ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
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ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Международный нормативный порядок: традиционное понимание, последние тенденции и проблемы

Рюдигер Вольфрум

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

The International Normative Order: Traditional Understanding, Recent Developments and Challenges

Rüdiger Wolfrum

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The present publication contains the text of lectures by Rüdiger Wolfrum on the topic “The International Normative Order: Traditional Understanding, Recent Developments and Challenges”, delivered by him within the frames of the Summer School on Public International Law 2021.

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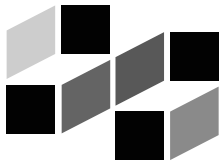

ЦЕНТР МЕЖДУНАРОДНЫХ
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Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

Летняя Школа – проект Центра, призванный дать возможность тем, кто изучает международное право, занимается или планирует заниматься им, получить дополнительные знания о предмете и стимулировать самостоятельную работу слушателей. Занятия в Летней Школе состоят из лекций и семинаров общего курса и объединённых рамочной темой специальных курсов, которые проводятся ведущими экспертами по международному праву, а также индивидуальной и коллективной работы слушателей.

В 2021 году Летняя Школа состоялась в четвёртый раз. Как и в 2020 году, в связи с пандемией COVID-19 она прошла в онлайн-формате на отдельно разработанной платформе. Специальные курсы были посвящены теме «Международное инвестиционное право». Их прочитали Самуэль Вордсворт («Международное инвестиционное право: история, настоящее, перспективы»), Анна Жубан-Брет («Материально-правовые стандарты защиты в международном инвестиционном праве»), Катарина Тити («Право на регулирование в международном инвестиционном праве»), Сергей Усоскин («Иностранные инвестиции и инвесторы»), Макане Моиз Мбенге («Урегулирование споров между инвесторами и государством»). Общий курс международного публичного права прочёл Рюдигер Вольфрум.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову, С. В. Усоскину – и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

In 2021, the Summer School was held for the fourth time. As in 2020, due to the COVID-19 pandemic, it was held on a tailor-made online platform. The Special Courses were devoted to the topic "International Investment Law". The courses were delivered by Samuel Wordsworth ("International Investment Law – History, Present, Perspectives"), Anna Joubin-Bret ("Substantive Standards of Protection in International Investment Law"), Catharine Titi ("The Right to Regulate in International Investment Law"), Sergey Usoskin ("Foreign Investments and Investors"), and Makane Moïse Mbengue ("Investor-State Dispute Settlement"). The General Course on Public International Law was delivered by Rüdiger Wolfrum.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board – Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, Bakhtiyar Tuzmukhamedov, and Sergey Usoskin – as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.

Рюдигер Вольфрум

Рюдигер Вольфрум, почётный профессор, почётный доктор наук, занимал должность судьи в Международном трибунале по морскому праву (1996-2017), был вице-председателем (1996-1999) и председателем Трибунала (2005-2008), членом нескольких международных арбитражных трибуналов, в том числе в спорах по Южно-Китайскому морю и по архипелагу Чагос, а также членом Согласительной Комиссии (*Восточный Тимор против Австралии*). Он также был профессором по национальному публичному праву и международному публичному праву на юридическом факультете Гейдельбергского университета и Директором Института сравнительного публичного права и международного права им. Макса Планка (1993-2012). Профессор Вольфрум является членом Института международного права (с 2007 года) и был Управляющим директором Фонда им. Макса Планка за международный мир и верховенство права (2013-2020). Автор многочисленных публикаций по международному, национальному и сравнительному публичному праву. Его публикации по международному праву посвящены ООН, международному экологическому праву, правам человека и общим вопросам международного права. Он также был редактором Энциклопедии международного публичного права Макса Планка (печатного и электронного изданий) до декабря 2020 года и остаётся соредактором Энциклопедии сравнительного конституционного права Макса Планка (электронной версии).

Rüdiger Wolfrum

Rüdiger Wolfrum, Professor Emeritus, Dr. Dres. h.c., served at the International Tribunal for the Law of the Sea (as a Judge (1996-2017), Vice-President (1996-1999), President (2005-2008)) and was a member of several international arbitral tribunals, such as on the South China Sea, on the Chagos Archipelago, and of a Conciliation Commission (*Timor-Leste v. Australia*). He also was a Professor for national public law and international public law at the Law Faculty of the University of Heidelberg, and the Director at the Max Planck Institute for Comparative Public Law and International Law (1993-2012). Professor Wolfrum is a member of the International Law Institute (since 2007) and was the Managing Director of the Max Planck Foundation for International Peace and the Rule of Law (2013-2020). He has numerous publications on public international law as well as on national and comparative public law. His publications on international law focused on the United Nations, international environmental law, international human rights, and general international law. He was also editor of the Max Planck Encyclopedia of Public International Law (in print and online) (until December 2020) and he is co-editor of the Max Planck Encyclopedia of Comparative Constitutional Law (online).

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I.

On the International Normative Order: Some General Considerations

It is a great pleasure to participate in the Summer School at the International Comparative Law Research Center, Moscow, and I am grateful to my colleague Judge Roman Kolodkin for having invited me. I thank him and all others from the Center for having made this lecture possible. I must confess, I would have preferred to be with you in person but we live in difficult times and I appreciate the application of a precautionary approach concerning traditional meetings.

The international normative order according to the approach pursued by this lecture is the international legal order and other elements, which operate at a legal as well as at a non-legal level.[1]

1. Defining Public International Law

International law is the legal order, which is meant to structure the interaction at the international level between entities participating therein and thus contributes to the shaping of international relations. This rather wide definition of public international law on purpose avoids concentrating on States as being the only subjects of international law or the only actors

[1] This lecture relies on the General Course on Public International Law, which I taught in January 2020 on "Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law", in *Collected Courses*, vol. 416 (2021). This Course summarized my previous writings putting them under a particular focus whereas the focus of this lecture is different and constitutes a further development of my considerations.

shaping the international normative order.[2] There is a variety of definitions of public international law. For example, Georges Abi-Saab[3] argues in favor of a wide notion referring not only to States but also to "communautés humaines organisées". Other definitions are used having a different focus or a narrower one in respect of the scope of norms concerned or in respect of the actors. For example, Samantha Besson[4] defines public international law as "a set of legal norms pertaining to the international community and to the cooperation between international subjects, whether states, international organizations, or, less frequently, individuals". In Oppenheim's International Law,[5] it is stated that "International law is the body of rules, which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relations of states, but states are not the only subjects of international law". Equally, the definition provided by Sean Murphy[6] is more restrictive stating that international law "is also concerned with certain legal norms that operate between a nation within its jurisdiction, and with certain legal norms that regulate the transboundary relationships of persons". In comparison thereto, Antonio Cassese[7] emphasizes that most of the rules of international law aim "at regulating the behavior of States, not that of individuals. States are the principal actors on the international scene. They are legal entities, aggregates of human beings dominated by an apparatus that wields authority over them". In Brownlie's Principles

[2] R. Wolfrum, "International Law", in *Max Planck Encyclopedia on Public International Law* (MPEPIL) (2006), <www.mpepil.com> accessed 21 August 2020.
[3] G. Abi-Saab, *Cours general de droit international public* (Martinus Nijhoff Publishers) 45 et seq.
[4] S. Besson, "Theorizing the Sources of International Law", in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 163 at 167.
[5] L.F.L. Oppenheim, R.Y. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Longman 1992, vol. I) 4.
[6] S. Murphy, *Principles of International Law* (St. Paul, MN Thomson/West 2006) 3.
[7] A. Cassese, *International Law* (Oxford University Press 2001) 3.

of Public International Law,[8] it is stated under the headline "Skepticism, Idealism and Reaction against International Law": "In sum international law provides a set of techniques for addressing the huge collective action problems presented by the co-existence of nearly 200 sovereign states … international law provides a normative structure for a rule-based system of international society".

Although most of these definitions predominantly refer to the impact of international law on international relations, it has to be noted that – and gaining in relevance – international law has an increasing influence on the normative order of States and other entities participating in international relations.

2. Addressees of the International Normative Order

In addressing the international normative order, it is necessary to distinguish between subjects of international law and actors/participants involved in the creation of international normative order and those to whom such international law is addressed. Such distinction is established under national law but not to the same extent in international law. In general, all subjects of international law may participate in shaping the international normative order and may be addressees thereof. However, other entities may have a direct or indirect influence on the shaping of the international normative order, too. Their influence in this respect is growing.

States play a significant role in today's international relations and continue to do so in spite of all prophecies to the contrary. However, they are not the only actors and creators of international law. In particular, since the end of World War II, international organizations have gained significant influence on the creation

[8] J. Crawford and I. Brownlie, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 17.

and shaping of international law.[9] The number of other actors who, directly or indirectly, participate in the shaping of international law has further increased beyond States and international organizations.

In the following, some emphasis will be placed upon the distinction between actors and addressees in international relations.

It is generally accepted that international law is addressing States and – at least indirectly – international organizations. The latter is an important issue from the point of view of dogmatics and practice. International organizations are mostly not parties to multilateral human rights treaties, for example; are they nevertheless obliged to honor them? It is discussed controversially whether individuals or groups of individuals are directly addressed and may directly benefit from or be obliged by international law.[10] The fact that other entities but States, in particular individuals and multilateral corporations, may be directly addressed by international law is of recent origin. This is so in spite of the fact that international responsibilities of individuals have their roots in earlier developments. Whether this results in acknowledging that individuals are to be considered subjects of international law is a different matter.[11] A comparatively new development attempts to oblige multinational enterprises to honor certain core international law principles. In my view, the subjectivity of individuals is an issue overrated in academic writings. What is of relevance, though, is

[9] J. Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009); M. Ruffert and C. Walter, *Institutionalisiertes Völkerrecht* (2nd edn, C.H. Beck 2015) 22 et seq.; J.E. Alvarez, *International Organizations as Law-makers* (OUP 2005) 1 and seq.

[10] This was and still is doubted in spite of the fact that already after World War I it was accepted that war crimes could be prosecuted based on international law directly.

[11] More generally, A. Peters, Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht (Mohr Siebeck 2017) favoring the international subjectivity of individuals. T. Treves, The Expansion of International Law, General Course on Public International Law (Brill/Nijhoff 2018) at 110/111 takes the opposite position.

whether they may be addressed by public international law directly. This is undoubtedly the case of international human rights regimes, in international humanitarian law and in international criminal law. This approach gains space in international environmental law and in world trade law.

Finally, some brief remarks on what qualifies law as public international law. It is generally held that the distinction between national public law and public international law is not a matter of applicability or subject matter but a matter of the procedure in which the law concerned was generated. If the law in question was developed by subjects of international law, it belongs, in principle, to public international law. This is also the case if the law in question has been developed in an international organization having the competence to enact binding legal rules. If the law concerned has been developed and adopted in a national procedure on the establishment of legal norms (with or without involving parliament), these rules are to be considered national law. The concentration on the procedure rather than on substance is necessary because international law meanwhile covers issues traditionally reserved for and still covered by national legislative jurisdiction.

Another matter is how international law is made effective at the national level.[12] International law may be directly applicable at the national level[13] besides being made applicable via a procedure incorporating rules of international law into national law.[14] In the

[12] P. Daillier, M. Forteau and A. Pellet, *Droit International Public* (8th edn, LGDJ 2009) at 99 offer a different definition: Le droit public étatique se subdivise ainsi en deux branches: le droit public interne et le droit public externe, ce dernier constituant précisément le droit international.

[13] Besson (note 5), at 167.

[14] The approaches towards the relation between international law and national law vary from State to State. Under the system of some States, it is assumed that by implementing public international law via enactment of a national legislative act, the international law norm in question is transformed into national law. Others argue that such legislative act merely allows the implementation of the

latter case, it depends on the national system concerned whether the incorporated international law rules keep their character as public international law rules or are transformed into national law.[15]

said international law rule within the national realm (for Germany, see report of K.J. Partsch, *Die Anwendung des Völkerrechts im innerstaatlichen Recht, Berichte der Deutschen Gesellschaft für Völkerrecht* (Müller Verlag 1964)). For example, the relevant part of Article 59(2) of the German Basic Law reads: "Treaties, which regulate the political relations of the Federal Republic of Germany or relate to matters of federal legislation, shall require the consent or participation, in the form of a federal law, of the bodies competent to any specific case for such federal legislation". A similar provision is to be found in the constitutions of Spain and of Australia. On the theoretical level, attempts have been made to express the relationship between public international law and national public law by having recourse to "dualism" and "monism". The former assumes that national law and public international constitute two different distinct and independent branches of law whereas under monism, national and international law form one single order (see on that Brownlie's, note 9, at 48–50). State practice does not implement – at least not in their pure form – either of the two theoretical approaches.

[15] See in this respect Article 25 of the German Basic Law, which provides "The general rules of public international law shall be an integral part of federal law". The problem of such an approach is whether the norm in question is precise enough for direct application. Public international public is, in general moot, in this respect.

II.

Is International Law Legally Binding and Is This a Decisive Feature of the International Normative Order?

1. In General

The traditional starting point for defining the basis for a binding public international law is a well-quoted ruling of the PCIJ in the *Lotus* case.[16]

> International law governs relations between independent States. The rules of binding upon States therefore emanate from their own free will as expressed in conventions or by usage that is generally accepted as expressing principles of law and established in order to regulate the relations between co-existing independent communities or with a view to the achievements of common aims.

Such definition of public international law does not cover the realities of international relations anymore. International law does not address only States and is not dependent only upon the consent of States as formulated by the Permanent Court of International Justice. Equally, it is not appropriate to categorically refer to States as "co-existing independent communities". However, it has to be acknowledged that the reference to "achievements of common aims" is becoming of increasing relevance and has culminated in regimes serving community interests.

This course will work based on a different definition of public international law. According to it, public international law has for objective to establish a binding set of norms, not necessarily only

[16] The case of the S.S. "Lotus" (*France v. Turkey*), 1927, PCIJ (ser. A), No.10, at 18.

legally binding, to structure the conduct of actors in international relations (not only of States) or to achieve objectives benefitting the international community at large.[17]

This definition reflects that public international law is not only shaped by States – although they continue to play an important or even dominant role in this respect – but also by other actors acting on their own or in cooperation with States and international organizations. As the consequence thereof, international law does not only depend in respect of its legitimacy on the consent of States; supplementary elements as means of legitimizing international law have developed, some being value-based. Particular attention has to be paid to the legitimizing function of the procedure, in which international norms are generated. Of significance are their transparency and their inclusiveness.

In the lecture, I shall attempt to establish the binding nature of international law by reference to the established sources of international law. These are, according to Article 38 ICJ Statute, international treaties, customary international law, and general principles. Let me emphasize that Article 38 ICJ Statute only binds the ICJ and the list is by no means a complete one. Therefore, the commonly used term "list of international law sources" is somewhat misleading. One has to add unilateral declarations of States, decisions of international organizations such as decisions under Chapter VII of the UN Charter, for example.

[17] This definition differs from the one offered by E.B. Weiss, "Establishing Norms in a Kaleidoscopic World", in *Recueil de Cours (RdC)* (vol. 396, Académie de droit international 2018) at p. 75, who relies on the concept of transnational law as elucidated by T.C. Halliday and G. Schaffer (eds.), *Transnational Legal Orders* (Cambridge University Press 2015) 11.

2. Treaty Law

a) Horizontal Structure: Its Procedural Consequences

The structure of the international legal system is horizontal involving more than 195 sovereign States. To make this legal framework of international law work, some basic norms – a *jus necessarium* – have to be recognized by all. Within the network of their legal relationships, States recognize shared principles and procedures for interaction.[18] One of these norms is the concept of *pacta sunt servanda* (agreements are binding). The conclusion of all international treaties is based on this premise.

The statement that international treaties require the consent of the State parties concerned is undisputed but conveys legitimacy only if such consent is supplemented by the continuing assent to the treaty concerned. This deserves an explanation. One has to distinguish between the binding nature of an international treaty and the legitimacy of the latter. International treaties are binding and remain binding after having been ratified in the prescribed procedure. However, this does not necessarily mean that international treaties remain legitimate; they may lose legitimacy over time. This is due to two factors. International treaties are living instruments and develop over time. This is particularly true for international treaties establishing international organizations. Apart from that, changing circumstances may influence the meaning and the relevance of international treaties. This means that the binding nature and the legitimacy may fall apart. The regime on international treaties has only limited mechanisms to reunite the binding nature and the legitimacy of treaties.

International treaties constitute one mechanism, among others, shaping international relations.[19] Although this process is referred

[18] M.N. Shaw, *International Law* (5th edn, Cambridge University Press 2003) 5 et seq.
[19] There is an overwhelming literature on international treaties; only a selection can be referred to here: A. Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge

to occasionally as international legislation, any association with national procedures on law making is misleading. International law is developed horizontally namely by those which are also the addressees of the law whereas national law has a vertical orientation addressing individuals or institutions over which the given State has jurisdiction.

b) Drafting International Treaties

The procedure for drafting international treaties is flexible. The Vienna Convention on the Law of Treaties (VCLT) provides guidance in respect of the negotiation of treaties, their entering into force, their interpretation, as well as their termination or invalidation.[20]/[21]

There is a significant difference in the form **deliberating a bilateral and a multilateral treaty**, although the objective in both cases is identical, namely to merge the will of the participants and to confirm this merger. The rules of the Vienna Convention on the Law

University Press 2013); R. Kolb, *Law of Treaties. An Introduction* (Edward Elgar Publishers 2016); L. McNair, *The Law of Treaties* (OUP 1961); S. Rosenne, *The Law of Treaties* (Nijhoff 1970); R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer 2005); M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 2009); M. Fitzmaurice, "Treaties", in *MPEPIL* (note 2) (2010), <www.mpepil.com> accessed 21 August 2020; O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer Verlag 2018).

[20] At the time of its adoption, most – but certainly not all – of the VCLT provisions were considered to reflect customary international law. Several efforts had been made previously to codify the law of treaties. In 1928, the American States adopted the Havana Convention on the Law of Treaties and the Harvard Law School in 1935 published a Draft Convention on the Law of Treaties. It was only after 1945 that the International Law Commission started the process of codifying the law of treaties on a more formal basis. A draft developed by the International Law Commission was the basis for the deliberations of the UN Conference on the Law of Treaties, which resulted in the Vienna Convention on the Law of Treaties, 1969.

[21] There are two further conventions relating to the law of treaties, namely the Vienna Convention on the Succession of States in Respect of Treaties, 1978 (UNTS, vol. 1946, p. 3) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 (ILM, vol. 25, p. 543). The former being in force the latter is not.

of Treaties (VCLT) on the elaboration of international treaties are embryonic at best. Article 9 VCLT does not refer to the deliberations but in paragraph 2 only states:

> The adoption of the text of the treaty at an international conference takes place by the vote of two-thirds of the States present and voting unless by the same majority they shall decide to apply a different rule.

Considering the proliferation of multilateral conferences and other international fora, which contribute to or are engaged in the development of international law, this provision does not reflect the reality anymore if it had even reflected it at the time when the Vienna Convention on the Law of Treaties was adopted.

States are flexible in organizing the procedure for negotiating and adopting international treaties. The whole process may be divided into two parts, the procedure of negotiating an international treaty and the procedure in which the States concerned express their consent. The latter part can be divided again into two or three parts depending upon the national rules of each single participating State.

The following will focus on multilateral treaties and the procedure of their drafting.

As far as the negotiation and adoption of multilateral treaties are concerned, it is necessary to distinguish between the situation that the text of a treaty to be negotiated has been prepared by an expert body, such as the ILC (this was the case for negotiating the Vienna Convention on the Law of Treaties), or such treaty is prepared by the multilateral conference itself or by a politically oriented body. The latter was the solution chosen for the UN Convention on the Law of the Sea.[22]

[22] The procedure for the latter differed markedly from the drafting of the Geneva Law of the Sea Conventions, 1958. The First UN Conference on the Law of the Sea

Several procedural decisions have to be reached before the deliberations on substance may begin. Such procedural decisions are set out in the rules of procedure; they deal, amongst others, with the right to participate in the conference concerned (States, international organizations, status of non-governmental organizations), the organization of deliberations, the voting procedure (quorum, majority needed for the taking of procedural decisions or the adoption of a text), how the consent to be bound by the text may be expressed and questions concerning the entry into force. Other equally relevant issues are the venue, the issue of authentic languages, and the period set aside for the negotiating process.

The mechanism to develop international agreements through multilateral conferences goes back to the Vienna Conference of 1815. Two of the most influential multilateral conferences at the end of the 19th century and in the beginning of the 20th century are the Hague Peace Conferences of 1899 and 1907.[23] Historically, multilateral treaties were adopted by unanimity. This is not considered adequate any more.

Seen from an abstract point of view, the rules of procedure for a multilateral conference with the mandate to develop a regime concerning the management of community interests are bound to establish a balance between the interests of particular individual States but as the same time honoring the objective pursued by the majority of States. Several factors are necessary to achieve this balance apart from the decision on which majority is needed to adopt the text of a draft treaty. The default rule in Article 9 VCLT according to which the text of a draft treaty may be adopted by a two-thirds majority was, at the time when it was adopted,

(Geneva) had had recourse to the preparation of the ILC, as well as drafts developed under the League of Nations.

[23] See on that J.B. Scott, *The Hague Peace Conferences of 1899 and 1907* (Garland Publishing 1972) Chapters II and III.

considered progressive. Due to the increase in the number of States, the view developed that such a voting procedure might lead to unrepresentative majorities disadvantaging smaller groups with particular vested interests. However, this may be counterbalanced by making the entry into force of international treaties dependent upon the adherence of a sufficient number of States having vested interests in the subject matter of the treaty in question. In reaction to such concerns, the consensus rule has become the alternative for the voting procedure at many international multilateral conferences, in particular the ones undertaken under the auspices of the United Nations. This means an agreement is adopted if no participant challenges the consensus reached by insisting on taking a vote. In fact, this does not mean that every participant fully agrees with the result achieved, but that it considers its objections not to be serious enough to challenge the result as such. Very often, such a procedure is combined with a majority voting system. If a participant objects, the text will have to be accepted by a qualified majority. However, the applicability and the efficiency of the consensus requires a supplementation namely that the content of the draft treaty is, as far as its content and scope are concerned, substantially balanced so that every participant has an incentive to join the treaty regime in question – this is referred to as package deal approach.[24] The consensus approach is more than a mechanism for voting; it has a significant impact on how deliberations are undertaken.

The national procedures vary widely in particular to the extent to which the parliamentary bodies are to be involved. In the period between the signature of the draft treaty and its final adoption or

[24] See the Remarks by Tommy T.B. Koh, Singapore, President of the Third United Nations Conference on the Law of the Sea, reprinted in: The Law of the Sea: United Nations Convention on the Law of the Sea; United Nations referred explicitly to the fact that the Convention constituted a package; see on E.L. Miles, *Global Ocean Politics: The Decision Process at the United Nations Conference on the Law of the Sea 1973-1982* (Martinus Nijhoff Publishers 1998) 277 et seq.; he distinguishes two different phases. He also, at 96 et seq. explains the effect the consensus principle has had on the decision-making procedure at UNCLOS III.

rejection, a State is under the obligation not to defeat the object and purpose of the treaty signed.[25] States are not under an obligation to finally adopt and implement an international agreement in whose negotiation they have participated. The moment when the treaty concerned is submitted to the scrutiny of the competent national institution, considerations that have not been followed up earnestly in the negotiations may become relevant. For example, the Australian and the French government decided not to ratify the Convention on Mineral Resource Activities in Antarctica (CRAMRA) invoking principled environmental considerations, which had been voiced by environmental groups. This was the reason why the plan for a supplementary agreement to the Antarctic Treaty, focusing on resource activities, was abandoned and a Protocol to the Antarctic Treaty on the protection of the environment and scientific research was adopted instead. Whether this shift was favorable for the protection of the Antarctic environment, in the end, is debatable.

If there is no intention of a State to approve a treaty, once signed, the obligation under Article 18 of the VCLT becomes obsolete.[26] This approach was pursued in regard of the ICC Statute by the United States. It had informed the depositary of the ICC Statute of the intention not to become a party to the treaty.[27] The establishment of the ICC and the prosecution of war crimes, genocide, crimes against humanity, and crime of aggression are in the interest of the international community. Therefore, this decision of the US government to refrain from becoming a member of the ICC Statute at the last moment, although it had participated fully in the deliberations, was an unfortunate move from the point of view of the interests of the international community.

[25] Article 18 VCLT; Villiger (note 19), Article 18, MN 9 et seq. elaborating on the meaning of the notion "not to defeat the object and purpose"; Dörr, in Dörr/Schmalenbach (note 19), Article 18 MN 29–38.
[26] Villiger (note 20), Article 18, MN 15 states that Article 18 cannot be invoked any more.
[27] Fitzmaurice, "Treaties", in *MPEPIL* (note 19) (2010), MN 48.

In the case of multilateral treaties, documents expressing agreement to be bound are deposited with a depositary; the treaty in question enters into force if a sufficient number – the number being stated in the treaty in question – of documents expressing agreement have been deposited. This majority may be qualified. For example, it is typical for commodity agreements to enter into force only after having been ratified by a percentage of exporters and importers of that commodity, respectively.[28] Such clauses ensure that a treaty does not disregard the views or interests of a sizable group of States whose interests are affected by the multilateral treaty concerned. One may, in this respect, speak of indispensable actors.

International treaties try to achieve a high standard of commitment but also strive to gain the participation of States as widely as possible. Both objectives cannot be easily reconciled. Reservations try to bridge these two objectives. By filing a reservation, the State in question objects to certain elements of a treaty while accepting the others.[29] Without that possibility, such a State may not adhere, which would be detrimental to the universality of or at least the wide participation in the treaty in question. Reservations are to be distinguished from interpretative declarations. Some international agreements exclude or limit the former allowing the latter.[30]

[28] The International Cacao Agreement, 2010 (<https://www.icco.org/about-us/international-cocoa-agreements/cat_view/2-icco-agreements-and-their-history/3-2010-international-cocoa-agreement.html>) provides in Article 57: "The agreement shall enter into force on October 2012, or any time thereafter, if by such date Governments representing at least five exporting countries accounting for at least 80 per cent of the total exports of countries listed in annex A and Governments representing importing countries having at least 60 per cent of total imports as set out in annex B have deposited their instruments of ratification, acceptance, approval or accession with the Depositary".

[29] See the definition in Article 2(d) VCLT.

[30] See Articles 309 and 310 of UNCLOS.

State practice was not uniform concerning the consequences of reservations. The traditional view was that a reservation in respect of one or several provisions of a multilateral treaty required the consent of the other parties to that treaty to become effective. If one State party objected, the reserving State would not become a party to the said treaty.[31]

The starting point in dealing with reservations is the Advisory Opinion of the ICJ on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[32] According to that Advisory Opinion, a State may submit reservations but no reservations, which are incompatible with the core of the treaty concerned. The consequence would have been that there would be no treaty relationship between a State having entered a reservation and the other States not having done so.

However, the Vienna Convention on the Law of Treaties takes a different position. States have the general right to formulate reservations[33] unless reservations are excluded or the treaty in question provides for the possibility of specific reservations but not for the type of reservation submitted.[34] If the treaty in question is silent on reservations, the reservation will not be admitted if it is incompatible with the object and purpose of the treaty concerned.[35] Unfortunately, the relationship between Article 19 VCLT on the "formulation of reservations" and Article 20 VCLT on "acceptance of and objections to reservations" is not fully clear.[36] The ILC developed a Guide to Practice on Reservations

[31] In more detail on the development of the rules concerning reservations Villiger (note 19), Article 19, MN. 3–5 and C. Walter, Article 19, in Dörr/Schmalenbach (note 19), MN 7 at seq.
[32] ICJ Reports 1951, 15 at 26 et seq.
[33] Article 19 VCLT; see Villiger (note 20), Article 19, MN 9; Walter, Article 19, in Dörr/Schmalenbach (note 19), MN 22.
[34] Article 19 lit. a and b VCLT.
[35] Article 19 lit. c VCLT.
[36] See Brownlie's (note 8), at p. 361 et seq.

to Treaties,[37] which provides that invalid or impermissible reservations are null and void. The Guide further provides that a Party having submitted an invalid or impermissible reservation together with its ratification of the treaty concerned will be bound by that treaty unless that party has expressed its intention otherwise.

International law developed some restrictions for making reservations. No reservation may be entered into against a norm of *jus cogens*. Apart from that, several international treaties declare that reservations in general or reservations against particular provisions are not permitted. As already indicated, Article 309 of UNCLOS provides that reservations are not possible unless expressly permitted by the Convention. Article 311(6) of that Convention even states that

> States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof.

This renders a principle, which formulates community interests, unchangeable but does not qualify it as *jus cogens*. Following a similar approach, the ICC Statute, 1998 excludes the possibility of making reservations,[38] so does, for example, the Ottawa Mines Convention, 1997.[39]

Quite frequently, States attach interpretative declarations to their document of signature or ratification. Several international treaties, which limit reservations, provide for such an option. This is true for the UN Convention on the Law of the Sea. The difference

[37] ILC Report 2011, GAOR, 66th Session, Supp N.10, A/66/10, 12-51 and Add.1; the Guide is not a binding instrument and there is no intention to transform it into a treaty supplementary to the VCLT.
[38] See Article 120.
[39] See Article 19.

between interpretative declarations and reservations is not always easy to draw. If the instrument in question attempts to change the scope of the international treaty, it constitutes a reservation. Interpretative declarations are often ambivalent. They may intend to limit the possible range of interpretations and, therefore, may be contrary to progressive development.

Article 42 VCLT provides that the **validity and continuance in force** of an international treaty may only be challenged based on that Convention or the treaty in question. Further, Article 45 VCLT limits the possibility to invoke grounds for invalidation, termination, withdrawal, or suspension. The primary objective of the Vienna Convention on the Law of Treaties is to sustain the stability of treaty regimes[40] rather than to open international treaties for progressive development.

c) Form and Substance of International Treaties

In international law, there is no uniformity when it comes to qualifying an instrument as a treaty although mostly the term "treaty" is used. Article 38(1)(a) of the ICJ Statute refers to "conventions". Other terms used exchangeably are treaties, protocols, covenants, and agreements.[41] This issue goes beyond how an instrument qualifies itself. In practice, memoranda of understanding, agreed minutes, exchange of letters, and codes of conduct have been considered as international treaties.[42] The ILC emphasized that an agreed conclusion by exchange of notes or joint declarations may constitute an international treaty. The ICJ took the same position;[43]

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[40] On this N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford University Press 1995); Villiger (note 20), Commentary on Article 42, MN. 15.

[41] As Article 2(2) VCLT indicates, the actual term used is of no relevance.

[42] Fitzmaurice, "Treaties" (note 19) MN 16 with further references.

[43] ICJ International status of South-West Africa, Advisory Opinion; ICJ Reports 1950, 128, at 135; ICJ South-West Africa *(Ethiopia v. South Africa; Liberia v. South Africa)* [Preliminary Objections], ICJ Reports 1962, 261, at 331; Maritime Delimitation and

it was followed by ITLOS.[44] Binding commitments may also have their basis in an agreed practice (tacit agreements). The ICJ has acknowledged this possibility[45] but a Special Chamber of ITLOS[46] has set the standards for the establishment of tacit agreements so high that in practice it will be complicated in the future to successfully refer thereto.

What alone is essential is that the instrument in question is the product of a merger of the will of two or more subjects of international law for regulating a particular issue under international law voluntarily with legally binding force. These three elements, namely the will to make arrangements that are legally binding and come under international law, are the indispensable assets of international treaties.[47] The procedure how to reach this merger of wills is irrelevant as long as such a merger of wills has been established.

The objective pursued by an agreed-upon instrument is irrelevant for the qualification or non-qualification of a treaty. The qualification of an instrument as a treaty is independent of the fact that treaties violating peremptory norms of international law (*jus cogens*) are null and void.[48]

Territorial Questions between Qatar and Bahrain, (*Qatar v. Bahrain*) Judgment, ICJ Reports 1994, p. 112, at 122 (para. 25).

[44] It shares the views of the ICJ in Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), Judgment, ICJ Reports 2007, 659, at 735, para. 253 in its judgment Delimitation of the maritime boundary in the Bay of Bengal (*Bangladesh/Myanmar*), ITLOS Reports 2012, p. 40, para. 117.

[45] *Qatar v. Bahrain* (note 44), para. 29.

[46] Dispute Concerning the Delimitation of the Maritime Boundary between Ghana/Cote d'Ivoire (*Ghana/Cote d'Ivoire*) in the Atlantic Ocean, Judgment 23 September 2017, ITLOS Reports 2017, p. 4, at paras. 211–228.

[47] Article 2(1)(a) VCLT provides the following definition which equally defines the scope of this Convention: "...'treaty' means an international agreement concluded between States in written form and governed by international law whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[48] Article 53 VCLT.

Arrangements not meeting these requirements of an international treaty are not covered by the VCLT but they are also contributing to the international normative order.

d) *Pacta sunt servanda* / *Pacta tertiis* Rule

As already indicated, the principle *pacta sunt servanda* is the basis for the binding nature of treaties.[49] Whether this principle is part of customary international law or to be considered a general principle of international law or is rooted outside international law has been discussed controversially. This discussion is rather of an academic nature. This principle is the logical consequence of adopting treaties; otherwise, there would be no point in elaborating or adopting them.[50]

International treaties provide for rights and obligations of the addressees or they may preserve a factual or legal situation or they may establish procedures and standards.

Article 34 VCLT stipulates that a treaty does not create either obligations or rights for third States without the consent of the latter (***pacta tertiis* rule**) – which is considered as the counterpart to the principle of *pacta sunt servanda*.[51] Exceptions to this rule exist. One such exception is Article 2(6) UN Charter, which provides that the UN organization "…shall ensure that States which are not Members

[49] Article 26 VCLT reads: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith"; see on the origin of this principle Schmalenbach, in Dörr/Schmalenbach (note 282), Article 26, MN 4 and 5.

[50] G. Dahm, J. Delbrück and R. Wolfrum,*Völkerrecht* (2nd edn, vol. I/1, De Gruyter 1989) at p. 600 refers to this principle as being necessary for the functioning of a legal regime. Others have indicated that the foundation of this principle is good faith, a view which has been endorsed by the ICJ in the Nuclear Tests case (*New Zealand v. France*), ICJ Reports 1974, 457, para. 49; others consider the *pacta sunt servanda* principle as a generally recognized rule of customary international law or a general principle of law (see on that Schmalenbach in Dörr/Schmalenbach (note 19), Article 26 MN 18–22).

[51] A. Proelß, Article 34, in Dörr/Schmalenbach (note 20) who describes Article 34 as the negative facet of the principle *pacta sunt servanda* MN 1; see the differentiated analysis of the term "obligations" used in Article 34 VCLT at MN 13–16.

of the United Nations act in accordance with these Principles...". Due to the universality of UN membership, this provision has lost its practical relevance. Another exception is boundary treaties in the case of State secession. In general, in the case of State secession, the "clean slate" principle applies. This means the international treaties concluded by the State from which the secession took place do not bind the newly established State. This reflects the sovereignty of the newly established State. An exception is made for treaties on territorial or maritime boundaries.[52]

A similar tendency seems to have developed in respect of human rights treaties.[53] The UN Commission on Human Rights in 1993, 1994, and 1995 adopted three successive resolutions entitled "Succession of States in Respect of International Human Rights Treaties".[54] The Commission encouraged successor States to confirm officially that they continued to be bound by obligations under relevant international human rights treaties, emphasizing the special nature of human rights treaties.[55] It, in fact, encouraged the treaty bodies of the various human rights treaties to seek to implement these recommendations. The reaction of the States concerned was ambivalent. This certainly does not touch upon the essence of Article 34 VCLT but it indicates that certain regimes may have a status, which is independent of the membership thereto.

Depending on the interpretation of the *pacta tertiis* rule, one may consider the latter to constitute an obstacle to fully implementing international treaties, which have an objective to establish an

[52] See on State succession Article 73 VCLT, as well as Article 11 of the Vienna Convention on the Succession to Treaties, H. Krieger, "Article 73" in Dörr/Schmalenbach (note 19), MN 11–18.

[53] See on that Krieger, in Dörr and Schmalenbach (note 20) at MN 17/18; N. el-Khoury, "Human Rights Treaties and the Law of State Succession" (2019) 23 Max Planck Yearbook UN Law.

[54] Resolution 1993/23 (5 March 1993), 1994/16 (25 February 1994) and 1995/18 (24 February 1995).

[55] Succession of States in Respect of International Human Rights Treaties: Report of the Secretary-General (28 November 1994) UN Doc. E/CN.4/1995/80, at para. 2.

international treaty-based regime serving community interests. To ensure the effectiveness of such regimes makes it mandatory not only to strive for the widest possible participation of States but to also ensure that States not having joined the regime concerned will not infringe upon the workability of that regime. This problem had been realized in deliberations of what later became Article 34 VCLT. The Waldock report III contained a provision concerning the toleration of objective regimes by third States, which the ILC did not accept.[56] Nevertheless, the negative impact of Article 34 VCLT is limited. It excludes the establishment of "obligations" but does not exclude that the regime concerned may have negative impacts, be they of a factual, political, or economic nature, on third States. This has been emphasized in the Waldock Report VI.[57] Still, a gray area seems to exist on how to apply the *pacta tertiis* rule in respect to regimes serving community interests.

e) Categorization of Treaties

International treaties may be categorized according to their subject matter, for example, human rights treaties, environmental treaties, delimitation treaties, etc. Treaties may also be categorized according to their membership, for instance, multilateral treaties, bilateral treaties, regional treaties, treaties with limited membership. Such categorizations are mostly of a descriptive nature.

Apart from this traditional categorization of international treaties, there are three groups of international treaty categories, which are of relevance here. These are, first, law-making treaties v. contractual treaties, second, treaties constituting an international organization, and third, international treaties, which are meant

[56] ILC Yb 1964 II, p. 26 et seq.; see on that M. Ragazzi, *The Concept of International Obligations erga omnes* (Clarendon Press 1997) 37 et seq.; Villiger (note 19), Article 34, MN 11.
[57] ILC Yb 1966 II, 67, para. 2; different Proelß, Article 34 (note 20), MN 42/3 and 52 et seq.

to provide for a comprehensive regime compared to those, which foresee a normative development (framework treaties).

Law-making (or normative) treaties[58] are those, which establish or contribute to a general – nevertheless binding – legal order, which provides for permanent obligations. Contractual (or reciprocal) treaties, instead, are based upon the exchange of concessions. The Vienna Convention on the Law of Treaties does not refer to this distinction although it was discussed during the deliberation of the ILC.

"Law-making" does not – and this is most relevant – fit convincingly into the pattern of reciprocal rights and obligations as contractual treaties do. The latter build upon the consideration that mutual rights and obligations among the parties to such treaties are in balance. This balance is supposed to guarantee or to contribute an incentive to first adhere to such a treaty and second to honor it. Therefore, it is said that this system is upheld by the principle of reciprocity.[59] The principle of reciprocity does not apply to law-making treaties, where the obligations undertaken are not primarily serving the particular interest of another party but the interests of a wider community, for example, the international community. This is the case for human rights treaties or treaties for the protection of the environment. Honoring, for example, the prohibition of torture in general does not – except for particular situations – serve the direct interest of another party to the treaty in question. The abolition of torture is in the interest of the community of States or at least in the interest of States being parties to the international convention outlawing torture.[60] Under contractual treaties, the

[58] Brownlie's (note 9), at 31/32.

[59] A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) paras. 64–67.

[60] For example, Article 7 of the Covenant of Civil and Political Rights states "No one shall be subject to torture, or cruel, inhuman or degrading treatment or punishment..." and the Preamble of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, declaring that the

party not honoring the treaty in question can be induced to honor the treaty again by either withholding from it the benefits under the given treaty, suspending its membership in such treaty, or threatening to terminate its membership. Such measures would, by themselves alone, not necessarily produce any positive result concerning the enforcement of a law-making treaty regime serving community interests.[61]

The distinction between law-making treaties and contract treaties is not always easily drawn. For example, the Third Geneva Convention on the Treatment of Prisoners of War may be qualified as a law-making treaty. Nevertheless, it equally contains an element of reciprocity. Parties to an international conflict accord the prisoner of war status to individuals of the opposing State also in the expectation that if its soldiers become prisoners of war, the opposing State would grant them the rights under the Third Geneva Convention, too.

Traditionally, international treaties, which are the constituent instrument for an international organization, are considered as a separate category of treaties.

Finally, one should distinguish between international treaties which are designed to cover the subject matter completely and those treaty regimes, which envisage being completed by additional protocols or annexes to be added later. The latter may be referred to explicitly as "Framework Agreements" or may *de facto* constitute as such. Even for a treaty that has not been qualified as a framework agreement, additional protocols are nevertheless an option for the progressive development of the regime concerned as implementation agreements. Therefore, a differentiation between a "final" agreement and a framework one depends much on the

prohibition of torture rests in the dignity of the human being can be understood to mean that the prohibition of torture constitutes an *erga omnes* obligation.

[61] For further details concerning treaties serving community interest, see below.

evolution of the facts, which are meant to be governed by the treaty concerned. Treaty regimes considered comprehensive have been progressively developed through different mechanisms. The mechanisms used are an interpretation of the norms concerned making use of the objective pursued by the legal regime in question (teleological interpretation) by a progressive interpretation of rules which are designed to be interpreted widely but within the limits of that treaty concerned. One of the numerous examples of such interpretation-open rules is the frequent obligation to avoid "arbitrariness" in Articles 6(1), 9(1), 12(3) 17(1), etc. ICCPR.[62] Such open terms constitute in fact a mandate for those called upon to interpret and to implement the norm in question to develop it. In doing so, they exercise prescriptive functions.

A further measure for the development of a regime progressively through interpretation is the possibility to take into account subsequent practice in the application of the treaty as referred to in Article 31(3)(b) VCLT.

It is further necessary to distinguish between obligations of result and those of conduct,[63] the latter providing the addressees with significant flexibility on how to fulfill the commitment. For example, according to Article 4(a) of the International Convention on the Elimination of all Forms of Racial Discrimination,[64] all member States "shall declare an offense punishable by law all dissemination

[62] UNTS vol. 999, p. 171.

[63] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) at p. 20-22 on the treatment of that issue by the ILC; the issue was omitted simply for the reason that it was of no relevance in the context of State responsibility. In its Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (ITLOS Reports 2011), the Seabed Disputes Chamber of ITLOS differentiated between obligations of result and those of conduct and spelled out the consequences in respect of State responsibility (at para. 110). The Seabed Disputes Chamber summarized "To utilize the terminology current in international law, this obligation may be characterized as an obligation 'of Conduct' and no 'of result', and as an obligation of 'due diligence'".

[64] UNTS vol. 660, p. 195.

of ideas based on racial incitement or hatred, incitement to racial discrimination, as well as acts of violence;…". This constitutes an obligation of result. Whereas the undertaking referred to in this Convention in Article 5 – "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms…" – constitutes an obligation of conduct. In respect of the latter, member States have to exercise due diligence. There seems to have been developed a trend to have more frequent recourse to obligations of conduct. This, in particular, is the case in respect of international regimes concerning the protection of the environment. An example to this extent is the Paris Agreement on Climate Change.

Equally, of relevance for the potentiality of a treaty to be progressively developed is whether it is adopted for an unlimited period of time, whether it has a revision clause, or whether it is concluded only for a limited period. The revision clause for an international treaty may provide for the progressive development of that regime, but it may also provide for the contrary. A typical example is the United Nations Charter, where the review clause *de facto* inhibits a revision. The same is true for the UN Convention on the Law of the Sea. In both cases, the said review clauses have for objective to safeguard the *status quo*. The consequence thereof is that a revision is sought outside the regime in question. For the UN Convention on the Law of the Sea, two Implementation Agreements were adopted. The term "Implementation Agreement" is misleading. They, in fact, significantly modified the Convention, at least one of them progressively. A further agreement of this type on biological resources beyond national jurisdiction is in preparation. The UN Charter in turn was modified in practice.

International treaties serving community interests are gaining ground. The term "international community" was first coined in international relations theory with the view to establish that a certain rule or a certain decision has legitimacy, which goes beyond the group of States or States represented in a particular

forum. Meanwhile, references to the international community are contained in political as well as in legal documents, frequently in the preambular parts or embedded in the principles. Those references and principles are meant to guide the interpretation and implementation of the instrument concerned. The term "community or community interests" is frequently referred to in literature.[65] It is a matter of debate in literature what is considered as "community" – whether these are only States and international organizations through which collective goals are pursued or whether the term also refers to humankind or at least to non-governmental entities.[66] This question is mostly an academic one. Under present international law, the principal actors in the formal international norm-making process are States and international organizations, although other entities have gained in relevance.

Identifying States and international organizations as principal actors, however, does not say anything about whose interests are taken into account and who is the addressee of international law

[65] On that see E. Benvenisti, G. Nolte and K. Yalin-Mor, *Community Interests Across International Law* (Oxford University Press 2018) with contributions on the notion in general, as well as its application in specific issues; I. Feichtner, "Community Interest", in *MPEPIL* <www.mpepil.com> accessed 21 August 2020; A.A. Cancado Trinidade, *International Law for Humankind: Towards a New Jus Gentium* (2nd edn, The Hague Academy of International Law 2013) at 327 et seq. prefers to refer to common heritage of mankind and common concern of mankind due to his individual oriented approach towards public international law.

[66] On the definition of the notion "community", see E. Kwakwa, The International Community, International Law, and the United States: Three in One, Two Against One and the Same? in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (CUP 2003) 25–56 at p. 27 et seq. who includes also non-state actors; B. Simma, "From Bilateralism to Community Interest in International Law" (1994) 250 (VI) RdC 215 at 233; C. Tomuschat, "Obligations Arising for States Without or Against their Will" (1993) 241 (IV) RdC 209, 227; G. Abi-Saab, "Whither the International Community" (1998) 9 EJIL 248; he stated on the concept that the reference to the international community "is based upon the awareness among legal subjects of the existence of a common interest or common value which cannot be protected or promoted unilaterally, but only by a common effort" (at p. 251).

norms. This is – at least in respect of the issues dealt with here – humanity.

The UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, 1994,[67] provides in its Preamble (paragraph 2) an indication of what is meant by the term "international community". It states:

> Reflecting the urgent concern of the international community, including States and international organizations, about the adverse impacts of desertification and drought.

This reference refers to the traditional subjects of international relations, namely States and international organizations, as the still dominant actors in international relations, while emphasizing that the addressee finally may be humanity.

The term "international community" implies – as a precondition for the establishment of the regimes concerned or as their consequence – that the States or international organizations involved are under an obligation to cooperate and that such cooperation is based upon the acceptance of common values or objectives.[68]

The term "international community" differs from the common heritage of humankind principle, although the latter constitutes a progressive development of the former. The common heritage principle refers to individuals rather than States and has for objective to foster equity, including intergenerational equity, which

[67] ILM 33 (1994), p. 1328.

[68] The reference to common values or objectives constitutes the difference between international society (Staatengesellschaft) and the international community which is united by or on the basis of common values and objectives (Staatengemeinschaft); critical in respect to a value based approach but accepting interdependence as a legitimizing factor M. Hakimi, "Constructing an International Community" (2017) 111 AJIL 317–356 at p. 321 et seq.

is alien to the notion of the international community. However, it is safe to say that all regimes reflecting or being constructed based on the common heritage principle are meant to serve community interests, not vice versus.

As already indicated, it is well established in recent international law instruments and confirmed in academic writings that certain community interests (or more vaguely concerning the beneficiary "common interests") exist, while references are equally made to "common concern". To name some prominent examples: These are the Global Compact for Migration[69] – which is "a non-legally binding"[70] instrument – also the Paris Agreement on Climate Change,[71] the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994 (Desertification Convention),[72] the Convention on Biological Diversity, 1992,[73] the Vienna Convention for the Protection of the Ozone Layer,[74] including the Montreal Protocol of 1987. A similar approach is taken in the context of the protection of human rights. For example, the Universal Declaration of Human Rights, 1948 refers to a "common standard of achievement for all peoples and all nations". The ICJ stated in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide that States have no

[69] Note 1 and 43, see also A/RES/73/195 of 19 December 2018.
[70] See the wording in para. 7 of the Preamble.
[71] Available at <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.
[72] It states in the second preambular paragraph "Reflecting the urgent concern of the international community, including States and international organizations, about the adverse impacts of desertification and drought".
[73] ILM 31 (1992), p. 822.
[74] ILM vol. 26 (1987), p. 529; The Convention speaks in the third preambular paragraph that "biological diversity is a common concern of humankind". It is to be noted that this treaty rather refers to the human being whereas other international treaties equally establishing that they serve the interest of the international community rather refer to States.

interest of their own in the object of the Convention, but merely a common interest.[75]/[76]

The idea that common interests should be taken into account when shaping international relations was overshadowed and marginalized by the dominance of the principle of State sovereignty as a structural principle of public international law in the 19th and early 20th centuries.

Establishing a regime, which is meant to serve community interests, is not necessarily driven by utilitarian considerations.[77] Such establishment has a dogmatic basis. It is based upon the assumption that public international law has a particular role, namely that it should come into play for those issues, which can only be managed effectively by a common effort of the international community.[78] The efforts to control and reduce climate change are a

[75] ICJ Reports 1951 at p. 23.

[76] The reference to common interest is not alien to international law, the contrary. F. Suárez (1548–1617) argued already that international law aimed at the conservation of justice and peace between States in order to preserve the common good of mankind. Hugo Grotius, picking up the term from M. Tullius Cicero, qualified pirates as *hostes gentium*. This insinuated that it was the task of all to fight piracy. Grotius approved of the right of States to try crimes committed outside their territorial jurisdiction if these crimes violated the law of nature or the law of nations. The attempts to abolish slavery and the slave trade provide a more recent example. Although the United Kingdom had abolished slave trade throughout its colonies already in 1807 and succeeded at the Congress of Vienna in 1815 in having slave trade condemned in principle, it took several international treaties to make slave trading a crime *jure gentium* like piracy. Whereas the fight against piracy was dominated mostly by pragmatic considerations, the fight against the slave trade rested on moral grounds.

[77] Cf., for example, J. Bentham, *Introduction to the Principles of Morals and Legislation*, Chapter I: Of the Principle of Utility, para. IV.

[78] Feichtner, "Community Interest', in *MPEPIL* (2007) at MN 4; Simma, "From Bilateralism to Community Interest in International Law" (1994) 250 (VI) RdC 217–384 defines at 233 "a consensus according to which the respect for certain fundamental values is not to be left to the free disposition of States individually or inter se but is recognized and sanctioned by international law as a matter of concern to all States".

typical example. Only common efforts will be able to stop or at least reduce climate change.[79]

There are three scenarios/reasons, which may induce or call for the establishment (and legitimization) of a regime based upon the principle of common interests. First, on the basis of facts, it is established that a particular issue has to be addressed and managed in the interest of a wider community and the efficiency of such management depends upon the participation of a larger group. This is particularly relevant for international environmental law, trade law, international regime on the protection of health, etc. Second, a certain value is accepted by the international community and its realization universally requires the participation of the international community. This is of particular relevance for the international human rights regime. Third, common spaces – spaces not under the territorial sovereignty of one State – require for factual reasons the common governance thus ensuring that all members of the international community can equally participate in the utilization of such spaces.[80]

Due to the growing interdependence of States, issues that are in the interest of the international community are growing; but is it as simple as that? Is it, for example, possible that the western European States, induced by a group of NGOs, declare that it is in the interest of the community of States to protect the Brazilian rainforest since the latter is essential for the protection of biodiversity and as a means against climate change? Could such a decision be taken and obligations formulated at the expense of Brazil and against the objections of the Brazilian government? This is not a hypothetical scenario. In the legal dispute between Mauritius and the United Kingdom, it was argued that there was

[79] See the Preamble of the United Nations Framework Convention on Climate Change, 1992; ILM vol. 31 (1992), p. 849.

[80] The three scenarios belong dogmatically together, only the reasons for considering them as regimes serving community interests differ; different Brown Weiss (note 17), p. 169–171.

community interest in establishing a marine protected area around the Chagos Archipelago against the objection of Mauritius, which claims sovereignty over the archipelago.[81] The struggle to find a solution for the problem of climate change demonstrates this dilemma quite clearly. The tendency to pursue environmental goals in spite of the objections of certain States has occasionally been coined eco-imperialism.[82]

The second scenario, a common interest based regime, may be advocated with the view to implement certain values considered to be fundamental. As an example may serve the dignity of the human being.[83] It may be easy to reach a general agreement at such a general level. However, it is much more complicated to reach a common agreement on the various consequences to be drawn from such a general principle. Is it necessary to reach such an agreement? The answer has to be affirmative. Otherwise, – without consent of others – those States or entities who claim the existence of a particular value or fundamental principle would claim the ethical dominance in international relations, a claim that is not reconcilable with the general pattern of international relations. These two types of common interests are referred to as topical community interests to distinguish them from the one, which is territorial, or space-oriented.

Third, the management of spaces, which fall outside national jurisdiction, such as the high seas, the deep seabed, Antarctica (disputed), and Outer Space, are considered areas, which should be governed by regimes considered as serving community interest since a territorial sovereign that could guarantee the adequate management is lacking. In these cases, the regimes to

[81] The *Chagos Marine Protected Area Arbitration* case (*Mauritius v. United Kingdom*), Award of 18 March 2015, <https://www.pcacases.com/pcadocs/MU-UK%20 20150318%20Award.pdf>, at paras. 127 et seq.
[82] A. Chambers, "The Fight against Eco-Imperialism" *The Guardian* (11 April 2010).
[83] Feichtner, "Community Interest", in *MPEPIL*, (2007), identifies further considerations (see MN 7-12).

be established have to develop an organizational/institutional system, which provides for the necessary rules, as well as their implementation. In that respect, they differ from the two previous categories.

Although the scenarios justifying and legitimizing the establishment of a common interest based regime are based upon different considerations, they, nevertheless, overlap in part. They also have different implications in respect of the procedure to be followed in establishing a common interest based regime.

There are procedural consequences as a precondition for establishing regimes based upon community considerations. The ascertainment of the facts and the common values concerned can only be achieved by following an adequate procedure in the establishment of such a regime and the general agreement in the underlying objectives and values. These procedures will necessarily differ for the three types of community interests identified above.[84]

As far as the procedural factor is concerned, it is a logical consequence that regimes serving community interests must be established in a procedure, which is open for international participation. It is to be noted that the establishment of such regimes in the recent period was mostly initiated by resolutions of the UN General Assembly or by international conferences in which all States were able to participate. The UN General Assembly has, for example, declared that the usage of long driftnets contradicts the community interest in the preservation of fish stocks.[85] For the same reason, it has taken the position that IUU fishing is irreconcilable with community interests.[86] Both such resolutions, formulated in principled terms, later boiled down to an international

[84] See Besson (note 5), at p. 38/39 having a different focus.
[85] See the Preamble of General Assembly Resolution A/RES/44/225 of 22 December 1989 and A/RES/45/197 of 21 December 1990; A/RES/46/215 of 20 December 1991.
[86] General Assembly Resolution A/RES/54/32 of 19 January 2000.

treaty based regime.[87] The statements of the UN General Assembly on the eradication of poverty also reflect that this task is in the interest of the international community.[88] Finally, the actions taken by the WHO against Ebola and against the Corona virus indicate that fighting such diseases is in the interest of the international community as a whole.[89]

The acknowledgment that the interests of the international community should guide the management of certain issues is often driven by forces of the society rather than States. The public opinion as formulated or influenced by NGOs plays a significant role in this respect by expressing and sharpening the concerns and aspirations of civil society. Modern forms of communication make it easier now to formulate positions of civil society.[90]

However, this procedural factor, addressed so far, is only one side of the legitimization of regimes serving community interests. Another question is what must be the substantial qualification of an issue to qualify it as being in the interest of the international community or at least in the interest of a regional community. It is essential that the international community be convinced that the protection or management of a particular issue serves the interests of the international community and that the measures undertaken are adequate and reasonable.

[87] See 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, 1995, ILM vol. 34 (1995), p. 1542.

[88] General Assembly Resolution A/RES/65/174, 20 December 2010; General Assembly Resolution A/RES/48/183 of 21 December 1993.

[89] Preamble of the Constitution of the WHO: for a detailed description of the WHO's efforts to fight Ebola, see <http://www.who.int/csr/disease/ebola/response/en/>; cf. also UN Security Council Resolution S/RES/2177 (2014), 18 September 2014.

[90] See the Resolution adopted by the General Assembly on 25 September 2015, Transforming Our World: the 2030 Agenda for Sustainable Development (A/RES/70/1), at para. 15.

One of the earliest references of international jurisprudence to the existence of community interests may be seen in a dictum of the International Court of Justice (ICJ) in its *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*. The Court stated that in such a Convention "[t]he Contracting Parties do not have any interests of their own; they merely have, one and all a common interest…".[91] This approach has been confirmed in the case brought by The Gambia against Myanmar[92] and it was honored by the ICJ in its Order on Provisional Measures of 23 January 2020.[93]

Attempting to establish a community has an impact upon the membership of the regime. The latter is essential for establishing legitimacy, as well as upholding it. A treaty establishing an international community based regime shall strive for universal membership at the moment of deliberating the regime. Without the possibility of the international community to participate in the discourse leading to the establishment of a regime serving community interests, such a regime will lack legitimacy from the outset.

f) Invalidation of International Treaties

Customary international law, as well as the Vienna Convention on the Law of Treaties, provides that an international treaty may

[91] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep p. 15, at 23. One may also refer to the Advisory Opinion of the ICJ on Reparations for Injuries suffered in the Service of the United Nations, [1949] ICJ Reports, at p. 185 in which it refers to the international community creating an entity possessing objective international personality. Concerning the analysis of the jurisprudence of the ICJ on this issue, see, in particular, A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (C.H. Beck 2001) 364 et seq.

[92] Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(The Gambia v. Myanmar*). In its application and request for provisional measures, Gambia relied on Article IX of the Genocide Convention.

[93] Order of 23 January 2020, <https://www.icj-cij.org/files/case-related/178/178-20200123-Ord-02-00-EN.pdf> accessed June 2020.

become invalid for several reasons.[94] There is very limited practice in this respect. The ICJ dealt with the question of the invalidity of a treaty in the case *Cameroon v. Nigeria* in which it was argued that the Marona Declaration of 1975 was not valid, as Nigeria's constitutional rules had not been complied with. However, the Court denied that the failure was manifest.[95] All these rules on the invalidity of international treaties are guided by the consideration that existing treaties ought to be protected. This approach excludes using the rules concerned for the progressive development of treaties.

The Vienna Convention on the Law of Treaties provides – and this would be an avenue for the progressive development of international Treaties – for the possibility of amendments.[96] The problem of amendments is that they only enter into force among those States Parties, which have accepted such amendments. Accordingly, an amendment may result in separate treaty relations. Such amendments mostly take place after the treaty in question has entered into force. It is, however, possible that an international treaty is changed even before entering into force. This was the case for the UNCLOS, which was amended by Implementation Agreements.

International treaties such as the Charter of the United Nations, the Antarctic Treaty, or the Convention on the Law of the Sea provide, amongst others, for the possibility of revisions setting out a particular revision procedure.[97] Often, such revisions may only be

[94] Articles 46 VCLT.
[95] ICJ Reports 2002 at p. 265 et seq.
[96] Articles 39–41.
[97] See Article 155 UNCLOS compared to the amendment procedure according to Article 312 and Article 313 UNCLOS. The objective of these two procedures on revision are diametrically opposite. The review conference to be convened 15 years after the beginning of commercial production under an approved plan of work in the Area was called upon to establish whether the system concerning exploration and exploitation of the Area had benefitted mankind as a whole. The objective of this review clause was clear. It was meant to further develop the implementation of

asked for after the treaty in question is in force for several years. Such clauses constitute the option to adjust an existing regime to changing circumstances and new considerations or insights. Theoretically, such a review conference or procedure would be the appropriate mechanism in which community interests could be formulated, reformulated, and means established for implementing them. The danger exists, though, that such a procedure would result in establishing parallel systems with different memberships. Article 155(4) UNCLOS avoided the development of parallel systems by making the amendments agreed upon by the review conference binding upon all States Parties. This provision, which has had no precedence, was declared non-applicable by Section 4 of the Implementation Agreement. The declaration of non-applicability of this provision was dictated by the fear of some States, in particular from the Western European region, that the majority of States would press for and adopt solutions to the detriment of a numerical minority of States.

Most international treaties contain clauses, which provide for the possibility to denounce a treaty or to withdraw therefrom. According to the Vienna Convention on the Law of Treaties, an international treaty may be denounced for its material breach by the other party or parties,[98] a fundamental change of circumstances,[99] supervening impossibility of performance,[100] and the emergence of a new peremptory norm of international law.[101] The reason for termination has to be specified. The prevailing tendency of the Vienna Convention on the Law of Treaties is to uphold the integrity of treaties.

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the common heritage principle. The amendment procedure as envisaged in Articles 312 and 313 UNCLOS refers to a possible modification of the Convention, except for provisions relating to activities in the Area.

[98] Article 60 VCLT.

[99] Article 62 VCLT; as to the elements, see T. Giegerich, Article 62, in Dörr/Schmalenbach (note 20), MN 26 et seq. This does not apply to borders.

[100] Article 61 VCLT.

[101] Article 63 VCLT.

The possibility to terminate a treaty for a material breach is to be seen in the context of enforcing the implementation of international obligations of that treaty. This mechanism is primarily effective in respect of treaties based upon the principle of reciprocity only, but not in respect of law-making treaties; there it may, in fact, be even counterproductive. This means that law-making treaties are in need of particular mechanisms to preserve their integrity. In that respect, the Vienna Convention does not provide any assistance.

A fundamental change of circumstances may be invoked for withdrawing from or terminating an international treaty (Article 62 VCLT). It is a relevant question in the context of the focus on which this course is concentrating whether this clause allows the termination or review of an international treaty, which does not meet anymore the demands of, for example, on intensification of environmental protection or the protection of human rights. The application and interpretation of Article 62 so far are not heading this way.[102] Article 62 VCLT gives preference to the stability of treaty relations.[103] The clause was invoked by States after having changed their political regime.[104] This was not considered sustainable. The clause is now interpreted in a restrictive manner and considered for application only in exceptional circumstances.

It is recognized that the supervening impossibility of performance constitutes a reason for terminating an international

[102] In the *Gabcikovo-Nagymaros Project* case (*Hungary/Slovaki*a), ICJ Reports 1997, 64 at para. 104 did not exclude the change of the political structure could be relevant under Article 62 VCLT. The attention which the doctrine has received in literature stands in no relation to its applicability in practice; see the list of literature on the doctrine in Villiger (note 19), Article 62, footnote 1; detailed on the legislative history Giegerich, in Dörr/ Schmalenbach (note 19); Verdross), MN 8-25.

[103] More positive Villiger (note 20), Article 62, MN 31.

[104] See Dahm/Delbrück/Wolfrum (note 75), 750–752, Verdross/Simma (note 59), paras. 835–837.

treaty.[105] Article 61 VCLT reflects customary international law.[106] However, Article 61 VCLT limits the scope of such a principle by referring to the permanent disappearance or destruction of the object indispensable for the execution of the said treaty. Further, this doctrine cannot be invoked by the party that was itself responsible for causing the impossibility of performance. The ICJ dealt with this issue, too, in the *Gabcikov-Nagymaros* case[107] denying Hungary the right to invoke this doctrine. Apart from that, jurisprudence is scarce. Theoretically, this doctrine may be used in the context of international environmental law but it is so narrowly defined that its applicability in practice will be an exception.

According to Article 64 VCLT, an international treaty, which is in conflict with a new norm of ***jus cogens***, becomes void but as Article 71 VCLT stipulates, not retroactively. The rule as such is a matter of consequence. *Jus cogens* norms are, by definition, hierarchically superior to other norms of international law, which may be changed by the will of States. It is the essential consequence of such norms that no derogation from them is permitted and that such norms may only be changed by another subsequent norm of the same character. There is ample academic discussion on the development and the status of *jus cogens* norms and, in particular, which norms, if any, apply as such. The majority view considers the prohibition of the use of force, the prohibition of genocide, piracy, and torture as such, as well as the right to self-determination. The issue of the termination of an international treaty due to it being not in conformity with a norm of *jus cogens* has not yet been dealt with by international courts and tribunals.

Finally, an international treaty may be terminated by *desuetude*. *Desuetude* means that the parties of an international treaty have not

[105] Article 61 VCLT.
[106] The Permanent Court of International Justice was confronted with a plea of impossibility of performance in the *Serbian and Brazilian Loans* Cases, PCIJ (1929) Series A nos.20/21, 40; Villiger (note 19), Article 61, MN 1.
[107] Note 358.

used a treaty thus indicating that this treaty has become obsolete. It is covered by Article 54(b) VCLT. The example quoted in this respect most frequently is Article 107 UN Charter.[108]

Summing up, it has to be stated that all termination clauses provided for in the Vienna Convention on the Law of Treaties are tailored so as to serve the stability of international treaties; at least they are interpreted this way. This approach should be reconsidered. International law is based upon the consent of the States concerned and the thus induced legitimacy has to be preserved over time. This makes it necessary that international treaties contain a mechanism for modifications and updating to meet new demands, insights, and developments.

g) Interpretation

The **interpretation** of legal rules is particularly relevant in the context of international law being based upon the consent of the States concerned. The starting point dealing with interpretation is Article 31 VCLT,[109] which has been qualified by the ICJ as customary international law.[110]

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[108] See in detail Dahm/Delbrück/Wolfrum, Völkerrecht 1/3 (note 75), 722/3 with further references; see further G. Ress and J. Bröhmer, "Article 107", in B. Simma et al. (eds), *The Charter of the United Nations, A Commentary* (note 116), 2183 et seq.

[109] (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given in the terms of the treaty in their context and in the light of its object and purpose.

(2) In the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty.

(3) …

[110] Amongst others: *The Legality of Use of Force* case (*Serbia and Montenegro/Belgium*), (Preliminary Objections), ICJ Reports 2004, 318, para. 100; the *LaGrand* case *(Germany/US*), ICJ Reports 2001, 501, para. 99; *Kasikili/Sedudu Island* case *(Botswana/ Namibia*); ICJ Reports 1999, 1059, para. 18. The latter case is particularly relevant

Generally speaking, interpretation is meant to establish the meaning of a norm. This can be done from different perspectives. One can seek to establish the meaning of the norm objectively for the time when the norm was adopted or the meaning as seen from the point of those who negotiated and adopted this rule. An alternative is not to refer to the time when the norm was generated.

There is a strong view in literature and State practice that interpretation is merely meant to establish the literal meaning of the rule concerned.[111] Others emphasize the relevance of the objective of the instrument concerned for the interpretation of the latter. Such objectives are often expressed in preambular articles of the said legal instruments or may be deducted from the provisions of such instruments. On that basis, it is highlighted that in interpreting the norm concerned, the context in which such norms are to be understood has to be taken into account. The ILC was not able to overcome these different views and instead referred to various techniques. One may distinguish between the technique of interpretation properly speaking (referred to in Article 31(1) VCLT) referring to the terms of a treaty as to their ordinary meaning, in their context and in the light of object and purpose and a supplementary technique such as the reference to subsequent treaties or practice.

Interpretation is a complex process including several stages.[112] These stages differ according to who undertakes the interpretation and for what purpose. Interpretation may be more than the application of abstract rules to a factual situation and drawing conclusions in formulating consequences by correlating facts and

since neither of the Parties was a State Party to the Vienna Convention on the Law of Treaties.

[111] This approach goes back to an intervention of the US delegation at the Conference on the Law of Treaties in Vienna; see on that H.W. Briggs, "The Travaux Preparatoire of the Vienna Convention on the Law of Treaties" (1971) 65 AJIL 705 et seq.

[112] Different Brownlie's (note 9), 365 et seq., who speaks of "a single combined operation".

the legal rule. The latter is true for interpretation in the context of resolving an international dispute by international courts or tribunals in contentious proceedings. The situation is different in the context of advisory proceedings. Although a legal dispute may also be the background of an application for an advisory opinion, the factual side is less dominant. That means the interpretation of the relevant norms serves a different purpose and not being tailored to the facts may result in a broader finding. To be more concrete: It makes a difference if an international court or tribunal has to decide whether ITU Aba qualifies as an island or when the interpreting body has to provide for an interpretation of Article 121 UNCLOS. Such advisory opinions are meant to provide a comprehensive interpretation of the norm concerned compared to the interpretation focusing on an interpretation – and thereby limited – by the necessity to solve a dispute.

It is now common to commence an interpretation by invoking the textual technique, which relies on the literal meaning of the relevant words of the text in question. From there it is standard to proceed to an interpretation analyzing the words in context. Additionally, there is an increasing tendency in respect of polyglot treaties to compare the relevant words in the authentic languages. The final step will be to take into account the object and purpose of the relevant international treaty (teleological approach). These three techniques attempt to establish the meaning of the norm concerned; they do not necessarily exclude each other nor do they have to come to different results.[113]

[113] An intensive literature on the interpretation of treaties exists: see for example, R.Y. Jennings, "The Progressive Development of International Law and its Codification" (1947) 24 BYIL 301–329; R. Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties" (1961) 27 ZaöRV 491 et seq.; H.F. Köck, *Vertragsinterpretation und Vertragsrechtskonvention* (Duncker & Humblot 1976); T. Bernárdez, "Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties", in I. Seidl-Hohenveldern and G. Hafner (eds), *Liber Amicorum* (Kluwer Law International

The International Court of Justice mostly starts with a textual interpretation presuming that the text represents the real expression of what the parties intended.[114] In fact, it combines the objective with the subjective approach. For example, the International Court of Justice stated in the territorial dispute *Libyan Arab Jamahiriya/ Chad* case that

> Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work ...[115]

The ICJ also referred to the criterion that the treaty must be interpreted in good faith. This refers to several principles such as the principle of *pacta sunt servanda* and, in particular, the meaning attributed to a particular term at the time of the conclusion of the treaty or the change of the meaning of a term tacitly agreed upon by the parties.

A textual interpretation may be guided by a definition of particular terms within the treaty itself. For example, Article 1 UNCLOS contains a list of definitions for certain key terms of the Convention. However, this list of definitions may equally be open for interpretation; apart from that, it is by no means complete. For

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1998) 721 et seq; R.K. Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015); Fitzmaurice, "Treaties" (note 282), MN 58–60; K. Berner, "Authentic Interpretation in Public International Law" (2014) 76 ZaöRV 845–878; J.M. Dupuy, "Evolutionary Interpretation of Treaties: Between Memory and Prophecy", in E. Cannizaro (ed), The Law of Treaties Beyond the Vienna Convention (OUP 2011) 123–137; Sir A. Watts, "Codification and Progressive Development of International Law", in *MPEPIL* (note 2), 2006. Note should be taken that the process of interpretation faces different limits as the treaty concerned. As Kenneth Keith has pointed out in his "Conclusion", in G. Abi-Saab, K. Keith, G. Marceau and C. Marquet (eds), *Evolutionary Interpretation and International Law* (Hart 2019) at 344, there is a "distinct reason for opposing an evolutionary reading to treaties imposing criminal responsibility on individuals".

[114] The "ordinary meaning" may be established in several ways. Frequently, recourse is made to dictionaries. This is considered to be objective but disregards the intertemporal aspect; see on that Villiger (note 20), Article 31, 426, MN 9.

[115] Territorial Dispute case (*Libyan Arab Jamahiriya/Chad*), Judgment, ICJ Reports 1994, p. 6, at 21/2.

example, the Law of the Sea Convention lacks the definition of the term ship or vessel.

Article 31(1) VCLT refers to the "ordinary meaning" to be given to the terms of the treaty in their "context" (literal and systematic interpretation). The reference to "context" may already allow taking into account the particularities of the treaty regime to be interpreted. For example, the interpretation of a term such as "significant harm" has to, in the context of an agreement concerning the protection of the marine environment, include the relevant environmental considerations. Thus, systematic interpretation is one of the techniques suited to introduce community interests into the interpretation. This technique is limited, though, since such interpretation has to remain in the ambit of the literal meaning of the term to be interpreted.

As far as the object or purpose is concerned, it is occasionally difficult to establish the object and purpose unless a treaty itself provides either in the Preamble or in Articles 1 and 2 – such as the UN Charter – the object and purpose of that particular treaty. It is a matter of dispute whether the object and purpose mean the same or refer to different issues, namely whether the notion "object" refers to the content of the treaty and purpose to the overall aim to be achieved by means of the treaty in question.[116] This is more an academic question since both are to be taken into account. Both may be deduced from either the context of the treaty in question or the Preamble and/or by introductory articles.

The reference to the "object and purpose" as referred to in Article 31(1) VCLT gives the interpreter a wider margin. The object and purpose are often set out in the Preamble or provisions at the beginning of the treaty or at the beginning of a chapter thereof, but they may also be derived by assessing the rules contained in the legal regime in question as a whole. For example, the Antarctic

[116] See on that briefly Fitzmaurice, "Treaties" (note 20), MN 90.

Treaty and the Protocol[117] thereto clearly define the object and purpose of that regime, which constitutes the guideline for interpreting the provisions of that legal regime. The same is true for all human rights treaties, the treaties concerning the protection of the environment, the treaties under the umbrella of the WTO,[118] and the UN Convention on the Law of the Sea. The impact of the object and purpose is particularly strong in the interpretation of terms, which are phrased as generic principles. International treaties in general, but in particular international agreements devoted to the protection of community interests, frequently contain such broadly phrased terms. For example, the term "threat to peace" in Article 39 UN Charter is such a term open for interpretation, which has undergone significant interpretative development.[119] The same is true for the notion of "innocent passage" as contained in Article 17 UNCLOS, which is open for a wide interpretation although some of the interpretation is already provided for in Articles 19 and 21 UNCLOS.

Additional techniques are referred to in Articles 31(2) and (3) VCLT referring to agreements between all parties in connection with the conclusion of the treaty to be interpreted, and an instrument established by some parties in connection with the conclusion of the treaty and accepted by other parties thereto, as well as any subsequent agreement between the parties regarding the interpretation of the treaty[120] and any relevant rules of international law applicable in the

[117] Sir A. Watts, *International Law and the Antarctic Treaty System* (Grotius 1992) 9 et seq.; S. Vöneky and S. Addison-Agyei, "Antarctica", in *MPEPIL*, 2011, <www.mpepil.com> accessed 21 August 2020, MN 12.

[118] For example, see J.H. Jackson, "History of the General Agreement on Tariffs and Trade", in R. Wolfrum, P.-T. Stoll and H. P. Hestermeyer (eds), *WTO: Trade in Goods, Max Planck Commentaries on World Trade Law*, vol. V (Martinus Nijhoff Publishers 2011) 1 at 3.

[119] N. Krisch, "Chapter VII Action with Respect to Threats to the Peace, Breaches of Peace and Acts of Aggression: Introduction to Chapter VII, The General Framework", in Simma et al. (note 116) vol. II, 1237 et seq, MN. 25; E. de Wet/Michael Wood, "Peace, Threat to", in *MPEPIL*, p. 2009.

[120] Villiger (note 19), Article 31, MN 21.

relation between the parties. The particularity of these techniques is that they constitute an authentic interpretation.[121]

This reference to any relevant rules of international law applicable in the relations between the parties is usually interpreted to mean any other norm of international law binding the parties. It envisages the interpretation of an international treaty against the background of international law in general.[122] The norm referred to may be treaty law, but more importantly, customary international law, as well as general principles. Some international treaties include a rule providing that an international court or tribunal may, in deciding a dispute, have resort to international law in general. An example to that extent is Article 193 UNCLOS. Technically, such a rule only establishes which norms international courts or tribunals may use under the dispute settlement system of the UN Convention on the Law of the Sea. Dogmatically, this rule also reflects that international law is meant to constitute a coherent system and that an agreement reached between parties in general or in another sectoral international legal regime should have implications on legal regimes established earlier. Such rules of international law have to be "applicable" in the relation between the parties. This seems to exclude non-legally binding norms.[123] This is not conclusive. At least non-legally binding norms become relevant via the means of interpretation.

According to Article 31(3)(b), in interpreting a norm, subsequent practices in the application of that norm shall be taken into account. The provision indicates clearly that the practice only of one State Party or of a limited group thereof is not sufficient. This practice must be such that it amounts to an agreement of the parties regarding the interpretation concerned.

[121] Ibid., MN 16.
[122] Ibid., MN 24.
[123] More flexible Dörr (note 19), Article 31 MN 100 referring to the jurisprudence of regional human rights courts.

This issue has been dealt with by the ILC.[124] ITLOS has referred to this mechanism more than once without elaborating on the "practice" or the "agreement". These cases have in common that the wording of the UNCLOS was left intact but it was broadened by interpretation. For example, Article 73 UNCLOS concerning the enforcement of laws and regulations of a coastal State on the exploitation of marine living resources in the exclusive economic zone of the latter provides for certain enforcement measures. The list of possible enforcement measures does not include the confiscation of fishing vessels (but also does not exclude such a measure). ITLOS referred to an overwhelming State practice that had accepted the existence of such competence.[125]

In the *Advisory Opinion on the Responsibilities and Obligation of States Sponsoring Persons and Entities with Respect to Activities in the Area*, of 1 February 2011[126] and the *Advisory Opinion upon the Request of the Sub-Regional Fisheries Commission*,[127] ITLOS referred to subsequent practice in several places indicating that such subsequent practice should be taken into consideration when interpreting a particular norm. The ICJ equally takes this position. In the *Kasikili Sedudu Island* case (*Botswana/Namibia*),[128] the Court adopted a restrictive approach to what comprises subsequent practice and did not take into account unilateral acts of the previous authorities of Botswana on the ground that these were for internal purposes only and unknown to the Namibian authorities.

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[124] See the ILC Report on Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties, see: A/RES/73/202 of 20 December 2018 bringing the report to the attention of the States Parties.

[125] The *Tommimaru* case (*Japan v. Russian Federation*), ITLOS Reports 2005–2007, p. 74, 96 at para. 72; see also M/V "Virginia G" (*Panama/Guinea-Bissau*), Judgment, ITLOS Reports 2014, p. 77 at para. 253.

[126] ITLOS Reports 2011, vol. 11, at 16 et seq. concerning the term "activities in the Area".

[127] Advisory Opinion of 21 April 2015, ITLOS Reports, vol. 15 (2015), 4 at 53 et seq.

[128] Kasilikili/Sedudu Island (*Botswana/Nambia*), ICJ Reports 1999, p. 1045 at 1074 et seq.; it is to be noted that the ICJ tested all means of interpretation mentioned above.

As far as the modifying result of taking into account subsequent practice on the interpretation of multilateral treaties, it is mandatory not to condone a breach of that treaty. Therefore, subsequent practice should come into play only if the treaty is silent in respect of a particular issue. Nevertheless, this makes the recourse to subsequent practice a valuable mechanism for progressive development.

It is difficult to draw a sharp line between interpretation and progressive development of a provision or an international treaty. The latter should be qualified as an act of legislation. For example, the Committee on Economic, Social and Cultural Rights has developed the right to water – a right that so far was not explicitly recognized in the Covenant – out of the right to life.[129] Such individual right to water has a direct influence on the international regime concerning the management of fresh water. This example demonstrates, first, that it is possible to develop by using the format of interpretation out of a right with a broad scope, such as the right to life, a more limited one such as the right to water. Second, it shows that the development in one legal regime – here the regime on the protection of human rights – may, by way of interpretation, have a bearing upon another legal regime.

The considerations on interpretation as a possible means for the progressive development of international law would not be complete without addressing two types of norms, namely open norms (or blanket norms) and norms providing for discretionary power of the addressee of the norm in question. Occasionally, those two types of norms are not sufficiently distinguished in international law although representing different challenges. Open norms are those, which are abstract and cannot be applied

[129] The Committee interprets in its General Comment No. 15 of 2002 (on the Right to Water) the right to water as falling "within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival" (para. 3).

directly. They require interpretation, which will have to rely predominantly on the object and purpose of the instrument concerned rather than upon the wording. Certainly, the implementation and application of every norm automatically constitute an interpretation. However, open norms, at the time of their adoption, were designed not to be implemented directly for several reasons. First, they are able to cover various, occasionally controversial options for implementation and application and therefore were, at the time when the instrument in question was deliberated, essential for achieving the consent of the States concerned. Second, such norms also mark the acknowledgment of the drafters that at the time when the instrument was deliberated it was impossible to cover all factual imponderabilities. Adopting a general formula on an abstract level entrusts the practice of States and in particular international courts and tribunals to fill the abstract formula and thus exercise legislative power. An illustrative example to this extent is Article 74(1) UNCLOS on the delimitation of the exclusive economic zone between States with opposite or adjacent coasts. Such delimitation "shall be effected ... in order to reach an equitable solution". The consequences of the international jurisprudence[130] now supplement Articles 74 and 83 UNCLOS. Such open norms are also common in the international regimes on human rights, as well as in international economic law. For example, the International Covenant on Civil and Political Rights[131] provides in Article 19(2) the right to freedom of expression but also provides in Article 19(3) that such right may be subject to certain restrictions which "shall only be such as are provided by law and are necessary". The

[130] The wording in Article 83(1) UNCLOS concerning the delimitation of continental shelves is identical. The literature on the delimitation as it developed in the jurisprudence of the ICJ, arbitration and ITLOS is numerous. A practice-oriented view is provided for by S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (OUP 2016).

[131] UNTS vol. 999, p.171.

term "necessary" is given some contours in paragraph 3 of the said article by reference to the rights or reputation of others and for the "protection of national security or of public order or public health or morals". The provision for providing for the possibility of a limitation of the freedom of expression, as well as the limitations to that limit, equally contain such open clauses as the "rights and reputation of others", "public order", and "morals". It is evident that by a wide interpretation of "public order" or "morals", the right to the freedom of expression may be curtailed significantly. A reference to public morals is also contained in Article XX lit. a GATT.[132] Particularly, the interpretation of "public order" and "morals" may be influenced by the cultural and religious background of the State concerned.[133] Along the same line, international environmental treaties provide for the protection of the environment against "significant harm or degradation". The term "significant" opens a range of possibilities for interpretation.

The interpretation of these "open norms" rests first with the addressees concerned but such interpretation may be challenged in compliance mechanisms – to the extent such mechanisms exist – and in the context of dispute settlement. The fact that commitments entered into are open for interpretation does not put into question the mandatory nature of the norm in question. The State concerned is under an obligation to conform to the commitment within the framework of the rule in question and it is the onus of that State to justify any limiting interpretation. It is debated controversially to what extent international courts and tribunals may question such interpretation.

[132] See N. Wenzel, "Commentary", in R. Wolfrum, P.-T. Stoll and H.P. Hestermeyer (eds), WTO: Trade in Goods (Martinus Nijhoff Publishers 2011) 479 et seq.
[133] See K.J. Partsch, "Freedom of Conscience and Expression and Political Freedoms", in L. Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 209–245 containing a detailed analysis of the legislative history of that norm.

3. International Customary Law

The literature about custom and customary international law is vast;[134] nevertheless, it was not possible to develop a broadly accepted understanding about it being developed and upon the basis for its bindingness. This course is not intended to deal with customary international law comprehensively. The objective of this sub-chapter is only to provide the background for the assessment as to whether customary international law may be used as a mechanism to progressively develop international law.

In the 19th as well as in the beginning of the 20th century, most of the then-existing international law was constituted by customary international law. In recent years, many international treaties have been concluded and for that reason, some authors have expressed doubts concerning the remaining relevance of customary international Law.[135] Others stress that customary international law remains of high significance for several reasons. Not all areas of international law are covered by treaty law; some important fields of international law are still ruled essentially by customary international law.[136] Frequently, customary international law was and is the inspiration for treaty law.[137] The most important aspect, though, is that the development of customary law is more flexible than the development of treaty law. Both aspects render it more open to the progressive development of international law. Finally,

[134] Tomuschat, "Obligations arising from States Without or Against Their Will" (note 66), at p. 199 et seq. already complained about this.
[135] W.G. Friedmann, The Changing Structure of International Law (Stevens 1964) 121–123.
[136] This was emphasized by the ILC Draft conclusions on identification of customary international law (with commentaries), A/73/10; ILC Yearbook 2018, vol. II, Part two, Commentary 3.
[137] Cassese (note 5), 58/9; M. Villiger, Customary International Law and Treaties: A manual on the theory and practice of the interrelation of sources (2nd edn, Kluwer 1997).

customary international law is mostly universal,[138] whereas treaty law is not.[139]

Apart from these specific reasons, which should demonstrate the prevailing relevance of customary international law, it is mandatory to emphasize more in general that customary international law reflects appropriately the characteristics of the international community understood as a legal community. The process of its development has the advantage that all States automatically share in the formulation of new rules, their modification, amendment, as well as in its review.[140] Customary international law is less precise than treaty law, but such lack of precision also provides for a certain amount of flexibility. In consequence, it may be more perceptible to new factual developments and considerations.[141]

Article 38(1) Statute of the International Court of Justice stipulates in subparagraph (b) that the Court shall apply

[138] As to exceptions, see ILC Draft conclusions on identification of customary international law A/73/10; ILC Yearbook (2028), vol. 2, Part 2, Conclusion 16 on particular customary international law which only applies among a limited number of States.

[139] A.A. D'Amato, *Concept of Custom in International Law* (Cornell University Press 1971) 12; T. Treves, "Customary International Law", in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2006), <www.mpepil.com> accessed 21 August 2020; G.M. Danilenko, "The Theory of Customary International Law" (1988) 31 GYIL 9–47; J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems" (2004) 15 EJIL 523–553; P.S. Rao, "The Identification of Customary International Law" (2017) 57 Indian Journal of International Law 221–258; W. Staff, "Customary International Law: A Vehicle on the Road from Istopia to Eutopia" (2017) 60 GYIL 423–449.

[140] This has been emphasized by Shaw (note 18) at 70 who spoke of the "democratic nature" of the generation of customary international law. As to the relativity of customary international law, see Brownlie's (note 8), 25 et seq.; it is stated that *de facto* only a small number of States take part in this process. Account has to be taken also of persistent objectors, States which consistently object to the development of a newly emerging norm. If such a norm becomes customary international law, these States are not bound thereby; see J.I. Charney, "The Persistent Objector Rule and the Development of Customary International Law" (1985) 56 BYIL 1, 5 seq.

[141] Shaw (note 25), 70; Oppenheim's (note 5), at 30 pointing out that the development of customary international is usually a slow process.

international custom, as evidence of a general practice accepted as law. Although it is generally accepted that customary international law consists of two elements, namely the practice and the related *opinio juris* of the States, the relationship between those two elements is discussed controversially and not adequately expressed in Article 38(1)(b) ICJ Statute.[142] The relevant part of this provision reads:

> (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) ...
>
> (b) international custom, as evidence of a general practice accepted as law; ...

To better express the relationship between the objective and the subjective element forming customary international law, this clause should be read as "custom as evidenced by a general practice accepted as law".[143] Generally speaking, custom may be regarded as "an authentic expression of the needs and values of the community at any given time".[144] Therefore, the notion of "customary international law" refers to the process of its establishment, as well as to the result of that process.[145]

As far as the foundation of customary international law is concerned, a long-standing controversy exists.[146] It has been agreed that customary international law develops in a process; through this

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[142] The two elements approach has been emphasized by the ILC in its Conclusions 2 and 3 (note 136).

[143] Treves, "Customary International Law", in *MPEPIL* (2006) MN 16. Judge Read in his dissenting opinion in the *Fisheries* case (*UK v. Norway*), ICJ Reports 1951, 116 Judge at 191 described customary international law as a "generalization of the practice of States".

[144] Shaw (note 18), 69, although he belittles the relevance of custom within the contemporary legal system.

[145] Treves, "Customary International Law", in *MPEPIL* (2006) MN 1.

[146] See on that Treves, "Customary International Law", in *MPEPIL* (2006) MN 5 and 6.

process facts, empirically verifiable ones, acquire a legal character, which ultimately establishes rights and obligations for subjects of international law.[147]

However, there is no agreement on the basis for the binding nature of that law. One of the theories, particularly endorsed by Soviet writers, was that customary law is based upon a *tacit* agreement.[148] That would mean that this law depends on the will of the States as treaty law does. This would be a fiction, which is rather difficult to sustain if one does not want to empty the notion of "will" of all its substance.[149] Another approach advances that the binding nature of customary international law has its basis in the longstanding practice of a State, which means that there is an expectation in the continuation of that practice and this renders customary international law

[147] Treves, "Customary International Law" (2006) MN 4.

[148] G.I. Tunkin, "International Law in the International System" (1975) 147 (IV) RdC 124 et seq.

[149] The jurisprudences of the Permanent Court of International Justice, as well as of the International Court of Justice, have contributed to the clarification of the meaning of customary international law without, however, overcoming the divergent views referred to already. The International Court of Justice and the Permanent Court of Justice have never really been able to demonstrate to which practice they were referring to and from where they took that this practice was carried by the belief that it was legally required. In the case of the S.S. "Lotus" (*France v. Turkey*) Merits PCIJ (ser. A), no. 10 (merits), 1927, the Court stated in para. 44 "International 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. Restrictions upon the independence of States cannot therefore be presumed. The Permanent Court of International Justice, as well as the ICJ, have elucidated also, what is meant by *opinio juris*. In the *Lotus* case, the Court declared that even if a certain practice existed, namely a practice of abstaining from instituting criminal proceedings, it would not amount to a custom. The ICJ confirmed this ruling in the *North Sea Continental Shelf* cases (ICJ Reports 1969, 3), in the *Nicaragua* case (merits) at p. 77 but did not uphold it in the *Gulf of Maine* case (ICJ Reports 1984 at para. 111). Evidently, Treves, *The expansion of International Law, General Course on Public International Law* (note 9), at 144 takes a different position arguing that "practice" also depends on the will of States.

binding.[150] A third group argues that customary international law may develop spontaneously from within the international community and derives its legitimacy that such rules are needed for the well-being of that international community.[151] This latter theory borrows, to a certain extent, from authors, which consider international law to be natural law.

It is an open and controversially discussed question how practice may express itself and whether some duration of such practice is necessary. Mostly, practice manifests itself in activities or omissions attributable to particular States. These activities or omissions may be of an internal character or may be exercised on the international level. As far as the internal level is concerned, one may refer to decisions or statements of national parliaments for the enactment of laws. Also of relevance may be national judgments. Although practice, which is relevant for the development of customary international law, does not develop out of purely internal national measures, such as internal memoranda, they may be of relevance at the moment they are brought to the attention of other States.

As far as the international level is concerned, declarations and statements particularly by those representatives of States which are referred to as the representatives of States in the Vienna Convention on the Law of Treaties, protests or statements at the institutions of international organizations, in particular, the UN General Assembly, may be of relevance. Judgments of international courts or tribunals are considered to be of relevance. They may either identify international customary rules[152] or they may contribute to the development of the latter. These effects of international judgments or awards are not always easy to distinguish. Judgments

[150] H. Kelsen, *General Theory of Law and State* (Harvard University Press 1949) 369 et seq.; ibidem, *Reine Rechtslehre* (2nd edn, Deuticke 1960) 221–223.
[151] See concerning the schools of thought, Treves, *General Course on Public International Law* (note 11), at p.142 et seq.
[152] See Article 38(1)(d) ICJ Statute.

of international courts or tribunals may refer to certain norms as being customary international law. As such they do not formulate customary international law but they identify it and to that extent, they are a source of reference. However, judgments of international courts or tribunals may also contribute to customary international law. The international interpretation of Article 73 UNCLOS is an example of the latter.

Another important element for the formation of practice is frequent recitals in international treaties, which may reflect a State practice relevant for the formulation of customary international law.[153] However, there is quite some controversy on this issue, namely as to whether, for example, numerous investment treaties may establish customary international law concerning investment or whether the frequent treaties on double taxation establish customary international law. However, one may also argue that if States feel the necessity to conclude such international agreements, they do not believe that the practice so far existing is a reflection of an obligation to that extent. Still, nowhere but in treaties the practice of States is as well reflected.

So far, only States have been mentioned as the ones developing the relevant practice. It is a question whether non-governmental organizations have an impact upon the formulation of customary international law. The traditional view is that they have no such possibility as long as their practice is not attributable to States or has not been taken over by the latter. This should be reconsidered. If the relevant practice has been initiated by non-governmental organizations but accepted by States as law, such practice would qualify as customary law. This may not only be a theoretical approach.

Custom may develop amongst States but equally in international organizations. This does not mean to say that a custom develops

[153] Danilenko (note 139), at 27.

directly from, for example, resolutions of the General Assembly, but a frequent repetition of certain principles may over time amount to custom.[154] In that respect, the ICJ follows a deductive approach in establishing practice and *opinio juris* rather than relying on an empirical analysis ascertaining State practice.

A final question discussed controversially is whether practice has to be carried on for a certain period of time before it may be considered as forming customary international law. This was the common understanding for long, but recently it has been argued that practice leading to custom may come about rather quickly or even instantaneously. This may be due to the urgency of coping with widespread sentiments of moral outrage regarding crimes committed in conflicts such as those in Ruanda and Yugoslavia that brought about the rapid formation of a set of customary rules concerning crimes committed in internal conflicts. For example, the view that "ethnic cleansing" constitutes a crime developed quickly.

Since customary international law is a non-written law, the rules of interpretation applying for treaties are not applicable. However, this is to be said only with a *caveat*. In recent times, it has been established that customary law can also be created through treaties. In such a case, the starting point for the establishment whether customary international law exists or not is a written document to which the rules on interpretation apply.

It is one of the discussed issues how customary international law may be changed or modified. Does the breach of a customary international law rule lead to the abolition of such a rule or even

[154] In this respect, the jurisprudence of the ICJ is quite liberal. In the case *Armed Activities on the Territory of the Congo,* the ICJ held that the principle of permanent sovereignty over natural resources constitutes a principle of customary international law by relying on three resolutions of the UN General Assembly instead of considering a relevant practice of States. In its Advisory Opinion on Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (of 29 February 2019 paras. 52-53), it used a slightly modified approach which, however, comes to the same conclusion.

create a new one? The problem, however, is that a new practice probably in most cases is lacking, as well as the consideration that such practice is required by law. One should consider whether in such a situation it is sufficient that the State in question has the intention to change an existing customary law norm with the view of establishing a new norm. This may be a starting point for the development of new customary international law only if other States follow such an example. Until such development comes to a conclusion, the deviation from a norm of customary international law remains a breach.[155] If the question arises whether a new custom has been created, the following scenario should be distinguished. When a new rule, which contradicts a prior rule, is maintained by a large number of States, the protests of a few States will preserve the prior rule. Nevertheless, the behavior contrary to a custom contains within itself the seeds of a new rule and if it is endorsed by other nations, the previous rule will slowly disappear and be replaced or alternatively, there would be a period of time, during which two customs coexist until one of them is generally accepted. In this context, it is also of relevance which States are involved. As the ICJ has stated in the *North Sea Continental Shelf* case, the practice and the *opinio juris* of the States mostly interested have a more significant weight in this respect than the practice or only statements of other States not affected by the particular rule in question.

Customary international law has been frequently codified. For example, most of the rules of the Vienna Convention on the Law of Treaties are enshrined in customary international law. By codifying them, they become treaty law, but these two sets of rules exist in

[155] See Judgment of the ICJ in the *Nicaragua* case where it was stated that: In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indication of the recognition of a new rule (ICJ Reports 1989, at p. 96).

parallel. This has the advantage that identical or at least similar rules are applied to States Parties and non-States Parties.

As an analysis of the international jurisprudence indicates, State practice, as well as *opinio juris*, are deduced also from General Assembly resolutions. This constitutes, from the point of view of community interests, an approach whose consequences may be far-reaching if it prevails. The ILC in its Draft Conclusions on Identification of Customary international law seems to be reluctant to fully endorse using General Assembly resolutions/declarations as a means of identifying customary international law.

4. General Principles

a) In General

This Course will not deal with the origin and the dogmatic foundation of the notion of general principles of law comprehensively[156] but will concentrate on the development of this notion in recent years. What should be stressed at the

[156] H.W. Thirlway, *The Sources of International Law* (OUP 2019) 125–130; A. Pellet and D. Müller "Article 38", in A. Zimmermann, C. Tams, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 819 at 923; M. Andenas and L. Chiussi, "Cohesion, Convergence, and Coherence of International Law", in M. Andenas et al. (eds), *General Principles and the Coherence of International Law* (Brill 2019) 10; H. Mosler, "General Principles of Law", in R. Bernhardt (ed), *Encyclopedia of Public International Law*, vol. II (Elsevier 1995) 513–515; R. Wolfrum, "General International Law (Principles, Rules, and Standards)", in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2010) <www.mpepil.com> accessed 21 August 2020; S. Vogenauer and S. Weatherhill (eds), General Principles of Law: European and Comparative Perspectives (Hart 2017); M. Bogdan, "General Principles of Law and the Problem of Lacunae in the Law of Nations" (1977) 46 Nordic Journal of International Law 37–53; C. Voigt, "Delineating the Common Interest in International Law", in W. Bendek, K. de Freyter, M. Kettemann and C. Voigt (eds), Common Interest in International Law (Intersentia 2014) 9–27. She distinguishes between interests and concern (at p. 18). A most comprehensive analysis is to be found in the First ILC report on general principles of law, A//C.4//732 of 5 April 2019.

outset as justification for the particular role attributed to the principles of international law to be dealt with is that all have been developed with the participation of the international community. In that respect, they differ from the general principles which were meant to be derived empirically from national or international law.

In dealing with general principles of law, it is necessary to distinguish between the terms "rules", "principles", and "approaches" as used in the following. The distinction between principles and rules is the higher form of abstraction of the former, which means that principles may not be applied directly, although they may guide the implementation of rules.[157] Such distinction is not as clear-cut as it may seem. Framework agreements are equally principle-oriented and implementable mostly at the procedural level only. The distinction between principles and approaches is to be seen in that principles are of a normative fundamental nature, whereas approaches just identify the way a certain issue is addressed within a particular treaty.

References to general principles of law may be found in arbitral decisions concerning international disputes well before the adoption of the Statute of the Permanent Court of International Justice.[158] For instance, in the arbitration between France and Venezuela in the *Antoine Fabiani* case, the arbitrator stated that he would apply "the general principles of the law of nations on the denial of justice" and defined those principles as "the rules common to most legislations or taught by doctrines".[159] This reference not only indicates what

[157] First ILC Report, at para. 146; see comprehensively C. Trinidade (note 65), at p. 53 et seq.
[158] First ILC Report on General Principles of Law, A/C.4/732, 5 April 2019, at paras. 77 et seq. and 126 et seq.
[159] Quoted ibidem at 84; the First ILC Report (note 158) refers to several arbitration cases invoking general principles of law before the establishment of the PCIJ. This indicates that the reference to general principles originally was used to overcome the lack of relevant international treaties or customary international law.

the arbitrator considered as relevant, but he also gave an indication concerning the dogmatic basis why national law principles could be augmented to the international level. It is the argument that what most States consider as binding for States organs at the national level should also apply on the international one, too. This argument is only sustainable in respect of general principles derived from national law.

The legislative history of Article 38(c) PCIJ Statute reveals that the formulation, which later became Article 38(1)(c) ICJ Statute, is a compromise, which covered a disagreement between the participants in the negotiating process.[160]

The legislative history of Article 38(1)(c) ICJ Statute clearly indicates that one has to distinguish between general principles from national law and general principles formed within the international legal system.[161]

b) General Principles Derived from National Law

General principles that exist in national systems of law do not – by their very nature – form part of international law. The main reason lies in the difference in structure between international society and national societies. The transfer of general principles derived from national legal systems to the international legal level faces two problems, a dogmatic and a practical one. The only means to overcome the differences in structure between the national societies and the international society is that the principles derived from national law are in fact equal, based upon identical considerations, and that no substantive objection exists in respect

[160] First ILC Report (note 158), at paras. 91–106; Critically O. Spierman, "The History of Article 38 of the Statute of the International Court of Justice: A Purely Platonic Discussion?", in J. d'Aspremont and S. Besson (eds), *The Oxford Handbook of Sources of International Law* (OUP 2017) 167.
[161] First ILC Report (note 158), para. 22.

of the general principle concerned. The practical problem arises in the context of adjudication.[162]

Identifying a general principle derived from national legal systems theoretically requires from the international court or

[162] General principles are often applied by international tribunals irrespective of whether there is a specific reference in their constituent instrument or not. Certain decisions refer, like the ICJ, to principles that find a parallel in national law systems. For example, the arbitration award in the Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy stated that [a] decision with the force of *res judicata* is legally binding on the parties to the dispute. This is a fundamental principle of the law of nations repeatedly invoked in the legal precedents, with regard [to] the authority of *res judicata* as a universal and absolute principle of international law. Similarly, the arbitration award in the *Case concerning the Loan Agreement between Italy and Costa Rica* referred to the fundamental character of the principle of good faith in international law and included it among the general principles of law recognized by civilized nations.

When there are differences in the way in which municipal systems address an issue, the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted in the *Tadić* case that national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognized by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion […]. More specifically, it would be necessary to show that, in that case, the major legal systems of the world take the same approach to this notion.

Other international tribunals have had less hesitation in applying general principles of law even in the presence of discrepancies among municipal systems. For instance, in *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, the arbitrator was required to interpret the relevant contract in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals. The arbitrator found that the corporation was entitled to *compensation* but not to *restitution*, which would have been required under certain municipal systems, because "[a] rule of reason … dictates a result which conforms both to international law, as evidenced by State practice and the law of treaties, and to the governing principle of English and American contract law".

In the first International Centre for Settlement of Investment Disputes (ICSID) arbitration award in *Amco Asia Co v. Republic of Indonesia*, the panel found that "the full compensation of prejudice, by awarding to the injured party the *damnum emergens* and the *lucrum cessans* is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law".

tribunal concerned a comparative analysis as to whether the principle in question is common to, at least, a number of legal systems.

Unlike certain arbitration tribunals, the ICJ has been reluctant to apply general principles in a way that would imply a selection from among national rules. The situation would be different if the general principle in question would exist both in national laws and in international law.[163]

c) General Principles Formed within the International Legal System

General principles formed within the international legal system may be identified by different means. They may be intrinsic to the international legal system and they may be founded in the very nature of man as a rational and social being.[164] Such general principles may also be the result of legal logic.[165] In practice, general principles are often empirically deduced from existing international treaties.[166] The process may be a twofold one. In a first step, it is established as to whether the treaty in question is guided by particular principled considerations. In a second step, it is mandatory to ascertain whether these principled considerations

[163] The case-law of both the PCIJ and the ICJ provides some examples of decisions in which a principle of international law was regarded as having a parallel in national laws. For instance, in the *Case concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 1927, PCIJ, Series A, No. 9, at 31, the PCIJ found that "[i]t is ... a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him". For further references, see First ILC Report (note 417) at p. 30 et seq.

[164] O. Schachter, "International Law in Theory and Practice, General Course" (1982) 178 RdC 9–396, at 74/75.

[165] H. Mosler, EPIL vol. II, 513–515; R. Wolfrum, "General International Law", in *MPEPIL* (2010), MN 28.

[166] Wolfrum, "General International Law", in *MPEPIL* (2010), MN 28.

are reflected in other treaties and on that basis crystalize into a principle.

Apart from these – one could say traditional formats of identifying or developing general principles of law – note has to be taken of the fact that increasingly principles are declared by the UN General Assembly or in pronouncements of multilateral conferences. For example, the common heritage principle was declared in a resolution of the UN General Assembly and the precautionary principle in the Rio Declaration. The declaration of both these principles stood at the beginning of the elaboration of a particular international legal regime and they were not the result of a deduction. They were meant to guide the elaboration of the regime concerned and continued after the establishment of the latter to serve as a guideline for interpretation and further developments.

In introducing general principles of law in a legal regime, States and other actors involved in drafting such an instrument are guided by several considerations. The general principles included may be the result of a disagreement as to which rules or procedures are adequate. However, the parties concerned agree on the objective of the measures to be taken on an abstract level. In fact, the rule-making is postponed, and instead, the general principle in question is meant to guide the rule-making when the time is ripe to do so. Alternatively, general principles of law may be inserted in an instrument to guide the interpretation of the latter or to fill gaps or to direct the devolution of the said instrument by secondary rules. This is, in particular, the case concerning the precautionary principle. A particular role is played by general principles of law, which have been pronounced and accepted by resolutions/declarations of the UN General Assembly or a multilateral conference. Such general principles not only guide the subsequent negotiations of the regime concerned, they keep their relevance for the latter even after that regime has been established for interpretation and progressive development. The common heritage principle constitutes a good

example to that extent and Article 311(6) UNCLOS constitutes clear proof for its prevailing relevance.

Coming back to the empirical deduction of general principles of international law, it is appropriate to refer to some jurisprudence of the ICJ to illustrate this method. For example, in the *Corfu Channel* case, the ICJ found that the Albanian authorities were under the obligation to notify the existence of a minefield in their territorial waters and to warn the approaching ships of the imminent danger. The ICJ stated:

> Such obligations are based ... on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[167]

In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ noted that:

> the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.[168]

Again, in its advisory opinion on *Western Sahara*, the ICJ stated:

> the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples.[169]

As a further example, the Chamber judgment in the *Frontier Dispute* case *(Burkina Faso/Republic of Mali)* considered:

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[167] *Corfu Channel* case, ICJ Reports, 1949, p. 4 at 22.
[168] Ibid., 23.
[169] *Western Sahara,* Advisory Opinion, ICJ Reports 1975, 12 at para. 59.

> the principle of "*uti possidetis juris*" as "a fairly established principle of international law where decolonization is concerned" and as "a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs".[170]

The references by the ICJ to general principles formed within the international legal system may be explained, at least in part, by the definition of customary international law and, in particular, by the problem of how to empirically establish an *opinio juris* and/or State practice. The recourse to general principles of law thus, *de facto*, constitutes a substitute for customary law. This may have been, for example, the case with the principle of the freedom of maritime communication, referred to in the *Corfu Channel* case, albeit the fact that this principle was already formulated and dogmatically justified by Hugo Grotius.

Article 38(1)(c) ICJ Statute requires a general principle of law to be "recognized by civilized nations".[171] When a given principle is only part of international law, recognition of that principle reflects the attitude that is taken in its regard by the international community, and thus essentially by States. In other words, for a principle to exist, it is necessary that States acknowledge, albeit implicitly, that this principle applies to their international relations. Thus, for instance, in the *Frontier Dispute* case, when assessing whether the principle of *uti possidetis* applies in international law, the Chamber noted that the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, were evidently declaratory rather than constitutive: they recognize and confirm an existing

[170] Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali) (Frontier Dispute case), ICJ Reports 1986, 554 at para. 20.

[171] On this term, see ILC First report (note 158) at paras. 90 et seq. The Special Rapporteur points to the drafting history and denies this term to be discriminatory; he proposes to read this term to refer to the community of nations (see para. 184).

principle and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent.[172] The assertion by the ICJ of a general principle of law is only rarely accompanied by an adequate demonstration of its existence in international law.

d) The Relationship between General Principles and Treaty Law as well as Customary International Law

The position of general principles of law in the list of sources of international law contained in Article 38(1) ICJ Statute is not indicative of a hierarchical order. As Lord Phillimore pointed out during the preparatory work of the PCIJ Statute, "the order mentioned simply represented the logical order in which these sources would occur to the mind of the judge".[173]

As indicated above, a general principle of law may be embodied in an international treaty or in customary international law or it may be distilled from either of these sources. According to a more recent development, principles of law may be coined by political fora, such as in the UN General Assembly or by multilateral conferences. This is without relevance of the said general principle; that principle belongs to public international law and constitutes an autonomous part thereof.[174] The ICJ gave an example of such an embodiment in the *Case of the Monetary Gold removed from Rome in 1943* when it stated that

> to adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute,

[172] *Frontier Dispute* case (note 433), at para. 24.
[173] Permanent Court of International Justice: Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes 333.
[174] First ILC Report (note 159), at para. 27; different Pellet/Müller (note 157), at 943.

namely, that the Court can only exercise jurisdiction over a State with its consent.[175]

When deciding a legal conflict, international courts and tribunals by having recourse to a general principle of law have a wide margin of appreciation in interpreting such general principle. In this context, one should not speak of "discretion". The mandate of the international courts and tribunals in such a situation is a matter of interpretation whereas discretion refers to the decision whether or not to take an executive action.

There is a substantial distinction between rules of treaty law, of customary international law, on one side, and general principles of law, on the other. One feature they have in common is their normative factor, which means they intend to steer the behavior of actors in international relations legally. This distinguishes them from political appeals. However, whereas rules of treaty law or customary international law call for a concrete action of the addresses, principles are norms, which guide the development of new norms of treaty law and customary international law and their implementation, as well as their interpretation. However, they also may be applied directly. In the latter case, they open a wide margin of interpretation, which may induce international courts and tribunals to act as legislators.

5. General Principles as Potential Mechanisms to Progressively Develop International Law

From what has been said so far, it is evident that general principles of law may play an important role in the establishment of new regimes in international law, their development and permanent

[175] Case of the Monetary Gold removed from Rome in 1943 (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*) (Preliminary Questions), ICJ Reports 1954, p.19, 32.

interpretation at the level of implementation.[176] The so far existing international jurisprudence provides some examples to that extent.

The question remains, however, as to whether general principles of international law have the legitimacy to play such a role. There are two options how to establish such legitimacy: a procedural and a substantive one.

In dealing with the recently emerged or emerging general principles of international law, it will be assessed as to how such principles were developed and how they were integrated into the international normative order serving community interests. Only if they meet the criteria, referred to concerning the establishment and upholding community interest oriented regimes, namely that the relevant procedures allow for the participation of the international community, they may constitute a viable element in such regimes. As to whether they have to meet ethical standards such as justice and fairness is still to be discussed.

6. Recently Emerged General Principles of Law Which Had an Impact on the Shaping of International Law: The Procedure of Their Emergence and Their Objective

The impact principles have on the content and development of the international normative order depends upon the procedure of their emergence, their objectives pursued, and the context in which they are used. One must distinguish whether they appear in policy documents, in the preamble of an international agreement, or in the operative part thereof. Promoted in policy documents, such as recommendations or declarations of the UN General Assembly or of multilateral conferences, they are meant to guide the policy of States, to channel subsequent negotiations on international agreements into a particular direction, or to influence the development of customary

[176] See on that Wolfrum, "General International Law", in *MPEPIL* (2010), MN 60-63.

international law. With increasing frequency, the UN General Assembly or UN conferences develop principles, which become the backbone of a legal regime negotiated on that basis. The already classical example to that extent is the common heritage principle, which governs Part XI of the UN Convention on the Law of the Sea.[177]

To the extent that principles are contained in the preamble of an international agreement, they influence the interpretation of that treaty, particularly concerning its object and purpose.[178] Recently, principles of general or specific application have appeared in operational parts of international environmental agreements. For example, Article 3 of the Framework Convention on Climate Change, 1992, lists principles, which are meant to guide the Parties in their actions to achieve the objective of the Convention and to implement its provisions. According to Sands et al.,[179] such principles in operative parts of international agreements "embody legal standards, but the standards they contain are more general than commitments and do not specify particular actions", although others question whether this view is tenable.

7. Principles as a Bridge between Legally Binding and the Non-Legally Binding Parts of the International Normative Order

General Principles have a Janus-headed character. They may be politically binding, which is the rule, but equally, they may be legally binding and may become legally binding in the course of the development of the regime concerned. The common heritage principle may serve as an example. When this principle was declared by the UN General Assembly, it was only politically

[177] Article 136 UNCLOS.
[178] See Article 31(2) VCLT.
[179] P. Sands, J. Peel, A. Fabra and R. MacKenzie, *Principles of International Environmental Law* (4th edn, CUP 2018), at p. 200.

binding. However, its status changed over time. When this principle was integrated as Article 136 into UNCLOS, it became legally binding – one may even argue that this status was achieved earlier. Nevertheless, this is not a necessary development. It may be that a General Principle will govern a non-legally binding regime. This is the case for the FAO Code on Responsible Fisheries. This Code is non-legally binding upon the member States of the FAO. It is based upon the principle of sustainable development as is the 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, 1995 – a legally binding international treaty. It is evident that the development under either instrument has an influence on the other.

8. Unilateral Acts as Elements of the International Normative Order

Besides international treaties, as well as customary international law, unilateral acts[180] can be a source of binding obligations of States. Unilateral acts may be freestanding or – and this type is gaining in relevance – are declared (commitments) within a non-legally binding regime. A prime example to that extent is the Global Compact for Migration. The classical unilateral acts are protests, the recognition of a situation, the renunciation of rights, and notification.[181]

Only the international commitments made by individual States or other actors in international relations in the context of a legally binding or a non-legally binding regime are of interest in

[180] One of the often quoted unilateral acts is the Ihlen Declaration by the Foreign Minister of Norway which was considered by the PCIJ as binding in the case *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 April 1933, PCJ Reports, Series A/B, No. 53, 71.

[181] Brownlie's (note 8), 401 et seq.

the context of this course. Such commitments have been made in the context of the Copenhagen Conference on Climate Change in December 2009;[182] this mechanism is a central element of the Paris Agreement, 2016, and for the already mentioned Global Compact for Migration. The latter is a non-legally binding pact, which has for objective to implement sustainable and socially responsible policies for business formulated in 10 guiding principles. These are derived from the Universal Declaration of Human Rights, ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration 1992, and the UN Convention Against Corruption.[183]

Such unilateral commitments constitute binding obligations. Expressed in the context of an international treaty, such as the Paris Agreement, they constitute a concretization of the obligations of the State Parties and – through this – transform obligations of conduct into those of result.[184]

9. Decisions of International Organizations as Elements of the International Normative Order

As indicated earlier, international organizations have a growing influence on the shaping of the international normative order, although direct law-making competence is the exception rather than the rule.[185] A prime example to this extent is the UN. Decisions taken by the Security Council under Chapter VII of the UN Charter are binding upon all member States.[186] This also applies to acts of subsidiary bodies of the Security Council, in particular to

[182] See E. Brown Weiss, "Voluntary Commitments as Emerging Instruments in International Environmental Law" (2014) 44 Environmental Policy and Law 83 et seq.
[183] For further details, see B. Weiss (note 17), 105 et seq.
[184] R. Bodle and S. Oberthür, in D. Klein, M.P. Carazo, M. Doelle, J. Bulmer and A. Higham (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017) 91, at 93.
[185] Alvarez (note 6), 274.
[186] See A. Peters, "Article 25, MN 15-19", in *The Charter of the United Nations* (note 116).

sanctions committees.[187] The Security Council also assumed *de facto* legislative power; its resolution on the financing of terrorism[188] is replacing a draft convention, which never came into being.[189] A similar normative effect has the resolution concerning the non-proliferation of weapons of mass destruction.[190] This legislative competence is seen critically for several reasons. Article 25 UN Charter was meant to be repressive in respect of certain acts or situations. These two resolutions are rather preventive, although it can hardly be denied that terrorism or the proliferation of weapons of mass destruction constitute threats to peace. Apart from that, these two resolutions are – as already indicated – normative covering numerous not yet defined situations, whereas Article 25 UN Charter targets punctual situations. Therefore, these resolutions have broadened the mandate of the Security Council; however, they fit into a modern understanding of the powers and functions of the Security Council emphasizing a preventive rather than a merely reactive response to threats of international peace.

A particularity of this competence is – and this has to be emphasized – that the Security Council has the authority to enforce its legislative competence. This is most evident in how it uses targeted sanctions to act against terrorism.

Another example of an international organization having direct law-making competence is the International Seabed Authority. It has the mandate and the responsibility to issue regulations concerning the exploration and exploitation of mineral resources of the seabed, which are directly binding for those States and indirectly binding for private operators engaged in deep seabed mining. The

[187] Council Decisions, Annuaire de L'Institut de Droit International, vol. 77 (2016), 11–113.

[188] S/RES/1373 (2001) has been perpetuated by S/RES/2178 (2014) S/RES/1373.

[189] S. Talmon, "The Security Council as World Legislator" (2006) 99 AJIL 175; E. Rosand, "The Security Council As 'Global Legislator': Ultra Vires or Ultra Innovative?" (2004) 28 Fordham Int. L. J. 542–590; Ruffert/Walter (note 9), 32/33.

[190] S/RES/1504 (2003), 4 September 2003.

International Seabed Authority in cooperation with States enforces these regulations.[191]

Examples of less traditional legislative powers are IMO, ILO, WHO, ICAO, and FAO.

A softer form of lawmaking was used by FAO. FAO established a Code of Conduct on Responsible Fisheries.[192] This Code of Conduct supplements the Draft Convention on Sustainable Fisheries (which did not enter into force) issued by FAO. Although the Code of Conduct is technically not binding, FAO requests its member States to report about its implementation and on the reasons for not implementing this Code. ILO follows a similar approach by having adopted core labor law principles.

Dogmatically, there is a significant methodological difference between the norm-making of the UN Security Council on the one hand and the FAO and IMO on the other. The UN Security Council relies on Article 25 UN Charter. The mechanisms used by FAO and IMO rely on their members whose views will be expressed in considerations and decisions of their respective assemblies.

10. The Role of Non-Legally Binding Norms (Soft Law)

It is well accepted that non-legally binding norms may influence the behavior and decisions of actors in international relations. Their influence rests on the fact that they contain commitments based upon political and/or moral considerations.[193] Such norms are

[191] R. Wolfrum, "The Contribution of the Regulations of the International Seabed Authority to the Progressive Development of International Environmental Law", in M. W. Lodge and M. H. Nordquist (eds), *Peaceful Order in the World's Oceans, Essays in Honor of Satya N. Nandan* (Brill/Nijhoff 2014) 241–248.
[192] Available at <www.fao.org/3/v9878e/0878e00.htm>.
[193] P. Gautier, "Non-Binding Agreements", in *MPEPIL* (2006), <www.mpepil.com> (21 August 2020).

generally referred to as "soft law"[194] to describe instruments with a non-legally binding effect. The term "soft law" eludes a precise definition. It is used in the context of this Course to cover norms of international law not referred to in Article 38(1) ICJ Statute but agreed upon or accepted by actors in international relations (not only subjects of international law), formulated as norms, not only as political appeals and expected to be complied with, albeit not on the basis of legal grounds. An example for such a non-legally binding norm was referred to, namely the Global Compact for Safe, Orderly and Regular Migration.[195] Another earlier example was the Final Act of the Helsinki Conference for Security and Cooperation in Europe of 1 August 1975.[196] However, non-legally binding instruments are also established in the economic as well as in the financial sector. For example, the Financial Task Force to address money laundering was established without a legally binding instrument.[197]

The phenomenon of non-legally binding rules has been dogmatically considered by associating such rules with the development of customary international law,[198] as elements of the drafting of new treaties or by treating each of its features separately.[199] In this Course, soft law will be considered as an element

[194] D. Thürer, "Soft Law", in *MPEPIL* (2009), <www.mpepil.com> (21 August 2020) MN 8; B. Weiss (note 17), 93 et seq.; U.Beyerlin and T. Marauhn, *International Environmental Law* (2nd edn, Hart Publishing/C.H. Beck 2011) 289–297, distinguish as far as international environmental law is concerned between "legally non-binding agreements", institutional non-legal arrangements, and recommendations of international organizations. The phenomenon of non-legally binding norms is not only relevant in respect of international environmental law but for international law as such.

[195] Negotiated 13 July 2018, formally endorsed by the UN General Assembly on 19 December 2018 (A/RES/73/195).

[196] Text in: ILM vol.14, 1292.

[197] B.A. Simmons, "International Efforts against Money Laundering", in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 244 et seq.; B. Weiss (note 17), 100.

[198] For example, G. Abi-Saab, (note 3) at 179 et seq.

[199] Thürer, "Soft Law", in *MPEPIL* (2009); critical on soft law, Abi-Saab (note 3), 2 at p. 06 et seq.

of international normativity which may stand at the beginning of the establishment of international hard law, guides treaty-making, the interpretation and the implementation of international treaties. However, soft law may also replace hard law.

11. Tentative Interim Conclusions

Let us return to the original question of whether international law is binding and why.

By way of generalization, one may argue that there are several approaches how to justify that international law is binding. It is possible to either refer to the consent[200] expressed by those subjects of international law that have agreed to an international treaty (consent-based approach – meaning consent in respect of the substance, as well as the possibility to have participated meaningfully in the law-making process). It is further possible – the second approach – to ascertain that the norm in question reflects metalegally accepted principles such as justice, equity, and fairness (a reference to metalegal considerations). The third approach is a pragmatic one – international law is binding since, without this binding nature, it would be impossible to maintain structured international relations in the interest of preserving peace.[201]

This course is based upon the hypothesis that international law in its totality cannot be founded on one of these approaches alone. Account has to be taken of the various sources, the traditional ones, as well as the ones that have emerged in respect of regimes serving community interests. It is disputable whether customary international law is consent-based. In respect of general principles of international law, this was doubted; however, the new format

[200] L. Oppenheim, "The Science of International Law: The Task and the Method" (1908) 2 AJIL 313, 332; J. Brunnée, "Consent", in *MPEPIL* (2010), <www.mpepil.com> accessed 21 August 2020.
[201] Brownlie's (note 9), at 11.

of how general principles of international law are generated demonstrates otherwise. Apart from that, other mechanisms of establishing international law have been developed due to the increase in the number of actors in international relations. Finally, non-legally binding international norms (soft law) supplement legally binding norms or are interwoven with the latter. This again requests a reappraisal of consent.

In sum, it is undisputed that consent is, generally speaking, the basis of international treaty law.[202] The caveat reflects that international treaties are living instruments, which will be developed by State practice and interpretation. In this respect, meetings of parties and treaty bodies play a decisive role. In spite of the original consent, it is questionable whether international treaties can provide for a long-term sustainable order among States, albeit the consent of the States involved, if such treaties do not also mirror at the beginning and during their life the principles of justice, equity, and fairness. It has to be discussed equally, whether an international order may be established alone on justice, equity, and fairness, however defined, if the addressees had no possibility to contribute to the shaping of such law and did not consent thereto. The delicate balance between these two foundations of international law has to be achieved for each individual rule of the international normative order at the moment of its establishment and it – and this is of paramount importance – has to be upheld over time.[203]

[202] J. Brunnée, "Consent", in *MPEPIL* (2010), describes the stages in which consent is expressed.

[203] A more in depth discussion on the legitimacy of international law is to be found in R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (Springer Verlag 2008), which cannot be repeated here. See in particular, A. Buchanan and R.O. Keohane, "The Legitimacy of Global Governance Institutions", ibidem 25–62; J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010); in these treaties, the authors focus on the correlation between compliance and normativity emphasizing that "social norms can only emerge when they are rooted in an underlying set of shared understandings supporting first the need to normativity and then particular norms intended to shape behaviour". (at p. 350). They, however, emphasize that "...shared understandings

Relevant for the shaping of international relations are not only the traditional sources of public international law – international treaties, customary international law, general principles, and binding decisions of international organizations. Equally relevant are other norms – like the Global Compact for Migration[204] – which are not claiming to be legally binding. Examples to that extent are the Universal Declaration on Human Rights,[205] the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,[206] – both by now reflecting customary international law – the Declaration on the Right of Development[207] and the Rio Declaration on Environment and Development as well as the follow-up instruments from the Rio system.[208]

Based upon an empirical assessment of two regimes serving community interests an attempt will be made to redefine the status of soft law in international normativity.

alone do not make law". Social norms are distinguished from legal norms, the latter have to meet certain criteria (p. 351).

[204] See www.iom/int/global-compact-migration; see also note 1.

[205] A/RES/217 A (III), 10 December 1948.

[206] A/RES/2625(XXV), 24.10 1970.

[207] A/RES/41/128, 4.12.1986.

[208] UN Doc. A/CONF 151/26 (vol. I), 14.6.92.

III.

The Development of Two International Legal Regimes to Mark the Pace of Development as far as Normativity as well as Implementation Are Concerned

1. From the Universal Declaration of Human Rights to the Global Compact for Safe, Orderly and Regular Migration

The Universal Declaration of Human Rights issued by the UN General Assembly is the starting point of the modern human rights regime. Before the Second World War, the treatment of its citizens was considered an internal affair of the State concerned although André Mandelstam, a Russian diplomat and international law expert had made attempts in the Institut de Droit International to also establish a mechanism to protect the human rights of individuals *vis-à-vis* their own States. The reconsideration of the human rights issue was prompted by the atrocities committed by the Nazi Regime in Germany and by Germans in occupied territories.

The Universal Declaration has its basis in Article 55 of the UN Charter. It charges the United Nations with the obligation to promote "universal respect for, and observation of human rights and fundamental freedom without distinction as to race, sex, language, and religion". In Article 56 UN Charter, the Members of the UN pledge themselves "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55". It should be noted that the commitments under Article 55 and 56 of the UN Charter are commitments, only; these two provisions do not contain yet directly implementable human rights. It is frequently overlooked, though, that the preamble of the UN Charter reaffirms the dignity of the human person and the

equality between men and women. It has been concluded therefrom that the equality of men and women was legally guaranteed with the entering into force of the UN Charter. The Universal Declaration together with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are commonly referred to as the UN Bill of Human Rights. Before the two Covenants, the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Elimination of all Forms of Racial Discrimination was adopted. The two Covenants were followed by the Convention of the Eliminations of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the UN Convention on the Rights of Persons with Disabilities, 2006.

Unfortunately, these human rights agreements overlap, and to some extent, they conflict with each other. This is the consequence of a tendency pursued by some NGOs, which believe that a proliferation of human rights treaties improves the human rights situation. This is not necessarily the case. Such agreements have only a positive effect if they are properly implemented and such implementation is monitored adequately. Many contracting States though lack the capability to monitor the human rights situation in their country and to report back as required.

The Universal Declaration enshrines the following rights – or at least confirms the following principles. These are the dignity of the human being (Article 1), the prohibition of discrimination (Article 2), the right to life, liberty and the security of a person (Article 3), prohibition of slavery (Article 4), prohibition of torture (Article 5), the right to be recognized as a person before the law (Article 6), equality before the law (Article 7), right to an effective remedy by the competent tribunals (Article 8); prohibition of arbitrary arrest (Article 9); the right to fair trial (Articles 10 and 11); protection of

privacy (Article 12); freedom of movement (Article 13); right to seek asylum (Article 14); right to nationality (Article 15); right to marry (Article 16); right to property (Article 17); freedom of thought and religion (Article 18); freedom of opinion and expression (Article 19); right to peaceful assembly (Article 20), and the right to take part in the government of his/her country (Article 21). These are the classical civil and political rights. Added thereto are some economic and social rights such as the right to social security (Article 22), right to work (Article 23), right to rest (Article 24), right to an adequate standard of living (Article 25), right to education (Article 26) and right to participate in the cultural life (Article 27). It is somewhat problematic to classify the right to an international social and economic order (Article 28). Such can only be realized in close cooperation among all States concerned and with the United Nations. The main development in this respect is the efforts against poverty.

The Universal Declaration was adopted as a non-binding UN General Assembly resolution and was intended to provide merely a common understanding of the human rights and fundamental freedoms referred to in the UN Charter. This is emphasized in the Preamble of the Universal Declaration. The Universal Declaration has gradually been accepted by the international community as a normative instrument, though, and thus has changed its status significantly. It has been stated that some of its provisions have become customary international law; it even has been argued that the Universal Declaration has become, in its entirety, customary international law. It is questionable whether such a view is sustainable. What is more important is the influence the Universal Declaration has had on the development of human rights regimes worldwide and at the national level. It is undisputed that the Universal Declaration has influenced, directly or indirectly, the bill of rights in several national constitutions, as for example, in Germany. It equally was the blueprint for several regional human rights instruments, for example, the European Convention for the

Protection of Human Rights and Fundamental Freedoms (1950), which came into force before the two International Covenants on Human Rights. The major other human rights instruments are the American Convention on Human Rights of 1962 and the African Charter on Human and People's Rights. These treaties have each created their own regional human rights regime. They mirror the regional cultural and historical differences towards human rights. The core elements, however, are identical at the universal, as well as on the regional level. Of origin that is more recent is the fact that the Universal Declaration has been integrated into the national law of some States.

It took many years for the development of the two International Covenants. In substance, the two Covenants mirror largely the basic categories of the rights that the Universal Declaration proclaims; however, there are also differences. For example, both Covenants provide in identical terms for the right of all peoples to self-determination in Article 2 and the right to dispose freely of their natural wealth and resources. This right was not mentioned in the Universal Declaration but this right has now become customary international law.[209] Another difference is in the right to the freedom of religion. Whereas the Universal Declaration also included in that rights the right to change a religion, this was omitted in the Covenant on Civil and Political Rights. The relevant part of Article 18 of the International Covenant for Civil and Political Rights reads:

> "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt the religion or belief of his choice, and freedom, either

[209] The ICJ stated in its Advisory Opinion on Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, ICJ Reports 2019, p. 95 at para 150 that "the adoption of resolution 1514 (XV) represents a defining moment in the consolidation of State practice on decolonization" and that "[b]oth State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination".

> individually or in community with others and in public or private, to manifest his religion or belief and worship observance, practice and teaching."

One has to note that the treaty body to this Covenant – the Human Rights Committee – has by way of interpretation Article 18 moved the right back to the wording of the Universal Declaration. We should also note that the reference to human dignity, which used to form Article 1 of the Universal Declaration, has moved into the preamble of the Covenant on Civil and Political Rights. Thus, it has become a principle, which guides the interpretation of the Covenant rather than an applicable provision. That a provision confirming the principle on human dignity as contained in Article 1 of the Universal Declaration may be applied directly can be seen in the practice of the German Federal Constitutional Court.

The two Covenants do not refer to the right to private property. This reflects the disagreement on the economic system of States at the time when the instruments were adopted.

The International Covenant on Economic Social and Cultural Rights contains the few economic and social rights referred to in the Universal Declaration but they have been detailed and therefore come closer to the possibility of application. One should, however, note that as far as the application is concerned, the Covenant on Economic Social and Cultural rights only promulgates undertakings of State Parties. Article 2 paragraph 1 reads:

> "Each state party to the present Covenant undertakes to undertake steps, individually and through international assistance and cooperation, especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

This constitutes an open obligation of conduct. This becomes quite evident if one compares this provision with Article 2, paragraph 1, of the International Covenant on Civil and Political Rights, which reads:

> "Each State Party to the present Covenant undertakes to respect to and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin property, resource and status".

The Global Compact for Safe, Orderly and Regular Migration adds a new element to the so-far existing international human rights regime. The Global Compact does not address individual human rights living under the jurisdiction of the States concerned but rather focuses on unspecified groups of persons having the interest to leave the jurisdiction of one state by migrating to another state. The Compact is rather topical oriented. As already the name of the instrument indicates, this instrument comprises non-legally binding commitments. They cannot be directly invoked by individuals but they may be of relevance before international or national courts as interpretative guidelines of the relevant national or international law.

2. The Development of the International Human Rights Regime: Between Implementation and Progressive Development

In respect of the implementation of human rights, there are actually three different branches for the protection and enhancement of human rights at the universal and the regional levels. Unfortunately, the coordination between these is limited. There is the implementation of human rights as provided for in the UN Charter; the implementation of human rights as provided

for in the various international human rights treaties, and third, the implementation and enforcement of human rights under the regional human rights systems. All these systems have developed significantly over the years by establishing particular institutions, procedures, and mechanisms, and these again have been developed.

In respect of the implementation of human rights under Article 55 and 56 of the UN Charter, several institutions have been set up, such as the Human Rights Council and in particular the office of the High Commissioner for Human Rights. With the authorization of the ECOSOC and the UN General Assembly, these entities have over time developed numerous procedures and mechanisms designed to enable them to address large-scale or massive human rights violations. The main responsibility rests, in this respect, with the Human Rights Council. Apart from that, there is a possibility of individual human rights complaints under ECOSOC resolution 1235. Additionally, a system of country and thematic rapporteurs was established to monitor State compliance with the Charter-based human rights obligations. One might mention in this context also the International Criminal Tribunal and the former criminal tribunals concerning Yugoslavia and Ruanda.

The international human rights treaties have been developed; a motor in this respect was the treaty bodies, particularly productive in this respect was the Committee of the Covenant on Economic, Social and Cultural Rights. Some examples should be sufficient to exemplify the practice of these treaty bodies to progressively develop the human rights treaty in question.[210]

[210] It is sometimes difficult to draw a line between progressive interpretation and the progressive development of a human rights treaty by the treaty body concerned. For example, the Treaty Body on Economic Social and Cultural Rights issued at its 5th Session General Comment No. 3 interpreting Article 2(1) of the Covenant on Economic, Social and Cultural Rights. The gist of the Comment was that this provision, in spite of the reference to restraints concerning the implementation of the rights under this Covenant due to the limits of available resources, imposed upon the States Parties' obligations having imminent effect. This narrowed the gap between this Covenant and the International Covenant on Civil and Political

The Committee to the ICESCR mostly framed its Comments as being of an interpretative nature; this is the practice of the other human rights treaty bodies, too. For example, in its General Comment No. 4 concerning the right to adequate housing (Article 11(1)), it elaborated substantially on that right broadening its substance. It added essential aspects to this right requesting that such right ought to be gender-neutral, include security of tenure, affordability, habitability, accessibility, and cultural adequacy.[211] In its General Comment No. 5 (11th session 1994) on persons with disabilities, the Treaty Body enumerated several rights which were later enshrined in the Convention of the Rights of Persons with Disabilities, 2007.[212] A different approach featured the General Comment No. 8 of the Treaty Body (17th session), which dealt in detail factually and legally with the relationship between economic sanctions and the respect for economic, social, and cultural rights. Having recourse to evaluations of the human rights situation under the economic sanctions, in particular in Iraq, the treaty body came to the conclusion that

> ... the provisions of the Covenant, virtually all which are also reflected in the range of other human rights treaties as well as the Universal Declaration of Human rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions. Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the

Rights. The Treaty Body came to this conclusion by using traditional interpretation techniques. Certainly, this is to be qualified as a progressive interpretation although such interpretation gets close to a progressive development of that norm. Apart from that, it is to be noted that the progressive development of the international human rights regime takes place in the format of implementation.

[211] UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 11.

[212] UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 17.

> core content of the economic, social and cultural rights of the affected peoples of that State.[213]

This statement influenced the sanctions system of the United Nations. Equally, the General Comment No. 12 on the Right to Adequate Food (Article 11) also couched in interpretative terms, clearly expanded that right by stating:

> The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of Article 11, even in times of natural or other disasters.[214]

The General Comment continues by elaborating on the notion of sustainability, adequacy, availability, and access to food. By introducing the notion of sustainability, it establishes a connection to the discussion on that notion from the point of view of environmental policy. General Comment No. 15: The right to water[215] establishes a new economic right, namely the right to water, invoking Articles 11 (right to food) and 12 (highest attainable standard of health) of the Covenant. This General Comment goes beyond interpretation, since it does not attempt to establish the right to water as an element of the right to food or the right to the highest standard of attainable health, but establishes a right to water as a freestanding right. Through this, the scope of the ICESCR has been expanded – as should be emphasized – in a logical way. The right to water is likely to become a mechanism for the implementation of international environmental law concerning surface and ground water. General Comment No. 16[216] has transformed the equal right of men and women in the enjoyment of all economic, social, and

[213] UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 43, at para. 7.
[214] UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 55, at para. 6.
[215] Twenty-ninth session (2002), UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 97.
[216] Thirty-fourth session (2005); HRI/GEN//1/Rev.9 (Vol. I), 133.

cultural rights set forth in the present Covenant[217] into a free-standing right.[218] In its General Comment No. 23 (2016) on the right to just and favorable conditions of work (Article 7 of the Covenant), the Committee detailed the minimum criteria for remuneration – fair wages, equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work and a decent living for workers and their families.

The General Comments of the Committee on Human Rights, the treaty body of the International Covenant on Civil and Political Rights (ICPR), are less forthcoming, although they also engage in a progressive interpretation of the provisions of that Covenant. General Comment No. 14 on Article 6, the right to life, addresses the proliferation of weapons of mass destruction. It states: "designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today".[219] General Comment 23 on Article 27 (Right of minorities) emphasizes that the rights of minorities are collective rights and to be distinguished from and additional to the individual rights the members of such groups are entitled to enjoy under the Covenant. General Recommendation XXIII on the rights of indigenous peoples of the Committee to the International Convention on the Elimination of all Forms of Racial Discrimination (CERD)[220] emphasized that the treatment of indigenous populations was a mandate of the Treaty Body under the Convention, in spite of the fact that indigenous people were not explicitly mentioned by the Convention. Apart from calling for the respect of indigenous people, their culture, history, language, and way of life, the General

[217] Article 3 International Covenant on Economic, Social and Cultural Rights (note 115).
[218] R. Wolfrum, "The Prohibition of Discrimination in International Human Rights Treaties: The development from an Accessory Norm to an Independent?" In *Festschrift für Eibe Riedel* (Duncker & Humblot 2013) 209–219.
[219] Twenty-third session (1984), HRI/GEN//1/Rev.9 (Vol. I), 188.
[220] Fifty-first session (1997), HRI/GEN/1/Rev. 9 (Vol. II), 285.

Recommendation of CERD highlighted that indigenous people had a particular relationship with the land they live on. This statement had a significant impact on the development of rules concerning the protection of indigenous people and the preservation of their cultures, languages, and way of life. General Recommendation of CERD XXVII on the discrimination against Roma[221] set out in detail the measures to be taken for the protection of Sinti and Roma. These go beyond merely to ensure that Sinti and Roma are not to be discriminated against by public authorities or the society they live in but also call for affirmative action in the form of public programs.

The Committee to the International Convention on the Elimination of all Forms of Discrimination against Women equally uses General Recommendations to progressively develop the convention and its implementation. For example, in its General Recommendation No. 14 on Female circumcision, Ninth session (1990), the Treaty Body indicated measures to be taken to eradicate the practice of female circumcision.[222]

From the foregoing, it is evident that human rights treaty bodies have – via general comments/recommendations – the possibility to progressively develop the content of the human rights treaty concerned. They do so formally by way of interpretation. The same mechanism is used by the conferences/meetings of parties referred to above. There is, however, a significant difference between the two institutions. The conferences/meetings of parties are composed of all States Parties, whereas the human rights treaty bodies are experts albeit having been elected by the latter. Nevertheless, they lack the legitimacy of the conferences and meetings of Parties and therefore are not able to rely on Article 31 VCLT. In spite of that, general comments/general recommendations grow into hard law as subsequent State practice according to Article 31(3)(b) VCLT. All treaty bodies use their general comments/recommendations as

[221] Fifty-seventh session (2000), HRI/GEN/1/Rev. 9 (Vol. II), 289.
[222] UN Doc. HRI/GEN//1/Rev.9 (Vol. II), 326.

their yardstick when assessing a State report. The States concerned are obliged to take these general comments/recommendations into account in the implementation of the human rights treaty in question. For example, in reporting on the implementation of the ICESCR, States are now obliged to report about the availability of water for human consumption and for health purposes. The mechanism of law-making can generally be described as an interpretation by a body of experts subsequently confirmed by State practice.

3. Development Concerning the Implementation Techniques

The obligation to report as a means to monitor, as well as to ensure compliance, was already introduced by Article 22 of the Covenant of the League of Nations. States which had taken over the administration of former colonies under the mandate system had to report to a permanent commission of the League of Nations which examined such reports and advised the Council of the League of Nations in respect of mandates.[223] An equivalent provision, Article 22 of the ILO Convention, stipulated that Member States of the ILO had to report to the Board of the ILO about the measures undertaken at the national level through which they implemented the ILO Conventions to which they were members.

In particular, the international system on the assessment of compliance with human rights standards relies on reports submitted by States Parties on their implementation of the respective human rights treaties. A similar reporting system has been introduced into the mechanisms to monitor compliance with international environmental law since the Stockholm Conference on the Human

[223] On the mandate system in general, see R. Gordon, "Mandates", in *MPEPIL* (note 2) (2013), <www.mpepil.com> accessed 21 August 2020; on the international supervision of the administration of mandates, see MN 29-45.

Environment in 1972. An advanced example constitutes the reporting system introduced by the Conference of Parties of the UN Framework Convention on Climate Change. According to this system, States Parties submitted national reports, which were reviewed by selected expert teams. Thus, the Framework Convention provides for a verification process similar to the process undertaken by the treaty bodies under the human rights system.

The reporting systems introduced by the various treaties differ widely, namely in respect of the required content of the reports, the possibility of scrutinizing them, and the potential follow-up. Whether a particular system may be considered to constitute an enforcement mechanism depends to a significant extent upon the functions entrusted to the secretariat, commission, and/or a particular implementation body, the functions of the conference/meeting of States Parties, and the role of the dispute settlement procedure.

A system of self-reporting was made the primary mechanism for monitoring and ensuring compliance with international commitments in the system of the United Nations beginning with the human rights regime. The first treaty to do so was the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). Its Article 9(1) reads:

> 1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention;
>
> (a) within one year after the entry into force of the Convention for the State concerned; and

(b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

The already mentioned treaty bodies play a central role in this system. They monitor the compliance of member States with the treaty concerned. As the members of these bodies are elected by the Conference of States Parties, this ensures that the community of States of that particular human rights regime is involved in the system concerning ensuring compliance.

The mechanisms/techniques treaty bodies employ to ensure compliance differ in detail but not in their basics. All States Parties of international human rights treaties are obliged to submit reports to the Committee concerned on how the rights of the treaty in question are implemented. Each Committee assesses the report received, engages the representative of the State that has submitted the report in an oral exchange of views, and issues a report, which contains its findings and its recommendations in the form of concluding observations. The system of discussing reports has developed over time. At the beginning of CERD, for example, the members of the treaty body were not allowed to use or introduce information in their reports different from the one submitted by the State concerned. Now all available information may be used by the members of the treaty body as long as the member takes the responsibility for accuracy. Some of the Committees have the right to request the submission of an additional report if the report was

not considered satisfactory.[224] The reports of the States Parties, as well as the reports formulated by the Committees, are submitted to the ECOSOC for further consideration.

The implementing factor in this reporting system is foremost of a psychological nature. The assessment of a report takes place in the presence of representatives of the State concerned. The members of the treaty bodies concerned engage with these representatives in a "constructive dialogue". Mostly, the dialogues start with an introduction by a representative of the State[225] whose report is discussed to be followed by a report of one of the committee members. The preparation of the reporting expert is often quite intense. For example, the expert Theo van Boven traveled to Germany and met with some NGOs in preparation for his report on Germany. The meeting of the treaty body is public. As indicated already, some of the treaty bodies have the right to request further information if the report or the discussion is not considered satisfactory.[226] In practice, this is considered by the States concerned as criticism and it is meant as a means to enforce the views and the criticism of the treaty body concerned.

Some States have established a national procedure, which enforces the implementing factor. The report submitted, as well as the reaction of the committee thereto, has to be submitted to the parliament of the State concerned where it will be discussed.

On the basis of the reports received, the treaty body issues general comments/recommendations, which may – as has been elaborated in some detail already – provide an interpretation of a particular norm and which may in fact develop that particular norm progressively.

[224] For example, CERD; this mechanism was used in practice.
[225] CERD, Rule 64 Rules of Procedure.
[226] For example, CERD, Rule 65 Rules of Procedure.

Most of the human rights treaty bodies concerned have the mandate to receive and assess individual complaints (petitions). In particular, the Human Rights Committee has developed a far-reaching practice in this respect. The findings on the petitions submitted provide for an interpretation of the norm concerned and are, therefore, besides assisting the persons having submitted such petitions to pursue their rights *vis-à-vis* the State having violated their right, a mechanism for further developing the treaty in question. Apart from that, the petition system has a strong element of enforcement.

The treaty bodies have the right to receive State complaints, which means any State Party may claim that another State Party has violated its commitments. The claiming State Party acts in the defense of the value order of the treaty in question, a clear indication that the human rights regimes are the concern of the international community. However, little use is made in practice of this instrument even on the regional level.

Only CERD – inspired by the Rwanda crisis – has developed an early warning system,[227] which in character resembles the Responsibility to Protect doctrine.

The reporting system has been criticized as being inefficient as a system monitoring compliance. It has been pointed out that many States are in delay in reporting and that there is a significant backlog in the various human rights treaty bodies. Many States are, in fact, overwhelmed with the reporting requirements. One of the reasons is the many reports, which have to be submitted due to the establishment of ever more reporting obligations. Frequently, reports concerning human rights obligations under the various human rights treaties overlap. Some measures have been taken by the UN High Commissioner for Human Rights to improve the

[227] In fact, CERD had warned in its report to the ECOSOC on the building of ethnical tensions in Rwanda without an effective counter-measure from the side of the UN.

situation by modifying the reporting requirements – for example, by providing for a core human rights document for the States, which makes the reports less onerous. Additionally, the working conditions of some treaty bodies have been changed, for example, the Human Rights Committee now meets more frequently. This, however, has some consequences for the composition of such bodies. Apart from that, the treaty bodies have the capacity to monitor and to ensure compliance, although their working method, being non-confrontational, differs from the traditional confrontational means used at the national level. At least in respect of those States Parties, which are in principle dedicated to implementing the human rights commitments, entering into the constructive dialogue with the treaty body concerned is helpful for improving the implementation of the obligations concerned. However, it is true that the effect of treaty bodies *vis-à-vis* those States, which have become members of a particular human rights instrument to improve their international reputation but have no intention to live up to their commitments, has little effect but alarming the international community. Although shaming may have some compliance effect, it is the function of the Conference of Parties concerned to proceed to confrontational means. This option has been rarely used.

Equally, the State complaint procedure has been invoked at the regional level only rarely and not at all on the universal level.

Individual complaints are in frequent use at the regional levels and have a place at the universal level at the Human Rights Committee. They are meant to protect individuals but more often than not such individual complaints cover areas where the State concerned more generally fails to fully honor its international commitments.

The United Nations Human Rights Council was established by resolution 60/251 of 15 March 2006 of the UN General Assembly. It is a body directly subordinate to the United Nations

General Assembly. This status is meant to increase its political weight. The legal basis for the establishment of the Human Rights Council is Article 22 UN Charter in conjunction with Article 7 (2) of the Charter. The Council is obliged to report to the UN General Assembly on its activities. The composition of the Council follows a pattern of geographical distribution. Its 47 members are elected by a majority vote of the General Assembly, 13 seats are reserved for Africa and Asia, each which gives the two regions the majority in the Council, six seats are reserved for Eastern Europe, seven for Western Europe and others, and eight for Latin America and the Caribbean. The Human Rights Council took over all functions of the Human Rights Commission; the founding resolution entrusted it with the responsibility for promoting universal respect for the protection of all human rights. The Council has a recommendatory function *vis-à-vis* the General Assembly concerning further development of human rights. In addition, thereto the Council has a protective function. It is charged with addressing "situations of violations of human rights, including gross and systematic violations" and with making recommendations on them. The Council may also respond to individual cases of alleged human rights violations. Finally, the Council must review periodically the fulfillment by each State of its human rights obligations. Hence, it has to monitor all States' compliance with human rights permanently and if necessary by *ad hoc* procedures or the appointment of special rapporteurs.

The assessment of the work of the UN Human Rights Council is mixed. It is a matter of fact that the Council criticizes Israel more often than other States. Apart from that, it does not add to the reputation of the Council that states being accused of systematic human rights violations are members of that body.

4. From the Stockholm Declaration over the Rio Conferences to the Paris Agreement on Climate Change

a) Development Concerning Normativity (Including the Role of Conferences and Meetings of State Parties)

The starting point of the development of modern international environmental law was the Stockholm Conference 1972,[228] although at all times and in all cultures, attempts have been made to protect the environment with the view to preserve the sustainability of the environment for the people depending upon it. Before the term "environment" was coined, international treaties, which now belong to the corpus of international environmental law, dealt with pollution and the protection or rather the management of certain species, such as whales or polar bears. In spite of the fact that the multilateral agreements concerning the protection of the environment or components thereof address particular issues, they have distinctive features in common as far as their initiation and their institutional structure are concerned. In principle, two groups of environmental treaties can be distinguished: treaties concerning a resource, which is by its natural characteristics a common resource, e.g., the air, the atmosphere, or the global climate, and particular resources located in areas under national jurisdiction such as biodiversity. The protection and management of the latter can likewise be in the interest of the international community.

[228] The international regime concerning the protection of the environment underwent considerable development. Universal environmental agreements prior to the 1972 United Nations Stockholm Conference on the Human Environment were oriented towards the utilization of certain environmental assets and did not recognize a common interest in the conservation of natural resources. This emphasis began to change with the Stockholm Declaration on the Human Environment, 1972 which, *inter alia*, proclaimed: "[T]o defend and improve the human environment for present and future generations has become an imperative goal for mankind...". However, apart from this, the Declaration of the 1972 Stockholm Conference was still very much concerned with transfrontier pollution reflecting a bilaterally oriented understanding of the protection of the environment.

Yet, the mechanisms for initiating an international regime and its implementation may differ.

The multilateral agreements forming the international regimes on the protection of the environment are highly differentiated – therefore the regime is to be considered as being decentralized in substance, as well as institutionally. The instruments concerned either provide for the protection of a particular environment (such as the Alps[229] or the Baltic Sea[230]) or the protection of a specific component of the environment (Ozone Layer), the protection of particular species of Fauna or Flora,[231] or they address particular activities and their specific risks (MARPOL).[232] Additionally, there are many international agreements managing particular resources.[233] As indicated earlier, many of the international agreements which are guided by environmental considerations also serve concrete commercial interests, others are purely environmentally driven. For the former, one may refer to the Convention on the Protection of Polar Bears[234] and for the latter, to fisheries agreements.

The objectives pursued by multilateral environmental agreements have been appropriately, albeit broadly, expressed in the Preamble of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 23 November 1972.[235] The Preamble calls for the necessity of protecting parts of the cultural and natural heritage of outstanding interest for the heritage of mankind. In this context, the Preamble of the

[229] Convention on the Protection of the Alps (Alpine Convention), 1991, ILM 767 vol. 13 (1992), 767.
[230] Convention on the Protection of the Baltic Sea Area, ILM, vol. 13 (1974), p. 546.
[231] Convention on the Conservation of Migratory Species of Wild Animals, 1979, ILM vol. 19 (1980), 25; Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1971, (CITES) UNTS vol. 993, p. 243.
[232] International Convention for the Prevention of Pollution from Ships, 1973/78 and Protocol of 1997.
[233] Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries, 1980.
[234] Agreement on the Conservation of Polar Bears, 1972, ILM vol. 13 (1974), 13.
[235] UNTS vol. 1037,151.

Convention on the Protection of Biological Diversity[236] should also be mentioned. This Preamble refers to the "importance of biological diversity for evolution and for maintaining life-sustaining systems of the biosphere" and affirms "that the conservation of biological diversity is a common concern of humankind".[237] Similarly, the Framework Convention on Climate Change[238] acknowledges that "the Earth's climate is a common concern of mankind since climate is an essential condition that sustains life". A similar objective is pursued by the Convention for the Protection of the Ozone Layer of 22 March 1985.[239] Although the Preamble of this convention does not contain a reference to the common concern principle, it strikes the same tune in focusing upon the global protection of human health and the environment against adverse effects resulting from modifications of the ozone layer. Although this

[236] Note 73. The concern about the preservation of genetic resources – as something different from the protection of species – dates back to the seventies. Recommendations 39 to 45 of the UN Conference on the Human Environment Action Plan specifically refer to genetic resources encouraging cooperation among States and with international organizations. In more detail, the Brundtland Report encourages the conclusion of a species convention to deal with biodiversity. It emphasized that the Convention "should articulate the concept of species and genetic variability as a common heritage of mankind". The report further indicated that such a Convention would need to be supported by a financial arrangement, in order to "ensure the conservation of genetic resources for all people", and "assure that the nations that possess many of these resources obtain an equitable share of the benefits and earnings derived from their development ... one such arrangement might be a Trust Fund to which all nations could contribute, with those contributing an appropriate share".

[237] On the meaning of this expression in a different context, see A.A. Trinidade and D.J. Allard, "The Implications of the Common Concern of Mankind Concept on Global Environmental Issues", in T. Iwama (ed), *Policies and Laws on Global Warming: International and Comparative Analysis*, 7 (Tokyo 1991). Two different qualifications of biological diversity were envisaged during the deliberations: a common heritage of humankind; a common responsibility of humankind. The use of the expression "common heritage" was particularly controversial and objected to by developing countries once having fought hard battles to establish this principle in the Convention on the Law of the Sea.

[238] United Nations Framework Convention on Climate Change, 1992, ILM vol. 31 (1992), p. 849.

[239] Vienna Convention for the Protection of the Ozone Layer, 1985, ILM vol. 26 (1987) p. 1527.

global concern aspect has been mentioned in other international agreements on the protection of the environment, such as the Convention on Wetlands of International Importance especially as Waterfowl Habitat of 2 February 1971[240] and the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[241] it has only been emphasized and made the focal point in the UNESCO Convention, the Convention on the Protection of Biological Diversity, the Convention for the Protection of the Ozone Layer and the Convention on Climate Change and the World Charter For Nature, which was resolved by the UN General Assembly of 28 October 1982.[242] Although the World Charter for Nature is not a legally binding instrument, its Preamble may be regarded as one source for defining the term "environmental problems of global relevance". According to this Preamble, the human being is a part of nature and life is dependent upon the continuity of nature. For this reason, nature must be protected. The notion of "common concern" does not connote specific rules and regulations, but, primarily, establishes a general basis for the international community to act. However, it implies that the respective part of the environment having been declared the common concern can no longer be considered as solely within the domestic jurisdiction of States due to its global importance. Further, the instrumentalization of this notion expresses a shift from classical treaty-making notions of reciprocity and material advantage, to action in the long-term interests of humanity.

Several of the later universal environmental agreements explicitly refer to community interests. For example, in the preamble of the Berne Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979,[243] the States

[240] UNTS vol. 996, 245.
[241] Note 231.
[242] A/RES/37/7 28 October 1982.
[243] COE Convention on the Conservation of European Wildlife and Natural Habitats, 1979, CETS No 104.

Parties recognize that wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, etc. value that needs to be preserved for future generations. Equally, in the preamble of the Bonn Convention on the Conservation of Migratory Species of Wild Animals of 23 June 1979,[244] States Parties commit themselves to take measures concerning the conservation of certain migratory species "for the good of mankind".

The Rio Declaration on Environment and Development of 1992,[245] as well as international agreements following the 1992 UN Conference on Environment and Development, such as the UN Framework Convention on Climate Change,[246] indicate a further shift of emphasis. They tend to strive for sustainable development and common but differentiated responsibilities. This again is community-oriented paying attention to the differing needs and capabilities of the various groups of States. In particular, the principle of sustainable development is a reflection of community interests, as it attempts to preserve natural resources also for common generations and thus is based on the consideration of inter-generational equity.[247]

The notion of a common concern of humankind as expressed in the preamble of the Convention on Biological Diversity reflects the community interest despite exclusive rights of States over natural resources under their jurisdiction.

The fact that the governance of a particular component of the environment has been acknowledged to be in the interest of the international community does not mean that the multilateral agreement in question, such as on Biological Diversity, the Convention

[244] Convention on the Conservation of Migratory Species of Wild Animals, 1979.
[245] UN Conference on Environment and Development Rio Declaration on Environment and Development (14 June 1992) UN Doc A/CONF. 151/26/Rev 1 vol. I, 3.
[246] United Nations Framework Convention on Climate Change (with Annexes) (note 238).
[247] Brown Weiss (note 17), at 239 et seq.

on the Protection of the Ozone Layer, or the Convention on Climate Change does not also serve utilitarian purposes. On the contrary, the reasons for conservation of biological diversity according to the Biodiversity Convention, for example, rest in the importance of biological diversity for evolution and for maintaining life-sustaining systems of the biosphere. This apparently anthropocentric approach – underlined in other rules of the Convention – is balanced by the first sentence of the Preamble of that Convention, in which the Parties recognize the intrinsic value of biological diversity. The reference to the intrinsic value of biodiversity is also referred to in other multilateral agreements, which have the protection of the environment for an objective such as the Antarctic Treaty system.

It should not be presumed, though, that emphasizing the need for global action to meet global concerns causes States to waive their sovereign rights completely, especially if the resource or the activity to be undertaken comes under the territorial jurisdiction of States. Particular mechanisms have been developed in the various multilateral environmental agreements to overcome the tension between the acknowledgment that the protection of the environment is in the interest of the international community and the fact that any measure taken under this perspective may interfere with the sovereignty of individual States.

The Biodiversity Convention may serve as an example. According to its Article 3,

> "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, and the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[248]

[248] This is a repetition of Principle 21 of the Stockholm Declaration, 1972.

This statement reflects, in a manner, which can now be qualified as conservative, the general obligation of States concerning the protection of the environment. It seems to indicate that States are absolutely free in their dealing with the environment under their territorial jurisdiction. This does not reflect the principled statements in the Preamble and Articles 1 and 6–10 of the Biodiversity Convention. The Preamble of the Biodiversity Convention counterbalances the sovereignty principle,[249] providing that the protection of biological diversity is the common concern of humankind. The fact that conservation of biological diversity is a common concern of humankind implies that the host State of the genetic resources concerned is called upon to conserve biodiversity. The obligations of host States compared to the ones of other States interested in making use of biological diversity (user States) differ. The host State is meant to act on behalf of the international community – it may be regarded as a trustee of the latter.

The user State is equally obliged to protect the genetic resources according to international law. Its obligation, however, goes a step further. Since States have different capabilities, their conservation efforts will consequently differ. Thus, the legal consequence of the common concern concept is, in this case, a duty imposed upon states to cooperate in a particular way to achieve a given objective. Moreover, as the possessors of genetic resources retain full sovereignty over their natural resources, the cooperation on the part of developed States in conservation should inevitably take the form of financial aid and scientific and technological assistance. This is reflected in the objectives of the Convention. Article 1 stresses the two elements of the Convention,

[249] See Article 3 whose first part reflects a principle underlying the UN General Assembly Declaration on the Permanent Sovereignty of States over natural resources, A/RES/1803 (XVII), 14 December 1962. A similar wording is to be found in Article 193 UNCLOS, which, however, is more efficiently balanced by Article 192 UNCLOS containing the obligation to protect the marine environment.

namely conservation of biological diversity and the sustainable use of its components on the one side and the "appropriate access[250] to genetic resources" on the other, both being linked by the right for a "fair and equitable sharing of the benefits arising out of the utilization of genetic resources" and the "appropriate transfer of relevant technologies". States interested in utilizing genetic resources have to respect the mandate and the rights of the host State; they must not only respect the national law of the host State concerned but also exercise due diligence to ensure that entities under its jurisdiction comply with such national laws. A similar approach has been established in respect of the management of fish resources in the exclusive economic zone. This has for consequence that States – host States hosting genetic resources and States interested in the utilization of such resources – are under an obligation to cooperate. This again is an approach, which is typical for regimes serving community interests, be it the dominant factor or a side aspect only, as established earlier.

The multilateral treaties, which in their totality constitute the international legal regime concerning the protection and management of the environment, display as far as their establishment and their institutions are concerned a distinctive pattern although a proliferation of specialized international

[250] R. Wolfrum and P.T. Stoll, *Access to Genetic Resources under the Convention on Biological Diversity and the Law of the Federal Republic of Germany* (E. Schmidt 1996); L. Glowka et al., A Guide to the Convention on Biological Diversity, International Union for the Conservation of Nature (IUCN) (1994) 30 Environmental Policy and Law Paper; G. Henne, *Genetische Vielfalt als Ressource: Die Regelung ihrer Nutzung* (Nomos Verlagsgesellschaft 1998) 138 et seq.; Beyerlin/Marauhn (note 194), 196 et seq., referring also to the Nagoya Protocol which deal with benefit sharing. See also Decision X/1 of the Conference of Parties on Access to Genetic resources and Fair and Equitable Sharing of Benefits Arising from their Utilization, UNEP/CBD/COP/10/27. As to the implementation of the Nagoya Protocol, see The Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the Parties to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, CBD/NP/MOP/3/10 31 January 2019.

environmental treaties is to be noticed. Such decentralization is equally dominant in most other regimes serving community interests.[251]

All these regimes mentioned so far are treaty-based. However, most of them, in particular the modern ones, were initiated or influenced by the Rio Conference on Environment and Development, 1992 and its follow-up conferences (the Rio Conference system); some of them emerged from political pronouncements in the United Nations or one of its Specialized Agencies. The initiatives concerned were introduced into one of these fora by individual States, groups of States, or non-governmental organizations.[252] The pronouncements of such fora, which contain directives, procedural or substantive ones, and principles, which needed to be transformed into rules, constitute the legally non-binding level and are formulated in different ways, as political objectives in hortatory terms or even, mostly subsequently as political commitments. The project concerning the development of an internationally binding instrument concerning biological resources beyond national jurisdiction constitutes a model, which is based upon an established practice.

The subsequent level is the drafting of an international agreement by a multilateral Conference, which provides for the applicable rules and standards, as well as the institutional infrastructure for that agreement.

As far as the content and, in particular, the preciseness of the substantial rules (obligations, rights, and behavioral standards) are concerned, all depends as to whether the instrument is designed as a framework agreement, which will be supplemented by a protocol or annexes or as an instrument, such as the Paris Agreement on climate change, depending on individual commitments or on

[251] Different and critical, Beyerlin/Marauhn (note 194), at p. 246.
[252] For example, the Biodiversity Convention was initiated by IUCN.

a treaty which attempts to be comprehensive. Apart from that, every agreement provides for a form of an institutional framework. Standard is the establishment of conferences/meetings of parties or treaty bodies or both.

Conferences/meetings of parties have in many cases developed or are designed as the motor for the implementation of the treaty in question and its progressive development. Such conferences/meetings of parties may adopt protocols or at least prepare them and annexes and may propose amendments to the agreement concerned itself. Apart from that, conferences of parties may issue political statements, supervise the implementation of the agreement in question, and may comment on the implementation measures undertaken (or not undertaken) by the States Parties concerned. Some of the measures taken – the drafting of protocols and amendments to the Convention, as well as annexes – may develop, with the consent of the States Parties concerned, into positive law. For the adoption of annexes and sometimes even protocols, a simplified procedure is applied. Mostly, conferences/meetings of parties exercise a quasi-legislative function; the status of their decisions often remains unspecified by the agreement concerned but clearly has political consequences. The mandate of the Montreal Protocol to exercise direct legislative functions is the exception rather than the rule.[253]

As far as the institutional structure of the various international treaties is concerned, it is necessary to distinguish between those, which were developed under the umbrella of an international organization such as IMO and FAO, which provide the institutional infrastructure for such agreements such as MARPOL, and multilateral treaties, which are freestanding.

[253] J. Brunnée, "Reweaving the fabric of International Law? Patterns of Consent in Environmental Framework Agreements", in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (Berlin 2005) 101, 106 et seq.

Additionally, IMO, FAO, WHO, and other international organizations contribute to the normative development of international environmental law in general as does the UN, directly through resolutions or declarations of the UN General Assembly or through the organization of international conferences such as the Rio Conference system. As already indicated, IMO and FAO additionally partake in the governance of particular regimes. They are, however, the exception to the general rule that each international environmental regime has its own governmental system, which does not qualify as an international organization.

The governance of the global environment is decentralized as far as substance and institutional structure are concerned. In that respect, similarities with the international human rights system are evident. No institutional mechanism exists, which has the mandate to concentrate environmental policymaking or at least to serve as a clearing-house mechanism.

As for the international human rights regime, attempts have been made to establish an international organization with overarching competences in respect of the governance of the environment or at least a focal point. The establishment of UNEP was meant to be a starting point for some centralization of competences concerning environmental governance.[254] Several steps have been taken to improve upon UNEP's mandate and status. Chapter 38, paragraph 21 of Agenda 21, adopted at the Rio Conference 1992, stated that there would be a need for an enhanced role for UNEP and its Governing Council. The governing Council should, within its mandate, continue to play its role with regard to policy guidance and coordination in the field of the environment, taking into account the development perspective. Attempts to

[254] A/RES/2997 (XXVII) of 15 December 1972 established UNEP, as a subsidiary organ of the UN, to promote international cooperation in the field of the environment and to recommend as appropriate, policies to that end and to provide general policy guidance for directions in coordination of environmental programs within the United Nations system.

establish UNEP as an international organization and as a center for the international environmental regimes have failed, so far.[255] If succeeded, it would have probably curtailed the flexibility of the environmental regimes involved and their capability to respond adequately to the demands of the challenges each of them is facing.

Another institution exercising influence on the forming of environmental policies was the Commission on Sustainable Development established by the UN General Assembly in 1992[256] as a body under ECOSOC. Its task was to oversee the outcomes of the 1992 UN Conference on Environment and Development. The Commission was replaced in 2013 by the High-Level Political Forum on Sustainable Development,[257] which meets as a subsidiary organ of the UN General Assembly every four years and in other years under the auspices of the ECOSOC. Its mandate is to provide political leadership, guidance, and recommendations for sustainable development. It is thus an organ for permanent cooperation of States concerning the implementation of agreed measures based upon sustainable development, as well as suggesting new mechanisms and policies to that end.

As is the case for the international human rights regime, each single multilateral environmental agreement – except for the ones developed under the auspices of IMO and FAO – disposes of its own institutional structure. These are conferences or meetings of State Parties.[258] In literature, they are occasionally referred to as "treaty

[255] See on that Beyerlin/Marauhn (note 194) at 251 and 253 with further references.
[256] A/RES/47/191 of 22 December 1992; see also Report of the UN Secretary General (A67/737 of 26 February 2013), Lessons Learned from Conference on Sustainable Development.
[257] Decided at the 2012 Rio Conference on Sustainable Development and formalized by A/RES/67/290 of 9 July 2013.
[258] According to an established terminology, the term "Conference of Parties" is used for multilateral agreements and the term "Meetings of Parties" for protocols. Occasionally a Conference of Parties also serves as a Meeting of parties for the Protocol connected the said multilateral agreement. The Paris Agreement 2015

bodies", which may be misleading,[259] since their competences are different from the expert bodies of international human rights treaties. Conferences of parties also exist for international human rights treaties, the main function of which, apart from occasional policy decisions, is to select the experts for the human rights treaty bodies such as the Human Rights Committee. Conferences or meetings of parties of multilateral environmental agreements, in fact, combine some of the competences of the expert bodies and the conferences of States Parties of international human rights treaties. Such conferences and meetings of parties constitute by now a well-established, institutionalized form of inter-state cooperation. The functions of such conferences or meetings of parties may exceed the ones of international conferences if they have legislative or at least quasi-legislative powers.

A comparison of the development of international environmental treaties adopted under the auspices of an international organization, such as IMO, and a freestanding multilateral environmental agreement elucidates the similarities and the differences between the two types of agreements. The main difference is that the international organization in question assumes all competences exercised by the conference or meeting of parties of the other. This means that in the case of environmental treaties under the responsibility of an international organization, all States parties may have an influence on the further development of that particular international agreement whereas, as far as a free-standing multilateral agreement is concerned, only members of the particular treaty regime have that option via the conference/meeting of parties of that treaty. This ensures that only those States, which are committed to the standards and principles of that particular regime, partake in the governance of the latter. One may

(note 135) has no Conference of parties of its own; the Conference of Parties of the Framework Convention on Climate Change acts as such for the Paris Agreement.

[259] G. Ulfstein, "Treaty Bodies", in D. Bodansky et al. (eds), *Oxford Handbook of International Environmental Law* (Oxford 2007) 877 et seq.

argue that this is not consistent with the qualification of a regime as serving the interests of the international community. However, such qualification means that the object and purpose of the regime in question strive for serving the interest of the international community. It does not mean, though, that those States, which are not committed to that object and purpose, may participate in the governance of a regime, the objective of which is not shared by them.

Conferences and meetings of parties do not have the administrative infrastructure of international organizations. They are considered to be more flexible; apart from that, States have a tendency to avoid an increase in international bureaucracy.

The mandates of the conferences and meetings of parties differ. The mandate may be limited as for UNCLOS or it may be extensive such as under the Convention on Biological Diversity[260]

[260] See note 73; the relevant part of Article 23 of the Biodiversity Convention reads:
"1. A Conference of the Parties is hereby established. ...
2. Extraordinary meetings of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, provided that, within six months of the request being communicated to them by the Secretariat, it is supported by at least one third of the Parties.
3. The Conference of the Parties shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules governing the funding of the Secretariat. At each ordinary meeting, it shall adopt a budget for the financial period until the next ordinary meeting.
4. The Conference of the Parties shall keep under review the implementation of this Convention, and, for this purpose, shall:
(a) Establish the form and the intervals for transmitting the information to be submitted in accordance with Article 26 and consider such information as well as reports submitted by any subsidiary body;
(b) Review scientific, technical and technological advice on biological diversity provided in accordance with Article 25;
(c) Consider and adopt, as required, protocols in accordance with Article 28;
(d) Consider and adopt, as required, in accordance with Articles 29 and 30, amendments to this Convention and its annexes;
(e) Consider amendments to any protocol, as well as to any annexes thereto, and, if so decided, recommend their adoption to the parties to the protocol concerned;

or the Basel Convention,[261] the latter two representing the general

(f) Consider and adopt, as required, in accordance with Article 30, additional annexes to this Convention;
(g) Establish such subsidiary bodies, particularly to provide scientific and technical advice, as are deemed necessary for the implementation of this Convention;
(h) Contact, through the Secretariat, the executive bodies of conventions dealing with matters covered by this Convention with a view to establishing appropriate forms of cooperation with them; and
(i) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation."

[261] The relevant part of Article 15 reads:
"1. A Conference of the Parties is hereby established. ...
2...
3. The Conference of the Parties shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules to determine in particular the financial participation of the Parties under this Convention.
4...
5. The Conference of the Parties shall keep under continuous review and evaluation the effective implementation of this Convention, and, in addition, shall:
   a. Promote the harmonization of appropriate policies, strategies and measures for minimizing harm to human health and the environment by hazardous wastes and other wastes;
   b. Consider and adopt, as required, amendments to this Convention and its annexes, taking into consideration, *inter alia*, available scientific, technical, economic and environmental information;
   c. Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation and in the operation of the agreements and arrangements envisaged in Article 11;
   d. Consider and adopt protocols as required; and
   e. Establish such subsidiary bodies as are deemed necessary for the implementation of this Convention.
6. The United Nations, its specialized agencies, as well as any State not Party to this Convention, may be represented as observers at meetings of the Conference of the Parties. Any other body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to hazardous wastes or other wastes which has informed the Secretariat of its wish to be represented as an observer at a meeting of the Conference of the Parties, may be admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties".

rule. Most conferences/meetings of parties play a decisive role in the progressive development of the treaty regime in question. Such progressive development takes place through amendments to the treaty, by adding protocols, which again may be amended, sometimes in a simplified procedure, and by adding annexes. Under the Biodiversity Convention, for example, amendments to the Convention, the adoption of protocols, as well as amendments thereto, have to be adopted by the Conference of Parties either by consensus or by a two-thirds majority. To become binding, such instruments have to be ratified by the States Parties. States Parties are not obliged to ratify additional protocols to the Biodiversity Convention; therefore, the membership to the Convention and its protocols differs. The same system applies to most of the international environmental treaties.

As far as the Annexes of the Biodiversity Convention or of the Montreal Protocol are concerned, these are decided by the relevant Meeting of States Parties. They, as some other meetings of States Parties, have legislative competences in this respect. The scope of such legislative powers depends upon the scope of issues such annexes may cover. The Meeting of Parties of the Montreal Protocol has the mandate to consider and to adopt adjustments and amendments to the Protocol. Whereas adjustments as referred to in Article 2(9) become legally binding if adopted by consensus or a two-thirds majority of the parties present and voting, amendments to the Protocol require ratification by a sufficient number of Parties. The Meeting of States Parties of the Montreal Protocol has made use of its powers by adding Annexes to the Protocol, which place new groups of controlled substances to the lists of substances covered by the Protocol and have tightened the schedule for the phasing out of controlled substances.

To conclude, international environmental law consists of a normative pyramid, which combines international politically oriented levels, international legally non-binding levels, and

international legally binding levels, followed by a level which oscillates between binding and non-binding rules and the national legislative, executive as well as the juridical levels. This combination of legally non-binding norms and legally binding ones renders the traditional differentiation between legally non-binding norms and binding ones questionable, or it demands a recalibration of the normative system of international law.

b) Developments Concerning Implementation Mechanisms

The focus of the implementation or enforcement mechanisms has changed. Instead of engaging in confrontational means of enforcement, a tendency is developing to use softer forms of enforcement. States parties, which are for one or the other reason unable or unwilling to fulfill their commitments, receive financial or technical assistance, which is meant to enable them to fully comply with their commitments. A typical example to this extent is the regime concerning the protection of the Ozone Layer. However, it is unclear whether this tendency will be dominant in the future. In the context of the efforts to stop climate change, one may identify tendencies, which point into the direction of a return to confrontational means of enforcement. These are the cases where individuals – endorsed by NGOs – successfully claimed that a government had not truly fulfilled its commitments made internationally or at the national level.[262] The claim is on compensation or on changing the policy. Whether such an approach is adequate remains to be seen.

[262] R. Wolfrum, "Environmental Liability in International Law", in W. Kahl and M.P. Weller (eds), *Climate Change Litigation. A Handbook*" (C.H. Beck, Hart, Nomos, 2021) 149 at 165 et seq.

IV.

How Has the International Dispute Settlement System to Change to Accommodate the Need to Protect Community Interests

1. Introduction

It is argued that the traditional system of judicial settlement is tailored to bilateral international relations and to solving legal disputes arising therefrom rather than to assist in the implementation of commitments to the international community. It has been further argued that the incorporation of the traditional dispute settlement system in regimes serving community interests does not reflect the matrix of such regimes since it does not provide for the possibility of single States to advocate, by recourse to judicial means, the full implementation of such regimes without being able to claim the violation of the rights of that State concerned. This is particularly evident for the management of the global commons, as well as for the protection of the environment, whereas the assessment of the dispute settlement system in respect of the protection of international human rights comes to a more positive conclusion.

At least two inherent limitations to the traditional judicial settlement system foreclose – or at least make it problematic – that this system of dispute settlement in its present format may become an efficient means in the implementation of the regime concerned. First, there are only very few examples providing for mandatory recourse to judicial dispute settlement, and, second, as a matter of principle, it is held that States may only invoke the violation of their own interests rather than their interests of the international community. To put it more technically: who has

standing[263] and who is bound by an international judgment or an arbitral award?

A more general question is whether there exist specialized international courts or arbitral tribunals tailored to one or several regimes serving community interests or regimes based upon the principle of solidarity.

2. The Potential Claimant

a) State Complaint or Equivalent Procedures as a Means to Uphold the Integrity of Human Rights Regimes?

As already mentioned above, most international human rights treaties provide for the possibility of inter-State complaint procedures. It is a fact, though, that States have no inclination to use this mechanism. Criticisms on non-compliance are voiced in various fora, in particular in the Human Rights Council or in the UN General Assembly. Alternatives exist. For example, ICERD provides an adequate procedure for dealing with inter-State complaints.[264] This procedure resembles a conciliation procedure avoiding a confrontational approach. It thus is in line with the procedural standards concerning non-compliance under modern international environmental law. An alternative to an inter-State complaint procedure is provided for in Article IX of the Genocide Convention to which the ICJ in the legal dispute between *Gambia v. Myanmar* had recourse to[265], recently. Article IX of the Genocide Convention provides for the possibility that disputes between contracting States relating to the interpretation and application or fulfillment of the Genocide Convention may be submitted to the ICJ. The potential of this procedure has been clearly demonstrated

[263] On standing, see C.J. Tams, Enforcing Obligations *Erga Omnes* in International Law (CUP 2005) 48 et seq.
[264] Articles 11–13.
[265] See note 92.

by the Order of 23 January 2020 of the ICJ. The important element is that the Gambia did not have to claim the violation of its own interests.[266] The ICJ had already come to the same conclusion as in the case of *The Gambia v. Myanmar* in the legal dispute between *Belgium v. Senegal*[267] by stating:

> [t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party.

The ICJ argues pragmatically that otherwise, in most situations, no State would be able to claim the cessation of the alleged breaches. The decisive point for the ICJ was though that the Convention against Torture served community interests and that, accordingly, each State party had the right to claim the cessation of the alleged violations.

The inter-State complaint procedure has been invoked sparingly under the European Convention on Human Rights. Two different types of inter-State complaints have to be distinguished, one focusing on the protection of the citizens of the claiming State and the other one defending the integrity of the European Convention on Human Rights (altruistic inter-State complaint procedure).[268] To conclude, the mechanisms to defend human rights by making use of

[266] See the Separate Opinion of Vice-President Xue at paras. 4 et seq., reiterating her Dissenting Opinion in the legal dispute on Questions relating to the Obligation to Prosecute or Extradite *(Belgium v. Senegal)* Judgment, ICJ Reports 2012 (II), 571; generally on the limitation of the ICJ to accept jurisdiction in case of a violation of fundamental rules of international law, J.M. Thouvenain, "La saisine de la CIJ en cas de violation des règles fondamentales", in C. Tomuschat and J.-M. Thouvenain (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers 2005) 319 et seq.

[267] Note above at 450, para. 69.

[268] For details on the two cases concerning an inter-State complaint procedure, see C. Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2003) 200–202.

judicial means tailored to the demands of community interests are available, what lacks is the will of States to use them.

b) Individual Complaint Procedures as a Means to Uphold the Integrity of a Human Rights Regime?

The international human rights treaties on the universal level, as well as on the regional level, provide for the possibility of individual complaints. Individual complaints primarily are meant to protect the rights of individuals although one should not underrate the general effect the decisions have on protecting the integrity of the human rights treaty as such.

c) Dispute Settlement Clauses in Multilateral Environmental Regimes or Regimes Concerning Common Spaces as Means to Uphold the Integrity of Such Regimes?

Most multilateral treaties concerning the protection of the environment, as well as those on the management of common spaces, dispose of a dispute settlement clause or – as in the case of UNCLOS – of an elaborate system of dispute settlement. The dispute settlement clauses of multilateral environmental agreements display a remarkable homogeneity. They all provide for the general structure, namely that States parties shall solve disputes with respect "to the interpretation or application" of the treaty concerned through negotiation or other peaceful means of their choice.[269] If no settlement can be reached, the dispute may be submitted to the ICJ or arbitration with the consent of both parties concerned. Some varieties are provided for, which, however, do not alter the general matrix.

First, it is to be noted that none of these dispute settlement clauses provides for a mandatory recourse to an institutionalized

[269] See, for example, Article XVIII CITES, Article 27 Biodiversity Convention, Article 28 Desertification Convention, Article 20(1)(2) Basel Convention, Article 14 UN Framework Convention on Climate Change (note 238).

system of dispute settlement. These clauses only refer to means of diplomatic settlement of disputes. As far as there is a reference to judicial forms of dispute settlement, they may only be made operational with the consent of the parties concerned. The dominant feature of these regimes, namely to serve community interests, is not reflected in the design of the dispute settlement mechanisms referred to. The main deficit of these clauses becomes evident when comparing them with Article IX of the Genocide Convention. The striking difference is that Article IX of the Genocide Convention provides for a unilateral recourse to an institutionalized dispute settlement procedure without the consent of the other party to the dispute. This is why the latter clause could be used by the ICJ as providing for the possibility of an *actio popularis* whereas the equivalent clauses in the multilateral environmental agreements cannot be utilized in the same way.

However, even if the unilateral recourse to a judicial system of dispute settlement is possible, the application of the traditional forms of judicial systems of dispute settlement display inherent deficiencies, which make it difficult, if not impossible, to use them in the interest of the international community. This can be explained most appropriately through the example of the dispute settlement regime established by UNCLOS.

UNCLOS establishes a sophisticated system for the settlement of law of the sea disputes.[270] Unfortunately, the dispute settlement system under UNCLOS is not adequately tailored to accommodate the demands of community interests[271] although this system

[270] According to Article 288 UNCLOS, courts and tribunals acting under Part XV have the jurisdiction "over any dispute concerning the interpretation or application of this Convention".

[271] See in this respect M. Forteau, "Third Party Intervention as a Possible Means to Bridge the Gap between the Bilateral Nature of Annex VII Arbitration and the Multilateral Nature of UNCLOS", in *The Rule of Law in the Seas of Asia, Navigational Chart for Peace and Stability* (Ministry of Foreign Affairs of Japan 2015) 160 at seq., at 166. The author deals predominantly with Annex VII arbitral tribunals but the same question arises in respect of ITLOS.

was considered as one of the major innovations of the Third UN Conference on the Law of the Sea. It was emphasized that the dispute settlement system was compulsory on the basis of the adherence to UNCLOS and that one forum – ITLOS – constituted an institutionalized and specialized institution for the settlement of disputes. Different from all other dispute settlement systems concerning the protection of the environment or commons spaces only in respect of ITLOS, it is guaranteed that the judges are elected by the States Parties of UNCLOS and thus receive their legitimacy by the community of States. In all other systems, the arbitrators are selected by the parties to the dispute, which underlines the bipolar nature of the dispute concerned.

An assessment of the dispute settlement system of Part XV of UNCLOS and the relevant Annexes VI and VII is less positive if seen through the lenses of community interests. Part XV of UNCLOS promulgates a number of limitations before recourse to compulsory judicial settlement entailing binding decisions is possible. Such limitations are supportive of the individual interests of the parties to the conflict and may be detrimental to the pursuance of community interests. All alternative mechanisms for the solving of legal disputes referred to in section 1 of Part XV of UNCLOS are meant to protect the sovereignty of the parties to a legal dispute. Any consent-based arrangement between the parties[272] takes precedence over the compulsory proceedings entailing binding decisions.

Additionally, it is to be noted that – although the procedures under section 2 of Part XV of UNCLOS are compulsory – parties

[272] See Article 281 UNCLOS referring to dispute settlements mechanisms agreed upon by the parties to the dispute and Article 282 UNCLOS, which refers to general, regional, or bilateral agreements. Article 282 UNCLOS was interpreted by the Arbitral Tribunal in the *Southern Blue Fin Tuna* cases (Award of 4. August 2000, RIAA vol. XXIII, 1-57) in a way which even further limited the applicability of compulsory procedures.

have a choice of procedure.[273] These are ITLOS, the ICJ, an arbitral tribunal constituted in accordance with Annex VII, or a special arbitral tribunal constituted under Annex VIII of UNCLOS. The precondition for choosing one of the two first options is that the opposing party has accepted the same procedure. If no such prior declaration has been made (which is the case for most of the State Parties to UNCLOS), the party concerned is considered to have accepted arbitration. In cases where the parties concerned have not opted for the same procedure, the legal dispute may be submitted to arbitration constituting the fallback option. Parties may otherwise agree on the procedure at a given dispute. One of the reasons why States prefer arbitration to ITLOS or the ICJ is that under the former States retain the right to select the judges. Considering that ITLOS constitutes a specialized court namely to decide on the interpretation and application of UNCLOS and related international treaties, it would have been a matter of logic to choose the former as the principally competent judicial authority. Apart from that – and more importantly – the community orientation of UNCLOS would be served more adequately by adjudicative institutions, the members of which are selected by the international community. That gives a preference to ITLOS and ICJ over arbitration, where the arbitrators are selected by the parties concerned.

International adjudication, in general,[274] as well as ITLOS or arbitral tribunals under Annex VII UNCLOS, is confined to inter-State disputes. The term "dispute" has been defined by the PCIJ in the *Mavrommatis Palestine Concessions* case. According to this definition, "a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons".[275] This definition is reiterated by international jurisprudence with the addition that it must be shown "that the claim of one party is positively opposed

[273] See Article 287 UNCLOS.
[274] See Article 34 ICJ Statute.
[275] *Greece/United Kingdom*, Jurisdiction, PCIJ, Series A. No. 2, 6 (11).

to the other".[276] Limiting the functions of international courts or tribunals on deciding actual legal disputes in which two claims of States are opposed to each other constitutes a significant bar for international adjudication to act in the interest of the international community. The jurisprudence of the ICJ proves that this is not necessarily the case. Very much depends on the interpretation of the notion that "the claim of one party is positively opposed to the other".

ITLOS, as well as arbitral tribunals acting under Annex VII to UNCLOS, have decided, so far, legal disputes concerning the interpretation or application of the Convention without rendering it a topic as to whether the issue under consideration is in the interest of the international community. Many of the judgments, awards, or orders, so far delivered, touched upon the interests of the international community or at least of a broader range of States. For example, the decision on how to distinguish an island from a rock is not only a matter of relevance for the Philippines or China[277] but for many other States. Equally, several of the judgments, orders, or awards concerning the management of fisheries[278] or concerning the protection of the marine environment[279] had implications beyond the parties to the dispute concerned. It should be noted in this context that Article 297(3) UNCLOS even limits any judicial control of the management of living resources established by coastal States

[276] South-West Africa cases (*Ethiopia/South Africa; Liberia/South Africa)*, Preliminary Objections, ICJ Reports 1962, 319 (328); In the *Northern Cameroon* Case *(Cameroon/ United Kingdom)*, ICJ Reports 1963, 15 (33/34) the ICJ states: "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties".

[277] An arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, award of 12 July 2016 on the merits, <https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>, (*Philippines v. China),* accessed 29 July 2020.

[278] ITLOS M/V "Virginia G" (*Panama/Guinea-Bissau*), Judgement, ITLOS Reports 2014, 4 at 67 et seq.

[279] ITLOS *MOX Plant* (*Ireland v. United Kingdom*), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, 95 at 110.

in their exclusive economic zones whereas no such limitation exists in respect of the protection of the environment.[280] Even the land reclamation case between Malaysia and Singapore[281] may be of relevance in times where sea level rise caused by climate change questions the sustainability of maritime boundaries.

The rule concerning the possibility to intervene in a procedure before ITLOS may be seen as a concession that UNCLOS serves the interests of the international community.[282] However, this mechanism has not been used. The reason for that may have been the highly criticized decision of the ICJ concerning the Declaration of Intervention of the Republic of El Salvador in the Case concerning Military and Paramilitary Activities in and against Nicaragua.[283]

Another missed opportunity is the possibility provided for in Article 289 UNCLOS, which stipulates that ITLOS may appoint at least two experts, acting upon the application of the two parties to a dispute or *proprio motu*, to sit with the Tribunal, however, without a vote in a case requiring scientific or technical expertise. Although cautiously phrased, this addition to the bench would ensure that other considerations, besides the ones introduced by the parties, be channeled into the deliberations of the court or tribunal concerned. No attempt has been made, so far, to have recourse to this opportunity although there was ample need and opportunity to do so. ITLOS, in the dispute Bangladesh/Myanmar on the delimitation of the maritime boundaries in the Gulf of Bengal[284] had to deal with

[280] Article 297(1)(c) UNCLOS.
[281] Case concerning Land Reclamation by Singapore in and Around the Straits of Johor, (*Malaysia v. Singapore*), Provisional Measures, Order 8 October 2003, ITLOS Reports 2003, 10 et seq.
[282] Article 32(3) Annex VI to UNCLOS states that "Every party referred to in paragraph 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation rendered by the judgment will be equally binding upon it".
[283] Order, ICJ Reports 1984, 215–217; critical C. Chinkin, "Article 63, in: The Statute of the International Court of Justice: A Commentary" (note 271), para. 58.
[284] Delimitation of the Maritime Boundary in the Bay of Bengal, Judgment, ITLOS Reports 2012, 4 (92 et seq.).

the delimitation of the continental shelf beyond 200 nm, (outer continental shelf) although the Continental Shelf Commission had not made its recommendation on the delineation of that continental shelf in accordance with Article 76(8) UNCLOS. In such a situation, the involvement of experts, according to Article 289 UNCLOS, would have strengthened the cause of the international community that the delineation of the outer continental shelf should not only reflect the interests of the coastal States concerned.

The Protocol to the Antarctic Treaty provides in Articles 18–20 for a dispute settlement system, which is influenced by the one under UNCLOS. The procedure is mandatory after the parties have not been able to solve a dispute concerning the interpretation or application of the Protocol and, in principle, its Annexes. The parties have a choice either to submit the dispute to the ICJ or to arbitration. As under Article 287 UNCLOS, parties may make declarations to that extent. If the parties have not agreed on a different procedure or have chosen different procedures, the dispute may be submitted to the Arbitral Tribunal (Article 19(5)). This dispute settlement system is administered by the Permanent Court of Arbitration. A similar dispute settlement system concerning environmental disputes is equally administered by the PCA. None of these two specialized dispute settlement systems has been invoked so far.

An assessment of the dispute settlement systems developed by regimes concerning the protection of the environment or in the context of regimes on the management of common spaces reveals that such dispute settlement systems are not particularly tailored to uphold the integrity of such regimes serving community interests. Only under UNCLOS, the judges are chosen by States Parties; in all other systems, the arbitrators are selected by the parties to the dispute concerned. The latter approach is typical for disputes between individual States. The mandate of the dispute settlement systems dealt with is uniform, namely disputes concerning the interpretation and application of the treaty concerned. This

mandate is theoretically wide enough also to cover issues, which not only directly serve the opposing interests of the parties to the dispute but also community interests. The jurisprudence of the ICJ is indicative in this respect.

d) Recourse to the Developing Jurisprudence of the ICJ Concerning the Standing in Disputes on *erga omnes* Obligations?

As already mentioned, the ICJ has in its Order concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*) of 23 January 2020 invoked Article IX of the Genocide Convention that The Gambia had a claim which was opposed by Myanmar and thus had standing.

This decision of the ICJ is not an isolated one; it is in line with a series of previous decisions. In its Advisory Opinion on the Genocide Convention, the ICJ stated that States had no interest of their own in the object of the Convention, but pursued merely a common interest. This may be regarded as the initiation of acknowledging the existence of community interest and drawing procedural conclusions concerning standing therefrom. The next step was the *obiter dictum* in the Barcelona Traction case,[285] where the Court distinguished between obligations owed to the international community (*erga omnes* obligations) and those owed to individual States. This obiter dictum is often said to have been the response to the criticism the Court had attracted by its decision in the second phase of the *South-West Africa* Case (*Ethiopia v. South Africa / Liberia v. South Africa*),[286] where the Court had stated that Ethiopia and Liberia, respectively, had no rights in their individual capacity[287] to call for the carrying out of the mandate. Instead, the

[285] Case concerning Barcelona Traction, Light and Power Co. Ltd. (New Application: 1962) (*Belgium v. Spain*) (Second Phase), ICJ Reports 1970, 3; see Thouvenain (note 266) at 326.

[286] ICJ Reports 1966, 6 (19/22 et seq.), paras. 7/14 et seq.

[287] The ICJ distinguished between the standing before the Court and the individual rights of the two applicants to call for the carrying out of the mandate. This

Court emphasized that the management of the mandate system was vested in the League of Nations, and individual States were restricted in participation in the management through the organs of the League.[288] A further step into the direction that obligations towards the international community or a particular community entitle every member of such community to claim the cessation of the alleged breach by another State party is the statement of the ICJ in the dispute *Question relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*:[289]

> [t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party.... It follows that any State party may invoke the responsibility of another State party with the view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* ... and to bring the failure to an end.

In its Order of 23 January 2020 in the dispute *The Gambia v. Myanmar*, the Court refers to this statement.

One has to distinguish between the right invoked by the applicant – a question to be decided on the merits – and the procedural question of standing. The former has its basis in the regime serving community interests as already confirmed by the ICJ in its Advisory Opinion concerning Reservations to the Genocide Convention. This substantive collective right found its expression in Article 48 of the ILC Articles on State Responsibility.

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differentiation is emphasized by G. Gaja, "Claims Concerning Obligations *Erga Omnes* in the Jurisprudence of the International Court of Justice", in R. Pisillo Mazzeschi and P. De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer Nature 2018) 39–46 at 42. Gaja further states that if the respondent does not object to the jurisdiction of the ICJ if the claimant pursues community interest then the Court will decide the claim on the merits (at 43).

[288] Note 1397 at 28/29 (para. 33).

[289] ICJ Reports 2012, 422 at 450, para. 69.

The step to establish the procedural right of the applicant's standing was accepted based upon the pragmatic argument of the ICJ that otherwise no State may invoke the responsibility of another State party.[290] One may add a further consideration. Based upon the Mavrommatis clause,[291] it is traditionally requested that the applicant claims an individual right opposed by the respondent. In fact, in the context of regimes serving community interests, the applicant may claim its interest in upholding the integrity of the regime concerned or – to put it into different terms – that the commitments of the applicant to the international community or a particular community are not devalued by the violations committed by the respondent.[292]

To sum up, on the question of who may act as a claimant in judicial proceedings in defense of regimes serving community interests, the jurisprudence of the ICJ has demonstrated a high degree of responsiveness to modern challenges of international law. It has not only accepted that regimes serving community interests have a place in international law but – to be effective – deserve adjustments as far as judicial review procedures are concerned. The progressive development in this respect is best demonstrated by comparing the statements in the South-West Africa case with the one in the case *Questions relating to the Obligation to Prosecute or Extradite*. Whereas the former denies rights individual States may have in a regime which is qualified as serving community interests (the reference is to a "sacred trust"), the latter clearly acknowledges "… that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining

[290] Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*) (note 121), 450 at para. 69.
[291] See note 275.
[292] Vice-President Xue of the ICJ in her Separate Opinion warns of connecting the substantive right of a State to claim the discontinuation of violations of obligations *erga omnes* with the possibility to have recourse to judicial settlement (notes 188 and 189), at para. 8).

the alleged failure to comply with its obligations *erga omnes partes* ... and to bring that failure to an end".[293]

e) Who is Bound by a Judgment or Award on Disputes Dealing with or Touching upon Community Interests: Is There a Possible Impact Different from Being Legally Binding?

According to Article 59 of the ICJ Statute, judgments (decisions) of the ICJ are binding only upon the parties and in respect to the legal dispute concerned. Similar wording is contained in the Statutes of other international courts or tribunals; for example, Article 33(2) Annex VI to UNCLOS (Statute of ITLOS) repeats the wording in Article 59 ICJ Statute. This clause is, with alterations, common in other statutes of dispute settlement institutions.

As far as regimes serving community interests are concerned, the clause does not seem to be adequate; it rather reflects the traditional bifocal nature of legal disputes. A more differentiated ascertainment of the dogmatic basis of this clause and the relevant judicial practice of international courts and tribunals allows a more lenient approach thereto.

Article 59 ICJ Statute should be assessed taking into account the status of international court decisions in the international normative order and the jurisprudential practice thereto. According to Article 38(1)(d) ICJ Statute, judicial decisions are "subsidiary means for the detection of rules of law". They are not promulgating rights and obligations of States but "documentary sources" indicating where a court or tribunal can find evidence of the existence of the rules it is to apply.[294] Additionally, it should be mentioned – just as a clarification – that in international jurisprudence, the common–law system of *stare decisis* does not exist. As a matter of principle, international judicial decisions are binding only upon the parties

[293] On that Tams (note 263) at 99 – a couple of years before the relevant decisions of the ICJ.
[294] Pellet/Müller, Article 38, (note 156) at MN 299.

of the legal dispute and only in respect to that dispute; they are not even binding upon the judicial institution having rendered the judicial decision concerned.

Nevertheless, it is to be noted that international courts and tribunals follow the practice to intensively quote previous judicial decisions, in the case of the ICJ mostly the ones of itself. There are several reasons for this practice. A pragmatic reason is that the reference to a previous judicial decision is a short-hand repetition of the reasoning previously provided for. Such short-hand reasoning glosses over disagreements, which may exist in the judicial institution concerned. More importantly, international courts and tribunals rely, for their being accepted, upon the transparency and predictability of their judicial decisions. Through references to previous judicial decisions, they establish a jurisprudence and thus give an indication of how they may decide in the future. This is particularly true for the ICJ which is able to rely on jurisprudence dating back to the earliest cases of the PCIJ. Such jurisprudence developed over a long time, apart from establishing predictability, may also constitute a challenge when new political developments recommend a reconsideration of the jurisprudence.

Although it is commonly emphasized that international courts and tribunals do not exercise legislative functions, international judicial decisions may, *de facto*, modify or supplement the international normative order. The dividing line between norm interpretation and the modification of existing norms or their normative supplementation is thin. A telling example to that extent is the international jurisprudence on the delimitation of maritime spaces, which started before the entry into force of UNCLOS and thereafter contributed to the crystallization of the open terms contained in Articles 74(1) and (2), as well as 83(1) and (2) UNCLOS – "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution". The international jurisprudence, in particular

the one of the ICJ, reached its peak and semifinal consolidation with the judgment in the *Black Sea* case.[295] The subsequent international jurisprudence followed the matrix developed by the ICJ, filling it with additional elements or considerations. In summing up this international jurisprudence, the Arbitral Award in the case *Bangladesh v. India* qualified this jurisprudence as constituting an acquis judiciaire,[296] to which other judicial decisions would contribute. What the arbitral award in fact does is to consider the sequence of judgments and awards as a source of international law to which Article 38(1)(d) ICJ Statute refers. This is an approach, which acknowledges the reality that a jurisprudence developed by several international courts and tribunals may solidify into hard law and thus may become generally applicable. Through this, the shackles of bi-focalism, which do not harmonize with regimes serving community interests, are removed. It remains to be seen, however, as to whether this unorthodox ruling of the Arbitral Award in the case *Bangladesh/India* will find acceptance.

f) Alternative Fora or Means for Third Party Dispute Settlement to Accommodate Community Interest

The shortcomings of the international system concerning dispute settlement in the context of regimes serving community interests[297] are the result of the latter being oriented on traditional legal disputes for which contentious proceedings are tailored. As

[295] Maritime Delimitation in the Black Sea (*Romania v. Ukraine*), Judgment of 3 February 2009, ICJ Reports 2009, 61.

[296] In the Matter of the Bay of Bengal Maritime Borders Arbitration (*The Peoples Republic of Bangladesh/The Republic of India*), Award of 7 July 2014. The Award stated at para. 339: "This Tribunal wishes to add that transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process. The ensuing – and still developing – international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under Article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention".

[297] See in particular the case concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment of 10 April 2010, ICJ Reports 2010, 4 et seq. Also see the Joint dissenting opinion of Judges Al-Khasawneh and Simma, who clearly describe some

indicated above, the ICJ has cautiously modified its procedure by accepting that States may, *de facto*, act on behalf of the international community. This approach has, amongst others, the advantage that the contentious proceedings are left intact and that – by accepting that the claimant may invoke rights of the international community – it is possible for the court or tribunal to take into account such community interests. One lacuna still remains that the judgment or award in question is technically binding for the parties to the dispute only.

Based on the considerations, it remains to be considered whether a judicial procedure can be envisaged, which does not follow the matrix of contentious bifocal proceedings, but where a State or States only initiate judicial proceedings concerning the interpretation and application of a regime serving community interests. The concrete question is whether advisory opinions may be – or may become – the appropriate mechanisms to judicially monitor the implementation of regimes serving community interests. It should be evident that by exercising such functions, the judicial fora concerned are not meant to replace the enforcement mechanisms already dealt with but only to supplement them.

Several standing international courts have the competence to deliver advisory opinions. In that respect, they followed the example of the Permanent Court of International Justice, which, based on Article 14 of the Covenant of the League of Nations, had such competence and has developed this mechanism through its jurisprudence. The powers conferred on the International Court of Justice (Article 96 UN Charter; Article 65 ICJ Statute) are similar and in rendering advisory opinions the International Court of Justice frequently refers to the jurisprudence of the Permanent Court of

of the problems traditional courts or arbitral tribunals are facing when having to deal with and to decide on scientifically complex cases concerning the environment.

International Justice.[298] Protocol No. 2 to the European Convention on the Protection of Human Rights and Fundamental Freedoms confers this power on the European Court of Human Rights to give advisory opinions. Similarly, the American Convention on Human Rights confers a broad competence to give advisory opinions on the Inter-American Court of Human Rights. Equally, the African Court of Human and People's rights may give an advisory opinion upon any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the commission. The Court of Justice of the European Union may also be requested to render an advisory opinion on particular issues. Finally, as far as UNCLOS is concerned, the International Seabed Authority may request an advisory opinion from the Seabed Disputes Chamber and according to Article 138 of the Rules of ITLOS, an advisory opinion may be requested from the Plenary of ITLOS by an international organization or a group of States.

The particular advantage of advisory opinions in relation to regimes serving community interests is that they open the possibility to the international community, at least to the interested members thereof, to participate in the proceedings, which enrich the background of the international court or tribunal concerned. All advisory opinions, in particular the ones before the ICJ, attracted a significant number of comments, oral as well as written ones. In the Advisory Opinion concerning the separation of the Chagos Archipelago,[299] more than 30 States submitted written comments covering procedural issues, as well as ones of substance. As can be seen from the proceedings, a dialogue between the ICJ and the participants developed. As indicated already, such participation is more appropriate for adjudicating regimes serving community

[298] K. Oellers-Frahm, "Article 96", in *The Charter of the United Nations*, vol. II (note 116), paras. 14–25.

[299] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, ICJ, Advisory Opinion of 25 February 2019, ICJ Reports 2019, 95.

interests than relying on the pleadings only of the parties to a legal dispute. Bifocal contentious cases artificially polarize the question in spite of the fact it is of broader relevance. Certainly, advisory opinions have no binding force. However, their impact on international relations can be significant as was the case with several advisory opinions issued by the ICJ.

V.

Conclusions and *de lege ferenda* Observations Concerning Dispute Settlement Systems

In the foregoing, it has been established that the international normativity has changed in respect of regimes serving community interests. The jurisprudence of international courts and tribunals has followed suit, however, without approaching the issue that community-oriented regimes require a reconsideration of who may act as a claimant. The ICJ has made in its judgments in the cases *Belgium v. Senegal* and *Gambia v. Myanmar* cautious procedural adjustments so as to accommodate the community interests concerned. These adjustments have been made in the context of the protection of human rights and on the basis of a particular rule. The same approach should be made in respect of other community interests such as those concerning the protection of the environment.

Legal disputes concerning the interpretation and application of multilateral treaties serving the interests of the international community cannot, in general, be adequately decided as contentious cases among States unless the following conditions are met:

- It should be ensured that States may act on behalf of the international community. This in fact means the traditional requirement that States before an international court or tribunal may only invoke their individual rights should be redefined;
- Such disputes should be open for an intervention of other members of the international community;

- Particular attention should be paid, and this ought to be procedurally safeguarded, that in any legal dispute the views of any institution having been established within the context of the multilateral agreement concerned should be heard;
- that the judgment or award may be made binding upon all States concerned; and
- that the impact of scientific advice in the deliberations is strengthened.

Unless and until the traditional procedure concerning contentious cases has been modified, more attention should be given to advisory opinions, which are better suited to serve the interests of the international community.[300] Another option might be the recalibration of specialized dispute settlement regimes, which, so far, have not been utilized.

[300] Arguing in the same direction, Thouvenain (note 266), at p. 328 seq.

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