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Draft report of the International Law Commission on the work of its sixty-fifth session

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

Addendum

Contents

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

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Draft Conclusion 5
Attribution of subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

Commentary

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

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

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

> "was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the Southern Channel of the Chobe; and, second,

[1] Articles on the Responsibility of States for internationally wrongful acts, with Commentaries, Report of the Commission to the General Assembly on the work of its fifty-third session, *Yearbook, 2001*, vol. II, (Part Two), p. 35, para. 4.; the question of the attribution of relevant subsequent conduct to international organizations for the purpose treaty interpretation will be addressed at a later stage of the work on the topic.

that the Bechuanaland authorities were fully aware and accepted this as a confirmation of the treaty boundary."[2]

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

(5) The Commission debated whether Draft Conclusion 5 should specifically address the question under which conditions the conduct of lower State organs would be relevant subsequent practice for purposes of treaty interpretation. In this regard, several members of the Commission pointed to the difficulty of distinguishing between lower and higher State organs, particularly given the significant differences in the internal organization of State governance. The point was also made that the relevant criterion was less the position of the organ in the hierarchy of the State than its actual role in interpreting and applying any particular treaty. Given the complexity and variety of scenarios that could be envisaged, the Commission concluded that this matter should not be addressed in the text of Draft Conclusion 5 itself, but rather in the commentary.

(6) Subsequent practice of States in the application of a treaty may certainly be performed by the high-ranking government officials mentioned in article 7 of the Vienna Convention. Yet, since most treaties typically are not applied by such high officials, international courts and tribunals have recognized that the conduct of lower authorities may also, under certain conditions, constitute relevant subsequent practice in the application of a treaty. Accordingly, the ICJ has recognized in the case of *Rights of U.S. Nationals in Morocco* that article 95 of the Act of Algeciras had to be interpreted flexibly in light of the inconsistent practice of local customs authorities.[3] The jurisprudence of arbitral tribunals confirms that relevant subsequent practice may emanate from lower officials. In the *German External Debts* Award, the Arbitral Tribunal considered a letter of the Bank of England to the German Federal Debt Administration as relevant subsequent practice.[4] And in the case of *Tax regime governing pensions paid to retired UNESCO officials residing in France* the Arbitral Tribunal accepted, in principle, the practice of the French tax administration of not collecting taxes on the pensions of retired UNESCO employees as being relevant subsequent practice. Ultimately, however, the Arbitral Tribunal considered some contrary official pronouncements by a higher authority, the French government, to be decisive.[5]

(7) It thus appears that the practice of lower and local officials may be subsequent practice "in the application of a treaty" if this practice is sufficiently unequivocal and if the

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[2] *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, I.C.J. Reports 1999, 1045, p. 1095, para. 74.

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

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

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

Government can be expected to be aware of this practice and has not contradicted it within a reasonable time.[6]

(8) The Commission did not consider it necessary to limit the scope of the relevant conduct by adding the phrase "for the purpose of treaty interpretation".[7] This had been proposed by the Special Rapporteur in order to exclude from the scope of the term "subsequent practice" such conduct which may be attributable to a State but which does not serve the purpose of expressing a relevant position of a State regarding the interpretation of a treaty.[8] The Commission, however, considered that the requirement, that any relevant conduct must be "in the application of the treaty", would sufficiently limit the scope of possibly relevant conduct. Since the concept of "application of the treaty" requires conduct in good faith, an intentional or clear misapplication of a treaty falls outside this scope.[9]

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

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

> "It is a recognized principle of treaty interpretation to take into account, together with the context, any subsequent practice in the application of an international treaty. This practice must, however, be a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of that treaty. Whereas one of the participants in the settlement negotiations, namely Bank Markazi, is an entity of Iran and thus its practice can be attributed to Iran as one of the parties to the Algiers Declarations, the other participants in the settlement negotiations and in actual settlements, namely the United States banks, are not entities of the Government of the United States, and their practice cannot be attributed as such to the United States as the other party to the Algiers Declarations."[10]

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[6] See A. Chanaki, *L'adaptation des traités dans le temps* (Bruylant, 2013), pp. 323–328; R. Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), p. 239.; M. Kamto, "La volonté de l'Etat en droit international" 310 Recueil des cours de l'Académie de droit international de La Haye (2004), 9, pp. 142–144; O. Dörr, "Commentary on Article 31 of the Vienna Convention" in O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (Springer, 2012), pp. 555–556, para. 78.

[7] See "First Report on Subsequent Agreement and Subsequent Practice in relation to Treaty Interpretation", A/CN.4/660, 19 March 2013 ("First Report"), p. 55, para. 144 (Draft Conclusion 4, paragraph 1).

[8] *Ibid.*, p. 46, para. 120.

[9] See Draft Conclusion 4, Commentary para. (18).

[10] *The United States of America, and others* and *The Islamic Republic of Iran, and others*, Award, 25 January 1984, No. 108-A-16/582/591 FT, 5 Iran-USCTR (1984), 57, p. 71; similarly *The Islamic Republic of Iran v. the United States of America*, Interlocutory Award, 9 September 2004, No. ITL 83-B1-FT (Counterclaim), 38 Iran-USCTR (2004–2009), 77, pp. 124–125, paras. 127–128; see also *International Schools Services, Inc. (ISS)* and *National Iranian Copper Industries Company (NICICO)*, Interlocutory Award (Dissenting Opinion of President Lagergren), 6 April 1984, No. ITL 37-111- FT, 5 Iran-USCTR (1984), 338, 348, p. 353: "the provision in the Vienna Convention on

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

(12) "Other conduct" in the sense of Paragraph 2 of Draft Conclusion 5 may be that of different actors. Such conduct may, in particular, be practice of parties which is not "in the application of the treaty", or pronouncements by a State, which is not party to a treaty, about the latter's interpretation,[12] or a pronouncement by a treaty monitoring body or a dispute settlement body in relation to the interpretation of the treaty concerned,[13] or acts of technical bodies which are tasked by Conferences of the States Parties to advise on the implementation of treaty provisions, or different forms of conduct or pronouncements of non-State actors.

(13) The phrase "assessing the subsequent practice" in the second sentence of paragraph 2 should be understood in a broad sense as covering both the identification of the existence of a subsequent practice and the determination of its legal significance. Pronouncements or conduct of other actors, such as international organizations or non-State actors, can reflect, or initiate, relevant subsequent practice of the parties to a treaty.[14] Such reflection or initiation of subsequent practice of the parties by the conduct of other actors should not, however, be conflated with the practice by the parties to the treaty themselves, including practice which is attributable to them. Activities of actors which are not State parties, as such, may only contribute to assessing subsequent practice of the parties to a treaty.

(14) Decisions, resolutions and other practice by international organizations can be relevant for the interpretation of treaties in their own right. This is recognized, for example, in article 2 (j) of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations which mentions the "established practice of the organization" as one form of the "rules of the organization"[15] Draft Conclusion 5 only concerns the question whether the practice of international organizations may be indicative of relevant practice by States parties to a treaty.

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subsequent agreements refers to agreements between States parties to a treaty, and a settlement agreement between two arbitrating parties can hardly be regarded as equal to an agreement between the two States that are parties to the treaty, even though the Islamic Republic of Iran was one of the arbitrating parties in the case".

[11] See *The United States of America, and others* and *The Islamic Republic of Iran and others*, Dissenting Opinion of Parviz Ansari, 24 September 1985, No. 108-A-16/582/591-FT, 9 Iran-USCTR (1985), 97, p. 99 (Award reprinted at 5 Iran-USCTR (1984), 57).

[12] See, for example, Observations of the United States of America on the Human Rights Committee's General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 22 December 2008, p. 1, para. 3, available at: http://www.state.gov/documents/organization/138852.pdf. To the extent that the statement by the United States relates to the interpretation of the Optional Protocol to the International Covenant of Civil and Political Rights, to which the US is not party nor a contracting State, its statement constitutes "other conduct" under Conclusion 5 (2).

[13] See, for example, International Law Association, Committee on International Human Rights Law and Practice, "Final Report on the Impact of the Findings of United Nations Human Rights Treaty Monitoring Bodies", 71 International Law Association Reports of Conferences (2004), p. 621, paras. 21f.

[14] See R. Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), p. 239.

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

(15) Reports by international organizations at the universal level, which are prepared on the basis of a mandate to provide accounts on the State practice in a particular field, may enjoy considerable authority in the assessment of such practice. For example, the Handbook of the UNHCR on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Handbook) is an important work which reflects and thus provides guidance for State practice.[16] The same is true for the so-called 1540 Matrix, which is a systematic compilation by the United Nations Security Council Committee established pursuant to Resolution 1540 (2004) of implementation measures taken by member States.[17] As far as the Matrix relates to the implementation of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction (BWC),[18] as well as to the 1993 Chemical Weapons Convention (CWC),[19] it constitutes evidence for and an assessment of subsequent State practice to those treaties.[20]

(16) Non-governmental organizations (NGOs) may also play an important role in assessing subsequent practice of the parties in the application of a treaty. A pertinent example is the International Committee of the Red Cross (ICRC).[21] Apart from fulfilling a general mandate conferred on it by the Geneva Conventions and by the Statutes of the Movement,[22] the ICRC occasionally provides interpretative guidance on the Geneva Conventions and the Additional Protocols on the basis of a mandate from the Statutes of the International Red Cross and Red Crescent Movement.[23] Article 5 (2) (g) of the Statutes provides:

> "The role of the International Committee, in accordance with its Statutes, is in particular: (…) (g) to work for the understanding and dissemination of knowledge of

[16] See UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (January 1992 – reedited), HCR/IP/4/Eng/REV.1, Foreword at VII; the view that the UNHCR Handbook itself expresses State practice has correctly been rejected by the Federal Court of Australia in *Semunigus v. The Minister for Immigration & Multicultural Affairs* [1999] FCA 422 (1999), Judgment, 14 April 1999, paras. 5–13; the Handbook nevertheless possesses considerable evidentiary weight as a correct statement of subsequent State practice. Its authority is based on article 35(1) of the Refugee Convention according to which "the Contracting States undertake to cooperate with the Office of the United Nations (…) in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention".

[17] UNSC Res 1540 (28 April 2004) UN Doc. S/RES/1540, op. para. 8 (c); according to the 1540 Committee's webpage, "the 1540 Matrix has functioned as the primary method used by the 1540 Committee to organize information about implementation of UN Security Council resolution 1540 by Member States (…)", http://www.un.org/en/sc/1540/national-implementation/matrix.shtml (accessed 24 July 2013).

[18] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction (Biological Weapons Convention – BWC) (signed in London, Moscow and Washington on 10 April 1972, entered into force 26 March 1975), United Nations, Treaty Series, Vol. 1015, No. 14860, 163.

[19] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention – CWC) (signed in Paris on 13 January 1993, entered into force on 29 April 1997), United Nations, Treaty Series, Vol. 1974, No. 33757, 317.

[20] See generally R. Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), p. 239.

[21] H.-P. Gasser, "International Committee of the Red Cross (ICRC)", *Max Planck Encyclopedia of Public International Law*, http://www.mpepil.com (accessed 24 July 2013), para. 20.

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

[23] Adopted by the 25th International Conference of the Red Cross at Geneva in 1986 and amended in 1995 and 2006, www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf (accessed 24 July 2013).

international humanitarian law applicable in armed conflicts and to prepare any development thereof."

On the basis of this mandate, the ICRC, for example, published in 2009 an "Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law".[24] The Guidance is the outcome of an "expert process" based on an analysis of State treaty and customary practice and it "reflect[s] the ICRC's institutional position as to how existing IHL should be interpreted".[25] In this context it is, however, important to note that States have reaffirmed their primary role in the development of international humanitarian law. Resolution 1 of the 31st Red Cross and Red Crescent Conference of 2011, while recalling "the important roles of the ICRC", "*emphasiz*[es] the primary role of States in the development of international humanitarian law".[26]

(17) Another example for conduct of non-State actors which may be relevant for assessing the subsequent practice of States parties is "The Monitor", a joint initiative of the "International Campaign to Ban Landmines" and the "Cluster Munitions Coalition". "The Monitor" acts as a "de facto monitoring regime"[27] for the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention)[28] and the 2008 Convention on Cluster Munitions (Dublin Convention).[29] The Cluster Munitions Monitor lists pertinent statements and practice by States parties and signatories and identifies, *inter alia*, interpretative questions concerning the Dublin Convention.[30]

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

(19) The Commission considered whether it should also refer, in the text of Draft Conclusion 5, to "social practice" as an example of "other conduct … which may be relevant when assessing the subsequent practice of parties to a treaty".[31] Taking into account the concerns expressed by several members regarding the meaning and relevance of that notion, the Commission considered it preferable to address the question of the possible relevance of "social practice" in the commentary.

(20) The European Court of Human Rights has occasionally considered "increased social acceptance"[32] and "major social changes"[33] to be relevant for the purpose of treaty

[24] ICRC, "Direct Participation in Hostilities (2009)", electronic version available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (accessed 24 July 2013), p. 10.

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

[26] ICRC, 31st International Conference 2011: Resolution 1 – Strengthening legal protection for victims of armed conflicts, 1 December 2012, http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm (accessed 24 July 2013).

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

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

[29] Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010), United Nations, Treaty Series, No. 47713.

[30] See *e.g.* Cluster Munitions Monitor (2011), http://www.theonitor.org/cmm/2011/pdf/Cluster_Munition_Monitor_2011.pdf (accessed 24 July 2013), pp. 24–31.

[31] See First Report, footnote 7 above, paras. 129ff.

[32] *Christine Goodwin v. the United Kingdom* [GC], Judgment (Merits and Just Satisfaction), 11 July

interpretation. The invocation of "social changes" or "social acceptance" by the Court, however, ultimately remains linked to State practice.[34] This is true, in particular, for the important cases of *Dudgeon v. the United Kingdom*[35] and *Christine Goodwin v. the United Kingdom*.[36] In *Dudgeon v. the United Kingdom*, the Court found that there was an "increased tolerance of homosexual behaviour" by pointing to the fact "that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied", and that it could therefore not "overlook the marked changes which have occurred in this regard in the domestic law of the member States".[37] The Court further pointed to the fact that "in Northern Ireland itself, the authorities have refrained in recent years from enforcing the law".[38] And in *Christine Goodwin v. the United Kingdom*, the Court attached importance "to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals".[39]

(21) The European Court of Human Rights thus verifies whether social developments are actually reflected in State practice. This was true, for example, in cases concerning the status of children born out of wedlock[40] and in cases that concerned the alleged right of certain Roma ("Gypsy") people to have a temporary place of residence assigned by municipalities in order to be able to pursue their itinerant lifestyle.[41]

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

2002, *Application No*. 28957/95, ECHR 2002-VI, para. 85.

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

[34] See also *I. v. the United Kingdom* [GC], Judgment (Merits and Just Satisfaction), 11 July 2002, Application No. 25680/94, para. 65; *Burden and Burden v. the United Kingdom* [GC], Judgment, 12 December 2006, Application No. 13378/05, ECHR 1064, para. 57; *Shackell v. the United Kingdom*, Decision on Admissibility, 27 April 2000, Application No. 45851/99, para. 1; *Schalk and Kopf v. Austria*, Judgment (Merits and Just Satisfaction), 24 June 2010, Application No. 30141/04, para. 58.

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

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

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

[38] *Ibid.*

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

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

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