not confined only to the situation of transboundary pollution, but extends to 'the protection of the high seas or the global atmosphere' (Tanaka, 2015, p. 37). No-harm principle has been incorporated in Article 194(2) of UNCLOS, which stipulates the following:

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

To prevent (among others factors) transboundary harm affecting the other States, responsible States must manage all sources of pollution and take all possible measures to minimise different categories of pollution.[15] UNCLOS Article 194(4) stipulates that even in 'taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention'.[16] In other words, the process of controlling one transboundary harm should not give rise to another.

In addition, the no-harm principle was reflected by many earlier agreements, including the International Plant Protection Convention, 1959[17] and the Nuclear Test Ban Treaty, 1963[18] and the World Heritage Convention, 1972.[19] The United Nations and other international organisations have consciously incorporated the no-harm principle into their resolutions and legal instruments, and it has been treated by United Nations General Assembly Resolution 2996 (XXVII)[20] as one of the few fundamental cannons in environmental governance between the States (Sands & Peel, 2012, p. 198). In the *Corfu Channel* case, the International Court of Justice (ICJ) stated that the sovereignty principle also imposes a duty on States that they must not use their territories in such a way that can affect the rights of the other States.[21] Similarly, an upstream State cannot divert the water of an international river, ignoring the right of the downstream State.[22]

Intergenerational and intragenerational equity

The principle of intergenerational equity refers to maintaining a fair balance between the interests of the present and future generations. The principle of *intra*-generational equity refers to the just distribution of the global wealth and resources between the current generations of different populations (e.g., those of developed and developing countries). Brown Weiss (1990, p. 198) states the following in relation to intergenerational equity:

> What is new is that now we have the power to change our global environment irreversibly, with profoundly damaging effects on the robustness and integrity of the planet and the heritage that we pass on to future generations.

Brown Weiss creates an idea of partnership between the past, present and future generations and emphasises that the present generation of human beings, which has moral sense, is a temporal trustee of the Earth for future generations, which are entitled to 'an equal access to and sharing of resources and environmental quality' (Jansen, 2002, pp. 12–13). Intra-generational equity developed from the principle of intergenerational equity (Des Jardins, 1997, pp. 27–28). Intra-generational equity involves two principal dimensions: human beings' relationship with other human beings, and human beings' relationship with the entire natural system, of which human beings are also an element (Brown Weiss, 1990, p. 199). The main problems related to the principles of intergenerational equity and intra-generational equity emerged from the continuous 'depletion of resources, global warming, ozone depletion and elimination of biodiversity' (Jansen, 2002, p. 3).

Intra-generational equity appears to be difficult to achieve because it involves the redistribution of world resources and must affect global, political, economic and social-reality factors (Jansen, 2002, p. 33). However, this principle is reflected in some international instruments. For example, the Preamble to UNCLOS states the aim to achieve the 'realization of a just and equitable international economic order which takes into account the interests and needs of humankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked'. This Preamble also notes that the components of the sea including seabed, ocean floor, subsoil thereof and their resources shall be 'the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States'.[23] The Preamble further states that even developing countries must receive preference in the allocation of required funds, technical assistance and specialised services 'for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects'.[24] Similarly, the Preamble to the CBD, 1992, states that 'special provision is required to meet the needs of developing countries, including the provision of new and additional financial resources and appropriate access to relevant technologies'[25] and that it is necessary to consider 'the special conditions of the least developed countries and Small Island States'.[26]

This approach is also somewhat reflected in the principle of common but differentiated responsibilities. However, the principle of intergenerational equity first attracted attention in the *Pacific Fur Seal* arbitration of 1893.[27] Thereafter, this principle has been included in many international and regional conventions and agreements, including those that directly and indirectly manage the preservation and protection of marine environment and resources. The first part of the Preamble to CITES, 1973, asserts that 'wild fauna and flora [. . .] must be protected for this and the generations to come'.[28] This means that water resources must be protected in an efficient manner 'so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs'.[29] The Preamble to the CBD, 1992, also affirms that State parties hold the determination to 'conserve and sustainably use biological diversity for the benefit of present and future generations'.[30] The Preamble to UNCLOS affirms that the State parties shall ensure an equitable use of their resources and the 'realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole'.[31] The Stockholm Declaration, 1972 also asserts that each human being 'bears a solemn responsibility to protect and improve the environment for present and future generations'.[32] With the aim of protecting the marine environment, several regional environmental agreements also embody the principle of intergenerational equity. For example, the Preamble to the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 1978, holds that State parties will think of mutual cooperation and coordination 'with the aim of protecting the marine environment of the region for the benefit of all concerned, including future generations'.[33] The same principle, using the same linguistic pattern, is used in the Jeddah Convention, 1982, which aims to protect the 'marine environment of the Red Sea and Gulf of Aden'.[34] Article 1(1) of the Jeddah Convention, 1982, specifically notes that the present generation will exploit the living and non-living marine and coastal resources while considering 'the needs and aspirations of future generations'.[35] The States in the Caribbean region also agreed to save their marine environment 'for the benefit and enjoyment of present and future generations'.[36] This principle has also been incorporated in other international instruments for protecting other components of the environment and nature (Sands & Peel, 2012, pp. 209–210).

Precaution

There is controversy as to whether 'precaution' in relation to conservation principles should be termed a 'precautionary principle' or a 'precautionary approach' (Vanderzwaag, 2002, p. 166). The term 'precautionary approach' usually implies 'a softer, non-binding nature', whereas the term 'precautionary principle' seems to bear some legal binding-ness (Freestone, 1999). However, some researchers believe these terms have a similar meaning, and the Rio Declaration, 1992, uses both the terms 'precautionary principle' and 'precautionary approach' (Vanderzwaag, 2002, p. 167). Any activity, including coastal development within marine areas, may

entail serious environmental damage and, given this, the precautionary principle or approach has been included in most of the international instruments related to marine environment (Freestone & Hey, 1996; Hohmann, 1994).

It is not surprising that UNCLOS did not incorporate the precautionary principle or approach for ocean and marine governance since this principle (or approach) was recognised in international law after the adoption of UNCLOS on 10 December 1982 (Rayfuse, 2012, p. 774). During evolution of the precautionary principle (or approach), it worked well for the governance of the marine resources and the environment, and achieved recognition in a number of international legal tools (Rayfuse, 2012, p. 774). For example, the Rio Declaration, 1992, concretely asserts the following:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[37]

The same principle and its conceptual elements were included in the London Protocol, 1996, which stipulates the following:

> Contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects.[38]

This principle is also found in the provision of the Fish Stock Agreement, 1995, that State parties, including the coastal States, will protect their fish stock through the assessment of the 'impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem'.[39] The Fish Stock Agreement, 1995, also imposes a strong legal duty on State parties to 'apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks' (Tanaka, 2015, p. 41).

For State parties to protect their marine environment and resources, some regional treaties incorporate stricter obligations in relation to the provision of precautionary measures. For example, the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 (OSPAR Convention, 1992)[40] embraces the 'precautionary principle' and prescribes the following:

> [The States will take] more stringent measures with respect to the prevention and elimination of pollution of the marine environment or with respect to the protection of the marine environment against the adverse effects of

> human activities than are provided for in international conventions or agreements with a global scope.[41]

The precautionary principle is incorporated as a fundamental principle in the Helsinki Convention, 1992, which affirms the following fundamental obligation of States:

> [To] take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects.[42]

Similarly, the precautionary principle was reflected in the Food and Agricultural Organization (FAO) Code of Conduct for Responsible Fisheries, 1995, which urges that State parties utilise the precautionary approach in total governance of the 'living aquatic resources' and 'aquatic environment'.[43]

Prevention

Generally, the principle of prevention obliges the State to take adequate measures so that its acts or omissions do not cause any damage to the environment. This principle binds a State not only to prevent transboundary damage to other States but to protect its own environment (Singh, 1986, pp. xi–xii). The principle has been treated as a 'principle of general international law' or as a 'customary rule', which is derived from due diligence in State practices (Sands & Peel, 2012, p. 200). This due diligence refers to the following:

> an obligation which entails not only the adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.[44]

Principle of prevention also requires the States to adopt careful measures at the initial stage of activity before any damage affects the environment.[45] That is, States must undertake preventive measures with 'due diligence' that is appropriate according to the attending circumstances.[46] This principle of prevention has similarities to the concepts underlying the principles of no harm and precaution.[47] The principle of prevention is reflected in many international and regional agreements made for the protection of environmental elements, including the oceans, seas and marine living resources.

UNCLOS incorporates the principle of prevention to be followed by the States while taking measures against the 'pollution of the marine environment from any

source'.[48] The OSPAR Convention, 1992, also includes this principle, stipulating that State parties must take required measures to 'prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities [and] prevent an increase in pollution of the sea outside the maritime area or in other parts of the environment'.[49] In an older convention, the Convention Relative to the Preservation of Fauna and Flora in Their Natural State, 1933, mutual cooperation was made compulsory in relation to preventing the extinction of fauna and flora in the territories of the Contracting Parties.[50] The principle of prevention is also included in the Convention for the Conservation of Antarctic Marine Living Resources, 1982 (CAMLR Convention, 1982), for preventing the decrease of harvested populations of different living organisms and 'recognising the importance of safeguarding the environment and protecting the integrity of the ecosystem of the seas surrounding Antarctica'.[51] Preamble to the MARPOL 73/78 discloses that the States have agreed to adopt mutual steps for preventing the 'pollution of the sea by oil discharged from ships'. The General Fisheries Council for the Mediterranean was endowed with the function of preventing occupational diseases of fishermen with the aim of 'development and proper utilization of the resources of the Mediterranean and contiguous waters'.[52] To protect the marine environment as a whole in the Black Sea, the provisions of preventive measures have been incorporated in several places in the Protocol to the Black Sea Convention, 2009.[53]

In some other instruments, there are similar provisions for preventive measures to be taken against the 'pollution of the seas from the dumping of radioactive waste',[54] the 'pollution of water resources generally',[55] the 'pollution of the marine environment by the discharge of harmful substances or effluents containing such substances',[56] the pollution of seas by land-based substances and energy,[57] the loss of fish stocks[58] and the hazards created by shipwrecks to the marine environment.[59] With a substantive analysis of the implementing environmental legislations in different countries, it is clear that the preventive principle influenced the State parties greatly in protecting the important components of the environment, including the oceans, seas and marine living resources (Sands & Peel, 2012, pp. 201–201).

Cooperation

No single State acting alone can ensure the adequate protection and preservation of the Earth's environmental elements, including the oceans, seas and marine resources. Such protection and preservation require international cooperation. Thus, the Stockholm Declaration, 1972, states the following:

> International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from

> activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.[60]

Similarly, the Rio Declaration, 1992, specifically asserts the following:

> States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.[61]

The UNCLOS also holds that the State parties desire to solve all legal matters relating to the sea 'in a spirit of mutual understanding and cooperation'.[62] This principle of cooperation was also upheld by the International Tribunal for the Law of the Sea (ITLOS) in the *MOX Plant* case, where it was stated that the 'duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law'.[63] ITLOS unanimously prescribed provisional measures for Ireland and the United Kingdom that they must cooperate through consultation to ensure the following:

> (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant; (b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea; (c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.[64]

ITLOS applies the principle of cooperation in the *Land Reclamation* case, in which it directed the parties (i.e., Malaysia and Singapore) to cooperate with each other so as to agree on a point that a panel of experts would assess the effects of the disputed land reclamation and suggest required measures for avoiding any adverse effects from such reclamation and to exchange necessary information.[65]

Several provisions are included in UNCLOS that emphasise the principle of cooperation in protecting the marine environment and resources. For example, UNCLOS imposes a duty on the Member States to cooperate with other States to conserve the 'living resources of the high seas'.[66] In addition, UNCLOS Article 118 holds that 'States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas'. It also holds that States must cooperate with each other internationally and regionally 'in formulating and elaborating international rules, standards and recommended practices and procedures consistent with [. . .] [UNCLOS] for the protection and preservation of the marine environment'.[67] In case of imminent danger or any pollution, UNCLOS states that 'competent international organizations shall cooperate [. . .] in eliminating the effects of pollution and preventing or minimising the damage [and] shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment'.[68] States are bound also to follow the principle

of cooperation in promoting studies, undertaking and conducting research (and the exchange of information and data) and, in view of such data and information, they must collaboratively determine 'appropriate scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution of the marine environment'.[69] In addition, the substantive role of the international legal instruments, the relevant international and regional bodies and the international judicial institutions is crucial in advancing cooperation between the Contracting States for the purpose of governing the oceanic environment and living resources (Tanaka, 2015, pp. 53–54).

Polluter-pays principle

The polluter-pays principle implies that the cost of any pollution will be paid by the polluter. However, its meaning and application attract different interpretations in different situations, including in the determination of the actual nature of environmental liability. Some countries interpret that the principle is enforceable in governing domestic affairs but not international issues (Sands & Peel, 2012, pp. 228–229). Although this principle has not yet obtained as much international legal recognition as have the principles of prevention and precaution (Sands & Peel, 2012, p. 229), it is reflected in several international and regional instruments. For example, Principle 7 of the Rio Declaration, 1992, has indirectly incorporated this principle from a global perspective in the clause that stipulates that the 'developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'. This principle is initially found in the Paris Convention, 1960,[70] and the Vienna Convention, 1963,[71] in relation to compensation for different nuclear damages.

To safeguard the marine environment, including flora and fauna, the OSPAR Convention, 1992, has embraced the polluter-pays principle, asserting that the 'costs of pollution prevention, control and reduction measures are to be borne by the polluter'.[72] The International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, has also absorbed the polluter-pays principle with the aim of preserving the 'human environment in general and the marine environment in particular'.[73]

The polluter-pays principle has also been recognised in some regional instruments aiming to protect the marine environment. For example, the Antigua Convention, 2002, holds that the Member States must apply the polluter-pays principle to make the polluters responsible for paying the 'full costs of measures to prevent, control, reduce and remedy such pollution' from the sense of obligation to 'protect the environment and contribute to the sustainable management, protection and conservation of the marine environment of the region'.[74] Similarly, for protecting and preserving the environment of Baltic Sea area, the State parties in the Helsinki Convention, 1992, unconditionally agreed to apply the polluter-pays principle.[75]

Common but differentiated responsibilities

The principle of common but differentiated responsibilities is principally based on the global recognition of the concept of equity and the consideration of the different and reasonable treatment of developing countries 'in the development, application and interpretation of rules of international environmental law' (Sands & Peel, 2012, p. 233). Principle 7 of the Rio Declaration, 1992, states the following:

> States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

That is, to protect the climate system, State parties must take action 'on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'.[76] The principle of common but differentiated responsibilities mainly consists of two concepts: that all nations have a common duty to protect the environment in general but that the degree of such duty may vary in accordance with their respective ability and the historical liability for the global climate situation.

The Preamble to the UNFCCC also includes the principle of common but differentiated responsibilities. According to the Basel Convention, to protect human health and the environment in general from different hazardous wastes, the State parties agreed to consider the 'limited capabilities of the developing countries'.[77] The Preamble to the CBD, 1992, embodies the principle that while the 'conservation of biological diversity is a common concern of humankind', special needs are acknowledged for developing countries and special conditions are felt for the least developed countries and the small island States.

UNCLOS reflects this principle based on fairness and equity (Deleuil, 2012, p. 1) in its Preamble and in other provisions. One of the vital goals of the State parties is to ensure the 'equitable and efficient utilisation of their [marine] resources' through the establishment of a common 'legal order for the seas and oceans'.[78] Such 'goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of humankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked'.[79]

In relation to governance of marine environment and resources, this principle of common but differentiated responsibilities is clear in the UNCLOS, which holds that the State parties must adopt individual and joint measures for the common purpose of preventing, reducing and controlling marine environment pollution 'in

accordance with their capabilities'.[80] In addition, UNCLOS Article 207(4) stipulates the following:

> States [. . .] shall endeavor to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and their need for economic development.[81]

Therefore, the constituent elements of the principle of common but differentiated responsibilities is incorporated in UNCLOS. The objectives of the London Protocol, 1996 also embody the principle of common but differentiated responsibilities:

> Contracting Parties shall individually and collectively protect and preserve the marine environment from all sources of pollution and take effective measures, according to their scientific, technical and economic capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter.[82]

Sustainable development

While the term 'sustainable development' was first used in the Brundtland Report, the principle of sustainable development is first found in the Preamble to the Agreement on the European Economic Area, 1992 (Sands & Peel, 2012, p. 206). The Brundtland Report defines sustainable development as the 'development that meets the needs of the present without compromising the ability of the future generations to meet their own needs' (World Commission on Environment and Development, 1987, p. 43). The principle of sustainable development generally holds that development activities be conducted considering environmental concerns while recognising that ecological protection must not absolutely override the priorities of development plans, programmes and projects. The principle holds that a balance should be maintained between the environment and development. In environmental studies, this principle is synonymously used with concepts such as 'sustainable use' and 'sustainability'. The principle of sustainable development comprises four elements: intergenerational equity, sustainable use, equitable use or intragenerational equity and integration (Sands & Peel, 2012, p. 207). However, some scholars include a broad array of principles within the concept of sustainable development.[83] Although the functioning of the concept of sustainable development largely depends on the national policies of a country, the ICJ has held that States duly consider this concept as a new norm and standard in economic decision-making so that the environment is also protected.[84]

Despite UNCLOS not specifically referring to the principle of sustainable development, all the elements of this principle are reflected in the text and philosophy

of UNCLOS. For example, UNCLOS affirms that in dealing with the seas and oceans, the State parties desire to establish a legal order that 'will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the [. . .] protection and preservation of the marine environment'.[85] Here, the clause the 'equitable and efficient utilization of their resources' also suggests the principle of intergenerational equity, and 'peaceful uses of the seas and oceans' and the 'conservation of their living resources' suggest the principle of sustainable use, while 'protection and preservation of the marine environment' suggests the concept of integration. UNCLOS also includes intragenerational equity by describing that the State parties intend to realise an 'international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked'.[86]

The principle of sustainable development is also included in several other international instruments that aim to protect different elements of seas and oceans. For example, the principle of sustainable development is found in the Preamble to and in Articles 2, 5(b) and 5(h) of the United Nations Fish Stocks Agreement, 1995.[87] The State Parties to the Agreement intend to 'ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the [UNCLOS]'.[88] In addition, the principle of sustainable development is incorporated in Article 1 of the CBD, 1992, which states that one of its objectives is to ensure the 'sustainable use of its components'. Agenda 21 also embodies the principle of sustainable development in relation to the protection of oceans, seas, coastal areas and marine living resources.[89] Code of Conduct for Responsible Fisheries, 1995, states that the 'long-term sustainable use of fisheries resources is the overriding objective of conservation and management' for the Contracting Parties.[90] The Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries, 1999, also agrees that parties will work together to 'seek the optimum and sustainable use of the world's fishery resources'.[91] The principle of sustainable development is also reflected in the Reykjavik Declaration on Responsible Fisheries in the Marine Eco-system, 2001, which emphasises 'an effort to reinforce responsible and sustainable fisheries in the marine ecosystem'.[92]

Role of international and regional institutions

The oceanic environment has different national, regional and international dimensions, and requires joint, cooperative approaches for its protection and conservation. The United Nations General Assembly has developed many global measures to attempt to smooth the governance of 'marine biodiversity and ecosystems' (Sands & Peel, 2012, p. 437). Since 1997, the United Nations General Assembly has adopted at least one resolution annually for the purpose of protecting marine spaces and ecosystems. Moreover, the IMO and the FAO have significantly contributed on a global level to the protection and preservation of the marine environment and

marine living resources in general. UNCLOS has focused on the importance of the legal and policy cooperation of States on the global and regional levels in governing the ocean and seas. UNCLOS Article 197 holds the following:

> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.[93]

Prior to the adoption of UNCLOS, several legal tools and institutions also existed to apply global and regional ocean governance.

IMO

UNCLOS has stipulated a major role for the international organisations, particularly the IMO, in managing activities occurring in oceans and seas, including the task of creating rules and regulations for the Member States (Oxman, 1995, p. 467). The IMO is one of the specialised agencies of the United Nations. It was established in 1948 and initially it did not incorporate in its constitution any objectives such as the prevention of marine pollution. However, the IMO Constitution was amended by incorporating the clause 'Control of marine pollution from ships' as one of its purposes in Article 1(a). In 1975, the IMO also established the Legal Committee and the Marine Environment Pollution Committee (MEPC), which work to ensure the overall legal protection and safety of the marine environment and ecosystems from vessel-source pollution. The IMO has delivered outstanding service in the legal protection and preservation of the oceanic environment (De La Fayette, 2001, p. 158).

The IMO has the global duty of adopting necessary legal and policy measures to ensure the safety and security of shipping and to prevent marine pollution by ships.[94] It works as the 'global standard-setting authority for the safety, security and environmental performance of international shipping'.[95] That is, the IMO acts as a global platform by which the Contracting Parties negotiate, develop and implement the rules and regulations of international legal tools that address the prevention of pollution and risk in the oceans (Roberts, 2006, p. 53). However, the IMO does not regulate international shipping, but rather functions as a forum 'for both [the] harmonisation of existing standards and for creating new ones' (Roberts, 2006, p. 56).

In addition, the IMO has also developed essential technical rules to supplement the norms and standards accepted by the Contracting Parties and these rules play an important role in the protection and preservation of marine spaces from ship-driven pollution (Dzidzornu & Tsamenyi, 1991, p. 75). Moreover, the concerned conventions can mandate the IMO to review, amend and approve necessary

amendments and regulatory proposals, and the IMO is also able to adopt relevant soft-law instruments such as guidelines and standards for protecting the marine environment (Roberts, 2006, p. 54). Oxman (1995, p. 468) identifies three roles of the IMO: 1) the forum role, which is fulfilled by promoting global cooperation, information sharing and consultation on international policy matters; 2) the standard-setting role, which is fulfilled by the creation and development of required legal instruments and procedures; 3) the approval role, which is fulfilled by the process of reviewing the existing legal standards and approving new proposals from the Member States.

MARPOL 73/78 is the principal international legal tool against marine pollution from vessels caused by operational and accidental factors (Karim, 2009, p. 57). The IMO has achieved significant success in reducing marine pollution by ships through the implementation of MARPOL 73/78, particularly through the modification of the equipment standard of oil tankers (Mitchell, 1994). The IMO developed conventions such as the Intervention Convention, 1969,[96] the International Convention for the Safety of Life at Sea, 1974 (SOLAS Convention, 1974),[97] and the OPRC Convention, 1990,[98] which play important roles in protecting the marine environment from pollution from ships (McGrath & Julian, 2000, p. 195). The IMO has also provided the essential coordinating or secretarial services in the consultation and conclusion of a series of subsequent global conventions, particularly those aimed at creating compensatory liability for any marine pollution by oil from ships,[99] 'control and management of ships' ballast water and sediments',[100] 'safe and environmentally sound recycling of ships'[101] and 'control of harmful anti-fouling systems on ships'.[102]

Regional organisations

To create a legal regime for the oceans and seas, UNCLOS emphasises global and regional cooperation in ensuring the protection and preservation of the marine environment.[103] Given that it is a highly complex issue, marine governance needs speedy and specific regional attention and activities to ensure its effectiveness. Before the adoption of UNCLOS, ocean governance was accomplished under regional arrangements such as UNEP's Regional Seas Programme (RSP) (Sands & Peel, 2012, p. 352). UNEP is now considered a vital organisation for implementing the measures adopted under UNCLOS (Techera, 2013, p. 78). UNEP's RSP was created in 1974 as a governing system to protect the marine environment on the regional level. In 2017, it addressed the marine protection of 18 regions of the world, making it one of the largest global initiatives.[104] Among these RSPs, 14 regional programmes are now active under their respective regional treaties and the remaining four have not yet adopted their conventions (Techera, 2013, p. 78). These regional seas programmes can broadly be classified into three types: the partner or independent programmes,[105] UNEP-administered programmes[106] and non-UNEP-administered programmes.[107] Most of the RSPs conduct their work through different action plans, each of which determine the essential strategies and

contents of the programme in consideration of the 'region's particular environmental challenges as well as its socio-economic and political situation'.[108]

The RSP mainly deals with the following six areas of marine protection: 'coastal area management, eco-system and biodiversity, land-based activities, marine litter, sea based pollution and small islands' (Oral, 2015, p. 343). UNEP has helped the RSP to fulfil its responsibilities to achieve to the priorities set by the UNEP Governing Council and the United Nations Environment Assembly, and toenable it to achieve certain global targets and goals such as the SDGs.[109]

To achieve the legal protection and preservation of the marine environment and ecosystem, UNEP has developed multilateral environmental agreements (MEAs) that incorporate the universal principles of environmental law and procedures relating to their implementation at regional and national levels, but these MEAs face significant challenges in national implementation (Oral, 2015, p. 339). In addition, these legal mechanisms now must consider critical issues, such as climate change, and new concepts, such as precautionary measures, that are difficult to harmonise with the existing legal mechanisms (Oral, 2015, p. 343). Most of the regional agreements or conventions follow identical legal structures and contents, including in their 'basic substantive and procedural obligations, institutional arrangements and mechanisms for the adoption of protocols and annexes' (Sands & Peel, 2012, p. 358). Therefore, most of these regional agreements need to be amended or to adopt additional instruments to adequately address new situations arising in the field of ocean governance.

Some international environmental issues can be solved adequately at the regional level, thus requiring no direct global action (Alhéritière, 1982). States or regional entities are now demonstrating their ability to ensure the protection and conservation of the marine living resources through regional mechanisms (Rochette et al., 2015, p. 10). Moreover, the mandate for regional cooperation in UNCLOS,[110] and the principle of regionalism have promoted the States to develop specific regional organisations that aim to protect and preserve marine and coastal environments. UNCLOS encourages such regional initiatives:

> States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned [and] cooperate to establish sub-regional or regional fisheries organizations to this end.[111]

Moreover, the Fish Stock Agreement, 1995, states that if there is no regional or sub-regional organisation or arrangement for the protection and management of fish stock in marine and coastal areas, then the concerned States can 'establish such an organisation or enter into other appropriate arrangements to ensure conservation and management of such stock and shall participate in the work of the organisation or arrangement'.[112] As a result, some regional bodies for fisheries management are

actively engaged in the supervision and monitoring of fishing in marine spaces, most often in response to the influence of the Fish Stock Agreement, 1995, and the FAO Code of Conduct for Responsible Fisheries, 1995 (Harrison, 2015, pp. 63–64).

Generally, all the RSPs have a Regional Coordinating Unit (RCU) that coordinates, communicates and cooperates to implement different policies for marine environment protection. On behalf of RSP, the RCU also liaises with different organisations, including United Nations bodies, government agencies, non-government organisations and intergovernmental organisations (Techera, 2013, p. 78). Some programmes have a Regional Activity Centre (RAC) that publishes data in papers and reports to assist the States in designing appropriate policies, arranges conferences and workshops to promote regional cooperation and supplies 'legal and technical assistance for the implementation of conventions, protocols and action plans' (Rochette et al., 2015, p. 10). The principal role of the regional mechanisms is to engage with programmes related to research, monitoring and assessment and management (Grip, 2017, p. 414).

Under the authority of relevant legal instruments,[113] some regional organisations, including commissions, were created to protect and preserve the marine and natural environment in the territorial jurisdiction of the European Union (Grip, 2017, p. 419). These regional organisations conduct their collective ventures through mutual cooperation and coordination under the regulatory framework of the IMO to save their marine environments from various types of pollution by ships and related activities (Grip, 2017, p. 419). For example, the Nordic Council of Ministers (NCM) accomplishes one of its major tasks, marine environment protection, with the help of the Nordic Marine Group (Grip, 2017, p. 419). In addition, the Helsinki Commission under the Helsinki Convention has adopted an action plan with a set of targets designed to save the environment and resources of the Baltic Sea (Backer et al., 2010). Similarly, the Regional Organization for the Protection of Marine the Environment (ROPME) is working to design action plans for preventing pollution in the marine environments of the territories of the Member States (Porkareh et al., 2013). Every region has organisations, groups or forums that manage the protection and preservation of different components of the environment, including the marine environment.[114]

Conclusion

The world's ocean has ecological, social and economic importance, and must therefore be protected and preserved under a comprehensive regulatory system. To fulfil this purpose, a growing number of environmental legal norms, instruments and organisations have emerged at all levels. Indeed, the principles of international environmental law are generally reflected in all the global and regional agreements and instruments designed to govern the marine environment. Among the legal instruments, UNCLOS provides the broadest framework for the governance, management, regulation and protection of the marine environment and resources. The

guiding environmental principles related to sovereign rights over natural resources, responsibility for transboundary harm, intergenerational and intragenerational equity, precaution, prevention, cooperation, polluter-pays principle, common but differentiated responsibilities and sustainable development play a catalytic role in protecting and conserving the marine environment and its living resources. The Member States have deliberately incorporated these principles in their international and regional agreements, and some of these principles have attained the status of customary international law. In addition, these principles constitute important legal norms and standards in designing the domestic legislations of Member States and international and regional marine environmental agreements. Most of the principles are directly or indirectly interrelated and, sometimes, overlap with one another.

Generally, the agreements by the States embody the provisions of regulatory mechanisms through creating new institutions or referring to established organisations such as the IMO or UNEP. The IMO has been actively working in marine environment protection, particularly in relation to pollution by ships. However, before the adoption in 1982 of UNCLOS, UNEP initiated the regional seas programmes to endeavour to preserve and protect oceans and seas through regional cooperation, and the programmes it promoted are quite successful in their mission despite certain difficulties in national implementation. Since 1982, UNCLOS has also stated the importance of a regional regulatory approach to be adopted along with global governing mechanisms to protect and preserve the oceans, seas and marine living resources. The environmental principles, instruments and institutions are continuously evolving and adopting new dimensions in following new global circumstances and scientific and moral understanding such as climate change, globalisation and technological developments that have a great effect on the marine environment, the biggest ecosystem on Earth.

Notes

1 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 29 December 1972, in force 30 August 1975.
2 International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), London 1973 and 1978.
3 United Nations Convention on the Law of the Sea (hereinafter UNCLOS), 1982, Montego Bay, 10 December 1982, in force 10 November 1994, 21 *International Legal Materials* (1982) 1261 Preamble para 4.
4 United Nations Convention on the Law of the Sea (UNCLOS), 1982, Montego Bay, 10 December 1982, in force 10 November 1994, 21 *International Legal Materials* (1982) 1261, Article 197.
5 Goal 14 states that the 'world's oceans – their temperature, chemistry, currents and life – drive global systems that make the Earth habitable for humankind. Our rainwater, drinking water, weather, climate, coastlines, much of our food, and even the oxygen in the air we breathe, are all ultimately provided and regulated by the sea. Throughout history, oceans and seas have been vital conduits for trade and transportation. Careful management of this essential global resource is a key feature of a sustainable future'.
6 See "Goal 14: Conserve and sustainably use the oceans, seas and marine resources", viewed 21 June 2017, www.un.org/sustainabledevelopment/oceans/.

7 See "Multi-sectoral partnerships and voluntary commitments", viewed 21 June 2017, https://sustainabledevelopment.un.org/sdinaction.
8 Paradell-Trius identifies some new principles such as the "principles of non-discrimination, equitable use and concerted management of natural shared resources, intergenerational equity, and integration of environmental considerations into economic and development project" (Tanaka, 2015, p. 32). The International Union for Conservation of Nature has developed ten principles for governing the sea area: "conditional freedom of activity on the high seas, protection and preservation of the marine environment, international cooperation, science-based approach to management, public availability of information, transparent and open decision making processes and precautionary approach" (Tanaka, 2015, p. 32).
9 GA Res. 17/1803, UN GAOR, 17th sess, 1194th plen mtg, Agenda Item 39, *UN Doc* A/*RES/17/1803* (14 December 1962).
10 Principle 2 of the Rio Declaration, 1992 affirms the following: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies".
11 *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v Libya*, 53 ILR 389 (1977), para 87.
12 For example, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, Article 9(6); Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971, Article 2(3); International Tropical Timber Agreement, 2006, Article 1; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989, Preamble; United Nations Framework Convention on Climate Change, 1992, Preamble; CBD, 1992, Preamble; Nagoya Protocol to the CBD, Article 6.
13 Principle 2 of the Rio Declaration, 1992 says, "States have [. . .] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".
14 *United States v Canada* [1941] 3 RIAA 1905, 1907.
15 UNCLOS, Article 194(3): 'These measures shall include, *inter alia*, those designed to minimise to the fullest possible extent: (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping; (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels; (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices; (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices'.
16 UNCLOS, Article 194(4).
17 See Preamble.
18 See Article I (1) (b).
19 See Article 6(3).
20 GA Res. 27/2996, UN GAOR, sess 27, Supp No 30, U.N. Doc. A/2996 (15 December 1972).
21 *UK v Albania* [1949] ICJ Rep 4, 22.
22 *Spain v France* [1957] 12 RIAA 281, 285.
23 UNCLOS Preamble para 8.

24 UNCLOS, Article 203.
25 Convention on Biological Diversity (CBD), Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 International Legal Materials (1992) 822, <www.biodiv.org>, Preamble para 17.
26 Convention on Biological Diversity (CBD), Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 International Legal Materials (1992) 822, <www.biodiv.org>, Preamble para 18.
27 See Pacific Fur Seal Arbitration, Proceedings of the Tribunal of Arbitration, convened at Paris, under the treaty between the United States and Great Britain, concluded in Washington, 29 February 1892, for the determination of questions between the two governments concerning the jurisdictional rights of the United States in the waters of Bering Sea, viewed 6 December 2017, https://archive.org/stream/fursealarbitrati02bering/fursealarbitrati02bering_djvu.txt.
28 Convention on International Trade in Endangered Species of Wild Fauna and Flora, (CITES), Washington, DC, 3 March 1973 in force 1 July 1975, Preamble para 2.
29 Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes, Helsinki, 17 March 1992, in force in 6 October 1996, Article 2(5)(c).
30 Convention on Biological Diversity (CBD), Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 International Legal Materials (1992) 822, <www.biodiv.org>, Preamble para 24.
31 UNCLOS Preamble para 6; also see Preamble para 4.
32 Stockholm Declaration on Human Environment, Stockholm, 5–16 June 1972, Principle I.
33 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, Kuwait City, 24 April 1978, in force 30 June 1979, Preamble para 9.
34 Regional Convention for the Conservation of the Red Sea and of the Gulf of Aden Environment, Jeddah, 14 February 1982, in force 20 August 1985, Preamble para 3.
35 Regional Convention for the Conservation of the Red Sea and of the Gulf of Aden Environment, Jeddah, 14 February 1982, in force 20 August 1985.
36 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena, 24 March 1983, in force 11 October 1986, Preamble para 3.
37 Rio Declaration, 1992, Principle 15.
38 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, Article 3(1).
39 Fish Stock Agreement, 1995, Article 5(d).
40 Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992.
41 Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, Preamble.
42 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992, Article 3(2).
43 FAO Code of Conduct for Responsible Fisheries, 1995, para 7.5.1; reference to a precautionary approach is also used in paras 7.5.2 and 6.5.
44 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (order on the Request for the Indication of Provisional Measures) [2006] ICJ Rep 135, para 197.
45 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (1997) ICJ Reports 7, 78 para 140; see also Sands and Peel (2012, p. 201).
46 See the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) (Seabed Dispute Chamber of ITLOS Case No. 17), para 117.
47 Goba (2004) considers that the principle of prevention has some inherent conformity to the principle of no harm.

48 UNCLOS, Article 194(1).
49 UNCLOS, Article 2.
50 Convention Relative to the Preservation of Fauna and Flora in Their Natural State, London, 8 November 1933, in force 14 January 1936, Article 12(2).
51 Convention for the Conservation of Antarctic Marine Living Resources, Canberra, 1 August 1980, in force 7 April 1982, Article 2(3)(a).
52 Agreement for the Establishment of a General Fisheries Council for the Mediterranean, Rome, 24 September 1949, in force 20 February 1952, Premable.
53 See Articles 1, 4, 6, 14 and 15.
54 Article 25.
55 Lake Victoria Basin Protocol, 2003, Article 4; also see, Sands and Peel (2012, p. 202).
56 MARPOL 73/78, Article 1(1).
57 Convention for the Prevention of Marine Pollution from Land-based Sources, Article 1.
58 Fish Stocks Agreement, 1995, Article 5(h).
59 Wrecks Convention, 2007, Article 1(7).
60 Stockholm Declaration, 1972, Principle 24.
61 Rio Declaration, 1992, Principle 27.
62 UNCLOS, Preamble para 2.
63 *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)*, ITLOS Case No. 10 (2002), para 82.
64 *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)*, ITLOS Case No. 10 (2002), para 89.
65 *Malaysia v Singapore* (2003), ITLOS Case No. 12, para 92.
66 UNCLOS, Article 117.
67 UNCLOS, Article 197.
68 UNCLOS, Articles 198 and 199.
69 UNCLOS, Articles 200 and 201.
70 Convention on Third Party Liability in the Field of Nuclear Energy, 1960.
71 Vienna Convention on Civil Liability for Nuclear Damage, 1963.
72 Article 2(2)(b).
73 International Convention on Oil Pollution Preparedness, Response and Co-operation, London, 30 November 1990, in force 13 May 1995, Preamble para 2.
74 Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, Antigua, 18 February 2002, (not yet in force), Article 5(6)(c).
75 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992, Article 3(4).
76 United Nations Framework Convention on Climate Change, 1992, Article 3(1).
77 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989, Preamble.
78 UNCLOS, Preamble para 5.
79 UNCLOS, Preamble para 6.
80 UNCLOS, Article 194(1).
81 UNCLOS, Article 207(4).
82 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, Article 2.
83 These principles are the principle of integration between the environment and development, precautionary principle, principle for common concern of humanity, principle of State sovereignty with State responsibility, principle of common but differentiated responsibility, principle of global partnership and cooperation, polluter-pays principle and principle of participatory and informed decision-making (see Dupuy, 1997, pp. 888–891; Tanaka, 2015).
84 See *Gabčíkovo – Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Reports, 78, para 140.
85 UNCLOS, Preamble, para 4.

86 UNCLOS, Preamble, para 5.
87 Original name of this instrument is 'The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' adopted on 4 August 1995 and entered into force on 11 December 2001.
88 United Nations Fish Stocks Agreement, 1995, Article 2.
89 See Chapter 17 of Agenda 21.
90 Article 7.2.1.
91 Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries, 1999, para 12(n).
92 Reykjavik Declaration on Responsible Fisheries in the Marine Eco-system, 2001, Preamble para 21.
93 UNCLOS, Article 197.
94 See 'Introduction to IMO', viewed 9 July 2017, www.imo.org/en/About/Pages/Default.aspx.
95 See 'Introduction to IMO', viewed 9 July 2017, www.imo.org/en/About/Pages/Default.aspx.
96 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969.
97 International Convention for the Safety of Life at Sea, 1974.
98 International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990.
99 International Convention on Civil Liability for Oil Pollution Damage, 1992.
100 *International Convention* for the *Control and Management of Ships' Ballast Water and Sediments*, 2004.
101 International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009.
102 International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001.
103 See UNCLOS, Article 197; see also Articles 198–201.
104 RSP, viewed 11 July 2017, www.unep.org/regionalseas/who-we-are/regional-seas-programmes.
105 These are active in the Antarctic, Arctic, Baltic, Caspian and North-East Atlantic seas.
106 These are active in the Caribbean, East Asian, Eastern African, Mediterranean, North-west Pacific and Western African seas.
107 These are active in the Black Sea region, Northeast Pacific, Red Sea and Gulf of Aden, South Asian Seas, Southeast Pacific, Pacific and the ROPME Sea Area.
108 RSP, viewed 11 July 2017, www.unep.org/regionalseas/who-we-are/regional-seas-programmes.
109 RSP, viewed 11 July 2017, www.unep.org/regionalseas/who-we-are/regional-seas-programmes.
110 See Article 197; see also Articles 198–201.
111 Article 118.
112 Article 8(5).
113 These are the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992; the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992; the Convention for the Protection of the Mediterranean Sea Against Pollution, 1995, and the Protocols to the Convention on the Protection of the Black Sea Against Pollution, 2009.
114 For example, institutions such as the Secretariat of the Pacific Community, the Forum Fisheries Agency and the Secretariat of the Pacific Regional Environment Programme aim to protect and preserve of the environment of the Pacific Island region.

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