A/77/10 (Advance version of 12 August 2022)

United Nations

Report of the International Law Commission

Seventy-third session
(18 April–3 June and 4 July–5 August 2022)

General Assembly
Official Records
Seventy-seventh Session
Supplement No. 10 (A/77/10)

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Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2022*.

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Chapter I
Introduction

1. The International Law Commission held the first part of its seventy-third session from 18 April to 3 June 2022 and the second part from 4 July to 5 August 2022 at its seat at the United Nations Office at Geneva. Both parts were held in a hybrid format (in person and virtually). The session was opened by Mr. Mahmoud D. Hmoud, Chair of the seventy-second session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Ali Mohsen Fetais Al-Marri (Qatar)

Mr. Carlos J. Argüello Gómez (Nicaragua)

Mr. Bogdan Aurescu (Romania)

Mr. Yacouba Cissé (Côte d'Ivoire)

Ms. Concepción Escobar Hernández (Spain)

Mr. Mathias Forteau (France)

Ms. Patrícia Galvão Teles (Portugal)

Mr. Juan Manuel Gómez-Robledo (Mexico)

Mr. Claudio Grossman Guiloff (Chile)

Mr. Hussein A. Hassouna (Egypt)

Mr. Mahmoud D. Hmoud (Jordan)

Mr. Huikang Huang (China)

Mr. Charles Chernor Jalloh (Sierra Leone)

Mr. Ahmed Laraba (Algeria)

Ms. Marja Lehto (Finland)

Mr. Shinya Murase (Japan)

Mr. Sean D. Murphy (United States of America)

Mr. Hong Thao Nguyen (Viet Nam)

Ms. Nilüfer Oral (Türkiye)

Mr. Hassan Ouazzani Chahdi (Morocco)

Mr. Ki Gab Park (Republic of Korea)

Mr. Chris Maina Peter (United Republic of Tanzania)

Mr. Ernest Petrič (Slovenia)

Mr. Aniruddha Rajput (India)

Mr. August Reinisch (Austria)

Mr. Juan José Ruda Santolaria (Peru)

Mr. Gilberto Vergne Saboia (Brazil)

Mr. Pavel Šturma (Czech Republic)

Mr. Dire D. Tladi (South Africa)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland)

Mr. Evgeny Zagaynov (Russian Federation)

B. Officers and the Enlarged Bureau

3. At its 3564th meeting, on 19 April 2022, the Commission elected the following officers:

Chair:	Mr. Dire D. Tladi (South Africa)
First Vice-Chair:	Sir Michael Wood (United Kingdom)
Second Vice-Chair:	Mr. Marcelo Vázquez-Bermúdez (Ecuador)
Chair of the Drafting Committee:	Mr. Ki Gab Park (Republic of Korea)
Rapporteur:	Mr. Pavel Šturma (Czech Republic)

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairs of the Commission,[1] the Special Rapporteurs[2] and the Co-Chairs of the Study Group on sea-level rise in relation to international law.[3]

5. On 27 May 2022, the Planning Group was constituted, composed of the following members: Sir Michael Wood (Chair), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Hussein A. Hassouna, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Mr. Ahmed Laraba, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Dire D. Tladi, Mr. Eduardo Valencia-Ospina, Mr. Marcelo Vázquez-Bermúdez, Mr. Amos S. Wako, Mr. Evgeny Zagaynov and Mr. Pavel Šturma (*ex officio*).

C. Drafting Committee

6. At its 3564th, 3569th, 3577th and 3592nd meetings, on 19 and 27 April, on 10 May and on 12 July 2022, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Immunity of State officials from foreign criminal jurisdiction*: Mr. Ki Gab Park (Chair), Ms. Concepción Escobar Hernández (Special Rapporteur), Mr. Bogdan Aurescu, Mr. Mathias Forteau, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Sean D. Murphy, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Pavel Šturma (*ex officio*);

(b) *Peremptory norms of general international law* (jus cogens): Mr. Ki Gab Park (Chair), Mr. Dire D. Tladi (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Mr. Mathias Forteau, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Sean D. Murphy, Mr. Hong Thao

[1] Mr. Mahmoud D. Hmoud, Mr. Ernest Petrič, Mr. Pavel Šturma and Mr. Eduardo Valencia-Ospina.

[2] Ms. Concepción Escobar Hernández, Ms. Marja Lehto, Mr. Pavel Šturma, Mr. Dire D. Tladi and Mr. Marcelo Vázquez-Bermúdez.

[3] Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

Nguyen, Ms. Nilüfer Oral, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Pavel Šturma (*ex officio*);

(c) *Protection of the environment in relation to armed conflicts*: Mr. Ki Gab Park (Chair), Ms. Marja Lehto (Special Rapporteur), Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Aniruddha Rajput, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Pavel Šturma (*ex officio*);

(d) *Succession of States in respect of State responsibility*: Mr. Ki Gab Park (Chair), Mr. Pavel Šturma (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Charles Chernor Jalloh, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Sir Michael Wood and Mr. Pavel Šturma (*ex officio*);

(e) *General principles of law*: Mr. Ki Gab Park (Chair), Mr. Marcelo Vázquez-Bermúdez (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Juan Manuel Gómez-Robledo, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Sean D. Murphy, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Dire D. Tladi, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Pavel Šturma (*ex officio*).

7. The Drafting Committee held a total of 56 meetings on the five topics indicated above.

D. Working Groups and Study Group

8. On 1 June 2022, the Planning Group established the following Working Groups:

(a) *Working Group on the long-term programme of work*: Mr. Mahmoud D. Hmoud (Chair), Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Claudio Grossman Guiloff, Mr. Hussein A. Hassouna, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Mr. Ahmed Laraba, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Chris Maina Peter, Mr. Ernest Petrič, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Mr. Amos S. Wako, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Pavel Šturma (*ex officio*);

(b) *Working Group on methods of work*: Mr. Hussein A. Hassouna (Chair), Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Ernest Petrič, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Dire D. Tladi, Mr. Eduardo Valencia-Ospina, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Pavel Šturma, (*ex officio*).

9. At its 3583rd meeting, on 17 May 2022, the Commission established a Study Group on sea-level rise in relation to international law, composed of the following members: Mr. Bogdan Aurescu (Co-Chair), Mr. Yacouba Cissé (Co-Chair), Ms. Patrícia Galvão Teles (Co-Chair, and Chair at the current session), Ms. Nilüfer Oral (Co-Chair), Mr. Juan José Ruda Santolaria (Co-Chair, and Chair at the current session), Mr. Carlos J. Argüello Gómez, Ms. Concepción Escobar Hernández, Mr. Mathias Forteau, Mr. Juan Manuel Gómez-Robledo, Mr. Claudio Grossman Guiloff, Mr. Hussein A. Hassouna, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Ahmed Laraba, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Gilberto Vergne Saboia, Mr. Dire D. Tladi, Mr.

Eduardo Valencia-Ospina, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood, Mr. Evgeny Zagaynov and Mr. Pavel Šturma (*ex officio*).

E. Secretariat

10. Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. Huw Llewellyn, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Arnold Pronto, Principal Legal Officer, served as Principal Assistant Secretary to the Commission. Mr. Trevor Chimimba, Senior Legal Officer, served as Senior Assistant Secretary to the Commission. Ms. Patricia Georget, Ms. Carla Hoe, Mr. Jorge Martinez Paoletti and Ms. Paola Patarroyo, Legal Officers, and Mr. Alexey Bulatov and Mr. Douglas Pivnichny, Associate Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

11. The Commission adopted an agenda for its seventy-third session consisting of the following items:

1. Organization of the work of the session.
2. Immunity of State officials from foreign criminal jurisdiction.
3. Protection of the environment in relation to armed conflicts.
4. Peremptory norms of general international law (*jus cogens*).
5. Succession of States in respect of State responsibility.
6. General principles of law.
7. Sea-level rise in relation to international law.
8. Programme, procedures and working methods of the Commission and its documentation.
9. Date and place of the seventy-fourth session.
10. Cooperation with other bodies.
11. Other business.

Chapter II
Summary of the work of the Commission at its seventy-third session

12. With regard to the topic "**Peremptory norms of general international law (*jus cogens*)**", the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/747), as well as comments and observations received from Governments (A/CN.4/748). The report addressed the comments and observations received from Governments on the draft conclusions and commentaries, as adopted on first reading, and proposed modifications to the draft conclusions where necessary.

13. The Commission adopted, on second reading, the entire set of draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), comprising 23 draft conclusions and an annex, together with commentaries thereto. The Commission decided, in accordance with article 23 of its statute, to recommend the draft conclusions to the General Assembly. In particular, the Commission recommended that the Assembly take note of the draft conclusions and commend them, together with the commentaries thereto, to the attention of States and all who may be called upon to identify peremptory norms of general international law (*jus cogens*) and to apply their legal consequences (chap. IV).

14. With respect to the topic "**Protection of the environment in relation to armed conflicts**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/750 and Corr.1 and Add.1), as well as comments and observations received from Governments, international organizations and others (A/CN.4/749). The report examined the comments and observations received from Governments, international organizations and others on the draft principles and commentaries, as adopted on first reading, and proposed modifications to the draft principles where necessary.

15. The Commission adopted, on second reading, the entire set of draft principles on protection of the environment in relation to armed conflicts, comprising a draft preamble and 27 draft principles, together with commentaries thereto. The Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly: (a) take note of the draft principles, annex them to its resolution and encourage their widest possible dissemination; and (b) commend the draft principles, together with the commentaries thereto, to the attention of States and international organizations and all who may be called upon to deal with the subject (chap. V).

16. With regard to the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission received and considered the report of the Drafting Committee (A/CN.4/L.969), following the completion by the Drafting Committee of its consideration of the remaining draft articles referred to it previously by the Commission, as contained in the second (A/CN.4/661), seventh (A/CN.4/729) and eighth (A/CN.4/739) reports of the Special Rapporteur. The Commission adopted, on first reading, 18 draft articles and a draft annex on immunity of State officials from foreign criminal jurisdiction, together with commentaries thereto. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2023 (chap. VI).

17. With regard to the topic "**Succession of States in respect of State responsibility**", the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/751), which primarily addressed the problems relating to a plurality of injured successor States or of responsible successor States. Following the debate in plenary, the Commission decided that the work of the Commission on the topic would take the form of draft guidelines, rather than draft articles. The Drafting Committee proceeded to prepare draft guidelines on the basis of the texts referred to it by the Commission at previous sessions. The Commission provisionally adopted draft guidelines 6, 10, 10 *bis* and 11, which had been provisionally adopted by the Drafting Committee in 2018 and 2021, as well as draft guidelines 7 *bis*, 12, 13, 13 *bis*, 14, 15 and 15 *bis,* which were provisionally adopted by the Drafting Committee at the present session, together with commentaries thereto. The Commission also took note

of revised draft guidelines 1, 2, 5, 7, 8 and 9, as provisionally adopted by the Drafting Committee and reflected in an annex to the statement of the Chair of the Drafting Committee (chap. VII).

18. With regard to the topic "**General principles of law**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/753), which discussed the issue of transposition, general principles of law formed within the international legal system, and the functions of general principles of law and their relationship with other sources of international law. Following the debate in plenary, the Commission decided to refer draft conclusions 10, 11, 12, 13 and 14, as presented in the third report, to the Drafting Committee, taking into account the comments made in plenary. The Commission received the report of the Drafting Committee on the consolidated text of draft conclusions 1 to 11, provisionally adopted by the Drafting Committee, and provisionally adopted draft conclusions 3, 5 and 7. The Commission took note of draft conclusions 6, 8, 9, 10 and 11, which were also contained in the report of the Drafting Committee (chap. VIII).

19. With respect to the topic "**Sea-level rise in relation to international law**", the Commission reconstituted the Study Group on sea-level rise in relation to international law. The Study Group had before it the second issues paper (A/CN.4/752 and Add.1) concerning issues relating to statehood and to the protection of persons affected by sea-level rise, prepared by two of the Co-Chairs of the Study Group, Ms. Patrícia Galvão Teles and Mr. Juan José Ruda Santolaria. The Study Group had an exchange of views on the basis of the second issues paper and on other matters related to the subtopics under consideration. The Study Group also addressed a series of guiding questions prepared by the Co-Chairs and held a discussion on the future programme of work on the topic (chap. IX).

20. Concerning "**Other decisions and conclusions of the Commission**", the Commission decided to include the following topics on its programme of work: (a) "Settlement of international disputes to which international organizations are parties", appointing Mr. August Reinisch as Special Rapporteur; (b) "Prevention and repression of piracy and armed robbery at sea", appointing Mr. Yacouba Cissé as Special Rapporteur; and (c) "Subsidiary means for the determination of rules of international law", appointing Mr. Charles Chernor Jalloh as Special Rapporteur (chap. X, sect. A). The Commission requested the Secretariat to prepare memorandums on those three topics and on sea-level rise in relation to international law (chap. X, sect. B).

21. The Commission re-established a Planning Group to consider its programme, procedures and working methods, which in turn decided to re-establish the Working Group on the long-term programme of work, chaired by Mr. Mahmoud D. Hmoud, and the Working Group on methods of work, chaired by Mr. Hussein A. Hassouna (chap. X, sect. C). The Commission decided to include in its long-term programme of work the topic "Non-legally binding international agreements" (chap. X, sect. C, and annex I). The Commission also provided the General Assembly with the information requested in paragraph 34 of Assembly resolution 76/111 of 9 December 2021 (chap. X, sect. E, annex II and appendix).

22. Judge Joan E. Donoghue, President of the International Court of Justice, addressed the Commission virtually on 1 June 2022. The Commission was once again regrettably unable to have its traditional exchanges of information with the African Union Commission on International Law; the Asian-African Legal Consultative Organization; the Committee of Legal Advisers on Public International Law of the Council of Europe; and the Inter-American Juridical Committee. However, it was able to have an informal exchange of views with the International Committee of the Red Cross on 21 July 2022 (chap. X, sect. F).

23. The Commission decided that its seventy-fourth session would be held in Geneva from 24 April to 2 June and from 3 July to 4 August 2023 (chap. X, sect. D).

Chapter III
Specific issues on which comments would be of particular interest to the Commission

A. General principles of law

24. The Commission considers as still relevant the request for information contained in chapter III of the report of its seventy-first session (2019) on the topic "General principles of law"[4] and would welcome any additional information.

B. Sea-level rise in relation to international law

25. The Commission would welcome any information that States, international organizations and other relevant entities could provide on their practice, as well as other pertinent information concerning sea-level rise in relation to international law, and reiterates its requests made in chapter III of its reports on the work of its seventy-first (2019)[5] and seventy-second (2021) sessions.[6]

26. At the seventy-fourth session (2023), the Study Group will focus on the subject of sea-level rise in relation to the law of the sea. In this connection, the Commission reiterates that it would appreciate receiving the following information by 1 December 2022:

(a) examples of practice relating to the updating, and frequency of updating, of national laws regarding baselines used for measuring the breadth of maritime zones; and of practice relating to the frequency of updating of national maritime zone notifications deposited with the Secretary-General of the United Nations;

(b) examples of practice relating to the updating, and frequency of updating, of charts on which baselines and outer limits of the exclusive economic zone and of the continental shelf are drawn, as well as lists of geographical coordinates prepared in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea and/or national legislation, including those which are deposited with the Secretary-General of the United Nations and given due publicity; and examples of practice relating to updating, and frequency of updating, of navigational charts, including for purposes of evidencing changes of the physical contours of the coastal areas;

(c) any examples of the taking into account or modification of maritime boundary treaties due to sea-level rise;

(d) information on the amount of actual and/or projected coastal regression due to sea-level rise, including possible impact on basepoints and baselines used to measure the territorial sea;

(e) information on existing or projected activities related to coastal adaptation measures in relation to sea-level rise, including preservation of basepoints and baselines.

27. The Commission is further requesting:

(a) the Office of Legal Affairs, Division of Ocean Affairs and the Law of the Sea of the United Nations to undertake a survey of charts or lists of geographical coordinates deposited with the Secretary-General of the United Nations which have been modified or updated during the period 1990 to the present, and any additional explanatory information, by 1 December 2022;

(b) the International Hydrographic Organization and the International Maritime Organization to provide information regarding the implementation of paragraphs 43 and 44

[4] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 30.
[5] *Ibid.*, paras. 31–33.
[6] *Ibid., Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 26.

of General Assembly resolution 58/240 of 23 December 2003 on oceans and the law of the sea, by 1 December 2022.

28. At the seventy-fifth session (2024), the Study Group will focus on the subject of sea-level rise in relation to statehood and protection of persons affected by sea-level rise. In this connection, the Commission would appreciate receiving, by 30 June 2023:

(a) in relation to the subtopic of statehood, information on the practice of States, international organizations and other relevant entities, and other pertinent information concerning:

(i) appraisals and/or practice on the requirements for the configuration of a State as a subject of international law and for the continuance of its existence in the context of the phenomenon of sea-level rise;

(ii) appraisals and/or practice regarding the nature of the territory of a State, including therein the land surface and the jurisdictional maritime zones, particularly in the context of the sea-level rise;

(iii) practice related to the protection of the rights of peoples and communities, as well as to the preservation of their identity, that may contribute with elements or be considered by analogy when addressing the phenomenon of sea-level rise;

(iv) practice regarding measures of a different nature adopted by States in relation to sea-level rise in order to provide for their conservation and with respect to international cooperation on the subject;

(b) in relation to the subtopic on protection of persons affected by sea-level rise, information on the practice of States, international organizations and other relevant entities, as well as other pertinent information concerning:

(i) measures relating to risk reduction specific to the mitigation of the adverse impacts of sea-level rise;

(ii) human rights implications of the adverse impacts of sea-level rise;

(iii) regulation of the displacement of persons affected by sea-level rise;

(iv) prevention of statelessness arising from the displacement of persons affected by sea-level rise;

(v) international cooperation regarding humanitarian assistance to persons affected by sea-level rise.

C. Subsidiary means for the determination of rules of international law

29. The Commission would appreciate receiving information from States, international organizations and others, by 1 December 2022, on the following elements in relation to the use of subsidiary means for the determination of rules of international law, in the sense of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, including such information as can be discerned from:

(a) decisions of national courts, legislation and any other relevant practice at the domestic level that draw upon judicial decisions and the teachings of the most highly qualified publicists of the various nations in the process of determination of rules of international law, namely: international conventions, whether general or particular; international custom, as evidence of a general practice accepted as law; and the general principles of law recognized by the community of nations;

(b) statements made in international organizations, international conferences and other forums, including pleadings before international courts and tribunals, concerning subsidiary means for the determination of rules of international law.

D. Prevention and repression of piracy and armed robbery at sea

30. The Commission would appreciate receiving information from States and relevant international organizations, by 1 May 2023, concerning:

(a) the legislation, case law and practice of States relevant to the topic, including in relation to articles 100 to 107 of the United Nations Convention on the Law of the Sea;

(b) the agreements entered into by States under which persons accused of piracy or armed robbery at sea are transferred with a view to prosecution; and

(c) the role of international, regional and subregional organizations regarding the prevention and repression of acts of piracy and armed robbery at sea.

E. Settlement of international disputes to which international organizations are parties

31. The Commission would appreciate receiving, by 1 May 2023, information from States and relevant international organizations which may be of relevance to its future work on the topic. A questionnaire to this effect will be communicated to States and relevant international organizations.

Chapter IV
Peremptory norms of general international law (*jus cogens*)

A. Introduction

32. At its sixty-seventh session (2015), the Commission decided to include the topic "*Jus cogens*" in its programme of work and appointed Mr. Dire D. Tladi as Special Rapporteur for the topic.[7] The General Assembly subsequently, in its resolution 70/236 of 23 December 2015, took note of the decision of the Commission to include the topic in its programme of work.

33. The Commission considered the first report (A/CN.4/693) of the Special Rapporteur at its sixty-eighth session (2016). At its sixty-ninth session (2017), following a proposal by the Special Rapporteur in his second report,[8] the Commission decided to change the title of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".[9] The Commission considered the third report (A/CN.4/714) of the Special Rapporteur at its seventieth session (2018); and his fourth report (A/CN.4/727) at its seventy-first session (2019).

34. At its seventy-first session (2019), on the basis of the draft conclusions proposed by the Special Rapporteur in his five reports, the Commission provisionally adopted 23 draft conclusions and an annex as the draft conclusions on peremptory norms of general international law (*jus cogens*), together with commentaries thereto, on first reading.[10]

B. Consideration of the topic at the present session

35. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/747), as well as comments and observations received from Governments (A/CN.4/748). The Special Rapporteur, in his fifth report, examined the comments and observations received from Governments on the draft conclusions, including the annex, as adopted on first reading. He made proposals for consideration on second reading, in light of the comments and observations, and proposed a recommendation to the General Assembly.

36. The Commission considered the fifth report at its 3564th to 3570th meetings, from 19 to 27 April 2022.

37. Following its debate on the report, the Commission, at its 3570th meeting, held on 27 April 2022, decided to refer draft conclusions 1 to 23, together with the annex, as contained in the Special Rapporteur's fifth report, to the Drafting Committee, taking into account the debate in the Commission.

38. At its 3582nd meeting, held on 17 May 2022, the Commission considered the report of the Drafting Committee (A/CN.4/L.967), and adopted the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), including the annex containing a non-exhaustive list of peremptory norms of general international law (*jus cogens*).

39. At its 3595th to 3601st meetings, held from 22 to 27 July 2022, the Commission adopted the commentaries to the draft conclusions (see sect. E.2 below).

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[7] At its 3257th meeting, on 27 May 2015 (*Yearbook ... 2015*, vol. II (Part Two), p. 85, para. 286). The topic had been included in the long-term programme of work of the Commission during its sixty-sixth session (2014), on the basis of the proposal contained in the annex to the report of the Commission (*Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 18, para. 23, and annex).

[8] A/CN.4/706, para. 90.

[9] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 146).

[10] *Ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 52–53.

40. In accordance with its statute, the Commission submits the draft conclusions, including the annex, to the General Assembly, with the recommendation set out below (see sect. C below).

C. Recommendation of the Commission

41. At its 3601st meeting, on 27 July 2022, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(*a*) take note of the draft conclusions of the International Law Commission on identification and legal consequences of peremptory norms of general international law (*jus cogens*), annex the draft conclusions to the resolution, and ensure their widest dissemination;

(*b*) commend the draft conclusions and annex, together with the commentaries thereto, to the attention of States and to all who may be called upon to identify peremptory norms of general international law (*jus cogens*) and to apply their legal consequences.

D. Tribute to the Special Rapporteur

42. At its 3601st meeting, held on 27 July 2022, the Commission, after adopting the draft conclusions and annex on identification and legal consequences of peremptory norms of general international law (*jus cogens*), adopted the following resolution by acclamation:

"*The International Law Commission,*

Having adopted the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*),

Expresses to the Special Rapporteur, Mr. Dire D. Tladi, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)."

E. Text of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)

1. Text of the draft conclusions and annex

43. The text of the draft conclusions and annex adopted by the Commission, on second reading, at its seventy-third session is reproduced below.

Identification and legal consequences of peremptory norms of general international law (*jus cogens*)

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*).

Conclusion 2
Nature of peremptory norms of general international law (*jus cogens*)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law.

Conclusion 3
Definition of a peremptory norm of general international law (*jus cogens*)

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Part Two
Identification of peremptory norms of general international law (*jus cogens*)

Conclusion 4
Criteria for the identification of a peremptory norm of general international law (*jus cogens*)

To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:

(*a*) it is a norm of general international law; and

(*b*) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Conclusion 5
Bases for peremptory norms of general international law (*jus cogens*)

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).

2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

Conclusion 6
Acceptance and recognition

1. The criterion of acceptance and recognition referred to in draft conclusion 4, subparagraph (*b*), is distinct from acceptance and recognition as a norm of general international law.

2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

Conclusion 7
International community of States as a whole

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*).

2. Acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.

3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form part of such acceptance and recognition.

Conclusion 8
Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.

2. Forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; constitutional provisions; legislative and administrative acts; decisions of national courts; treaty provisions; resolutions adopted by an international organization or at an intergovernmental conference; and other conduct of States.

Conclusion 9
Subsidiary means for the determination of the peremptory character of norms of general international law

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law. Regard may also be had, as appropriate, to decisions of national courts.

2. The works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law.

Part Three
Legal consequences of peremptory norms of general international law (*jus cogens*)

Conclusion 10
Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.

2. Subject to paragraph 2 of draft conclusion 11, if a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

Conclusion 11
Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)

1. A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (*jus cogens*) is void in whole, and no separation of the provisions of the treaty is permitted.

2. A treaty which is in conflict with a new peremptory norm of general international law (*jus cogens*) becomes void and terminates in whole, unless:

(*a*) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application;

(*b*) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of the parties to be bound by the treaty as a whole; and

(*c*) continued performance of the remainder of the treaty would not be unjust.

Conclusion 12
Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)

1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to:

(*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (*jus cogens*); and

(*b*) bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*).

Conclusion 13
Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)

1. A reservation to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).

Conclusion 14
Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)

1. A rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character.

2. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

3. The persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).

Conclusion 15
Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)

1. A unilateral act of a State manifesting the intention to be bound by an obligation under international law that would be in conflict with a peremptory norm of general international law (*jus cogens*) does not create such an obligation.

2. An obligation under international law created by a unilateral act of a State ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

Conclusion 16
Obligations created by resolutions, decisions or other acts of international

organizations conflicting with a peremptory norm of general international law (*jus cogens*)

A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*).

Conclusion 17
Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)

1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest.

2. Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.

Conclusion 18
Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness

No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

Conclusion 19
Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)

1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*).

2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation.

3. A breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.

4. This draft conclusion is without prejudice to the other consequences that any breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*) may entail under international law.

Part Four
General provisions

Conclusion 20
Interpretation and application consistent with peremptory norms of general international law (*jus cogens*)

Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former.

Conclusion 21
Recommended procedure

1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law should do so by notifying other States concerned of its claim. The notification should be in writing and should indicate the measure proposed to be taken with respect to the rule of international law in question.

2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, will not be less than three months, the invoking State may carry out the measure which it has proposed.

3. If, however, any State concerned raises an objection, the States concerned should seek a solution through the means indicated in Article 33 of the Charter of the United Nations. If no solution is reached within a period of twelve months, and the objecting State offers to submit the matter to the International Court of Justice or to some other procedure entailing binding decisions, the invoking State should not carry out the measure which it has proposed until the dispute is resolved.

4. This draft conclusion is without prejudice to the procedures set forth in the Vienna Convention on the Law of Treaties, to the relevant rules concerning the jurisdiction of the International Court of Justice, or to other applicable dispute settlement provisions agreed by the States concerned.

Conclusion 22
Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail

The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law.

Conclusion 23
Non-exhaustive list

Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex

(*a*) The prohibition of aggression;

(*b*) the prohibition of genocide;

(*c*) the prohibition of crimes against humanity;

(*d*) the basic rules of international humanitarian law;

(*e*) the prohibition of racial discrimination and apartheid;

(*f*) the prohibition of slavery;

(*g*) the prohibition of torture;

(*h*) the right of self-determination.

2. Text of the draft conclusions and commentaries thereto

44. The text of the draft conclusions adopted by the Commission, on second reading, together with commentaries thereto, is reproduced below.

Identification and legal consequences of peremptory norms of general international law (*jus cogens*)

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*).

Commentary

(1) As is always the case with the Commission's outputs, the draft conclusions are to be read together with the commentaries.

(2) These draft conclusions concern peremptory norms of general international law (*jus cogens*), which have increasingly been referred to by international and regional courts, national courts, States and other actors. These draft conclusions are aimed at providing guidance to all those who may be called upon to determine the existence of peremptory norms of general international law (*jus cogens*) and their legal consequences. Given the importance and potentially far-reaching implications of peremptory norms of general international law (*jus cogens*), it is essential that the identification of such norms and their legal consequences be done systematically and in accordance with a generally accepted methodology.

(3) Draft conclusion 1 is introductory in nature and sets out the scope of the present draft conclusions. It provides in simple terms that the present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*). The draft conclusions, dealing with identification and legal consequences, are primarily concerned with methodology. They do not attempt to address the content of individual peremptory norms of general international law (*jus cogens*). It should also be noted that the commentaries will refer to different materials to illustrate methodological approaches in practice. The materials referred to as examples of practice, including views of States, serve to illustrate the methodology for the identification and consequences of peremptory norms of general international law (*jus cogens*). They do not imply agreement with, or endorsement of, the views expressed therein by the Commission.

(4) The draft conclusions are concerned primarily with the method for establishing whether a norm of general international law has the added quality of having a peremptory character (that is, being accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law (*jus cogens*) having the same character). The draft conclusions are thus not concerned with the determination of the content of the peremptory norms themselves. The process of identifying whether a norm of international law is peremptory or not requires the application of the criteria developed in these draft conclusions.

(5) In general, the draft conclusions use the word "identify" to signify the process of establishing that a norm is a peremptory norm of general international law (*jus cogens*). The word "determine", however, is also used at places.

(6) In addition to the identification of peremptory norms of general international law (*jus cogens*), the draft conclusions also concern the legal consequences of such norms. The term "legal consequences" is used because it is broad. While there may be non-legal consequences of peremptory norms of general international law (*jus cogens*), it is only the legal consequences that are the subject of the present draft conclusions. Moreover, individual peremptory norms of general international law (*jus cogens*) may have specific consequences that are distinct from the general consequences flowing from all peremptory norms. The present draft conclusions, however, are not concerned with such specific consequences, nor do they seek to determine whether individual peremptory norms have specific consequences. The draft conclusions only address general legal consequences of peremptory norms of general international law (*jus cogens*).

(7) The terms "*jus cogens*", "peremptory norms" and "peremptory norms of general international law" are sometimes used interchangeably in State practice, international

jurisprudence and scholarly writings.[11] The Commission settled on the term "peremptory norms of general international law (*jus cogens*)" because it is clearer and also because it is the term used in the 1969 Vienna Convention on the Law of Treaties (1969 Vienna Convention).[12]

(8) The term "peremptory norms of general international law (*jus cogens*)" also serves to indicate that the topic is concerned only with norms of general international law. *Jus cogens* norms in domestic legal systems, for example, do not form part of the topic. Similarly, norms of a purely bilateral or regional character are also excluded from the scope of the topic.

(9) The word "norm" is used because it is understood to have a broader meaning than other related words such as "rules" and "principles" and to encompass both. It is, however, to be noted that, in some cases, the words "rules", "principles" and "norms" can be used interchangeably. The Commission, in its 1966 draft articles on the law of treaties, used the word "norm" in draft article 50 which became article 53 of the 1969 Vienna Convention. However, in the commentaries, the Commission used the word "rules".[13] Both articles 53 and 64 of the Convention use the word "norm". To be consistent with that Convention, the word "norm" is retained.

(10) In general, the present draft conclusions apply to States, as the primary subjects of international law. For this reason, the text of the draft conclusions refers in the main to "States". Nonetheless, there are instances in which the draft conclusions also apply to international organizations. Where a particular draft conclusion applies to international organizations, the commentaries will make this clear.

Conclusion 2
Nature of peremptory norms of general international law (*jus cogens*)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law.

Commentary

(1) Draft conclusion 2 describes the general nature of peremptory norms of general international law (*jus cogens*). The general nature is described in terms of three essential characteristics associated with peremptory norms of general international law (*jus cogens*). The draft conclusion is placed after the provision on scope, in order to indicate that it provides a general orientation for peremptory norms of general international law (*jus cogens*).

(2) The first characteristic referred to in draft conclusion 2 is that peremptory norms of general international law "reflect and protect fundamental values of the international community". The Commission chose the words "reflect and protect" to underline the dual function that fundamental values play in relation to peremptory norms of general international law. The word "reflect" is meant to indicate that the fundamental value(s) in question provide, in part, a rationale for the peremptory status of the norm of general international law at issue. Further, the word "reflect" seeks to establish the idea that the norm in question gives effect to particular values. The word "protect" is meant to convey that a specific peremptory norm of general international law serves to protect the value(s) in question. Put differently, it indicates the idea that underlying peremptory norms are particular values shared by the international community as a whole that the norms seek to protect. In some ways, these are mutually reinforcing concepts. A value reflected by a peremptory norm of general international law (*jus cogens*) will be protected by compliance with that norm.

[11] For a discussion on nomenclature, see D. Costelloe, *Legal Consequences of Peremptory Norms in International Law*, Cambridge University Press, 2017, pp. 11 *et seq.*

[12] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331. See, for example, article 53 of the 1969 Vienna Convention.

[13] See draft article 50 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 183, where the word "norm" is used. The commentaries, however, refer to "general rule[s] of international law ... having the character of *jus cogens*" and "rules of *jus cogens*" (*ibid.*, p. 248, paras. (2)–(3) of the commentary to draft article 50).

(3) The characteristic that peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community relates to the content of the norm in question. Already in 1951, before the adoption of the 1969 Vienna Convention or the 1966 draft articles on the law of treaties, the International Court of Justice had linked the prohibition of genocide, a prohibition today widely accepted and recognized as a peremptory norm, to fundamental values, noting that the prohibition was inspired by the commitment "to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations".[14]

(4) The references in the International Court of Justice advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* to "the conscience of mankind" and "moral law" evoke fundamental values shared by the international community. In subsequent decisions, the Court has reaffirmed this description of the underlying basis for the prohibition of genocide and, at the same time, affirmed the peremptory status of the prohibition of genocide.[15] Moreover, in its 2007 judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court referred to peremptory norms along with "obligations which protect essential humanitarian values", thus indicating a relationship between them.[16] Similarly, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, the Court described the *erga omnes* character of the prohibition of genocide as based on, in part, "shared values".[17] The connection between values and the peremptory character of norms has also been made by other international courts and tribunals.[18]

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[14] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 23. See also P. Bisazza, "Les crimes à la frontière du *jus cogens*", in L. Moreillon, *et al.* (eds.), *Droit pénal humanitaire*, Series II, vol. 4, Brussels, Bruylant, 2009, at p. 164, where she evokes, quoting Bassiouni, *la conscience de l'humanité*; and L. Boisson de Chazournes, "Commentaire", in R. Huesa Vinaixa and K. Wellens (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international : travaux du séminaire tenu à Palma*, *les 20–21 Mai 2005*, Brussels, Bruylant, 2006, at p. 76, referring to a *conscience universelle*.

[15] See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 110–111, para. 161; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at p. 46, para. 87.

[16] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (see footnote 15 above), p. 104, para. 147.

[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 3, p. 17, at para. 41 ("In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented"). On the relationship between peremptory norms of general international law (*jus cogens*) and *erga omnes* obligations, see draft conclusion 17 below.

[18] See *Prosecutor* v. *Anto Furundžija* (*Case No. IT-95-17/1-T, Judgment of 10 December 1998*, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, vol. 1, p. 466, at p. 569, paras. 153–154), where the Tribunal expressly linked the status of the prohibition of torture as a peremptory norm of general international law (*jus cogens*) to the "importance of the values it protects", noting that "[c]learly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community". This holding was quoted with approval by the European Court of Human Rights in *Al-Adsani* v. *the United Kingdom, Application no. 35763/97, Judgment of 21 November 2001*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2001-XI*, para. 30. In the case of *Goiburú*, et al. v. *Paraguay* (*Judgment of 22 September 2006 on Merits, Reparations and Costs*, Inter-American Court of Human Rights, *Series C*, No. 153, para. 128), that Court described offences prohibited by *jus cogens* as those that "harm essential values and rights of the international community". See also *Michael Domingues* v. *United States* (*Case 12.285, Merits, Judgment of 22 October 2002*, Inter-American Commission on Human Rights, *Report No. 62/02*, para. 49), where that Commission linked peremptory norms of general international law (*jus cogens*) to "public morality" and, more importantly, stated that they "derive their status from

(5) Support for the link between peremptory norms of general international law (*jus cogens*) and fundamental values can be found in the practice of States. For example, many States have, in official statements, including before the United Nations, recognized the connection between fundamental values and peremptory norms.[19] The recognition of this link has been particularly pronounced in the decisions of national courts.[20] For example, in *Siderman de Blake* v. *Argentina*, the United States Court of Appeals for the Ninth Circuit quoted with approval the statement that peremptory norms of general international law (*jus cogens*) are "'derived from values taken to be fundamental by the international community'".[21] The Constitutional Tribunal of Peru referred to the "extraordinary

fundamental values held by the international community", noting that violations of *jus cogens* "shock the conscience of humankind".

[19] See, for example, the statements by Germany (A/C.6/55/SR.14, para. 56): "[the Government of Germany] reiterated its conviction regarding the need to define more clearly peremptory norms of international law that protected fundamental humanitarian values"; Italy (A/C.6/56/SR.13, para. 15): "The Vienna Convention on the Law of Treaties contained a tautological definition of peremptory law, which doctrine and jurisprudence had endeavoured to interpret as being a framework of rules prohibiting conduct judged intolerable because of the threat it posed to the survival of States and peoples and to basic human values"; Mexico (A/C.6/56/SR.14, para. 13): "the very concept of peremptory norms had been developed to safeguard the most precious legal values of the community of States"; and Portugal, *ibid.*, para. 66: "the concepts of *jus cogens*, obligations *erga omnes* and international crimes of State or serious breaches of obligations under peremptory norms of general international law were based on a common belief in certain fundamental values of international law". See also the Federal Council of Switzerland, "La relation entre droit international et droit interne. Rapport du Conseil fédéral en réponse au postulat 07.3764 de la Commission des affaires juridiques du Conseil des Etats …", 5 March 2010, FF 2010 2067, at 2086: "Il s'agit donc d'une disposition si fondamentale pour la communauté internationale qu'aucune violation ne saurait être admise" ["It is therefore such a fundamental provision for the international community that no violation can be accepted"]; and Federal Council of Switzerland, "Clarifier la relation entre le droit international et le droit interne. Rapport du Conseil fédéral en exécution du postulat 13.3805", 12 June 2015, at p. 13: "Ces normes ont pour la communauté internationale un caractère fondamental tel qu'elles s'imposent à tous les Etats. Aucun d'eux ne peut les violer, sous aucun prétexte" ["These norms are of such fundamental importance to the international community that they are binding on all States. None of them may violate them under any pretext"].

[20] See, for example, *Bayan Muna as represented by Representative Satur Ocampo* et al. v. *Alberto Romulo, in his capacity as Executive Secretary* et al., where the Supreme Court of the Republic of the Philippines noted that *jus cogens* norms are "deemed … fundamental to the existence of a just international order" (*Case G.R. No. 159618, Judgment of 1 February 2011*), Supreme Court of the Republic of the Philippines, ILDC [*International Law in Domestic Courts*] 2059 (PH2011), p. 56). See also *Kaunda and Others* v. *President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa intervening as Amicus Curiae)* 2005 (4) SA 235 (CC); *Minister of Justice and Constitutional Development and Others* v. *Southern African Litigation Centre and Others* (*Case No. 867/15, Judgment of 15 March 2016*), South Africa Supreme Court of Appeal, [2016] ZASCA 17, where the Court states that it agrees with the following sentiment: "As State sovereignty is increasingly viewed to be contingent upon respect for certain values common to the international community, it is perhaps unsurprising that bare sovereignty is no longer sufficient to absolutely shield High officials from prosecution for *jus cogens* violations"; and *Alessi and Others* v. *Germany and Presidency of the Council of Ministers of the Italian Republic (intervening) (Referral to the Constitutional Court of Italy, Order No. 85/2014 of 21 January 2014*), Tuscany, Florence Court of First Instance, ILDC 2725 (IT 2014): "Not in dispute are the fact that the subject of this case is an international crime by nature and its potential detrimental effect on fundamental human rights as enshrined in the Italian Constitution and the Charter of Fundamental Rights of the European Union (2000/C 364/01). Also considering that in the Italian legal system, the fundamental human rights recognized by the Constitution are necessarily fused to the *jus cogens* norms that protect fundamental human rights in international law, highlighting the same basic universal values of protection of human dignity."

[21] *Siderman de Blake* v. *Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d 699 (9th Cir. 1992), at p. 715 (citing D. F. Klein, "A theory for the application of the customary international law of human rights by domestic courts", *Yale Journal of International Law*, vol. 13 (1998), pp. 332–365, at p. 351). This decision was cited with approval by lower courts in the Ninth Circuit including in: *Estate of Hernandez-Rojas* v. *United States*, District Court for the Southern District of California, 2013 U.S. Dist. LEXIS136922 (S.D.Cal. 2013), at p. 13; *Estate of*

importance of the values that underlie" *jus cogens* obligations.[22] Similarly, in the *Arancibia Clavel* case, the Supreme Court of Argentina held that the purpose of peremptory norms of general international law (*jus cogens*) was "to protect States from agreements concluded against some of the general values and interests of the international community of States as a whole".[23] The Supreme Court of Canada has described peremptory norms as those norms of "fundamental importance".[24] In its *Order of 26 October 2004*, the Federal Constitutional Court of Germany described peremptory norms of general international law as those norms that were "firmly rooted in the legal conviction of the community of States [and which were] indispensable to the existence of public international law".[25]

(6) The relationship between peremptory norms of general international law (*jus cogens*) and values is also accepted in scholarly writings. Kolb states that the idea that peremptory norms of general international law (*jus cogens*) are somehow connected with fundamental values "is the absolutely predominant theory" in international law.[26] Similarly, Gagnon-

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Hernandez-Rojas v. *United States*, District Court for the Southern District of California, 2014 U.S. Dist. LEXIS101385 (S.D. Cal. 2014), at p. 9; and *Doe I* v. *Reddy*, District Court for the Northern District of California, 2003 U.S. Dist. LEXIS26120 (N.D. Cal 2003), at pp. 32 and 34. See also the Ninth Circuit's opinion in *Alvarez-Machain* v. *United States* (331 F.3d 604 (9th Cir. 2003)), at p. 613. Although that decision was eventually overturned by the Supreme Court in *Sosa* v. *Alvarez-Machain* (542 U.S. 692 (2004)), the idea of peremptory norms reflecting values of the international community was itself not addressed by the Supreme Court of the United States.

[22] *25% del número legal de Congresistas contra el Decreto Legislativo N° 1097, EXP. No. 0024-2010-PI/TC, Judgment of the Jurisdictional Plenary of 21 March 2011*, Constitutional Tribunal of Peru, para. 53 (*de la extraordinaria importancia de los valores que subyacen a tal* [jus cogens] *obligación* ("of the extraordinary importance of the values that underlie [the *jus cogens*] obligation")).

[23] *Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, Case No. 259, Judgment of 24 August 2004*, Supreme Court of Argentina, para. 29 (*es proteger a los Estados de acuerdos concluidos en contra de algunos valores e intereses generales de la comunidad internacional de Estados en su conjunto*).

[24] *Nevsun Resources Ltd.* v. *Araya, Judgment of 28 February 2020*, Supreme Court of Canada, 2020 SCC 5, para. 99.

[25] *Order of 26 October 2004, 2 BvR 1038/01*, Federal Constitutional Court of Germany, para. 97.

[26] R. Kolb, *Peremptory International Law—Jus Cogens: a General Inventory*, Oxford, Hart Publishing, 2015, at p. 32. See also P. Galvão Teles, "Peremptory norms of general international law (*jus cogens*) and the fundamental values of the international community", *in* D. Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*): Disquisitions and Disputations*, Leiden, Brill Nijhoff, 2021. See also M. M. Mbengue and A. Koagne Zouapet, "Ending the splendid isolation: *jus cogens* and international economic law", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (*ibid.*), pp. 509–574, at p. 513; S. Karvatska, "*Jus cogens:* problem of the role in treaty interpretation", *Indonesian Law Journal*, vol. 9, No. 2 (2021), pp. 305–318, at p. 307 ("The *jus cogens* concept is an unchanging foundation of the international legal order designed to protect the fundamental interests"); H. Olasolo Alonso, A. Mateus Rugeles and A. Contreras Fonseca, "La naturaleza imperativa del principio 'no hay paz sin justicia' respecto a los máximos responsables del fenómeno de la lesa humanidad y sus consecuencias para el ámbito de actuación de la llamada 'justicia de transición'", *Boletín mexicano de derecho comparado*, vol. 49 (2016), pp. 135–171; C. Zelada, "Ius cogens y derechos humanos: luces y sombras para una adecuada delimitación de conceptos", *Agenda Internacional*, vol. 8, No. 17 (2002), pp. 129–156, at p. 139; A. A. Cançado Trindade, "*Jus cogens*: the determination and the gradual expansion of its material content in contemporary international case-law", *XXXV Course of International Law organized by the OAS [Organization of American States] Inter-American Juridical Committee in Rio de Janeiro from 4 to 29 August 2008*, Washington, D.C., OAS (2009), pp. 3–29, at pp. 6 and 12; F. J. Lara Castro, "El *ius cogens*: criterio de justicia universal", *Revista Perspectiva Jurídica*, UP 15 (2020, Semester II), pp. 127–159, at p. 130; K. Hossain, "The concept of *jus cogens* and the obligation under the U.N. Charter", *Santa Clara Journal of International Law*, vol. 3, No. 1 (2005), pp. 72–98, at p. 73; L. Henkin, "International law and the inter-State system", *Collected Courses of the Hague Academy of International Law*, vol. 216 (1989), pp. 21 *et seq.*, at p. 60; J. R. Argés, "*Ius cogens*: descripción, valoración y propuestas de aplicación actual de un tópico jurídico clásico", doctoral dissertation, Universidade de Santiago de Compostela, 2017, at p. 273; A. C. de Beer, *Peremptory Norms of General International Law (*Jus Cogens*) and the Prohibition of Terrorism*, Leiden, Brill, 2019, pp. 79–83; E. Petrič, "Principles of the Charter of the United Nations: *jus cogens*?", *Czech Yearbook of Public and Private International Law*, vol. 7 (2016), pp. 3–17; W. A. Schabas, "Le droit coutumier,

Bergeron describes the characteristic of "fundamental values" as "the only determinative feature of *jus cogens*".[27] Hannikainen, describing the role of peremptory norms of general international law (*jus cogens*), observes that "a legal community may find it necessary to establish peremptory norms for the protection of such overriding interests and values of the community itself".[28] Similarly, Pellet sees peremptory norms of general international law (*jus cogens*) as paving a way towards a more "moral value oriented public order",[29] while Tomuschat describes them as "the class of norms that protect the fundamental values of the international community".[30]

(7) It is unnecessary and, indeed, impractical to specify the fundamental values to which draft conclusion 2 refers.[31] These values are not static and may evolve over time. While the values often associated with *jus cogens* are generally humanitarian in nature, other values, as long as they are shared by the international community, may also underlie peremptory norms of general international law (*jus cogens*).[32]

(8) It will be noted from the discussion above that courts and scholarly writings have employed different terms to signify the relevance of fundamental values. For example, the terms "fundamental values"[33] and "interests",[34] or variations thereof, have been employed interchangeably. These different choices of words, however, are not mutually exclusive and they indicate the important normative and moral background of the norm in question.

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les normes impératives (*jus cogens*), et la Cour européenne des droits de l'homme", *Revue québécoise de droit international*, vol. 33 (2020), pp. 681–704, at p. 698; K. Crow and L. Lorenzoni-Escobar, "From traction to treaty-bound: *jus cogens, erga omnes* and corporate subjectivity in international investment arbitration", *Journal of International Dispute Settlement*, vol. 13, No. 1 (March 2022), pp. 121–152; and M. A. Rodríguez Bolañoz and S. Portilla Parra, "Aplicación y límites de la inmunidad diplomática, a la luz de las normas del 'ius cogens'", *Opinión Jurídica* , vol. 19, No. 38 (January–June 2020), pp. 259–281, at p. 267. For a critique, see, generally, R. Kolb, "Peremptory norms as a legal technique rather than super norms", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (see above).

[27] N. Gagnon-Bergeron, "Breaking the cycle of deferment: *jus cogens* in the practice of international law", *Utrecht Law Review*, vol. 15, No. 1 (2019), pp. 50–64, at p. 64.

[28] L. Hannikainen, *Peremptory Norms* (Jus Cogens) *in International Law: Historical Development, Criteria, Present Status*, Helsinki, Finnish Lawyers' Publishing Company, 1988, at p. 2.

[29] A. Pellet, "Comments in response to Christine Chinkin and in defense of *jus cogens* as the best bastion against the excesses of fragmentation", *Finnish Yearbook of International Law*, vol. 17 (2006), pp. 83–90, at p. 87.

[30] C. Tomuschat, "The Security Council and *jus cogens*", *in* E. Cannizzaro (ed.), *The Present and Future of* Jus Cogens, Rome, Sapienza Università Editrice, 2015, at p. 8, who describes *jus cogens* as "the class of norms that protect the fundamental values of the international community". See also H. Ruiz Fabri, "Enhancing the rhetoric of *jus cogens*", *European Journal of International Law*, vol. 23, No. 4 (2012), pp. 1049–1058, at p. 1050; M. den Heijer and H. van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 3–21, at p. 15; and D. Shelton, "Sherlock Holmes and the mystery of *jus cogens*", *ibid.*, pp. 23–50, especially from p. 42.

[31] See, however, Galvão Teles (footnote 26 above), at p. 47, who identifies the inherent dignity of the human person as being amongst the fundamental values of the international community.

[32] J. E. Viñuales, "The Friendly Relations Declaration and peremptory norms", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 668–688, at p. 668, stating that peremptory norms "rest primarily (although not exclusively) on humanitarian considerations". See also N. Oral, "Environmental protection as a peremptory norm of general international law: is it time?", *ibid*., pp. 575–599, at p. 577, referring to the values as "fundamental values of humanity".

[33] Tomuschat, "The Security Council and *jus cogens*" (see footnote 30 above), at p. 8. See also *Siderman de Blake* v. *Argentina* (footnote 21 above), at p. 715, where the United States Court of Appeals referred to "values taken to be fundamental by the international community", and the Constitutional Tribunal of Peru in *25% del número legal de Congresistas*, referring to "extraordinary importance of the values" (footnote 22 above).

[34] See, for example, O. Quirico, "Towards a peremptory duty to curb greenhouse gas emissions?", *Fordham International Law Journal*, vol. 44, No. 4 (April 2021), pp. 923–965, at p. 947 ("protects a fundamental interest"). See also Hannikainen (footnote 28 above), at p. 2, referring to "overriding interests"; and *Arancibia Clavel* (footnote 23 above), where the Supreme Court of Argentina referred to "general interests of the international community" as the underlying source of peremptory norms.

(9) A further terminological point is that while draft conclusion 2 refers to "the international community", other draft conclusions, including draft conclusion 3, draft conclusion 4 and draft conclusion 7, refer to "the international community of States as a whole". The "international community of States as a whole" is used in respect of the criteria for peremptory norms of general international law (*jus cogens*), because in so far as the application of the criteria is concerned, it is the views of States that matter. However, in respect of the values underlying peremptory norms, a more inclusive sense of the "international community" is relevant. This more inclusive international community of course includes States, but it includes other actors beyond States, which may play an important role in the emergence of fundamental values.

(10) With respect to the second characteristic, draft conclusion 2 provides that peremptory norms of general international law (*jus cogens*) are universally applicable. The universal applicability of peremptory norms of general international law (*jus cogens*) means that they are binding on all subjects of international law that they address, including States and international organizations. The idea that peremptory norms of general international law (*jus cogens*) are universally applicable, like that of their hierarchical superiority, flows from non-derogability. The fact that a norm is non-derogable, by extension, means that it is applicable to all, since States cannot derogate from it by creating their own special rules that conflict with it. The universal application of peremptory norms of general international law (*jus cogens*) is both a characteristic and a consequence of peremptory norms of general international law (*jus cogens*).

(11) In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* the International Court of Justice referred to "the universal character of the condemnation of genocide", which it considered to be a consequence of the fact that genocide "shocks the conscience of mankind and results in great losses to humanity, and [which] is contrary to moral law".[35] The universal character of peremptory norms of general international law (*jus cogens*) was affirmed by the judgments of the International Criminal Tribunal for the Former Yugoslavia.[36] The Inter-American Court of Human Rights has described peremptory norms of general international law (*jus cogens*) as being "applicable to all States" and as norms that "bind all States".[37] Similarly, in *Michael Domingues* v. *United States*, the Inter-American Commission on Human Rights determined that peremptory norms of general international law (*jus cogens*) "bind the international community as a whole, irrespective of protest, recognition or acquiescence".[38]

(12) The universal character of peremptory norms of general international law (*jus cogens*) is further reflected in decisions of national courts. In *Tel-Oren* v. *Libyan Arab Republic*, the United States Court of Appeals for the District of Columbia Circuit referred to peremptory norms of general international law (*jus cogens*) as "universal and obligatory norms".[39] In *Youssef Nada* v. *State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, the Swiss Federal Supreme Court described peremptory norms of general

[35] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 14 above), at p. 23. This language has been reaffirmed by the International Court of Justice in recent judgments. See, for example, the judgments referred to in footnote 58 below.

[36] See, for example, *Prosecutor* v. *Anto Furundžija* (footnote 18 above), at p. 571, para. 156. See also *Prosecutor* v. *Jelisić, Case No. IT-95-10-T, Judgment of 14 December 1999*, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1999*, p. 399, at pp. 431–433, para. 60.

[37] *Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States*, Inter-American Court of Human Rights, *Series A*, No. 18, p. 113, paras. 4–5.

[38] *Michael Domingues* v. *United States* (see footnote 18 above), at para. 49.

[39] *Tel-Oren* v. *Libyan Arab Republic*, United States Court of Appeals for the District of Columbia Circuit, 726 F.2d 774 (D.C. Cir. 1984). See also *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2nd. Cir. 1996), at p. 242, in which the United States Court of Appeals for the Second Circuit noted that peremptory norms "do not depend on the consent of individual states, but are universally binding by their very nature" (citing A. C. Belsky, M. Merva and N. Roht-Arriaza, "Implied waiver under the FSIA: a proposed exception to immunity for violations of peremptory norms of international law", *California Law Review*, vol. 77, No. 2 (March 1989), pp. 365–415, at p. 399).

international law (*jus cogens*) as those norms that were "binding on all subjects of international law".[40] The Constitutional Court of Germany described peremptory norms of general international law (*jus cogens*) as "universally applicable public international law."[41] The view that peremptory norms of general international law (*jus cogens*) have a universal character is also reflected in the writings of scholars.[42]

(13) The characteristic of universal applicability of peremptory norms of general international law (*jus cogens*) itself has two implications. First, the persistent objector rule or doctrine is not applicable to peremptory norms of general international law (*jus cogens*). This aspect is considered further in draft conclusion 14. As described in paragraph (8) of the commentary to draft conclusion 1, a second implication of the universal application of peremptory norms of general international law (*jus cogens*) is that such norms do not apply on a regional or bilateral basis.[43]

(14) As a third characteristic, draft conclusion 2 states that peremptory norms of general international law (*jus cogens*) are hierarchically superior to other norms of international law. The fact that peremptory norms of general international law (*jus cogens*) are hierarchically superior to other norms of international law is both a characteristic and a consequence of peremptory norms of general international law (*jus cogens*). It is a consequence in that the identification of a norm as a peremptory norm of general international law (*jus cogens*) has the effect that it will be superior to other norms not having the same character. Some of the implications of hierarchy are reflected in the consequences of peremptory norms described in Part Three of these draft conclusions, for example the consequence of invalidity of a conflicting treaty rule. Hierarchical superiority is also characteristic since it describes the nature of the peremptory norms of general international law (*jus cogens*).

(15) International courts and tribunals have often referred to the hierarchical superiority of peremptory norms of general international law (*jus cogens*). The International Criminal Tribunal for the Former Yugoslavia, for example, held that a feature of the prohibition of torture "relates to the hierarchy of rules in the international normative order" and that the prohibition "has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".[44] The Inter-American Court of Human Rights has similarly accepted the hierarchical

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[40] *Youssef Nada* v. *State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Case No. 1A 45/2007, Administrative Appeal Judgment of 14 November 2007*, Federal Supreme Court of Switzerland, BGE 133 II 450, para. 7.

[41] *Order of 26 October 2004*, Federal Constitutional Court of Germany (see footnote 25 above), para. 117.

[42] See, for example, W. Conklin, "The peremptory norms of the international community", *European Journal of International Law*, vol. 23, No. 3; C. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties*, Amsterdam, North-Holland, 1976, at p. 78; G. Gaja, "*Jus cogens* beyond the Vienna Convention", in *Collected Courses of the Hague Academy of International Law*, vol. 172 (1981), pp. 271–289, at p. 283; G. M. Danilenko, *Law-Making in the International Community*, Dordrecht, Martinus Nijhoff, 1993, at p. 211; L. A. Alexidze, "Legal nature of *jus cogens* in contemporary international law", *Collected Courses of the Hague Academy of International Law*, vol. 172 (1981), pp. 219–263; P-M. Dupuy and Y. Kerbrat, *Droit international public*, 11th ed., Paris, Précis Dalloz, 2012, at p. 322 (*la cohésion de cet ensemble normatif exige la reconnaissance par tous ses sujets d'un minimum de règles* imperatives ("the cohesion of this set of standards requires recognition by all its subjects of a minimum of *mandatory* rules")); A. Rohr, *La responsabilidad internacional del Estado por violación al* jus cogens, Buenos Aires, SGN Editora, 2015, at p. 6; D. Dubois, "The authority of peremptory norms in international law: State consent or natural law?", *Nordic Journal of International Law*, vol. 78 (2009), pp. 133–175, at p. 135 ("A *jus cogens* or peremptory norm … is applicable to all States regardless of their consenting to it"); and M. Saul, "Identifying *jus cogens* norms: the interaction of scholars and international judges", *Asian Journal of International Law*, vol. 5 (2014), pp. 26–54, at p. 31 ("*Jus cogens* norms are supposed to be binding on all states").

[43] States were virtually unanimous on this point: see, for example, Finland (on behalf of the Nordic countries) (A/C.6/73/SR.24, para. 126); Greece (A/C.6/73/SR.27, para. 9); Malaysia (*ibid*., para. 104); Portugal (A/C.6/73/SR.26, para. 119); South Africa (A/C.6/73/SR.27, para. 46); Thailand (A/C.6/73/SR.26, para. 96); the United Kingdom of Great Britain and Northern Ireland (A/C.6/73/SR.22, para. 84); and the United States of America (A/C.6/73/SR.29, para. 34).

[44] *Prosecutor* v. *Anto Furundžija* (see footnote 18 above), at p. 569, para. 153.

superiority of peremptory norms of general international law (*jus cogens*).[45] In *Kadi* v. *Council and Commission*, the Court of First Instance of the European Communities described peremptory norms of general international law (*jus cogens*) as a "body of higher rules of public international law".[46] The European Court of Human Rights, in *Al-Adsani* v. *the United Kingdom*, has similarly described a peremptory norm of general international law (*jus cogens*) as "a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".[47]

(16) The recognition of the hierarchical superiority of peremptory norms of general international law (*jus cogens*) can also be seen in the practice of States. For example, the High Court of Zimbabwe, in *Mann* v. *Republic of Equatorial Guinea*, described peremptory norms of general international law (*jus cogens*) as those norms "endowed with primacy in the hierarchy of rules that constitute the international normative order".[48] Courts in the United States have similarly recognized the hierarchical superiority of norms of peremptory norms of general international law (*jus cogens*). In *Siderman de Blake* v. *Argentina*, the United States Court of Appeals for the Ninth Circuit stated that freedom from torture, a peremptory norm of general international law (*jus cogens*), is "deserving of the highest status under international law".[49] Various terms denoting hierarchical superiority have been used by different national courts to describe peremptory norms of general international law (*jus cogens*). They have been held to have "the highest hierarchical position amongst all other customary norms and principles",[50] to be "not only above treaty law, but over all other sources of law",[51] and to be norms which "prevail over both customary international law and treaties".[52] States have also, in their statements, referred to the hierarchical superiority of peremptory norms of general international law (*jus cogens*).[53]

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[45] *García Lucero*, et al. v. *Chile, Judgment 28 August 2013*, Inter-American Court of Human Rights, *Series C*, No. 267, para. 123, note 139, quoting with approval *Prosecutor* v. *Anto Furundžija* (see footnote 18 above). See also *Michael Domingues* v. *United States* (footnote 18 above), at para. 49, describing *jus cogens* norms as being derived from a "superior order of legal norms".

[46] *Yassin Abdullah Kadi* v. *Council of the European Union and Commission of the European Communities, Case No. T-315-01, Judgment of 21 September 2005*, Second Chamber, Court of First Instance of the European Communities, [2005] ECR II-3649, para. 226. See also *Hassan* v. *Council of the European Union and Commission of the European Communities*, *Case No. T-49/04, Judgment of 12 July 2006*, Second Chamber, Court of First Instance of the European Communities, para. 92.

[47] *Al-Adsani* v. *the United Kingdom* (see footnote 18 above), para. 60.

[48] *Mann* v. *Republic of Equatorial Guinea, Case No. 507/07, Judgment of 23 January 2008*, High Court of Zimbabwe, [2008] ZWHHC 1.

[49] *Siderman de Blake* v. *Argentina* (see footnote 21 above), at p. 717.

[50] *Bayan Muna* v. *Alberto Romulo* (see footnote 20 above), at para. 92. See also *Certain Employees of Sidhu and Sons Nursery Ltd*., et al., *Case Nos. 61942, 61973, 61966, 61995, Decision of 1 February 2012*, BCLRB No. B28/2012, para. 44, where the British Columbia Labour Relations Board (Canada), identified peremptory norms of general international law (*jus cogens*) as enjoying a "higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules". See also *Regina (Al Rawi and Others)* v. *Secretary of State for Foreign and Commonwealth Affairs and Another, Case No. C1/2006/1064, Judgment of 12 October 2006*, England, Court of Appeal (Civil Division), [2006] EWCA Civ 1279, ILR [*International Law Reports*], vol. 136, p. 624; and *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3), Decision of 24 March 1999*, England, House of Lords, [2000] 1 A.C. 147, ILR, vol. 119 (2002), p. 198.

[51] *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, *Case No. 17.768, Judgment of 14 June 2005*, Supreme Court of Argentina, S. 1767. XXXVIII, para. 48 (*que se encuentra no sólo por encima de los tratados sino incluso por sobre todas las fuentes del derecho* ("which is not only above treaties but even above all sources of law")). See also *Julio Lilo Mazzeo y otros s/rec. de casación e inconstitucionalidad, Judgment of 13 July 2007*, Supreme Court of Argentina, para. 15 (*se trata de la más alta fuente del derecho internacional* (*jus cogens* "is the highest source of international law")).

[52] *Sabbithi* v. *Al Saleh*, United States District Court for the District of Columbia, 605 F. Supp. 2d 122, (D.D.C. 2009), at p. 129. See also *Mario Luiz Lozano* v. *the General Prosecutor for the Italian Republic, Case No. 31171/2008, Appeal Judgment of 24 July 2008*, First Criminal Division, Supreme Court of Cassation, Italy, p. 6 ("priority should be given to the principle of higher rank and of *jus cogens*").

[53] See, for example, the statements by the Netherlands (A/C.6/68/SR.25, para. 101) ("*Jus cogens* was hierarchically superior within the international law system, irrespective of whether it took the form of

(17) The hierarchical superiority of peremptory norms of general international law (*jus cogens*) was recognized in the conclusions of the work of the Commission's Study Group on the fragmentation of international law.[54] This characteristic is also generally recognized in the writings of scholars.[55]

(18) The characteristics contained in draft conclusion 2 are themselves not criteria for the identification of peremptory norms of general international law (*jus cogens*). Thus, draft conclusion 2 is not to be read as imposing additional criteria for the identification of peremptory norms of general international law (*jus cogens*). The criteria for the identification of peremptory norms of general international law (*jus cogens*) are contained in Part Two of the draft conclusions. To identify a norm as a peremptory norm of general international law (*jus cogens*), it is not necessary to advance evidence of the characteristics in draft conclusion 2. Nor can the advancement of the characteristics in draft conclusion 2 serve as substitutes for the criteria for the identification of peremptory norms of general international law (*jus cogens*) found in Part Two.

written law or customary law"); and the United Kingdom (*Official Records of the United Nations Conference on the Law Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 53rd meeting, para. 53) ("in a properly organized international society there was a need for rules of international law that were of a higher order than the rules of a merely dispositive nature from which States could contract out").

[54] Conclusion (32) of the conclusions of the work of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.702), at p. 20 ("[a] rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*)"). See, further, the report of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (finalized by Martti Koskenniemi) (*Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1).

[55] See, for support in the literature for the hierarchical superiority of peremptory norms of general international law (*jus cogens*), C. Ene, "*Jus cogens* (peremptory norms): a key concept of the international law", *Perspectives of Law and Public Administration*, vol. 8, No. 2 (December 2019), pp. 302–304, at p. 303; I. Handayani, "Concept and position of peremptory norms (*jus cogens*) in international law: a preliminary study", *Hasanuddin Law Review*, vol. 5, No. 2 (August 2019), pp. 235–252, at p. 241; T. Fleury Graff, "L'interdiction de l'esclavage, norme de jus cogens en droit international et droit inconditionnel en droit européen", *Les cahiers de la Justice*, vol. 2 (2020), pp. 197–206, at p. 205 (*Une règle de* jus cogens *est une règle hiérarchiquement supérieure à toute autre règle du droit international, si bien qu'une règle qui ne s'y conformerait pas encourrait la nullité* ("A rule of *jus cogens* is a rule hierarchically superior to any other rule of international law, so that a rule which does not comply with it would incur nullity")); A Orakhelashvili, *Peremptory Norms in International Law*, Oxford, 2006, at p. 8; G. M. Danilenko, "International *jus cogens*: issues of law-making", *European Journal of International Law*, vol. 2, No. 1 (1991), pp. 42–65, at p. 42; and Conklin (footnote 42 above), at p. 838 ("[T]he very possibility of a peremptory norm once again suggests a hierarchy of international law norms with peremptory norms being the 'fundamental standards of the international community' at the pinnacle"). See also M. M. Whiteman, "*Jus cogens* in international law, with a projected list", *Georgia Journal of International and Comparative Law*, vol. 7, No. 2 (1977), pp. 609–626, at p. 609; and M. W. Janis, "The nature of *jus cogens*", *Connecticut Journal of International Law*, vol. 3, No. 2 (Spring 1988), pp. 359–363, at p. 359. Tomuschat, for example, describes as a certainty that peremptory norms of general international law (*jus cogens*) are superior to other norms. See C. Tomuschat, "Reconceptualizing the debate on *jus cogens* and obligations *erga omnes*: concluding observations", *in* C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes, Leiden, Martinus Nijhoff, 2006, at p. 425 ("One thing is certain, however: the international community accepts today that there exists a class of legal precepts which is hierarchically superior to 'ordinary' rules of international law"). See also A. Cassese, "For an enhanced role of *jus cogens*", in A. Cassese (ed.), *Realizing Utopia: the Future of International Law*, Oxford University Press, 2012, pp. 158–171, at p. 159. For a contrary view, see Kolb, "Peremptory norms as a legal technique …" (footnote 26 above), at p. 37, suggesting that the language of hierarchy should be avoided and that the focus should be on voidness since the former concept – of hierarchy – leads to confusion and misunderstanding.

(19) Though they themselves are not criteria, the existence of the characteristics contained in draft conclusion 2 may provide context in the assessment of evidence for the identification of peremptory norms of general international law (*jus cogens*). For example, evidence that a norm reflects and protects fundamental values of the international community, is hierarchically superior to other norms of international law and is universally applicable, may serve to support or confirm the peremptory status of a norm. This supplementary evidence cannot, however, in and of itself, constitute the basis for identifying peremptory norms of general international law (*jus cogens*). Evidence supporting the criteria, as described in Part Two of the present draft conclusions, must always be present.

Conclusion 3
Definition of a peremptory norm of general international law (*jus cogens*)

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law (*jus cogens*) having the same character.

Commentary

(1) Draft conclusion 3 provides a definition of peremptory norms of general international law (*jus cogens*). It is based upon article 53 of the 1969 Vienna Convention with modifications to fit the context of the draft conclusions. First, only the second sentence of article 53 of the 1969 Vienna Convention is reproduced. The first sentence of article 53, which concerns the invalidity of treaties in conflict with peremptory norms of general international law (*jus cogens*), does not form part of the definition. It is rather a legal consequence of peremptory norms of general international law (*jus cogens*), which is addressed in draft conclusion 10. Second, the phrase "[f]or the purposes of the present Convention" is omitted from the definition. As will be demonstrated below, the definition in article 53, though initially used for the purposes of the 1969 Vienna Convention, has come to be accepted as a general definition of peremptory norms of general international law (*jus cogens*) that applies beyond the law of treaties. Finally, in keeping with the general approach in this topic, the Commission has decided to insert the phrase "*jus cogens*" in parentheses after "peremptory norm of general international law".

(2) This formulation was chosen because it is the most widely accepted definition in the practice of States and in the decisions of international courts and tribunals. It is also commonly used in scholarly writings. States have generally supported the idea of proceeding on the basis of 1969 Vienna Convention.[56] Decisions of national courts have generally also referred to article 53 when defining peremptory norms of general international law (*jus cogens*) including beyond the context of treaty law.[57] Similarly, international courts and

[56] See, for example, the statement by the Czech Republic (A/C.6/71/SR.24, para. 72). See also the statements by Canada (A/C.6/71/SR.27, para. 9), Chile (A/C.6/71/SR.25, para. 101), China (A/C.6/71/SR.24, para. 89), the Islamic Republic of Iran (A/C.6/71/SR.26, para. 118) ("The aim of the Commission's work on the topic was not to contest the two criteria established under article 53 … . On the contrary, the goal was to elucidate the meaning and scope of the two criteria"), and Poland (*ibid.*, para. 56). See, further, the statement by Ireland (A/C.6/71/SR.27, para. 19) (the delegation of Ireland "agreed with the view that articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties should be central to work on the topic").

[57] See, for example, *Al Shimari*, et al. v. *CACI Premier Technology, Inc., Opinion of 22 March 2019*, United District Court for the Eastern District of Virginia, 368 F. Supp. 3d 935 No. 1:08-cv-827 (LMB/JFA), 2019 WL 1320052 (E.D. Va. 2019), at p. 26; *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, United States Court of Appeals for the District of Columbia Circuit, 859 F.2d 929 (D.C. Cir. 1988), at p. 940; *Youssef Nada* v. *State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (footnote 40 above), para. 7.1; *National Commissioner of The South African Police Service* v. *Southern African Human Rights Litigation Centre and Another, Case No. CC 02/14, Judgment of 30 October 2014*, Constitutional Court of South Africa, [2014] ZACC 30, para. 35; *Priebke, Erich s/ solicitud de extradición, Case No. 16.063/94, Judgment of 2 November 1995*, Supreme Court of Argentina, para. 70; *Bouzari* v. *Islamic Republic of Iran, Docket C38295, Decision of 30 June 2004*, Court of Appeal for Ontario, 71 OR (3d) 675 (Ont CA), ILDC

tribunals have used article 53 of the 1969 Vienna Convention as a basis when addressing peremptory norms of general international law (*jus cogens*) in different contexts.[58] Article 53 of the 1969 Vienna Convention is also accepted as the general definition of peremptory norms of general international law (*jus cogens*) in scholarly writings.[59] While the formulation in article 53 of the 1969 Vienna Convention is for "the purposes of the Convention", it also applies in other contexts including in relation to State responsibility.[60] The Commission has, when addressing peremptory norms of general international law (*jus cogens*) in the context of other topics, also used the definition in article 53 of the 1969 Vienna Convention.[61] It is

175 (CA 2004), para. 86; and *Gabriel Orlando Vera Navarrete, EXP. No. 2798-04-HC/TC, Decision of 9 December 2004*, Constitutional Tribunal of Peru, para. 8. See also *Jorgić Case, Order of 12 December 2000, 2BvR 1290/99*, Federal Constitutional Court of Germany, at para. 17.

[58] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; *Prosecutor* v. *Anto Furundžija* (footnote 18 above), at p. 571, para. 155; and *Prosecutor* v. *Jelisić* (footnote 36 above), at pp. 431–433, para. 60. See also *Jaime Córdoba Triviño, Case No. C-578/95, Sentence of 4 December 1995*, Constitutional Tribunal of Colombia. See, especially, the separate opinion of Judge *ad hoc* Dugard in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 2006*, p. 6, at p. 88, para. 8.

[59] See, for example, Mbengue and Koagne Zouapet (footnote 26 above), at p. 510; S. Knuchel, Jus Cogens: *Identification and Enforcement of Peremptory Norms*, Zurich, Schulthess, 2015, at p. 19 ("Given that Article 53 provides the only written legal definition of the effects of *jus cogens* … as well as of the process by which such norms come into being … it is the necessary starting point for analyzing this concept"); S. Kadelbach, "Genesis, function and identification of *jus cogens* norms", *Netherlands Yearbook of International Law 2015*, vol. 46 (2016), pp. 147–172, at p. 166, noting that "treatises on *jus cogens* usually start" with article 53 of the 1969 Vienna Convention and, at p. 162, assessing enhanced responsibility and the *erga omnes* effects of *jus cogens* on the basis of article 53 of the 1969 Vienna Convention; and U. Linderfalk, "Understanding the *jus cogens* debate: the pervasive influence of legal positivism and legal idealism", *ibid.*, pp. 51–84, at p. 52. See also, generally, Costelloe (footnote 11 above), who, though never stating that article 53 of the 1969 Vienna Convention is the definition, certainly proceeds on that basis. Similarly, see Hannikainen (footnote 28 above), especially at pp. 5–12; and Alexidze (footnote 42 above), at p. 246.

[60] See T. Weatherall, Jus Cogens: *International Law and Social Contract*, Cambridge University Press, 2015, at pp. 6–7 ("Although the Vienna Convention concerns the law of treaties and binds only signatories … Article 53 reflected a concept with legal effect beyond the treaty context. … The contemporary practice of international and domestic judicial organs, to refer to Article 53 for any consideration of *jus cogens*, is consistent with this view of a concept existing outside the treaty context"); E. Santalla Vargas, "In quest of the practical value of *jus cogens* norms", *Netherlands Yearbook of International Law 2015*, vol. 46 (2016), pp. 211–240, at pp. 223–224 ("However, the potential effects of *jus cogens* not only expand beyond treaty law but they even appear more significant in situations that are not concerned with treaty law"); and Cassese (footnote 55 above), at p. 160 ("Fortunately states, national courts, and international judicial bodies have invoked peremptory norms with regard to *areas other than treaty-making.* By so doing, these entities have expanded the scope and normative impacts of peremptory norms" (emphasis in original)). See also H. Charlesworth and C. Chinkin, "The gender of *jus cogens*", *Human Rights Quarterly*, vol. 15 (1993), pp. 63–76, at p. 63 ("A formal, procedural definition of the international law concept of *jus cogens* is found in the Vienna Convention on the Law of Treaties").

[61] See paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85 ("The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law … but further that it should be recognized as having peremptory character by the international community of States as whole"). See also the conclusions of the Study Group on the fragmentation of international law (footnote 54 above), conclusion (32) ("A rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, [article 53 of the 1969 Vienna Convention]), that is, norms 'accepted and recognized by the international community of States as a whole from which no derogation is permitted'"). See, further, the report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (*ibid.*), para. 375 ("The starting-point [for establishing the criteria] must be the formulation of article 53 itself, identifying *jus cogens* by reference to what is 'accepted and recognized by the international community of States as a whole'").

therefore appropriate for these draft conclusions to rely on article 53 for the definition of peremptory norms of general international law (*jus cogens*).

(3) The definition of peremptory norms in article 53 contains two main elements. First, the norm in question must be a norm of general international law. Second, it must be accepted and recognized by the international community of States as a whole as one from which no derogation is permitted, and which can only be modified by a norm having the same character. These elements constitute the criteria for the identification of peremptory norms of general international law (*jus cogens*) and are elaborated upon further in draft conclusions 4 to 9.

Part Two
Identification of peremptory norms of general international law (*jus cogens*)

Conclusion 4
Criteria for the identification of a peremptory norm of general international law (*jus cogens*)

To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:

(*a*) it is a norm of general international law; and

(*b*) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

(1) Draft conclusion 4 sets out the criteria for the identification of a peremptory norm of general international law (*jus cogens*). The criteria are drawn from the definition of peremptory norms contained in article 53 of the 1969 Vienna Convention, which was reproduced in draft conclusion 3. Such criteria must be shown to be present in order to establish that a norm has a peremptory character.

(2) The *chapeau* of the draft conclusion states "[t]o identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria". The phrase "it is necessary to establish" indicates that the criteria must be shown to be present and that they should not be assumed to exist. It is thus not sufficient to point to the importance or the role of a norm in order to show the peremptory character of that norm. Rather, "it is necessary to establish" the existence of the criteria enumerated in the draft conclusion.

(3) On the basis of the definition contained in draft conclusion 3, draft conclusion 4 sets forth two criteria. First, the norm in question must be a norm of general international law. This criterion is derived from the phrase "norm of general international law" in the definition of peremptory norms (*jus cogens*) and is the subject of draft conclusion 5. Second, the norm must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted, and which can be modified only by a norm having the same character. It bears pointing out that this second criterion, though composed of various elements, is a single composite criterion. This criterion is the subject of draft conclusions 6 to 9. The two criteria are cumulative: they are both necessary for the establishment of the peremptory character of a norm of general international law.

(4) The language of article 53 of the 1969 Vienna Convention is complex and has given rise to different interpretations. The phrase "and which can be modified only by a subsequent norm of general international law having the same character" could, for example, be viewed as a separate criterion.[62] Yet, the essence of the second criterion is the *acceptance and recognition* by the international community of States as a whole, not just that the norm is one

[62] But see Knuchel (footnote 59 above), at pp. 49–136. See also the statement by the Islamic Republic of Iran (A/C.6/71/SR.26, para. 118), where the two criteria identified are said to be, first, a norm recognized by the international community of States as a whole as a norm from which no derogation was permitted and, second, a norm that could be modified only by a subsequent *jus cogens* norm.

from which no derogation is permitted, but also that it can be modified only by a subsequent norm of general international law having the same character. Hence, the non-derogation and modification elements are not themselves criteria but rather, form an integral part of the "acceptance and recognition" criterion. It is in this sense that the second criterion, though composed of several elements, constitutes a single criterion.

(5) Alternatively, it has been suggested that the phrase "accepted and recognized" qualifies "general international law" rather than the non-derogation and modification clauses. Seen from this perspective, article 53 would have three criteria for proving that a norm has peremptory character: (*a*) the norm must be a norm of general international law that is accepted and recognized (as a norm of general international law) by the international community of States as a whole; (*b*) it must be a norm from which no derogation is permitted; and (*c*) it must be a norm that can only be modified by a subsequent peremptory norm of general international law (*jus cogens*). Such an interpretation, however, raises at least two problems. First, it would render the first criterion tautologous, since "general international law" ought to be generally accepted and/or recognized by the international community to begin with. Second, in that form the second and third criteria would not be criteria but rather a consequence of peremptoriness and a description of how peremptory norms of general international law (*jus cogens*) can be modified, respectively.

(6) Based on the foregoing, the two cumulative criteria in draft conclusion 4 imply a two-step approach to the identification of a peremptory norm of general international law (*jus cogens*). First, evidence that the norm in question is a norm of general international law is required. Second, the norm must be shown to be accepted and recognized by the international community of States as a whole as having a peremptory character. This two-step approach was aptly described by the Commission in the commentaries to the articles on responsibility of States for internationally wrongful acts:

> The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question meet all the criteria for recognition as a norm of general international law, binding as such, but *further* that it should be recognized as having peremptory character by the international community of States as a whole.[63]

Conclusion 5
Bases for peremptory norms of general international law (*jus cogens*)

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).

2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

Commentary

(1) Draft conclusion 5 concerns the bases of peremptory norms of general international law (*jus cogens*). It addresses the first criterion specified in draft conclusion 4 to identify peremptory norms of general international law (*jus cogens*), namely that the norm in question must be a norm of "general international law". The draft conclusion is composed of two paragraphs. Paragraph 1 deals with customary international law as the basis for peremptory norms of general international law (*jus cogens*), while paragraph 2 addresses treaty provisions and general principles of law as possible bases of such norms.

[63] Paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85 (emphasis added). See also R. Rivier, *Droit international public*, 2nd ed., Paris, Presses universitaires de France, 2013, at p. 566 (*Ne peut accéder au rang de règle impérative qu'une provision déjà formalisée en droit positif et universellement acceptée comme règle de droit* ("Only a provision already formalized in positive law and universally accepted as law can achieve the rank of peremptory norm")). See also U. Linderfalk, "The creation of *jus cogens*–making sense of article 53 of the Vienna Convention", *Heidelberg Journal of International Law*, vol. 71 (2011), pp. 359–378, at p. 371 ("by 'the creation of a rule of *jus cogens*' I mean, not the creation of a rule of law, but rather the elevation of a rule of law to a *jus cogens* status").

(2) The Study Group on the fragmentation of international law established by the Commission observed that "there is no accepted definition of 'general international law'".[64] The meaning of general international law will always be context-specific.[65] In some contexts, "general international law" could be construed in contradistinction to *lex specialis*.[66] In the context of peremptory norms of general international law (*jus cogens*), however, the term "general international law" is not a reference to *lex generalis* or law other than *lex specialis*. Rather, the word "general" in "norms of general international law", in the context of peremptory norms, refers to the scope of applicability of the norm in question. Norms of general international law are thus those norms of international law that, in the words of the International Court of Justice, "must have equal force for all members of the international community".[67]

(3) The words "basis" in paragraph 1 and "bases" in paragraph 2 of draft conclusion 5 are to be understood flexibly and broadly. They are meant to capture the range of ways that various sources of international law may give rise to the emergence of a peremptory norm of general international law (*jus cogens*). The Commission decided not to use the words "source" or "sources" as these might create confusion with the notion of sources of international law in Article 38, paragraph 1, of the Statute of the International Court of Justice.

(4) Paragraph 1 of draft conclusion 5 states that customary international law, which refers to a general practice accepted as law (*opinio juris*), is the most common basis for peremptory norms of general international law (*jus cogens*). This is because customary international law is the most obvious manifestation of general international law.[68] This position is borne out by State practice, which confirms that customary international law is the most common source for peremptory norms of general international law (*jus cogens*).[69] The Supreme Court of

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[64] Report of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.702), para. 14 (10), note 11. See also A. Zdravkovič, "Finding the core of international law: *jus cogens* in the work of the International Law Commission", *South Eastern and European Union Legal Issues*, vol. 5 (December 2019), pp. 141–158, at p. 144.

[65] *Ibid.* See also footnote 667 to paragraph (2) of the commentary to conclusion 1 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), p. 123 ("'general international law' is used in various ways (not always clearly specified) including to refer to rules of international law of general application, whether treaty law or customary international law or general principles of law").

[66] See, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 137–138, para. 274. See also *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, *Judgment*, *I.C.J. Reports 1997*, p. 7, at p. 76, para. 132.

[67] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63.

[68] See Cassese (footnote 55 above), at p. 164 ("The second question amounts to asking by which means an international tribunal should ascertain whether a general rule or principle of international law has acquired the status of a peremptory norm. Logically, this presupposes the existence of such a *customary* rule or principle"); G. Cahin, *La coutume internationale et les organisations internationales : l'incidence de la dimension institutionnelle sur le processus coutumier*, Paris, Pédone, 2001, at p. 615, who states that customary international law is the "normal, if not exclusive, means" of formation of *jus cogens* norms (*voie normale et fréquente sinon exclusive*). See also Rivier (footnote 63 above), at p. 566 (*Le mode coutumier est donc au premier rang pour donner naissance aux règles destinées à alimenter le droit impératif* ("Customary international law is thus a primary source of rules that will form the basis of peremptory law")). See, further, J. E. Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law*, Zurich, Schulthess, 2016, p. 115 ("As the most likely source of general international law, customary norms would constitute *ipso facto* and *ipso iure* a privileged source of *ius cogens* norms"); Gagnon-Bergeron (footnote 27 above), at p. 53; and A. Bianchi, "Human rights and the magic of jus cogens", *European Journal of International Law*, vol. 19 (2008), p. 491, at p. 493 ("the possibility that *jus cogens* could be created by treaty stands in sharp contrast to the view that peremptory norms can emerge only from customary law"). See, for a contrary view, Janis (footnote 55 above), at p. 361.

[69] For statements by States, see the statement by Pakistan at the thirty-fourth session of the General Assembly (A/C.6/34/SR.22, para. 8) ("The principle of the non-use of force, and its corollary, were *jus cogens* not only by virtue of Article 103 of the Charter [of the United Nations], but also because

Argentina, for example, recognized that peremptory norms relative to war crimes and crimes against humanity emerged from rules of customary international law already in force.[70] Similarly, the Constitutional Tribunal of Peru stated that peremptory norms of general international law (*jus cogens*) referred to "customary international norms under the auspices of an *opinio juris seu necessitatis*".[71] In *Bayan Muna* v. *Alberto Romulo*, the Supreme Court of the Philippines defined *jus cogens* as "the highest hierarchical position among all other customary norms and principles".[72] Similarly, in *The Kenya Section of the International Commission of Jurists* v. *the Attorney-General and Others,* the High Court of Kenya determined the "duty to prosecute international crimes" to be both a rule of customary international law and a peremptory norm of general international law (*jus cogens*).[73] In *Kazemi Estate* v. *Islamic Republic of Iran*, the Supreme Court of Canada described peremptory norms of general international law (*jus cogens*) as a "higher form of customary international law".[74] In *Siderman de Blake* v. *Argentina*, the United States Court of Appeals for the Ninth Circuit described peremptory norms of general international law (*jus cogens*) as "an elite subset of the norms recognized as customary international law".[75] That Court also noted that, in contrast to ordinary rules of customary international law, *jus cogens* "embraces customary laws considered binding on all nations".[76] In *Buell* v. *Mitchell*, the United States Court of Appeals for the Sixth Circuit noted that "[s]ome customary norms of international law reach a 'higher status'", namely that of peremptory norms of general international law (*jus cogens*).[77] The description of peremptory norms of general international law (*jus cogens*) as a subset of customary international law is also reflected in the *Nevsun Resources Ltd.* v. *Araya.*[78] In determining that the prohibition of the death penalty was not a peremptory norm of general international law (*jus cogens*), the Court made the following observation: "Moreover, since the abolition of the death penalty is not a customary norm of international law, it cannot have risen to the level that the international community as a whole recognizes it as *jus cogens*, or a norm from which no derogation is permitted."[79]

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they had become norms of customary international law recognized by the international community"). See also the statements by the United Kingdom (A/C.6/34/SR.61, para. 46) and Jamaica (A/C.6/42/SR.29, para. 3) ("The right of peoples to self-determination and independence was a right under customary international law, and perhaps even a peremptory norm of general international law").

70 *Arancibia Clavel* (see footnote 23 above), para. 28.

71 *25% del número legal de Congresistas* (see footnote 22 above), para. 53 (*Las normas de* ius cogens *parecen pues encontrarse referidas a normas internacionales consuetudinarias que bajo el auspicio de una* opinio iuris seu necessitatis ("*jus cogens* norms seem like they refer more to international customary norms than to *opinio juris seu necessitatis*")).

72 *Bayan Muna* v. *Alberto Romulo* (see footnote 20 above), para. 92.

73 *The Kenya Section of the International Commission of Jurists* v. *the Attorney-General and Others*, *Miscellaneous Criminal Application 685 of 2010, Judgment of 28 November 2011*, High Court of Kenya, [2011] eKLR, p. 14.

74 *Kazemi Estate* v. *Islamic Republic of Iran, File No. 35034, Appeal Decision of 10 October 2014*, Supreme Court of Canada, 2014 SCC 62, [2014] 3 S.C.R. 176, at p. 249, para. 151. See also *Germany* v. *Milde (Max Josef), Case No. 1072/2009, Appeal Judgment of 13 January 2009*, First Criminal Section, Supreme Court of Cassation, Italy, ILDC 1224 (IT 2009), para. 6 ("customary rules aiming to protect inviolable human rights did not permit derogation because they belonged to peremptory international law or *jus cogens*").

75 *Siderman de Blake* v. *Argentina* (see footnote 21 above), at p. 715, citing *Committee of United States Citizens Living in Nicaragua* v. *Reagan* (see footnote 57 above), at p. 940.

76 *Ibid.* This contrast between "ordinary" rules of customary international law and *jus cogens* – suggesting the latter constitutes extraordinary rules of customary international law – is often based on the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Anto Furundžija* (see footnote 18 above), at p. 569, para. 153, where a similar distinction is drawn. It has been mentioned, with approval, in several decisions, including decisions of the courts of the United Kingdom. See, for example, *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)* (footnote 50 above), at p. 198. See also *Regina (Al Rawi and Others)* v. *Secretary of State for Foreign and Commonwealth Affairs* (*ibid.*).

77 *Buell* v. *Mitchell*, United States Court of Appeals for the Sixth Circuit, 274 F.3d 337 (6th Cir. 2001), at pp. 372–373.

78 See *Nevsun Resources Ltd.* v. *Araya* (footnote 24 above), at para. 83.

79 *Buell* v. *Mitchell* (see footnote 77 above), at p. 373.

(5) The jurisprudence of the International Court of Justice equally provides strong evidence of the basis of peremptory norms of general international law (*jus cogens*) in customary international law. In the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the Court recognized the prohibition of torture as "part of customary international law" that "has become a peremptory norm (*jus cogens*)".[80] Similarly, the Court's description of "many [of the] rules of humanitarian law" as constituting "intransgressible principles of international customary law" suggests that peremptory norms – referred to here as "intransgressible principles" – have a customary basis.[81]

(6) Other international courts and tribunals have also accepted customary international law as the basis for peremptory norms of general international law (*jus cogens*).[82] The International Criminal Tribunal for the Former Yugoslavia, for example, has noted that the prohibition of torture is a "norm of customary international law" and that it "further constitutes a norm of *jus cogens*".[83] In *Prosecutor* v. *Anto Furundžija*, that Tribunal described peremptory norms as those that "enjoy a higher rank in the hierarchy of international law than treaty law or even 'ordinary' customary rules".[84] Similarly, in *Prosecutor* v. *Jelisić*, the Tribunal stated that "[t]here can be absolutely no doubt" that the prohibition of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide falls "under customary international law" and is now "on the level of *jus cogens*".[85]

(7) While customary international law is the most common basis for the emergence of peremptory norms of general international law (*jus cogens*), other sources listed in Article 38, paragraph 1, of the Statute of the International Court of Justice may also form the basis of peremptory norms of general international law (*jus cogens*) to the extent that they can be regarded as norms of general international law. Paragraph 2 of draft conclusion 5 captures this idea by stating that "[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)". The words "may also" are meant to indicate that while there is little practice to support the emergence of peremptory norms from these sources, the possibility of these other sources of international law forming the basis of peremptory norms of general international law (*jus cogens*) cannot be *a priori* excluded.

(8) Treaties are an important source of international law, as provided for in Article 38, paragraph 1 (*a*) of the Statute of the International Court of Justice. Paragraph 2 of draft conclusion 5 identifies treaty provisions as a possible basis for peremptory norms of general international law (*jus cogens*). The phrase "treaty provisions" is used instead of "treaties" to indicate that what is at issue are the one or more norms contained in the treaty rather than the treaty itself. Treaties, in most cases, are not "general international law" since they do not usually have a general scope of application with "equal force for all members of the international community".[86] There is, however, support in scholarly writings that provisions in treaties can form the basis of the peremptory norms of international law (*jus cogens*).[87]

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[80] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment*, *I.C.J. Reports 2012*, p. 422, at p. 457, para. 99.

[81] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 58 above), at p. 257, para. 79.

[82] See, for example, *"Las Dos Erres" Massacre* v. *Guatemala, Judgment of 24 November 2009*, Inter-American Court of Human Rights, *Series C*, No. 211, at p. 41, para. 140.

[83] *Prosecutor* v. *Delalić*, et al., *Case No. IT-96-21-T, Judgment of 16 November 1998*, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, at para. 454.

[84] *Prosecutor* v. *Anto Furundžija* (see footnote 18 above), at p. 569, para. 153.

[85] *Prosecutor* v. *Jelisić* (see footnote 36 above), at pp. 431–433, para. 60.

[86] *North Sea Continental Shelf* (see footnote 67 above), at pp. 38–39, para. 63 ("for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; – whereas this cannot be so in the case of general or customary international law rules and obligations which, by their very nature, must have equal force for all members of the international community"). See also Bianchi (footnote 68 above), at p. 493 ("The possibility that *jus cogens* could be created by treaty stands in sharp contrast to the view that peremptory norms can emerge only from customary law").

[87] G. I. Tunkin, "Is general international law customary law only?", *European Journal of International Law*, vol. 4 (1993), at p. 534, especially p. 541 ("I believe that international lawyers should accept that general international law now comprises both customary and conventional rules of international

While recognizing the special character of the Charter of the United Nations, it is noteworthy that in the commentary to draft article 50 of the 1966 draft articles on the law of treaties, the Commission identified "the law of the Charter [of the United Nations] concerning the prohibition of the use of force" as a "conspicuous example of a rule of international law having the character of *jus cogens*".[88] The role of treaties as a basis for peremptory norms of general international law (*jus cogens*) may be understood as a consequence of the relationship between treaty rules and customary international law as described by the International Court of Justice in *North Sea Continental Shelf* cases.[89] In that case, the Court observed that a treaty rule can codify (or be declaratory of) an existing general rule of international law,[90] or the conclusion of a treaty rule can help crystallize an emerging general rule of international law,[91] or that a treaty rule can, after adoption, come to reflect a general rule on the basis of subsequent practice.[92] This general approach can also be seen in judgments of other international courts and tribunals.[93]

(9) The phrase "general principles of law" in paragraph 2 of draft conclusion 5 refers to general principles of law in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. It is appropriate to refer to the possibility of general principles of law forming the basis of peremptory norms of general international law (*jus cogens*).[94]

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law"). See, specifically in the context of *jus cogens*, G. I. Tunkin, "*Jus cogens* in contemporary international law", *The University of Toledo Law Review*, vol. 1971, Nos. 1–2 (Fall–Winter 1971), p. 107, at p. 116 ("principles of *jus cogens* consist of 'rules which have been accepted either expressly by treaty or tacitly by custom ...'. Many norms of general international law are created jointly by treaty and custom"). See also Knuchel (footnote 59 above), at p. 50 ("Contemporary international law comprises, in the words of the [International Court of Justice], 'instruments of a universal or quasi-universal character,' and nothing precludes future conventions from creating universally binding norms which could be elevated to *jus cogens*"). See also R. Nieto-Navia, "International peremptory norms (*jus cogens*) and international humanitarian law", *in* L. Chand Vorah, *et al.* (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, The Hague, 2003, p. 595, at p. 613 ("One can state generally that norms of *jus cogens* can be drawn generally from the following identified sources of international law: (i) General treaties … and (ii) General principles of law recognized by civilized nations"). See, however, Weatherall (footnote 60 above), at pp. 125–126; Hannikainen (footnote 28 above), at p. 92; and E. J. Criddle and E. Fox-Decent, "A fiduciary theory of *jus cogens*", *Yale Journal of International Law*, vol. 34 (2009), p. 331. See, further, Orakhelashvili (footnote 55 above), at p. 113 ("The propensity for academics to place emphasis on custom seems to follow from the general acknowledgment of the unsuitability of treaties to create peremptory norms"); and U. Linderfalk, "The effect of *jus cogens* norms: whoever opened Pandora's box, did you ever think about the consequences?", *European Journal of International Law*, vol. 18 (2007), p. 853, at p. 860.

88 Paragraph (1) of the commentary to article 50 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 247.

89 *North Sea Continental Shelf* (see footnote 67 above). See also conclusion 11 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), pp. 143–146.

90 *North Sea Continental Shelf* (see footnote 67 above), at p. 38, para. 61.

91 *Ibid.*, at pp. 38–41, paras. 61–69.

92 *Ibid.*, at pp. 41–43, paras. 70–74. See also *Margellos and Others* v. *Federal Republic of Germany, Case No. 6/2002, Petition for Cassation, Judgment of 17 September 2002*, Special Supreme Court of Greece, para. 14 ("the provisions contained in the … Hague Regulations attached to the Hague Convention IV of 1907 have become customary rules of international law (*jus cogens*)").

93 See, for example, *Prosecutor* v. *Tolimir, Case No. IT-05-88/2-T, Judgment of 12 December 2012*, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, at para. 733 ("These provisions of the [Convention on the Prevention and Punishment of the Crime of Genocide] are widely accepted as customary international law rising to the level of *jus cogens*"); and *Questions Relating to the Obligation to Prosecute or Extradite* (footnote 80 above). See also the statement by Mr. Ago at the 828th meeting of the Commission in 1966, *Yearbook ... 1966*, vol. I (Part One), p. 37, para. 15 ("Even if a rule of *jus cogens* originated in a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from the treaty … , it was already a rule of general international law").

94 While there is little practice in support of general principles of law as a basis for peremptory norms of general international law (*jus cogens*), the following cases, among others, may be considered in this connection: *Prosecutor* v. *Jelisić* (see footnote 36 above), at pp. 431–433, para. 60, where the

General principles of law are part of general international law since they have a general scope of application with equal force for all members of the international community.[95] In the context of the interpretation of treaties under article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, the conclusions of the Study Group on the fragmentation of international law distinguished between the application of treaty law on the one hand, and of general international law on the other.[96] The latter, according to the Commission, consists of both "customary international law and general principles of law".[97] There is, moreover, some support in writings for general principles of law as a basis of peremptory norms of general international law (*jus cogens*).[98]

(10) The phrase "accepted and recognized" has a particular relevance for the sources which can serve as a basis for peremptory norms of general international law (*jus cogens*). The text "accepted and recognized by the international community of States as a whole" was adopted at the United Nations Conference on the Law of Treaties on the basis of a joint proposal of Finland, Greece and Spain with regard to what later became article 53 ("recognized by the international community"),[99] to which the Drafting Committee at the Conference inserted the word "accepted". As explained by the Chair of the Drafting Committee, this was done because Article 38 of the Statute of the International Court of Justice includes both the words "recognized" and "accepted"; "recognized" was used in connection with conventions and treaties and general principles of law, while "accepted" was used in connection with customary international law.[100] This language would seem to suggest that the Commission had in mind the possibility that treaties and general principles of law could also form bases of peremptory norms of general international law (*jus cogens*). For that reason, notwithstanding the scarcity of practice to that effect, the Commission decided to include, in

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International Criminal Tribunal for the Former Yugoslavia, having accepted that the prohibition of genocide was a norm of *jus cogens*, stated that the principles underlying the prohibition were "principles … recognized by civilised nations". The Inter-American Court of Human Rights determined the right to equality to be a peremptory norm of general international law (*jus cogens*) flowing from its status as a general principle of law in its advisory opinion on the *Juridical Condition and Rights of Undocumented Migrants* (see footnote 37 above), at p. 99, para. 101: "Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws."

95 See *North Sea Continental Shelf* (footnote 67 above), at pp. 38–39, para. 63, where the Court described general international law as rules that, "by their very nature, must have equal force for all members of the international community".

96 Conclusions of the Study Group on the fragmentation of international law (see footnote 54 above), at paras. 20–21.

97 *Ibid.*

98 See, for example, Knuchel (footnote 59 above), at p. 52 ("general principles [of law] may be elevated to *jus cogens* if the international community of States as a whole accepts and recognizes them as such"); Shelton, "Sherlock Holmes and the mystery of *jus cogens*" (footnote 30 above), at pp. 30–34; and A. A. Cançado Trindade, "*Jus cogens* …" (footnote 26 above), at p. 27. See also Weatherall (footnote 60 above), at p. 133; and T. Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies", *Netherlands Yearbook of International Law*, vol. 46 (2016), p. 173, at p. 195 ("a peremptory norm must first become general international law i.e. customary international law or general principles of law pursuant to Article 38(1) of the [Statute of the International Court of Justice]"). See also Conklin (footnote 42 above), at p. 840; O. M. Dajani, "Contractualism in the law of treaties", *Michigan Journal of International Law*, vol. 34 (2012), p. 1, at p. 60; Nieto-Navia, "International peremptory norms (*jus cogens*) and international humanitarian law" (footnote 87 above), at pp. 613 *et seq*. ("One can state generally that norms of *jus cogens* can be drawn generally from the following identified sources of international law: (i) General treaties … and (ii) General principles of law recognized by civilized nations"); Orakhelashvili (footnote 55 above), at p. 126; and Santalla Vargas (footnote 60 above), at p. 214 ("*jus cogens* derives from customary law and general principles of international law").

99 *Official Records of the United Nations Conference on the Law Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May, Documents of the Conference* (A/CONF.39/11/Add.2), document A/CONF.39/C.1/L.306 and Add.1–2, p. 174.

100 *Official Records of the United Nations Conference on the Law Treaties, First Session* ... (see footnote 53 above), Summary record of the eightieth meeting of the Committee of the Whole, p. 471 at para. 4.

draft conclusion 5, the possibility that treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

Conclusion 6
Acceptance and recognition

1. The criterion of acceptance and recognition referred to in draft conclusion 4, subparagraph (*b*), is distinct from acceptance and recognition as a norm of general international law.

2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized by the international community of States as a whole as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

Commentary

(1) The second criterion for the identification of a peremptory norm of general international law (*jus cogens*) is that the norm in question must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can only be modified by a subsequent norm having the same character. As stated in paragraph (4) of the commentary to draft conclusion 4, this is a single criterion composed of different elements. While draft conclusion 5 addresses the first element, which is referred to in paragraph (*a*) of draft conclusion 4, namely that the norm in question must be a norm of general international law, draft conclusion 6 concerns the second element, referred to in paragraph (*b*) of draft conclusion 4, namely that the norm of general international law in question must be "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". The emphasis in this criterion is on "acceptance and recognition". The other elements of this second criterion indicate two aspects of that acceptance and recognition. First, they indicate what must be accepted and recognized, namely that the norm is one from which no derogation is permitted and that it can only be modified by a norm having the same character. Second, they indicate who must do the accepting and recognizing, namely the international community of States as a whole. Draft conclusion 7 addresses this latter aspect.

(2) Paragraph 1 of draft conclusion 6 seeks to make clear that the acceptance and recognition referred to in the draft conclusion is distinct from the acceptance and recognition required for other rules of international law. In other words, the "acceptance and recognition" addressed in draft conclusion 6 is not the same as, for example, acceptance as law (*opinio juris*), which is an element for the identification of customary international law, or recognition, which is an element for the identification of general principles of law. Acceptance as law (*opinio juris*) addresses the question of whether States accept a practice as a rule of law and is a constitutive element of customary international law. Recognition as a general principle of law addresses the question of whether a principle has been recognized as provided for in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. The acceptance and recognition referred to in draft conclusion 6 is qualitatively different. Acceptance and recognition, as a criterion of peremptory norms of general international law (*jus cogens*), concerns the question of whether the international community of States as a whole recognizes a rule of general international law as having peremptory character. As Gagnon-Bergeron explains, there is an additional criterion, over and above the criteria for the existence of a rule of general international law, that must be met for peremptory norms of general international law (*jus cogens*).[101] It is this additional criterion that is referred to in draft conclusion 6.

(3) Paragraph 2 explains what is meant by the acceptance and recognition required to elevate a norm of general international law to the status of a peremptory norm of general international law (*jus cogens*). It states that the norm in question must be accepted and recognized as one from which no derogation is permitted, and which can be modified only by a subsequent norm having the same character. This implies that in order to show that a

[101] Gagnon-Bergeron (see footnote 27 above), at p. 52.

norm is a peremptory norm of general international law (*jus cogens*), it is necessary to provide evidence that the norm is accepted and recognized as having the qualities mentioned, in other words that it is a norm from which no derogation is permitted and that can only be modified by a subsequent norm having the same character.

(4) This framework of acceptance and recognition by the international community of States as a whole is based on the generally accepted interpretation of article 53 of the 1969 Vienna Convention.[102] In keeping with the definition of peremptory norms of general international law in draft conclusion 3, derived from article 53 of the 1969 Vienna Convention, draft conclusion 4 (*b*) refers to acceptance and recognition. Yet these are not two separate requirements that have to be shown independently. Acceptance and recognition as a criterion for the identification of peremptory norms of general international law (*jus cogens*) is meant to denote the range of ways that States may show their view that a norm has peremptory character. It is, therefore, sufficient to show, in general, the acceptance and recognition of the norm of general international law as being peremptory in nature.

(5) Draft conclusion 6 concerns the identification of peremptory norms of general international law (*jus cogens*). Such determination involves the weighing and assessment of evidence. The word "evidence" is used to indicate that it is not sufficient merely to assert that a norm is accepted and recognized by the international community of States as a whole as one from which no derogation is permitted. It is necessary to substantiate such a claim with evidence. The evidence that may be relied upon is addressed in draft conclusions 8 and 9. Draft conclusion 6, and the requirement for evidence, is not intended to undermine the value, as evidence, of different materials identified in draft conclusion 8. Those materials reveal the position of States in respect of particular norms and may be advanced as evidence, even if not themselves supported by evidence. Thus, individual assertions by States concerning the peremptory character of norms, with or without evidence, will still constitute material to be considered under draft conclusion 8, paragraph 2.

Conclusion 7
International community of States as a whole

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*).

2. Acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.

3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as

[102] See *Committee of United States Citizens Living in Nicaragua* (footnote 57 above), at p. 940 ("Finally, in order for such a customary norm of international law to become a peremptory norm, there must be a further recognition by 'the international community ... *as a whole* [that this is] a norm from which no derogation is permitted'"); and *Michael Domingues* v. *United States* (footnote 18 above), at para. 85 ("Moreover, the Commission is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*, a development anticipated by the Commission in its Roach and Pinkerton decision"). See also *Prosecutor* v. *Simić, Case No. IT-95-9/2-S, Sentencing Judgment of 17 October 2002*, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, at para. 34. See, for discussion, J. Vidmar, "Norm conflicts and hierarchy in international law: towards a vertical international legal system?", *in* E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: the Place of Human Rights*, Oxford, 2011, p. 26. See also C. Costello and M. Foster, "Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test", *Netherlands Yearbook of International Law*, vol. 46 (2016), p. 273, at p. 281 ("to be *jus cogens*, a norm must meet the normal requirements for customary international law … and furthermore have that additional widespread endorsement as to its non-derogability"); and A. Hameed, "Unravelling the mystery of *jus cogens* in international law", *British Yearbook of International Law*, vol. 84 (2014), p. 52, at p. 62. See, further, G. A. Christenson, "*Jus cogens:* guarding interests fundamental to international society", *Virginia Journal of International Law*, vol. 28 (1987–1988), p. 585, at p. 593 ("The evidence would also need to demonstrate requisite *opinio juris* that the obligation is peremptory, by showing acceptance of the norm's overriding quality").

a whole, these positions cannot, in and of themselves, form part of such acceptance and recognition.

Commentary

(1) As already indicated in draft conclusion 6, the second criterion for the peremptory character of a norm is that the norm in question must be accepted and recognized as having a peremptory character. Draft conclusion 7 is concerned with the question of whose acceptance and recognition is relevant for the identification of peremptory norms of general international law (*jus cogens*). It provides, in general terms, that it is the "international community of States as a whole" that must accept and recognize the peremptory character of a norm.

(2) It is worth recalling that the Commission itself, when adopting article 50 of its 1966 draft articles on the law of treaties, had not included the element of acceptance and recognition by the international community of States as a whole, stating only that a peremptory norm of general international law (*jus cogens*) is one "from which no derogation is permitted".[103] Rather, this element was added by States in the course of the 1968–1969 United Nations Conference on the Law of Treaties leading to the adoption of the 1969 Vienna Convention. However, even during the deliberations in the Commission, the link between peremptory norms of general international law (*jus cogens*) and the acceptance and recognition of the "international community of States" had been expressed by some members of the Commission.[104]

(3) Paragraph 1 of draft conclusion 7 states that it is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*). This paragraph seeks to make clear that it is the position of States that is relevant and not that of other actors. While there have been calls for the inclusion of other actors whose acceptance and recognition might be pertinent for the establishment of peremptory norms of general international law (*jus cogens*),[105] the current state of international law retains States as the entities whose acceptance and recognition is relevant. In the context of the draft articles on the law of treaties between States and international organizations or between international organizations, the Commission considered using the phrase "international community as a whole" and thus excluding the words "of States" from the phrase.[106] However, upon reflection, the Commission decided that "in the present state of international law, it is States that are called upon to establish or recognize peremptory norms".[107]

(4) State practice and the decisions of international courts and tribunals have continued to link the elevation of norms of general international law to peremptory status with State acceptance and recognition. The International Criminal Court, for example, has stated that a peremptory norm of general international law (*jus cogens*) requires recognition by States.[108] The International Court of Justice, likewise, in the case concerning *Questions Relating to the*

[103] See article 50 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 247.

[104] See the statement by Mr. de Luna at the 828th meeting of the Commission, *Yearbook ... 1966*, vol. I (Part One), p. 39, para. 34 ("[*jus cogens*] was positive law created by States, not as individuals but as organs of the international community").

[105] See, for example, Canada (A/C.6/71/SR.27, para. 9), indicating that "it would be beneficial for the Commission … to enlarge the idea of the acceptance and recognition of peremptory norms to include other entities, such as international and non-governmental organizations".

[106] See paragraph (3) of the commentary to article 53 of the draft articles on the law of treaties between States and international organizations or between international organizations, *Yearbook ... 1982*, vol. II (Part Two), p. 56. See also, in the context of the current topic, the statement by Canada (footnote 105 above).

[107] Paragraph (3) of the commentary to article 53 of the draft articles on the law of treaties between States and international organizations or between international organizations.

[108] See *Prosecutor* v. *Katanga, Case No. ICC-01/04-01/07-34-05-tENg, Decision on the Application for the Interim Release of Detained Witnesses of 1 October 2013*, Trial Chamber II, International Criminal Court, at para. 30 ("peremptoriness [of the principle of *non-refoulement*] finds increasing recognition among States").

Obligation to Prosecute or Extradite, determined the peremptory character of the prohibition of torture on the basis of instruments developed by States.[109] Domestic courts have similarly continued to link the establishment of peremptory norms of general international law (*jus cogens*) with State recognition. For example, in determining that the prohibition of the death penalty was not a peremptory norm of general international law (*jus cogens*), the United States Court of Appeals for the Sixth Circuit stated, in *Buell* v. *Mitchell*, that "only sixty-one countries, or approximately thirty-two percent of countries, had completely abolished the use of the death penalty".[110] While peremptory norms of general international law (*jus cogens*) continue to be linked to notions of the conscience of humankind in practice and scholarly writings,[111] even then the material advanced to illustrate the peremptory character of norms remains acts and practice generated by States, including within international organizations.

(5) Although draft conclusion 7 states that it is the acceptance and recognition of States that is relevant for determining whether a norm has a peremptory character, that does not mean that other actors do not play a role. Other actors may provide context and may contribute to the assessment of the acceptance and recognition by the international community of States as a whole. The subsidiary role of other actors has been recognized by the Commission in other topics. In its conclusions on identification of customary international law, the Commission stated that it is "primarily ... the practice of States that contributes to the formation, or expression, of rules of customary international law", while noting that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law". It went on to note that the conduct of non-State actors, even though not practice for such purposes, "may be relevant when assessing the practice" of States.[112] Likewise, in the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", the Commission concluded that the conduct of non-State actors did not constitute practice for the purposes of article 31 of the 1969 Vienna Convention but that it may "be relevant when assessing the subsequent practice of parties to a treaty".[113] Acts and practice of international organizations may provide evidence for the acceptance and recognition by States when determining whether a norm has a peremptory character.[114] Ultimately, however, the positions of entities other than States are not, of themselves, sufficient to establish the acceptance and recognition required for the elevation of a norm of general international law to peremptory status. This consideration is reflected in paragraph 3 of draft conclusion 7.

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[109] *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 80 above), at p. 457, para. 99. The Court cites, amongst others, the Universal Declaration of Human Rights, the Geneva Conventions for the protection of war victims, the International Covenant on Civil and Political Rights, General Assembly resolution 3452 (XXX) of 9 December 1975 and domestic legislation.

[110] See, for example, *Buell* v. *Mitchell* (footnote 77 above), at p. 373. See also *On Application of Universally Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction, Ruling No. 5 of 10 October 2003 as amended on 5 March 2013, Decision of the Plenary Session*, Supreme Court of the Russian Federation, at para. 1 ("The universally recognized principles of international law should be understood as the basic imperative norms of international law, accepted and recognized by the international community of states as a whole, deviation from which is inadmissible").

[111] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (see footnote 15 above), at p. 46, para. 87; and A. A. Cançado Trindade, "International law for humankind: towards a new *jus gentium* (I)", *Collected Courses of the Hague Academy of International Law*, vol. 316 (2005), pp. 9–312, at p. 183 ("It is my view that there is, in the multicultural world of our times, an irreducible minimum, which, in so far as international law-making is concerned, rests on its ultimate material source: human conscience").

[112] Conclusion 4 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), pp. 130–132.

[113] Conclusion 5 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *ibid*., pp. 132–133.

[114] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 14 above), p. 23: "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide … . The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope". See also conclusion 12 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), pp. 147–149.

(6) Paragraph 2 of draft conclusion 7 seeks to explain what is meant by "as a whole". It states that what is required is the acceptance and recognition by a very large and representative majority of States. As explained by the Chair of the Drafting Committee during the United Nations Conference on the Law of Treaties, the words "as a whole" are meant to indicate that it was not necessary for the peremptory nature of the norm in question "to be accepted and recognized ... by all States" and that it would be sufficient if "a very large majority did so".[115] This meaning is also captured by the phrase "community of States" as opposed to simply "States". The combination of the phrases "as a whole" and "community of States" serves to emphasize that it is States as a collective or community that must accept and recognize the non-derogability of a norm for it to be a peremptory norm of general international law (*jus cogens*).

(7) The Commission considered that acceptance and recognition by a simple "majority" of States was not sufficient to establish the peremptory status of a norm. Rather, the majority had to be very large. Determining whether there was a very large majority of States accepting and recognizing the peremptory status of a norm was not, however, a mechanical exercise in which the number of States is to be counted. Rather than a purely quantitative assessment in which a majority was determined, the assessment had to be qualitative.

(8) The idea that what is required is a qualitative assessment is also captured by the word "representative" to qualify "majority of States". The acceptance and recognition by the international community of States as a whole requires that the acceptance and recognition be across regions, legal systems and cultures.[116] The effect of paragraph 2 of draft conclusion 7 is that the majority of States accepting and recognizing the peremptory character of norms should be both very large and representative.

Conclusion 8
Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.

2. Forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; constitutional provisions; legislative and administrative acts; decisions of national courts; treaty provisions; resolutions adopted by an international organization or at an intergovernmental conference; and other conduct of States.

Commentary

(1) To identify a norm as a peremptory norm of general international law (*jus cogens*), it is necessary to show the acceptance and recognition by the international community of States as a whole of the non-derogability of such a norm. As implied in paragraph 2 of draft

[115] Mr. Yasseen, Chair of the Drafting Committee, *Official Records of the United Nations Conference on the Law Treaties, First Session* ... (see footnote 53 above), 80th meeting, at para. 12. This position has been affirmed by the Federal Tribunal of Switzerland. See *A* v. *Federal Department of the Economy, Case No. 2A.783/2006 /svc, Judgment of 23 January 2008*, Federal Tribunal of Switzerland, para. 8.2 ("Les mots « par la communauté internationale des Etats dans son ensemble » ne permettent pas d'exiger qu'une règle soit acceptée et reconnue comme impérative par l'unanimité des Etats. Il suffit d'une très large majorité" ["The words 'by the international community of States as a whole' do not mean that a norm must be accepted and recognized as peremptory by States unanimously. A very large majority is sufficient"]). See also E. de Wet, "*Jus cogens* and obligations *erga omnes*", in D. Shelton (ed.) *The Oxford Handbook of International Human Rights Law*, Oxford, 2013, p. 541, at p. 543 ("This threshold for gaining peremptory status is high, for although it does not require consensus among all states … it does require the acceptance of a large majority of states"). See, further, Christófolo (footnote 68 above), at p. 125 (The formation of peremptory norms reflects "a common will represent[ing] the consent of an overwhelming majority of States. Neither one State nor a very small number of States can obstruct the formative process of peremptory norms").

[116] See *Michael Domingues* v. *United States* (footnote 18 above), at para. 85 ("The acceptance of this norm crosses political and ideological boundaries and efforts to detract from this standard have been vigorously condemned by members of the international community as impermissible under contemporary human rights standards").

conclusion 7, this requires that evidence of acceptance and recognition must be adduced. Draft conclusion 8 concerns the types of evidence necessary to identify that the international community of States as a whole accepts and recognizes that a norm has a peremptory character. Subsidiary means which may be relevant for the identification of peremptory norms of general international law (*jus cogens*) are addressed in draft conclusion 9.

(2) Paragraph 1 of draft conclusion 8 is a general statement. It provides that evidence of acceptance and recognition may take a wide range of forms. In its judgment in *Questions Relating to the Obligation to Prosecute or Extradite*, the International Court of Justice relied on a variety of materials when stating that, "[i]n [its] opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[117] It should be recalled that what is at stake is the acceptance and recognition of the international community of States as a whole. Therefore, any material capable of expressing or reflecting the views of States would be relevant as evidence of acceptance and recognition.

(3) Paragraph 2 of draft conclusion 8 describes the forms of materials that may be used as evidence that a norm is a peremptory norm of general international law (*jus cogens*). In keeping with the statement above that evidence of acceptance and recognition may take various forms, paragraph 2 of draft conclusion 8 states that the forms of evidence "include, but are not limited to". The list contained in paragraph 2 of draft conclusion 8 is therefore not a closed list. Other forms of evidence not mentioned in paragraph 2 of draft conclusion 8, if reflecting or expressing the acceptance and recognition of States, may be adduced in support of the peremptory character of a norm. The phrase "and other conduct of State" is intended to be a "catch-all" phrase that caters for the possibility of other materials that, although not reflected in the list, reveal the positions of States.

(4) It will be noted that the forms of evidence listed in paragraph 2 of draft conclusion 8 are similar to those provided for in paragraph 2 of conclusion 10 of the conclusions on identification of customary international law, which concerns forms of evidence of acceptance as law (*opinio juris*).[118] This similarity is because the forms of evidence identified are those from which, as a general matter, the positions, opinions and views of States can be gleaned. The potential uses of these materials for the purposes of satisfying the acceptance and recognition criterion for peremptory norms of general international law (*jus cogens*), on the one hand, and their uses for the purposes of the identification of customary international law, on the other hand, must be distinguished. For the former, the materials must establish acceptance and recognition by the international community of States as a whole that the norm in question is one from which no derogation is permitted, while for the latter the materials are used to assess whether States accept the norm as a rule of customary international law.

(5) The non-exhaustive list of forms of evidence in paragraph 2 of draft conclusion 8 have in common that they are materials expressing or reflecting the views of States. These materials are the result of processes capable of revealing the positions and views of States. States routinely express their views about the peremptory character of particular norms through public statements and statements in international forums.[119] Decisions of national

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[117] See *Questions Relating to the Obligation to Prosecute or Extradite* (footnote 80 above), at p. 457, para. 99. Paragraph 99 continued: "[t]hat prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora."

[118] Conclusion 10 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), pp. 140–142.

[119] See, for example, on aggression: Ghana (*Official Records of the United Nations Conference on the Law Treaties, First Session* ... (footnote 53 above), 53rd meeting, para. 15); the Netherlands (A/C.6/SR.781, para. 2); Uruguay (*Official Records of the United Nations Conference on the Law Treaties, First Session* ... (footnote 53 above), 53rd meeting, para. 48); Japan (S/PV.2350); Belarus (A/C.6/73/SR.26, para. 90); and Mozambique (A/C.6/73/SR.28, para. 3). In this respect, in the case

courts may also be a reflection of the views of States and have been relied upon in the determination of the peremptory character of norms.[120] Likewise, provisions in national constitutions, as well as legislative and administrative measures provide alternative avenues by which States express their views and may thus also provide evidence of the peremptory character of a norm of general international law.[121]

(6) Treaties and resolutions adopted by States in international organizations or at intergovernmental conferences may be an obvious example of such materials since they may also reflect the views of States.[122] In assessing the weight of such treaties, various acts of States, in connection with the treaties and resolutions, must be taken into account. These include statements in explanation of vote, the extent of support expressed through positive or negative votes and abstentions, reservations, context and, in relation to treaties, the number of ratifications.

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concerning *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 80 above), the International Court of Justice referred to the fact that "acts of torture are regularly denounced within national and international fora" in asserting the peremptory character of the prohibition of torture (p. 457, para. 99).

120 See, for example, *Prosecutor* v. *Anto Furundžija* (footnote 18 above), at p. 569, note 170. See also *Al-Adsani* v. *the United Kingdom* (footnote 18 above), at paras. 60–61, where the Court relied, *inter alia*, on *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)* (footnote 50 above) and "other cases before … national courts" in its assessment of the peremptory character of the prohibition of torture.

121 In coming to the conclusion that the prohibition of torture was of a peremptory character, the International Court of Justice in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 80 above), referred to the fact that the prohibition had "been introduced into the domestic law of almost all States" (p. 457, para. 99). Similarly, in its decision on the prohibition of the execution of individuals below the age of 18, the Inter-American Commission on Human Rights in *Michael Domingues* v. *United States* (see footnote 18 above), at para. 85, took account of the fact that States had introduced relevant amendments to their national legislation.

122 See *Dispute Concerning Coastal States Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *the Russian Federation), PCA Case No. 2017-06, Award of 21 February 2020 concerning the Preliminary Objections of the Russian Federation*, Permanent Court of Arbitration, at paras. 173 *et seq.*, speaking of the value of General Assembly resolutions. In the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 80 above), at p. 457, para. 99, the International Court of Justice referred to both treaties ("the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966") and resolutions ("the Universal Declaration of Human Rights of 1948; … General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment"), in expressing its recognition of the prohibition of torture as a peremptory norm of general international law (*jus cogens*). See also *Prosecutor* v. *Mucić, Case No. IT-96-21-T, Judgment of 16 November 1998*, International Criminal Tribunal for the Former Yugoslavia, and *Prosecutor* v. *Delalić*, et al. (see footnote 83 above), at para. 454, relying on the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the 1966 International Covenant on Civil and Political Rights, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, and the 1969 American Convention on Human Rights ("Pact of San José, Costa Rica"). See also *Prosecutor* v. *Anto Furundžija* (footnote 18 above), at p. 563, para. 144. In reaching its decision on the peremptory character of the prohibition of the execution of individuals under the age of 18, the Inter-American Commission on Human Rights in *Michael Domingues* v. *United States* (see footnote 18 above), at para. 85, relied on the ratification by States of treaties such as the 1966 International Covenant on Civil and Political Rights, the 1989 Convention on the Rights of the Child and the Pact of San José, Costa Rica, which it said were "treaties in which this proscription is recognized as non-derogable". See also the separate opinion of Vice-President Ammoun in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, p. 16, at p. 79, relying on General Assembly and Security Council resolutions for the conclusion that the right of self-determination is a peremptory norm. See also the *Written Observations Submitted by the Government of the Solomon Islands to the International Court of Justice on the request by the World Health Organization for an Advisory Opinion on the Legality of the Use of Nuclear Weapons in View of their Effects on Human Health and the Environment*, at pp. 39–40, para. 3.28 ("It is quite normal in international law for the most common and the most fundamental rules to be reaffirmed and repeatedly incorporated into treaties").

(7) In addition to the caveat that the forms of evidence in paragraph 2 of draft conclusion 8 are non-exhaustive, it should also be recalled that such materials must speak to whether the norm has a peremptory character. The question is not whether a particular norm has been reflected in these materials but, rather, whether the materials, when taken together, establish the acceptance and recognition of the international community of States as a whole that the norm in question is one from which no derogation is permitted.

(8) Finally, it should be recalled that the materials listed in draft conclusion 8 provide evidence. As such they are not, individually, conclusive of the peremptory character of a norm. Thus, the fact that a resolution of the United Nations, a treaty provision, a national court decision, a public statement or any other conduct by a State indicates the belief that a norm has peremptory status, is not sufficient to establish that norm as a peremptory norm of general international law (*jus cogens*). The materials have to be weighed and assessed together, in their context, in order to determine whether they evince acceptance and recognition of the international community of States as a whole of the peremptory character of the norm in question.

Conclusion 9
Subsidiary means for the determination of the peremptory character of norms of general international law

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law. Regard may also be had, as appropriate, to decisions of national courts.

2. The works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law.

Commentary

(1) To identify a norm as being a peremptory norm of general international law (*jus cogens*), it is necessary to provide evidence that the international community of States as a whole accepts and recognizes the said norm as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character. As explained in draft conclusion 8, the forms of evidence relevant for this purpose are materials expressing or reflecting the views of States. Subsidiary means may also be used for the determination of the peremptory character of a norm. Draft conclusion 9 concerns such subsidiary means. It is important to emphasize that the word "subsidiary" in this context is not meant to diminish the importance of such materials, but is rather aimed at expressing the idea that those materials facilitate the identification of "acceptance and recognition" but do not, in themselves, constitute evidence of such acceptance and recognition.[123]

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

[123] See also paragraph (2) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), p. 149 ("The term 'subsidiary means' denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law). The use of the term 'subsidiary means' does not, and is not intended to, suggest that such decisions are not important for the identification of customary international law").

(3) There is an abundance of examples of decisions of international courts relying on other decisions of international courts and tribunals when identifying a peremptory norm of general international law (*jus cogens*).[124] As an example, the International Criminal Tribunal for the Former Yugoslavia, in *Prosecutor* v. *Anto Furundžija*, determined that the prohibition of torture was such a norm on the basis of, *inter alia*, the extensiveness of the prohibition including the fact that States are prohibited "from expelling, returning or extraditing" a person to a place where they may be subject to torture.[125] To demonstrate the extensiveness of this prohibition, the Court referred to judgments of the European Court of Human Rights, among others.[126] The judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Anto Furundžija* has itself often been referred to in order to illustrate the peremptory status of the prohibition of torture.[127] The Special Tribunal for Lebanon in *Prosecutor* v. *Ayyash*, et al., concluded that "[t]he principle of legality (*nullum crimen sine lege*) … [is] so frequently upheld by international criminal courts with regard to international prosecution of crimes that it is warranted to hold that by now it has the status of a peremptory norm (*jus cogens*)".[128] The Special Tribunal for Lebanon, in *El Sayed*, determined that the right of access to justice has "acquired the status of a peremptory norm (*jus cogens*)" based on, *inter alia*, jurisprudence of both national and international courts.[129] The decision in *El Sayed* provides a particularly apt illustration of the manner in which decisions of international courts and tribunals can be a subsidiary means for the identification of peremptory norms of general international law (*jus cogens*). There, the Tribunal, in the judgment written by its then-President, Antonio Cassese, relied on various forms of evidence, including evidence listed in draft conclusion 8, to come to the conclusion that, taken as a whole, the evidence suggested that there was an acceptance and recognition of the peremptory character of the right of access to courts.[130] The decision then refers to the decision in the case of *Goiburú*, et al. v. *Paraguay*, in which the Inter-American Court of Human Rights determined that the right of access to courts is a peremptory norm of general international law (*jus cogens*), in order to give context to the primary evidence relied upon and to solidify that evidence.[131]

(4) The first sentence of paragraph 1 of draft conclusion 9 explicitly mentions the International Court of Justice as a subsidiary means for the determination of the peremptory character of norms. There are several reasons for this express mention. First, it is the principal judicial organ of the United Nations and its members are elected by the main political organs

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[124] To this end, Cançado Trindade makes the point that the International Criminal Tribunal for the Former Yugoslavia and the Inter-American Court of Human Rights have made considerable contributions to the advancement of the law on peremptory norms (see Cançado Trindade, "International law for humankind …" (footnote 111 above), at p. 296.

[125] *Prosecutor* v. *Anto Furundžija* (see footnote 18 above), para. 144.

[126] *Soering* v. *the United Kingdom, Application no. 14038/88, Judgment of 7 July 1989*, European Court of Human Rights; *Cruz Varas and Others* v. *Sweden, Application no. 15576/89, Judgment of 20 March 1991*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 201; and *Chahal* v. *the United Kingdom, Application no. 22414/93, Judgment of 15 November 1996*, Grand Chamber, European Court of Human Rights.

[127] See, for example, *Al-Adsani* v. *the United Kingdom* (footnote 18 above), at para. 30; and *García Lucero*, et al. v. *Chile* (footnote 45 above), at paras. 123–124, especially note 139. See also, generally, *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)* (footnote 50 above), where several of the Lords referred to *Prosecutor* v. *Anto Furundžija* (footnote 18 above).

[128] *Prosecutor* v. *Ayyash*, et al., *Case No. STL-11-01/I, Interlocutory Decision of 16 February 2011 on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Appeals Chamber, Special Tribunal for Lebanon, at para. 76. For this decision the Court relied on, *inter alia*, the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Duško Tadić (Case No. IT-94-1-AR-72)*, *Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction*, International Criminal Tribunal for the Former Yugoslavia); *Prosecutor* v. *Delalić*, et al. (see footnote 83 above); and *Prosecutor* v. *Akayesu, Case No. ICTR-96-4-T, Judgment of 2 September 1998*, Trial Chamber I, International Criminal Tribunal for Rwanda.

[129] *El Sayed, Case No. CH/PRES/2010/01, Order of 15 April 2010 assigning Matter to Pre-Trial Judge*, President of the Special Tribunal of Lebanon, para. 29, referring in particular to the case of *Goiburú*, et al. v. *Paraguay* (see footnote 18 above).

[130] See *El Sayed* (footnote 129 above), paras. 21–28.

[131] *Ibid.*, para. 29.

of the United Nations. Second, it remains the only international court with general subject-matter jurisdiction. Moreover, while the Court has been reluctant to pronounce on peremptory norms of general international law (*jus cogens*), its jurisprudence has left a mark on the development both of the general concept of peremptory norms and of particular peremptory norms, even in cases where such norms were not explicitly invoked. In particular, its advisory opinions on *Reservations to the Convention on the Prevention and Punishment of Genocide*, the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, as well as its decisions in *Barcelona Traction, East Timor*, and the *Military and Paramilitary Activities in and against Nicaragua*, have made major contributions to the understanding and evolution of peremptory norms of general international law (*jus cogens*), notwithstanding the fact that they do not expressly and unambiguously invoke, for their respective conclusions, such norms.[132] When the International Court of Justice has pronounced itself expressly on peremptory norms of general international law (*jus cogens*), its decisions have been even more influential. The judgment of the Court in *Questions relating to the Obligation to Prosecute or Extradite*, for example, has confirmed the peremptory status of the prohibition of torture.[133]

(5) The second sentence of paragraph 1 of draft conclusion 9 provides that regard may also be had, as appropriate, to decisions of national courts. It will be recalled that Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice refers to "judicial decisions", which includes both decisions of international courts and decisions of national courts. Consequently, the second sentence is intended to capture the idea that decisions of national courts are also relevant as subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*). The Commission decided to use the phrases "may also" and "as appropriate" to indicate that, although decisions of national courts may serve as subsidiary means for the determination of peremptory norms of general international law (*jus cogens*), they should be resorted to with caution. In particular, the weight to be accorded to such national decisions will be dependent on the reasoning applied in the particular decision.

(6) In addition to serving as subsidiary means under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, decisions of national courts may also constitute primary evidence under draft conclusion 8. When relied upon under draft conclusion 8, decisions of national courts provide evidence of the acceptance and recognition of the State in question. In that context, the relevance of the decision of the court concerns whether it evidences that State's position and not its broader assessment of the recognition and acceptance of the norm in question by the international community of States as a whole as peremptory in nature.

(7) Paragraph 2 of draft conclusion 9 concerns other subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*). As with decisions of international courts and tribunals, these other means are subsidiary in the sense that they facilitate the determination of whether there is acceptance and recognition by States, but they themselves are not evidence of such acceptance and recognition. The paragraph lists, as examples of other subsidiary means, the works of expert bodies and teachings of the most highly qualified publicists of the various nations, also referred to as scholarly writings. The use of the phrase "may also" in paragraph 2, in contradistinction to the word "are" which is used to qualify decisions of international courts and tribunals in paragraph 1, indicates that less weight may attach to works of expert bodies and scholarly

[132] See *Reservations to the Convention on the Prevention and Punishment of the Genocide* (footnote 14 above); *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (footnote 122 above), p. 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136; *Legality of the Threat or Use of Nuclear Weapons* (footnote 58 above); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90; and *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment* (footnote 66 above), at para. 190.

[133] See *Questions relating to the Obligation to Prosecute or Extradite* (footnote 80 above), at p. 457, para. 99.

writings in comparison to judicial decisions. The relevance of these other subsidiary means depends on various factors, including the reasoning of the works or writings, the extent to which the views expressed are accepted by States and the extent to which such views are corroborated either by other forms of evidence listed in draft conclusion 8 or decisions of international courts and tribunals.

(8) The first category relates to the works of expert bodies. The phrase "established by States or international organizations" indicates that the paragraph refers to organs established by international organizations and subsidiary bodies of such organizations, such as the International Law Commission and expert treaty bodies. The qualification was necessary to emphasize that the expert body in question had to have an intergovernmental mandate and had to be created by States. The use of the phrase "established by States or by international organizations" means that private organizations which do not have an intergovernmental mandate are not included in the category of expert bodies. This does not mean that the works of expert bodies without an intergovernmental mandate are irrelevant. The works of the Institute of International Law or the International Law Association may, for example, qualify as "teachings of the most highly qualified publicists" under paragraph 2 of draft conclusion 9.[134] The term "works" covers not only the final outcomes of the expert bodies but also their work leading up to the final outcome.

(9) The reliance on other materials is also supported by courts. In *RM* v. *Attorney-General*, for example, the High Court of Kenya relied on the Human Rights Committee general comment No. 18 on non-discrimination [135] for its determination that non-discrimination is a peremptory norm of general international law (*jus cogens*).[136] Similarly, for its conclusion that the principle of *non-refoulement* was a peremptory norm of general international law (*jus cogens*), the International Criminal Court relied on, *inter alia*, an advisory opinion of the Office of the United Nations High Commissioner for Refugees.[137] Likewise, the finding by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Anto Furundžija* that the prohibition of torture was a norm of *jus cogens* was based, *inter alia,* on observations of the Inter-American Commission on Human Rights, the Human Rights Committee and a report of a Special Rapporteur, Mr. Kooijmans.[138]

(10) The Commission has also often been referred to in the assessment of whether a particular norm has attained peremptory status. In assessing the status of the prohibition of the use of force, the International Court of Justice observed that the "International Law Commission … expressed the view that 'the law of the Charter [of the United Nations] concerning the prohibition of the use of force in itself constitutes a conspicuous example of

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[134] See paragraph (5) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), p. 151.

[135] Human Rights Committee, general comment No. 18 (1989) on non-discrimination, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A, para. 1.

[136] *RM* v. *Attorney-General, Civil Case No. 1351 2002 (O.S.), Judgment of 1 December 2006*, High Court of Kenya at Nairobi, [2006] eKLR, at p. 18. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* (*Preliminary Objections, Decision of 4 February 2021*, International Court of Justice, General List No. 172), where the Court, while recognizing that the determinations of expert bodies such as the Committee on the Elimination of Racial Discrimination should be accorded great weight, noted that it was "'in no way obliged, in the exercise of its judicial functions, to model its own interpretation of'" human rights treaties on the views of those expert bodies (para. 101).

[137] See *Prosecutor* v. *Katanga* (footnote 108 above), at para. 30, referring to the 2007 Advisory Opinion of the Office of the United Nations High Commissioner for Refugees (UNHCR) on the *Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (available from the UNHCR website: www.unhcr.org/4d9486929.pdf). The International Criminal Court also referred to several UNHCR Executive Committee Conclusions.

[138] See *Prosecutor* v. *Anto Furundžija* (footnote 18 above), at paras. 144 and 153. The Tribunal referred to the Inter-American Convention on Human Rights, General Comment on Article 7 and general comment No. 24 of the Human Rights Committee and a report by Special Rapporteur Kooijmans.

a rule in international law having the character of *jus cogens*'".[139] Scholarly writings that provide a list of generally accepted peremptory norms of general international law (*jus cogens*) often rely on the list provided by the Commission in the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts.[140] The Commission's own work may thus also contribute to the identification of peremptory norms of general international law (*jus cogens*).

(11) Paragraph 2 refers to "teachings of the most highly qualified publicists", which may also be useful as subsidiary material for the identification of peremptory norms of international law.[141] This refers to scholarly writings and other works that may be used as secondary material in assessing and providing context to the primary forms of acceptance and recognition of peremptory status. It is important to emphasize that the weight to be accorded to such teachings will vary greatly depending on the quality of the reasoning and the extent to which they find support in State practice and in the decisions of international courts and tribunals.[142]

(12) It is worth pointing out that the subsidiary means identified in paragraphs 1 and 2 of draft conclusion 9 are not exhaustive. The means identified in the draft conclusion are, however, the most common subsidiary means that have been relied upon in the identification of peremptory norms of general international law (*jus cogens*).

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[139] *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment* (see footnote 66 above), at pp. 100–101, para. 190. See also *Re Víctor Raúl Pinto, Re, Pinto (Víctor Raúl)* v. *Relatives of Tomás Rojas, Case No. 3125-94, Decision on Annulment of 13 March 2007*, Supreme Court of Chile, ILDC 1093 (CL 2007), at paras. 29 and 31.

[140] Paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85). See den Heijer and van der Wilt (footnote 30 above), at p. 9, referring to the norms in the list as those "beyond contestation". See also Christófolo (footnote 68 above), at p. 151; and Weatherall (footnote 60 above), at p. 202. See also de Wet (footnote 115 above), at p. 543. She relies, however, not on a Commission list, but rather on the list from paragraph 374 of the report of the Study Group of the Commission (finalized by Martti Koskenniemi) (see footnote 54 above, p. 77), with a list that is slightly modified from that of the Study Group. For example, in the list de Wet provides, "the right of self-defence" is included as a peremptory norm of general international law (*jus cogens*) in its own right, while the list of the Study Group contains the "prohibition of aggression" but not "self-defence" as an independent peremptory norm of general international law (*jus cogens*).

[141] See, for example, *Nguyen Thang Loi* v. *Dow Chemical Company*, United States District Court for the Eastern District of New York, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), at p. 135, relying on M. C. Bassiouni, "Crimes against humanity", *in* R. Gutman and D. Rieff (eds.), *Crimes of War: What the Public Should Know*, Norton, 1999; *Prosecutor* v. *Kallon and Kamara, Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision of 13 March 2004 on Challenge to Jurisdiction: Lomé Accord Amnesty*, Appeals Chamber, Special Court for Sierra Leone, at para. 71, relying on L. Moir, *The Law of Internal Armed Conflict*, Cambridge, 2002; and *Bayan Muna* v. *Alberto Romulo* (see footnote 20 above), at p. 55, citing M. C. Bassiouni, "International crimes: *jus cogens* and *obligatio erga omnes*", *Law and Contemporary Problems*, vol. 59 (1996), p. 63. See also *Siderman de Blake* v. *Argentina* (footnote 21 above), at p. 717, citing several authors, including K. Parker and L. B. Neylon, "*Jus cogens*: compelling the law of human rights", *Hastings International and Comparative Law Review*, vol. 12, No. 2 (Winter 1989), pp. 411–463; and K. C. Randall, "Universal jurisdiction under international law", *Texas Law Review*, vol. 66 (1987–1988), pp. 785–841, in support of the proposition that the prohibition of torture is a peremptory norm of general international law (*jus cogens*).

[142] See also paragraph (3) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), p. 151 ("There is need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies: this is reflected in the words 'may serve as'. First, writers sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). In doing so, they do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual viewpoints of their authors. Third, they differ greatly in quality. Assessing the authority of a given work is thus essential").

Part Three
Legal consequences of peremptory norms of general international law (*jus cogens*)

Conclusion 10
Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.

2. Subject to paragraph 2 of draft conclusion 11, if a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

Commentary

(1) Draft conclusion 10 concerns the invalidity and termination of treaties on account of their being in conflict with peremptory norms of general international law (*jus cogens*). It is of course expected that States would not conclude treaties in conflict with peremptory norms of general international law (*jus cogens*). However, in the event that such treaties are concluded, such treaties will be void. The invalidity of treaties is the legal effect that is most closely associated with peremptory norms of general international law (*jus cogens*).[143] Article 53 of the 1969 Vienna Convention has rarely been relied upon to invalidate a treaty, so much so that it has been questioned whether that article remains relevant.[144] The fact that treaties have rarely been invalidated on account of a conflict with peremptory norms is, however, not because the rule in article 53 is not accepted by States, but simply because States do not generally enter into treaties that conflict with peremptory norms of general international law (*jus cogens*).[145] Thus, the rule that a treaty in conflict with peremptory norms is invalid continues to be applicable even though it has rarely been applied.

(2) While instances of invalidity of treaties on account of conflict with peremptory norms of general international law (*jus cogens*) have been rare, this does not mean that there has been no practice at all that may be relevant to this question. There have been statements made by individual States assessing whether a particular treaty was consistent or not with a peremptory norm of general international law (*jus cogens*) and, accordingly, whether it could

[143] Danilenko, *Law-Making in the International Community* (see footnote 42 above), at p. 212 ("As originally conceived, within the codification process relating to the law of treaties, the concept of *jus cogens* applies only to treaty relationships … to invalidate bilateral and multilateral agreements contrary to fundamental community rules recognized as 'higher law'"). See also Kleinlein (footnote 98 above), at p. 181; K. Kawasaki, "A brief note on the legal effects of *jus cogens* in international law", *Hitotsubashi Journal of Law and Politics*, vol. 34 (2006), p. 27; and den Heijer and van der Wilt (footnote 30 above), at p. 7.

[144] See Costelloe (see footnote 11 above), at p. 55 ("the relevant [provisions of the 1969 Vienna Convention] are very narrow, and the question whether they still have much relevance … and are now virtually a dead letter, is justified"). See Charlesworth and Chinkin (footnote 60 above), pp. 65–66 ("Despite fears that the inclusion of [article 53 of the Vienna Convention] would subvert the principle of *pacta sunt servanda* and act to destabilize the certainty provided by treaty commitments, *jus cogens* doctrine has been only rarely invoked in this context. It thus has had little practical impact upon the operation of treaties"); and Kadelbach (footnote 59 above), p. 161 ("direct conflict in the sense that a treaty has an illicit subject-matter is a theoretical case"). See also Cassese (footnote 55 above), pp. 159–160 ("Should we conclude that consequently what is normally asserted to be a major advance accomplished by the 1969 Vienna Convention ... has in fact proved over the years to be an outright flop?"). See, for examples, Shelton, "Sherlock Holmes and the mystery of *jus cogens*" (footnote 30 above), at p. 36; and Kadelbach (footnote 59 above), p. 152. See, for discussion, Knuchel (footnote 59 above), at p. 141.

[145] See C. Maia, "*Jus cogens* and (in)application of the 1969 Vienna Convention on the Law of Treaties in the jurisprudence of the International Court of Justice", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 342–365, at p. 355.

be considered as valid or not.[146] The General Assembly has also adopted relevant resolutions[147] which have been interpreted as recognizing that the validity of certain agreements is to be determined by reference to their consistency with certain fundamental principles. There have also been judicial decisions that have considered the invalidity of treaties on account of possible inconsistency with peremptory norms of general international law (*jus cogens*). In *Prosecutor* v. *Charles Ghankay Taylor,* the Special Court for Sierra Leone had to determine whether the provision in its own statute, which did not recognize the immunities of any officials, was invalid.[148] The Court held that since the provision was "not in conflict with any peremptory norm of general international law, [it] must be given effect" to by the Court.[149] It seems to follow that had the provision been in conflict it would not have been given effect by the Court. Similarly, in the *Aloeboetoe and Others* v. *Suriname* case before the Inter-American Court of Human Rights, reliance had been placed on an agreement concluded between the Netherlands and the Saramaka community for the purposes of reparation.[150] The Court noted that, under some provisions of the treaty, the Saramaka undertook to capture any escaped slaves and return them to slavery.[151] On that account, the Court held that if the agreement in question were a treaty, it would be "null and void because it contradicts the norms of *jus cogens superveniens*".[152]

(3) Draft conclusion 10 follows the approach of the 1969 Vienna Convention by distinguishing between, on the one hand, treaties that, at the time of their conclusion, are in conflict with a peremptory norm of general international law (*jus cogens*) (paragraph 1) and,

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[146] For general statements to this effect, see the statement by the Netherlands during the eighteenth session of the Sixth Committee (A/C.6/SR.781, para. 2) (on the question of *jus cogens*, the "Agreement concerning the Sudeten German Territory, signed at Munich on 29 September 1938, was one of the few examples of treaties which had come to be regarded as contrary to international public order"). Cyprus, at the same session and in order to show the practice in support of nullity as a consequence of conflict with peremptory norms of general international law (*jus cogens*), listed a number of treaties as providing for nullity on account of conflict with a peremptory norm, namely the prohibition on the use of force (A/C.6/SR.783, para. 18) ("The Covenant of the League of Nations, the General Treaty for the Renunciation of War as an Instrument of National Policy (known as the Briand Kellogg Pact); the Charter of the Nürnberg Tribunal; the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East and, most recently, Article 2, paragraph 4, of the Charter of the United Nations made it *lex lata* in modern international law that a treaty procured by the illegal threat or use of force was void *ab initio*"). See also the statement by the Ukrainian Soviet Socialist Republic during the eighteenth session of the Sixth Committee (A/C.6/SR.784, para. 8). For more specific statements, see *East Timor (Portugal* v. *Australia), Counter-Memorial of the Government of Australia of 1 June 1992*, para. 223 (available from: www.icj-cij.org), declaring that the "Timor Gap Treaty" (the Treaty on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia, signed over the zone of cooperation, above the Timor Sea, on 11 December 1989, United Nations, *Treaty Series*, vol. 1654, No. 28462, p. 105), if in conflict with the right of self-determination, would be invalid on account of being in breach of a norm of *jus cogens*; and the Memorandum from Roberts B. Owen, Legal Adviser of the State Department to Warren Christopher, Acting Secretary of State 29 December 1979, in *U.S. Digest*, chapter 2, section 1, para. 4, reproduced in M. L. Nash, "Contemporary practice of the United States relating to international law", *American Journal of International Law*, vol. 74, No. 2 (April 1980), p. 418, at p. 419 ("Nor is it clear that the treaty between the USSR and Afghanistan … is valid. If it actually does lend itself to support of Soviet intervention of the type in question in Afghanistan, it would be void under contemporary principles of international law, since it would conflict with what the Vienna Convention on the Law of Treaties describes as a 'peremptory norm of general international law' … , namely that contained in Article 2, paragraph 4 of the Charter" of the United Nations).

[147] General Assembly resolutions 33/28A of 7 December 1978, 34/65 B of 29 November 1979, 36/51 of 24 November 1981 and 39/42 of 5 December 1984.

[148] *Prosecutor* v. *Taylor, Case No. SCSL-2003-01-I, Decision of 31 May 2004 on Immunity from Jurisdiction*, Appeals Chamber, Special Court for Sierra Leone, para. 53. See also *Prosecutor* v. *Kallon, Case No. SCSL-2004-15-AR72(E), Decision of 13 March 2004 on Constitutionality and Lack of Jurisdiction*, Appeals Chamber, Special Court for Sierra Leone.

[149] *Prosecutor* v. *Taylor* (see footnote 148 above), para. 53.

[150] *Aloeboetoe and Others* v. *Suriname, Judgment of 10 September 1993 on Reparation and Costs*, Inter-American Court of Human Rights, *Series C*, No. 15.

[151] *Ibid.*, at para. 57.

[152] *Ibid.*

on the other hand, treaties that conflict with a peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty (paragraph 2).[153] The first alternative is addressed in the first sentence of article 53 of the 1969 Vienna Convention while the second alternative is addressed in article 64 of that Convention. Paragraphs 1 and 2 of the present draft conclusion follow closely the text of the 1969 Vienna Convention.

(4) The first sentence of paragraph 1 of draft conclusion 10 states simply that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The sentence follows closely the first sentence of article 53 of the 1969 Vienna Convention. The import of this sentence is that such a treaty is void *ab initio.* The second sentence of paragraph 1 of draft conclusion 10 is taken from paragraph 1 of article 69 of the Convention and provides that the provisions of a treaty that is invalid on account of being in conflict with a peremptory norm at the time of its conclusion have no legal force.

(5) Paragraph 2 of draft conclusion 10 concerns the consequences of a newly emerged peremptory norm of general international law (*jus cogens*) on an existing treaty. It states that such a treaty becomes void and terminates. The phrase "becomes void and terminates" indicates that the treaty is not void *ab initio* but only *becomes* void at the emergence of the peremptory norm. The treaty becomes void from the moment the norm in question is recognized and accepted as one from which no derogation is permitted. The consequence of the treaty *becoming* void is that it is only the continuing legal or subsequent legal effects of the provisions of the treaty that terminate. It is for this reason that the second sentence of paragraph 2 provides that the parties to such a treaty are released from any obligation further to perform the treaty. This formulation is drawn from article 71, paragraph 2 (*a*), of the 1969 Vienna Convention. The effect of the text is to recognize that the treaty provisions were valid and could produce legal consequences prior to the emergence of the peremptory norm of general international law (*jus cogens*). Subject to draft conclusion 12, it is only the obligation to "further" perform that is affected by any termination. Prior to the acceptance and recognition, the rights and obligations under the impugned treaty are fully valid and applicable.

(6) The rule contained in paragraph 2 of draft conclusion 10 should be read together with draft conclusion 11 which makes provision for separability in certain cases. For this reason, paragraph 2 begins with the words "Subject to paragraph 2 of draft conclusion 11".

(7) Draft conclusion 10 on the invalidity of treaties on account of conflict with peremptory norms should also be read together with draft conclusion 21 on the recommended procedure for invoking invalidity. In accordance with draft conclusion 21, a party to a treaty cannot unilaterally declare that a treaty is contrary to a peremptory norm and excuse itself from the duty to perform under the treaty. The procedure set out in draft conclusion 21 is to be followed to confirm, objectively, the invalidity of the treaty before any consequences of invalidity can be relied upon.

(8) Draft conclusion 10 should also be read together with draft conclusion 20 on interpretation and application of peremptory norms of general international law (*jus cogens*).

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[153] See paragraph (6) of the commentary to article 50 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 248 (draft article 50 "has to be read in conjunction with article 61 (Emergence of a new rule of *jus cogens*), and in the view of the Commission, there is no question of the present article having retroactive effects. It concerns cases where a treaty is void *at the time of its conclusion* by reason of the fact that its provisions are in conflict with an already existing rule of *jus cogens.* The treaty is wholly void because its actual conclusion conflicts with a peremptory norm of general international law … . Article 61, on the other hand, concerns cases where a treaty, valid when concluded, becomes void and terminates by reason of the subsequent development establishment of a new rule of *jus cogens* with which its provisions are in conflict. The words '*becomes* void and *terminates*' make it quite clear, the Commission considered that the emergence of a new rule of *jus cogens* is not to have retroactive effects on the validity of a treaty. The invalidity is to attach only from the time of the establishment of the new rule of *jus cogens*").

Conclusion 11
Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)

1. A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (*jus cogens*) is void in whole, and no separation of the provisions of the treaty is permitted.

2. A treaty which is in conflict with a new peremptory norm of general international law (*jus cogens*) becomes void and terminates in whole, unless:

(*a*) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application;

(*b*) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of the parties to be bound by the treaty as a whole; and

(*c*) continued performance of the remainder of the treaty would not be unjust.

Commentary

(1) Draft conclusion 11 addresses circumstances where only some provisions of a treaty are in conflict with a peremptory norm of general international law (*jus cogens*) while other provisions are not in conflict with such a norm. As with draft conclusion 10 concerning invalidity of treaties, the draft conclusion follows the general approach of the 1969 Vienna Convention, namely to distinguish between, on the one hand, treaties which, at the time of their conclusion, conflict with a peremptory norm of general international law (*jus cogens*) and, on the other hand, treaties which conflict with a peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty. The draft conclusion also follows closely the text contained in the relevant provisions of the 1969 Vienna Convention.

(2) Paragraph 1 of draft conclusion 11 concerns those cases where the treaty, at the time of its conclusion, is in conflict with a peremptory norm of general international law (*jus cogens*). Under the 1969 Vienna Convention, in such cases, the treaty becomes void in whole. Article 53 of the Convention provides that the "treaty is void" and not that the relevant provision of the treaty concerned is void. Moreover, article 44, paragraph 5, of the 1969 Vienna Convention makes it express that, in such cases, severance of the impugned provisions from the treaty is not permitted. Draft conclusion 11 thus makes it clear that the whole treaty is void *ab initio* and that there is no possibility of separating those provisions that are in conflict with peremptory norms from other provisions of the treaty. First, the phrase "void in whole" in the draft conclusion is meant to clarify that the whole treaty and not only the offending provision is void. Second, to emphasize this basic point, the second part of the sentence explicitly states that "no separation of the provisions of the treaty is permitted". The first part of the sentence follows the text of article 53 of the 1969 Vienna Convention, while the second part of the sentence is based on paragraph 5 of article 44 of the Convention, which excludes cases of invalidity under article 53 from the rules on separability in article 44.

(3) Paragraph 2 addresses circumstances where a treaty (or particular provisions of a treaty) conflict with a peremptory norm of general international law (*jus cogens*) which emerges subsequent to the conclusion of the treaty. The formulation of paragraph 2 follows closely that of paragraph 3 of article 44 of the 1969 Vienna Convention. It recognizes the possibility of separation in cases where a treaty becomes invalid due to the emergence of a peremptory norm of general international law (*jus cogens*) subsequent to the conclusion of the treaty.

(4) The *chapeau* of paragraph 2 makes plain that, as a general rule, a treaty becomes void as a whole if it conflicts with a peremptory norm of general international law (*jus cogens*), even in cases where the peremptory norm emerges subsequent to the conclusion of the treaty. For that reason, the first part of the *chapeau* of paragraph 2 of draft conclusion 11 provides

that a treaty which becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole. The word "unless", at the end of the *chapeau*, however, signifies that in limited instances, which are covered by subparagraphs (*a*) to (*c*), separation may take place. The elements listed in subparagraphs (*a*) to (*c*) are cumulative in nature. In other words, all three elements must be present in order for provisions that conflict with a peremptory norm to be separated from the rest of the treaty.

(5) The elements listed in paragraph 2 of draft conclusion 11 are taken from article 44, paragraph 3, of the 1969 Vienna Convention. The first element, as stipulated in subparagraph (*a*), is that the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) must be separable from the remainder of the treaty with regard to their application. This means that it must be possible to apply the rest of the treaty without the provisions which are in conflict with the peremptory norm of general international law (*jus cogens*). Where the other provisions serve the function of facilitating the implementation of the impugned provision, such a provision can obviously not be separated from the rest of the treaty with regard to its application.

(6) It is not enough that it is possible to apply the treaty without the impugned provision. Subparagraph (*b*) of paragraph 2 of draft conclusion 11 states that it must appear from the treaty or be otherwise established that the acceptance of the said provisions was not an essential basis of the consent of the parties to be bound by the treaty as a whole. Even if a treaty could be applied without the impugned provision, it would be contrary to the consensual nature of treaties for a treaty to be applied without a provision that was "an essential basis" for its conclusion, since without that provision there would have been no consent to the treaty.

(7) Pursuant to subparagraph (*c*), the last condition that has to be met is that the continued performance under the treaty would not be unjust. The word "unjust", in this context, is meant to refer to the essential balance of rights and obligations created by the treaty, which could be disturbed if some provisions were separated while others were retained. Furthermore, to decide whether continued performance of the treaty would be "unjust", consideration needs to be given not only to the impact on the parties to the treaty, but also impacts beyond the parties, if relevant and necessary.

(8) Whether the three conditions set out in paragraph 2 are present is to be established by a consideration of all the relevant circumstances, including the subject of the provision, its relation to other clauses of the treaty and the *travaux préparatoires*, amongst other factors.[154]

Conclusion 12
Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)

1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to:

(*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (*jus cogens*); and

(*b*) bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*).

[154] See paragraph (5) of the commentary to article 41 of the draft articles on the law of treaties, *ibid.*, p. 238.

Commentary

(1) One of the consequences of a conflict with a peremptory norm of general international law (*jus cogens*) is that the treaty is void or, in the case of the emergence of the peremptory norm subsequent to the adoption of the treaty, the treaty becomes void. Yet a treaty, even a void one, may lead to consequences through, for example, parties acting pursuant to the treaty. Those consequences may manifest themselves through the creation of rights and obligations or by the establishment of factual situations. Draft conclusion 12 addresses the consequences of the invalidation of treaties as a result of a conflict with a peremptory norm of general international law (*jus cogens*). There is therefore a close relationship between draft conclusion 10 and draft conclusion 12. Draft conclusion 12 addresses the consequences of a treaty that has been rendered void.

(2) As is the case for draft conclusions 10 and 11, draft conclusion 12 is structured on the basis of the distinction between articles 53 and 64 of the 1969 Vienna Convention: those cases of invalidity as a result of a conflict with an existing peremptory norm of general international law (*jus cogens*) and those cases of invalidity on account of conflict with a peremptory norm of general international law (*jus cogens*) that emerges subsequent to the adoption of the treaty. Furthermore, as with draft conclusions 10 and 11, draft conclusion 12 follows closely the text of the 1969 Vienna Convention. Finally, as is the case with draft conclusion 10, the consequences for the invalidity of a treaty are subject to the recommended procedure set out in draft conclusion 21.

(3) Paragraph 1 of draft conclusion 12 addresses cases where a treaty is void as a result of a conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion. The formulation of the paragraph follows closely the formulation of article 71, paragraph 1, of the 1969 Vienna Convention concerning "a treaty which is void under article 53". Since in that case no treaty comes into being – which is the essence of *void ab initio* – no reliance can be placed on the provisions of the treaty. However, acts may have been performed in good faith in reliance on the void treaty producing particular consequences. To address these consequences, paragraph 1 of draft conclusion 12 refers to two obligations.

(4) The first obligation of the parties to the void treaty, expressed in subparagraph (*a*), is to eliminate as far as possible the consequences of any act performed in reliance on any of its provisions in conflict with a peremptory norm of general international law (*jus cogens*). First, it will be noted that the obligation is to eliminate "as far as possible". The obligation is thus not one of result but one of conduct. It recognizes that it may not be possible to eliminate the relevant consequences, but requires States to make best efforts to eliminate any such consequences. Second, the duty is not to eliminate the consequences of any acts performed in reliance on any part of the treaty, but only the consequences of those acts performed in reliance on the impugned provisions of the treaty. Thus, while the whole treaty is void, there is no obligation to eliminate consequences of acts performed in reliance on provisions of the treaty that are not in conflict with peremptory norms of general international law (*jus cogens*). The second obligation, which flows from the first and is expressed in subparagraph (*b*), is that the parties are to bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*). This means that, moving forward, the parties to the treaty should ensure that their relations are consistent with the peremptory norm in question. Thus, while the first obligation is concerned with past conduct, the second is concerned with future conduct.

(5) Paragraph 2 concerns the situation addressed by article 64 of the 1969 Vienna Convention, namely those cases in which a treaty becomes void as a result of a peremptory norm that emerges subsequent to the adoption of the treaty. The formulation in paragraph 2 of draft conclusion 12 follows closely the text of article 71, paragraph 2, of the 1969 Vienna Convention. It must be reiterated that, in such cases, the treaty only becomes invalid after the emergence of the peremptory norm of general international law (*jus cogens*). In other words, during the period between the adoption of the treaty and the emergence of the peremptory norm, the treaty remains valid and, consequently, acts performed and rights and obligations created pursuant to it remain valid. There can therefore, in general, be no obligation to eliminate consequences of acts validly performed. The draft conclusion states that the termination of a treaty due to conflict with a peremptory norm that emerges subsequent to the adoption of the treaty does not affect any right, obligation or legal situation created

through the execution of the treaty prior to the termination of the treaty. Thus, while the treaty becomes void, rights, obligations or legal situations created through the lawful performance under the treaty will in principle not be affected. However, those rights, obligations or legal situations may be maintained or relied upon only to the extent that their continued existence is not itself a violation of a peremptory norm of general international law (*jus cogens*).

(6) Paragraph 2 of draft conclusion 12 specifies, as does article 71 of the 1969 Vienna Convention, that it is the rights, obligations or legal situations "of the parties" that are unaffected. This does not mean, however, that rights, obligations or legal situations of third States created prior to the invalidation of the treaty will necessarily be affected. The Commission decided to specify "of the parties" because draft conclusion 12 concerns treaty relations. Thus, any right, obligation or legal situation of a third State or person, created through the execution of the treaty prior to its invalidation, is not affected to the extent that its maintenance is not in itself in conflict with peremptory norms of general international law (*jus cogens*).

Conclusion 13
Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)

1. A reservation to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).

Commentary

(1) Draft conclusion 13 concerns the effects of peremptory norms of general international law (*jus cogens*) on the rules of international law relating to reservations to treaties. The purpose of the draft conclusion is not to regulate reservations, which are dealt with in articles 19 to 23 of the 1969 Vienna Convention.

(2) Paragraph 1 addresses the case where a reservation is entered to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*). The formulation of paragraph 1 of draft conclusion 13 is based on the Commission's Guide to Practice on Reservations to Treaties.[155] It states that a reservation to a provision in a treaty that reflects a peremptory norm does not affect the binding nature of that norm which shall continue to apply as such. The phrase "as such" is intended to indicate that even when reflected in a treaty provision, a peremptory norm of general international law (*jus cogens*) continues to exist independently of the treaty provision. This means that, while the reservation may well affect the legal effect of the treaty provision in respect of the reserving State, the norm, as a peremptory norm of general international law (*jus cogens*), will not be affected and will continue to apply.[156] The rule reflected in this paragraph of draft conclusion 13 flows from the normal operation of international law. It derives, in particular, from the fact that the treaty provision reflecting a peremptory norm of general international law (*jus cogens*) has, in accordance with the jurisprudence of the International Court of Justice, an existence separate from the underlying peremptory norm.[157]

[155] Guideline 4.4.3. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 23 *et seq*. See also General Assembly resolution 68/111 of 16 December 2013, annex.

[156] *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment* (see footnote 66 above), at pp. 93–94, para. 175 (addressing this issue in the context of a reservation to a declaration recognizing as compulsory the jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the International Court of Justice).

[157] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J Reports 1984*, p. 392, at p. 424, para. 73 ("The fact that the above-mentioned principles, recognized as such, have been codified or embodied

(3) The rule in paragraph 1 of draft conclusion 13 does not relate to the validity of the reservation. In many cases, it would be expected that a reservation to a treaty provision reflecting a peremptory norm of general international law (*jus cogens*) would be contrary to the object and purpose of the treaty and thus invalid. However, whether the reservation is valid or not, and the consequences of any invalidity, are matters that are governed by the rules contained in the 1969 Vienna Convention and not the rules on peremptory norms of general international law (*jus cogens*). It would, thus, be going too far to prohibit a reservation to a provision in a treaty which reflects a peremptory norm of general international law (*jus cogens*) outright since such a determination should always be dependent upon ascertaining the object and purpose of the treaty in question – an exercise that can only be done through the interpretation of each particular treaty. It is nonetheless important to emphasize that, whatever the validity of the reservation in question, a State cannot escape the binding nature of a peremptory norm of general international law (*jus cogens*) by formulating a reservation to a treaty provision reflecting that norm.

(4) Paragraph 2 of draft conclusion 13 concerns reservations which, on their face, are neutral and do not relate to peremptory norms, but whose application would be contrary to a peremptory norm of general international law (*jus cogens*). Such reservations are invalid. Drawing on paragraph 2 of guideline 4.4.3 of the Guide to Practice on Reservations to Treaties, draft conclusion 13 states that a reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*). The typical example identified in the commentary to guideline 4.4.3 is a reservation "intended to exclude a category of persons from benefitting from certain rights granted under a treaty".[158] The right to education, though very important, is not at this time a peremptory norm of general international law (*jus cogens*). Thus, the formulation of a reservation to a treaty provision proclaiming a right to education would not, as such, be contrary to a peremptory norm of general international law (*jus cogens*), nor would it constitute a reservation to a treaty provision reflecting a peremptory norm of general international law (*jus cogens*). However, a reservation that limits the implementation of such right to a particular racial group or excludes a particular racial group from the enjoyment of the treaty right may well be found to violate the peremptory norm of general international law (*jus cogens*) prohibiting racial discrimination.[159]

Conclusion 14
Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)

1. A rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character.

2. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

3. The persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).

in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law"). See also *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment* (see footnote 66 above), at pp. 93–94, para. 174. This view is also implicit in *North Sea Continental Shelf* (footnote 67 above), at pp. 41 *et seq*., paras. 71 *et seq*.

[158] Guide to Practice on Reservations to Treaties (see footnote 155 above), para. (5) of the commentary to guideline 4.4.3.

[159] See, for example, paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85.

Commentary

(1) Draft conclusion 14 addresses the consequences of peremptory norms of general international law (*jus cogens*) for customary international law. Draft conclusion 14 is divided into three paragraphs. Paragraph 1 concerns the consequences that an existing peremptory norm of general international law (*jus cogens*) has on the formation of a new rule of customary international law. Paragraph 2 concerns the consequences that a new peremptory norm of general international law (*jus cogens*) has on existing rules of customary international law. Paragraph 3 addresses the non-applicability of the persistent objector rule to peremptory norms of general international law (*jus cogens*). Paragraphs 1 and 2 mirror draft conclusion 10, which distinguishes between the situation of a treaty at the time of its conclusion conflicting with an existing peremptory norm of general international law (*jus cogens*), on the one hand, and that of a treaty conflicting with a peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of a treaty.

(2) The first sentence of paragraph 1 of draft conclusion 14 provides that a rule of customary international law does not come into existence if it would conflict with a peremptory norm of general international law (*jus cogens*). The words "does not come into existence" are meant to indicate that, even if the constituent elements of customary international law were to be present (practice and *opinio juris*), a rule of customary international law would not come into existence if the putative rule conflicted with a peremptory norm of general international law (*jus cogens*). Unlike in the case of treaties, the terms "invalid" or "void" are not appropriate since the putative rule of customary international law does not come into existence in the first place.

(3) Peremptory norms of general international law (*jus cogens*) are hierarchically superior to other norms of international law and therefore override such norms in the case of conflict. Decisions of national courts have recognized that peremptory norms of general international law (*jus cogens*) prevail over conflicting rules of customary international law. In *Siderman de Blake* v. *Argentina,* the United States Court of Appeals for the Ninth Circuit considered that "[i]ndeed … the supremacy of *jus cogens* extends over all rules of international law" and noted that "norms that have attained the status of *jus cogens* 'prevail over and invalidate international agreements and other rules of international law in conflict with them'".[160] The Supreme Court of Argentina has similarly stated that crimes against humanity had the "character of *jus cogens*, meaning that [the prohibition is] above both treaty law, and all other sources of international law".[161]

(4) The position that peremptory norms of general international law (*jus cogens*) prevail over conflicting rules of customary international law has also been recognized in decisions of international courts and tribunals. In the *Jurisdictional Immunities of the State* case*,* the International Court of Justice noted the proposition of Italy that "*jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law".[162] The Court did not reject that proposition, but declined to find that there was a conflict between the rule on State immunities in civil proceedings and peremptory norms of general international law (*jus cogens*).[163] The hierarchical superiority of peremptory norms of general international law (*jus cogens*) over customary international law was also recognized in *Al-Adsani* v. *the United Kingdom*, in which the European Court of Human Rights determined, having considered *Prosecutor* v. *Anto Furundžija*, that peremptory norms of general international law (*jus cogens*) are those norms that enjoy "a

[160] *Siderman de Blake* v. *Argentina* (see footnote 21 above), p. 716 (citing the *Restatement (Third) of the Foreign Relations Law of the United States* (1987), § 102, comment k).

[161] *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad* (see footnote 51 above), para. 48 (*el carácter de* ius cogens *de modo que se encuentra no sólo por encima de los tratados sino incluso por sobre todas las fuentes del derecho*).

[162] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 140, para. 92.

[163] *Ibid.*, paras. 92–93. See, in this regard, U. Linderfalk, *Understanding* Jus Cogens *in International Law and International Legal Discourse*, Edward Elgar, 2020, at section 1.3.1 (examples include the priority-rule implicitly confirmed by the International Court of Justice in the case of *Jurisdictional Immunities of the State* (see footnote 162 above): in the event of a conflict between a *jus cogens* norm and a rule of customary international law, States must act upon the former).

higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".[164] The consequences of peremptory norms of general international law (*jus cogens*) on the existence of a conflicting rule of customary international law is aptly captured in the joint dissenting opinion of Judges Rozakis and Caflisch in the *Al-Adsani* v. *the United Kingdom* case:

> By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law … . For the basic characteristic of a *jus cogens* rule is that … it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails.[165]

(5) The rule in the first sentence of paragraph 1 of draft conclusion 14, which states that a rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*), follows from the fact that peremptory norms of general international law (*jus cogens*) prevail over conflicting rules of customary international law. Thus, the High Court of Kenya, in *The Kenya Section of the International Commission of Jurists* v. *the Attorney-General and Others*, stated that peremptory norms of general international law (*jus cogens*) "rendered void" any other rules of international law "which come into conflict with them".[166]

(6) The second sentence of paragraph 1 of draft conclusion 14 provides that the general principle captured in the first sentence is without prejudice to the possible modification of a peremptory norm of general international law *(jus cogens)* by a subsequent norm of general international law having the same character.[167] This is based on the recognition that, as provided for in draft conclusion 5, customary international law is the most common basis for peremptory norms of general international law (*jus cogens*) and that, therefore, modification of a peremptory norm of general international law (*jus cogens*) is most likely to occur through the subsequent acceptance and recognition of an existing rule of customary international law as a peremptory norm of general international law (*jus cogens*) or the emergence of a new rule of customary international law so accepted and recognized.

(7) While the current draft conclusions do not address the modification of peremptory norms of general international law (*jus cogens*), the second sentence of paragraph 1 serves to emphasize that, in principle, modification of peremptory norms of general international law (*jus cogens*) is possible. The threshold for modification of a peremptory norm of general international law (*jus cogens*) is, however, very high.[168] To be able to modify a peremptory norm of general international law (*jus cogens*), the rule of customary international law in question must have the same character as the peremptory norm of general international law (*jus cogens*) being modified. The phrase "having the same character", which is taken from article 53 of the 1969 Vienna Convention, indicates that such a rule of customary international law must itself be recognized and accepted as one from which no derogation is permitted and which can only be modified by a subsequent peremptory norm of general international law (*jus cogens*). In practice, this means that there must be, at the point of the emergence of a peremptory norm of general international law (*jus cogens*), a practice accepted as law (*opinio juris*) and which the international community of States as a whole,

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[164] *Al-Adsani* v. *the United Kingdom* (see footnote 18 above), para. 60. See also *Prosecutor* v. *Anto Furundžija* (footnote 18 above), para. 153.

[165] Joint dissenting opinion of Judges Rozakis and Caflisch (joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić) in *Al-Adsani* v. *the United Kingdom* (see footnote 18 above), para. 1. See also Kleinlein (footnote 98 above), p. 187 ("it is a relatively straightforward case to perceive a structural hierarchy between *jus cogens* and regional or local customary rules").

[166] *The Kenya Section of the International Commission of Jurists* v. *the Attorney-General and Others* (see footnote 73 above). See also *C* v. *Director of Immigration*, HCAL 132/2006, [2008] 2 HKC 165, [2008] HKCFI 109, ILDC 1119 (HK 2008), 18 February 2008, para. 75.

[167] The modification of peremptory norms of general international law (*jus cogens*) is considered in M. Payandeh, "Modification of peremptory norms of general international law", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 92–131.

[168] See *ibid*., at p. 122. See also D. Tladi, "Grotian moments and peremptory norms of general international law: friendly facilitators or fatal foes?", *Grotiana*, vol. 42 (2021), pp. 335–353, at p. 346 ("an exceedingly onerous threshold").

at the same time, accept and recognize as having peremptory character. That a rule of customary international law could only derogate from, and thus modify, a peremptory norm of general international law (*jus cogens*) if such a rule of customary international law also had a peremptory character is supported by a judgment of the Queen's Bench Division of the England and Wales High Court of Justice in *R (Mohamed)* v. *Secretary of State for Foreign and Commonwealth Affairs*, which, having referred to the hierarchical superiority of peremptory norms of general international law (*jus cogens*), stated that their "derogation by States through treaties or rules of customary law not possessing the same status [was] not permitted".[169]

(8) Paragraph 2 of draft conclusion 14 concerns situations where a rule of customary international law, which at the time of its formation did not conflict with an existing peremptory norm of general international law (*jus cogens*), conflicts with such a norm that emerges subsequent to the formation of the rule of customary international law. It provides that such a rule of customary international law "ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*)". The phrase "ceases to exist" indicates that, prior to the emergence of the new peremptory norm of general international law (*jus cogens*), the rule of customary international law was in force, but that it ceases to exist upon the emergence of the peremptory norm of general international law (*jus cogens*). The phrase "if and to the extent" is meant to indicate that only those parts of the rule of customary international law in question that conflict with the peremptory norm of general international law (*jus cogens*) will cease to exist. This phrase operates like a separability provision, in order to maintain those parts of the rule of customary international law that are consistent with the peremptory norm of general international law (*jus cogens*). The qualifier "if and to the extent" does not apply to paragraph 1 of draft conclusion 14 since, in the case of a pre-existing peremptory norm of general international law (*jus cogens*), the rule of customary international law in question does not come into existence at all.

(9) Paragraph 3 of draft conclusion 14 deals with the persistent objector rule. It provides that the persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*). Conclusion 15 of the Commission's conclusions on identification of customary international law states that a rule of customary international law is not opposable to a State that has persistently objected to that rule of customary international law while it was in the process of formation for as long as that State maintains its objection. Conclusion 15 of the conclusions on identification of customary international law also states, however, that this rule is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).[170]

(10) That the persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*) flows from both the universal application and hierarchical superiority of peremptory norms of general international law (*jus cogens*) as reflected in draft conclusion 2.[171] This means that peremptory norms of general international law (*jus cogens*) apply to all States. In this respect, the Federal Supreme Court of Switzerland, in *Youssef Nada* v. *State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, stated that *jus cogens* norms "were binding on *all subjects* of international law".[172] The Inter-

[169] *R (Mohamed)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579, para. 142 (ii). See also A. C. de Beer and D. Tladi, "The use of force against Syria in response to alleged use of chemical weapons by Syria: a return to humanitarian intervention?", *Heidelberg Journal of International Law*, vol. 79, No. 2 (2019), p. 217, in which the authors noted that if the prohibition on the use of force were regarded as a peremptory norm of general international law (*jus cogens*), a subsequent rule of customary international law could only emerge if it were "'accepted and recognized' as having a peremptory character, in a way that would modify the" pre-existing peremptory norm of general international law (*jus cogens*).

[170] Conclusion 15 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), pp. 152–154.

[171] On the universal application of these norms, see, for example, the written statement of 19 June 1995 by the Government of Mexico on the request for an advisory opinion submitted to the International Court of Justice by the General Assembly at its forty-ninth session (resolution 49/75K), para. 7 ("The norms … are of a legally binding nature for all the States (*jus cogens*)").

[172] *Youssef Nada* v. *State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (see footnote 40 above), para. 7 (emphasis added).

American Court of Human Rights has concluded that peremptory norms of general international law (*jus cogens*) "bind all States".[173] The rule that, by virtue of their universal application and hierarchical superiority, peremptory norms of general international law (*jus cogens*) cannot be subject to the persistent objector rule has been reflected in statements by States.[174] Specifically in response to an argument about the persistent objector rule, the Inter-American Commission on Human Rights, in *Michael Domingues* v. *United States*, determined that peremptory norms of general international law (*jus cogens*) "bind the international community as a whole, irrespective of protest, recognition or acquiescence".[175]

(11) A question that arises in scholarly writings is whether a peremptory norm of general international law (*jus cogens*) can ever emerge in the face of persistent objection of one or a few States.[176] It can because persistent objection to a rule of customary international law by a few States does not prevent the rule's emergence; rather, such objection merely renders that rule not opposable to the State or States concerned for so long as the objection is maintained. For that reason, the persistent objector rule does not prevent the emergence of a peremptory norm of general international law (*jus cogens*) based on a rule of customary international law to which one or more States have persistently objected. At the same time, if a rule of customary international law, to which a State has persistently objected, becomes accepted and recognized by the international community of States as a whole as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character, the effect of the persistent objection falls away.

(12) Whether there is such acceptance and recognition of a rule of general international law (*jus cogens*), however, may be affected by persistent objections to the establishment of the rule. According to paragraph 2 of draft conclusion 7, the phrase "international community of States as a whole" does not require the acceptance and recognition of all States, but does

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[173] *Juridical Condition and Rights of Undocumented Migrants* (see footnote 37 above), p. 113, paras. 4–5.

[174] See also the Islamic Republic of Iran, "the 'persistent objector' … had no place in the formation of *jus cogens*" (A/C.6/68/SR.26, para. 4). See also statements by States in the 2016 and 2018 meetings of the Sixth Committee (agenda item 78: report of the International Law Commission), particularly the following: Brazil "welcomed the clarification in draft conclusion 15 [of the conclusions on identification of customary international law] that the inclusion of the persistent objector rule was without prejudice to any issues of *jus cogens*" (A/C.6/71/SR.22, para. 18); Chile stated that "[w]here the rules of *jus cogens* were concerned, the persistent objector institution did not apply" (A/C.6/71/SR.21, para. 102); Cyprus "welcomed paragraph 3 [of conclusion 15 of the conclusions on identification of customary international law] … [as] without prejudice to any question concerning peremptory norms of general international law (*jus cogens*)" (A/C.6/73/SR.23, para. 43); El Salvador "agreed with the Special Rapporteur that the doctrine of the persistent objector was not applicable to *jus cogens* norms" (A/C.6/71/SR.25, para. 63); Finland, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), "welcomed the inclusion in the draft conclusions [on identification of customary international law] of the persistent objector rule … . Nonetheless, the category of rule to which the State objected should be taken into account and particular consideration must be given to universal respect for fundamental rules, especially those relating to the protection of individuals" (A/C.6/71/SR.20, para. 52); Greece "reiterated [the] delegation's doubts about the applicability of the persistent objector rule in relation not only to the rules of *jus cogens* but also to the broader category of the general principles of international law" (A/C.6/71/SR.22, para. 10); Iceland, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), stated that "the notion of persistent objector was not compatible with the concept of *jus cogens*" (A/C.6/71/SR.24, para. 63); Mexico stated that "there could be no persistent objection to *jus cogens* rules" (A/C.6/71/SR.22, para. 25); Slovenia "agreed with the enunciation of *jus cogens* norms as being of a special and exceptional nature, reflecting the common and overarching values adhered to by the international community. For that reason, [the] delegation reaffirmed its view that the persistent objector was incompatible with the nature of *jus cogens*" (A/C.6/71/SR.26, para. 114); South Africa "agreed with [the Special Rapporteur's] preliminary observation that there could be no objection to *jus cogens* norms" (*ibid.*, para. 86); and Spain stated that "it was regrettable that it had not been specifically stated in draft conclusion 15 [of the conclusions on identification of customary international law] that there could be no persistent objection to peremptory norms of general international law" (A/C.6/73/SR.21, para. 91).

[175] *Michael Domingues* v. *United States* (see footnote 18 above), para. 49.

[176] C. Mik, "*Jus cogens* in contemporary international law", *Polish Yearbook of International Law*, vol. 33, No. 27 (2013), p. 50. See also Costelloe (footnote 11 above), pp. 21–23.

require the acceptance and recognition of a very large and representative majority. Thus, if a rule of customary international law was the object of persistent objections from several States, such objections might not be sufficient to preclude the emergence of a rule of customary international law, but might be sufficient to preclude the norm from being recognized as a peremptory norm of general international law (*jus cogens*). In other words, to the extent that such persistent objection implies that the norm in question is not accepted and recognized by the international community of States as a whole as one from which no derogation is permitted, then a peremptory norm of general international law (*jus cogens*) might not arise.

(13) Paragraph 3 of draft conclusion 14 refers to the persistent objector "rule". The Commission settled on the "persistent objector rule" since this concept is often referred to as a "rule" and since the Commission has already referred to it as either a "rule" or a "doctrine" in its prior work.[177]

(14) The application of draft conclusion 14 is to be read together with the interpretative rule set out in draft conclusion 20 and the recommended procedure set forth in draft conclusion 21.

Conclusion 15
Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)

1. A unilateral act of a State manifesting the intention to be bound by an obligation under international law that would be in conflict with a peremptory norm of general international law (*jus cogens*) does not create such an obligation.

2. An obligation under international law created by a unilateral act of a State ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

Commentary

(1) Draft conclusion 15 addresses the legal consequences of peremptory norms of general international law (*jus cogens*) for unilateral acts of States manifesting the intention to be bound by an obligation under international law.[178] Draft conclusion 15 is based on the understanding that unilateral acts may, under certain conditions described below, establish obligations for the State performing the unilateral act. Paragraph 1 of draft conclusion 15 addresses those cases in which the unilateral act, at the time of its performance, is in conflict with a peremptory norm of general international law (*jus cogens*). It provides that, in such cases, the unilateral act does not create any such obligation. This consequence of peremptory norms of general international law (*jus cogens*) mirrors those in the first sentence of paragraph 1 of conclusions 10 and 14 of the present draft conclusions, namely that no obligations come into existence at all.

(2) Paragraph 1 of draft conclusion 15 is inspired by article 53 of the 1969 Vienna Convention.[179] The Commission, in its guiding principles applicable to unilateral declarations of States capable of creating legal obligations, formulated the rule in the following terms: "A unilateral declaration which is in conflict with a peremptory norm of general international

[177] For example, see the commentary to Part Four, as well as paragraph (4) of the commentary to conclusion 15, of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), p. 153.

[178] The scope of this draft conclusion is thus broader than the scope of the 2006 guiding principles applicable to unilateral declarations of States capable of creating legal obligations, which "relate only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international laws" (fifth preambular paragraph, *Yearbook … 2006*, vol. II (Part Two), pp. 161 *et seq*., paras. 176–177).

[179] See the Guide to Practice on Reservations to Treaties (footnote 155 above), p. 224, paragraph (18) of the commentary to guideline 3.1.5.3, stating that it was true that "the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts".

law is void."[180] Although the guiding principles use the phrase "is void" in the context of a unilateral declaration, the present draft conclusion uses broader phrases, "does not create such an obligation" and "ceases to exist", so as to capture more fully the broader context of the draft conclusion, which is addressing unilateral acts in a broader sense. The focus is therefore on the legal obligations intended to be created by the unilateral act in question. As indicated in paragraph 1, such obligations are not created if they conflict with a peremptory norm of general international law (*jus cogens*).

(3) Paragraph 2 concerns those cases in which a peremptory norm of general international law (*jus cogens*) emerges subsequent to the creation of an obligation under international law resulting from a unilateral act. The scope of this paragraph is different from that of paragraph 1 because paragraph 2 refers to obligations that have already been created by a unilateral act. Paragraph 2 provides that such an obligation would cease to exist if, subsequent to its creation, it comes into conflict with a new peremptory norm of general international law (*jus cogens*). Paragraph 2 of draft conclusion 15 mirrors paragraph 2 of draft conclusions 10 and 14. It recognizes that, in these circumstances, an obligation does come into existence and only ceases to exist at the time of the emergence of a new peremptory norm of general international law (*jus cogens*). The rule in paragraph 2 of draft conclusion 15 is inspired by article 64 of the 1969 Vienna Convention.

(4) The obligations arising from a unilateral act that conflict with a new peremptory norm of general international law (*jus cogens*) emerging subsequent to the performance of the unilateral act cease to exist only to the extent that such obligations are inconsistent with the new peremptory norm of general international law (*jus cogens*). As in paragraph 2 of draft conclusion 14, the phrase "if and to the extent" is meant to indicate that only those aspects of the obligation in question that conflict with the peremptory norm of general international law (*jus cogens*) will cease to exist. Other aspects of the obligation would continue to exist and apply, but only if it is possible to maintain them in the absence of the aspects of the obligations that cease to exist.

(5) Draft conclusion 15 does not concern all unilateral acts, nor does it concern all acts creating obligations. It is concerned with unilateral acts by a State undertaken with the intention to create obligations only for the State itself. This draft conclusion does not concern sources of obligations, such as treaties and customary international law, which are addressed in previous draft conclusions. Similarly, it does not address reservations, which are dealt with in draft conclusion 13. Moreover, draft conclusion 15 does not cover other acts in conflict with peremptory norms of general international law (*jus cogens*), which are addressed by other draft conclusions concerning responsibility for wrongful acts under international law. For example, a unilateral act that is not intended to create obligations on the State but that, nonetheless, constitutes a breach of a peremptory norm of general international law (*jus cogens*), is subject to conclusions 17, 18, 19 and 22 of the present draft conclusions. Draft conclusion 15 concerns only those unilateral acts by which a State manifests the intention to unilaterally assume obligations, and not other acts.[181]

(6) Paragraph 1 of draft conclusion 15 describes the unilateral act under consideration as one "manifesting the intention to be bound by an obligation under international law". The State performing the unilateral act must thus intend to establish obligations under international law. This requires an ascertainment of the intention of the State performing a unilateral act. In *Frontier Dispute (Burkina Faso/Republic of Mali)*, the International Court of Justice determined that whether a unilateral act could create obligations "all depends on the intention of the State in question".[182] The words "manifesting the intention" intend to

[180] Guiding principle 8 of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations (see footnote 178 above), p. 165.

[181] See the commentary to guiding principle 2 of the 2006 guiding principles applicable to unilateral declarations of States capable of creating legal obligations (*ibid*., p. 162).

[182] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 554, at p. 573, para. 39. See also *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 267, para. 43 ("When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration").

convey that, although it is the subjective intention of the State that is sought, this intention has to be determined from the overall facts and circumstances of each particular case.[183] The subjective intention is therefore to be sought by relying on objective facts. In the words of the International Court of Justice, whether a unilateral act was intended to create a legal obligation is to be "ascertained by interpretation of the act".[184] Likewise, paragraph 2 of draft conclusion 15 only applies to unilateral acts as described in paragraph (5) of this commentary.

(7) Draft conclusion 15 applies to unilateral acts of States. Unilateral acts of international organizations that create or are intended to create obligations for that international organization are addressed in draft conclusion 16. The fact that draft conclusion 15 applies to unilateral acts of States is without prejudice to the possible legal consequences of peremptory norms of general international law (*jus cogens*) for unilateral acts of non-State actors.

(8) The application of draft conclusion 15 is to be read together with the interpretative rule set out in draft conclusion 20 and the recommended procedure set forth in draft conclusion 21.

Conclusion 16
Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)

A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*).

Commentary

(1) Draft conclusion 16 concerns the legal consequences of peremptory norms of general international law (*jus cogens*) for resolutions, decisions and other acts of international organizations.

(2) Draft conclusion 16 applies to resolutions, decisions or other acts of international organizations whatever their designation. The phrase "resolution, decision or other act" of an international organization is intended to convey the same meaning as the description of "resolution" in paragraph (2) of the commentary to conclusion 12 of the conclusions on identification of customary international law.[185] It also covers unilateral acts of international organizations manifesting an intention to be bound. The words "that would otherwise have binding effect" serve to limit the scope of the draft conclusion to resolutions, decisions and acts of international organizations that would ordinarily have binding effect, but for the conflict with the peremptory norm of general international law (*jus cogens*). Examples of a resolution, decision or act of an international organization that would otherwise have binding effect include a decision in a resolution of the Security Council,[186] taken under Chapter VII of the Charter of the United Nations,[187] or a decision of the General Assembly admitting a

[183] *Frontier Dispute* (see footnote 182 above), p. 574, para. 40.

[184] *Nuclear Tests (Australia* v. *France)* (see footnote 182 above), p. 267, para. 44.

[185] See paragraph (2) of the commentary to conclusion 12 of the conclusions on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), p. 147.

[186] By virtue of Article 25 of the Charter of the United Nations, which provides that the "Members of the United Nations agree to accept and carry out the decisions of the Security Council", the decisions of the Security Council under Chapter VII of the Charter of the United Nations are binding.

[187] For the statements by States, see for example, Switzerland, on behalf of Germany, Sweden and Switzerland: "some courts have also expressed their willingness to ensure that Security Council decisions comply with" peremptory norms of general international law (*jus cogens*), "from which neither the Member States nor the United Nations may derogate" (S/PV.5446, p. 28); and Qatar: while, by virtue of Article 103 of the Charter of the United Nations, obligations flowing from Security Council resolutions supersede other obligations, this did not apply to peremptory norms of general international law (*jus cogens*) (S/PV.5779, p. 23). See also Argentina and Nigeria (S/PV.5474, p. 20;

State to membership in the Organization. The question of whether such a decision has binding effect (or is one that would otherwise have binding effect) is to be determined by an interpretation of the relevant decision.[188] The European Union also produces acts in the form of directives, regulations and decisions, which are binding on member States. Other international organizations, such as the International Civil Aviation Organization, the African Union and the World Trade Organization may also produce resolutions, decisions or other acts that, but for the rule set forth in this draft conclusion, would have binding effect. Draft conclusion 16 is thus meant to be broad, covering all resolutions, decisions and acts that would otherwise establish obligations under international law.

(3) Following the language of draft conclusions 14 and 15, draft conclusion 16 states that resolutions, decisions and other acts, as described in paragraph (2) of this commentary, do not create obligations under international law if and to the extent that such obligations conflict with peremptory norms of general international law (*jus cogens*). As in paragraph 2 of draft conclusion 14 and paragraph 2 of draft conclusion 15, the words "if and to the extent" are meant to indicate that only those obligations that conflict with a peremptory norm of general international law (*jus cogens*) will be affected by the operation of the draft conclusion. Other obligations not in conflict with peremptory norms of general international law (*jus cogens*) will not be affected by the operation of draft conclusion 16. Provisions in a resolution, decision or other act of an international organization that are not in conflict with a peremptory norm of general international law (*jus cogens*) will continue to apply if they are separable.

(4) The rule in draft conclusion 16, that a resolution, decision or act does not create obligations under international law if those obligations conflict with a peremptory norm of general international law (*jus cogens*), follows from the hierarchical superiority of peremptory norms of general international law (*jus cogens*). If rules of international law that are inconsistent with peremptory norms of general international law (*jus cogens*) cannot be created through treaties, customary international law and unilateral acts, it follows that such

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and S/PV.5474 (Resumption 1), p. 19, respectively); Finland, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), observing that there was a "widely held view that the powers of the Security Council, albeit exceptionally wide, were limited by the peremptory norms of international law" (A/C.6/60/SR.18, para. 18); and the Islamic Republic of Iran (A/C.6/66/SR.7, para. 84). For other views by States, see the United States (A/C.6/60/SR.20, para. 36), which cautioned that "general pronouncements about the relationship" between peremptory norms of general international law (*jus cogens*) and obligations flowing from Article 103 of the Charter of the United Nations (of which the Security Council resolutions were a prominent example) "should be avoided"; the United Kingdom (A/C.6/73/SR.27, para. 73, citing paragraph 5 of the annex to the written statement), stating that there is no "State practice to support the contention that a State can refuse to comply with a binding [Security Council] resolution based on an assertion of a breach of a *jus cogens* norm"; and the Russian Federation (A/C.6/73/SR.26, para. 131), which emphasized that discussions on the issue of Security Council resolutions in connection with *jus cogens* norms "were not based on any practice", and that the draft conclusion could be misinterpreted in a way "which would undermine the activities of the Security Council". For the views of Courts see, for example, *R (On the Application of Al-Jedda)* v. *Secretary of State for Defence, Appeal Judgment of 12 December 2007*, House of Lords [2008] 3 All ER 28 (Lord Bingham), para. 35; *Youssef Nada* v. *State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (see footnote 40 above), para. 7 ("Yet *jus cogens*, the peremptory law binding on all subjects of international law, marks the limit of the obligation to apply resolutions of the Security Council. For this reason, it must be determined whether, as the petitioner asserts, the resolutions of the Security Council containing the sanctions violate *jus cogens*"); *Prosecutor* v. *Duško Tadić, Case No. IT-94-1, Decision of 15 July 1999*, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 296; and *Yassin Abdullah Kadi* v. *Council of the European Union and Commission of the European Communities* (see footnote 46 above), para. 226 (on appeal, the European Court did not address the matter).

[188] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 122 above), p. 53, para. 114 ("The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council").

rules cannot be created through resolutions, decisions or other acts of international organizations either. Obligations arising under the Charter of the United Nations, however, require additional consideration since, pursuant to Article 103, such obligations prevail in the event of conflict over other rules of international law.[189] If a resolution, decision or other act of the United Nations does not create obligations under international law due to a conflict with a peremptory norm of general international law (*jus cogens*) then no obligations arise that implicate Article 103. For this reason, considering the hierarchical superiority of peremptory norms of general international law (*jus cogens*), the Commission considered it important to highlight that draft conclusion 16 applies equally to binding resolutions, decisions and acts of the Security Council.

(5) The application of the rule in draft conclusion 16 has to be read together with the interpretative rule set out in draft conclusion 20 and the procedures laid out in draft conclusion 21. While the procedural rules laid out in draft conclusion 21 apply also to other sources of obligations, these are particularly important in relation to resolutions of the United Nations adopted under Chapter VII of the Charter of the United Nations.[190] Draft conclusion 16 should therefore not be read as providing cover for unilateral repudiation of obligations flowing under binding resolutions of the United Nations. Indeed, while the commentary states that Security Council resolutions are covered by draft conclusion 16, the Commission is conscious that it is highly unlikely that a Security Council resolution would, on its face, be in conflict with a peremptory norm of general international law (*jus cogens*).[191] Thus, in the first place, before determining that there is a conflict between a Security Council decision and a peremptory norm of general international law (*jus cogens*), the rule of interpretation contained in draft conclusion 20 should be applied in order to avoid, where possible, such a conflict.[192] Second, prior to adopting any measure on the strength of a belief that a binding Security Council resolution is in conflict with a peremptory norm of general international law (*jus cogens*), a State should follow the procedure set forth in draft conclusion 21.

Conclusion 17
Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)

1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest.

2. Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.

Commentary

(1) Draft conclusion 17 addresses obligations *erga omnes*. It consists of two paragraphs. Paragraph 1 states that peremptory norms of general international law (*jus cogens*) give rise

[189] Article 103 of the Charter of the United Nations provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". While this provision speaks only of international agreements, it has been interpreted as applying to customary international law and certainly to resolutions, decisions and acts of other international organizations. See, for discussion, the report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (footnote 54 above), paras. 344–345, especially at para. 345 ("Therefore it seems sound to join the prevailing opinion that Article 103 should be read extensively – so as to affirm that [C]harter obligations prevail also over United Nations Member States' customary law obligations").

[190] See, on the importance of the procedural rules for the application of peremptory norms of general international law (*jus cogens*), M. Wood, "The unilateral invocation of *jus cogens* norms", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 366–385.

[191] See D. Costelloe, "Peremptory norms and resolutions of the United Nations Security Council", *ibid.*, at pp. 441–467.

[192] *Ibid.*, at p. 444 ("Interpretation of the Security Council resolution in its context and in light of other applicable rules of international law may already provide an answer").

to obligations owed to the international community as a whole (obligations *erga omnes*). The relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* has been recognized in the practice of States. The Democratic Republic of the Congo, for example, in a statement in the Sixth Committee of the General Assembly, proposed a treaty on the prohibition of the use of force and stated that the proposed treaty should have an *erga omnes* effect in view of the fact that the prohibition of the use of force was a peremptory norm of general international law (*jus cogens*).[193] Similarly, the Czech Republic stated that "*jus cogens* obligations were *erga omnes* obligations, which did not allow for any derogation, including by means of an agreement".[194] The Federal Court of Australia, in *Nulyarimma and Others* v. *Thompson*, also accepted the contention of the parties that "the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) giving rise to non derogable obligations *erga omnes* that is, enforcement obligations owed by each nation State to the international community as a whole".[195] Similarly, in *Kane* v. *Winn*, the United States District Court for the District of Massachusetts determined that "the prohibition against torture" is an obligation *erga omnes* that, "as [a] *jus cogens* [norm is] 'non-derogable and peremptory'".[196] The Federal Constitutional Court of Germany has also stated that norms that are part of *jus cogens* enjoy *erga omnes* effect.[197]

(2) The International Court of Justice has not explicitly pronounced that a link exists between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes.* Nevertheless, such a link could be deduced from some of its judgments and advisory opinions. First, every norm described by the Court[198] as one having an *erga omnes* character is also one that has been included in the non-exhaustive list of norms previously referred to by the Commission as having peremptory status. This list is reproduced in the annex to the present draft conclusions. Second, the Court has applied the legal consequences under article 41 of the articles on responsibility of States for internationally wrongful acts (which concern

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[193] The Democratic Republic of the Congo (formerly known as Zaire) (A/C.6/35/SR.32, para. 38). See also the statement of the Netherlands at the 25th meeting of the Sixth Committee during the forty-ninth session of the General Assembly, in which it stated that "an international crime would always involve a breach of a *jus cogens* or *erga omnes* obligation" (A/C.6/49/SR.25, para. 38).

[194] Czech Republic (A/C.6/49/SR.26, para. 19). See also Burkina Faso (A/C.6/54/SR.26).

[195] *Nulyarimma and Others* v. *Thompson, Appeal Decision of 1 September 1999*, [1999] FCA 1192, 165 ALR 621, 96 FCR 153, ILDC 2773 (AU 1999), para. 81.

[196] *Kane* v. *Winn*, United States District Court for the District of Massachusetts, 319 F. Supp. 2d 162, 199 (D. Mass. 2004). See also *R and Office of the United Nations High Commissioner for Refugees* v. *Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Home Affairs, Appeal Judgment of 12 October 2006 of the High Court*, [2006] ALL ER (D) 138, para. 102, referring to "*ius cogens erga omnes*".

[197] *Jorgić Case* (see footnote 57 above), at para. 17.

[198] See, for example, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019*, p. 95, at p. 139, para. 180 (viewing the right of self-determination as having an *erga omnes* character). See also *East Timor (Portugal* v. *Australia)* (footnote 132 above), p. 102, para. 29, in which the Court described the statement that self-determination had an *erga omnes* character as being "irreproachable". In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (see footnote 15 above), the Court affirmed "that the Genocide Convention contains obligations *erga omnes*" and "that the prohibition of Genocide has the character of a peremptory norm (*jus cogens*)" (*ibid*., p. 47, para. 87). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)* (footnote 17 above); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 132 above), paras. 88, 149 and 155; and *Barcelona Traction* (*ibid.*), p. 32, paras. 33–34, in which the Court determined "obligations [that] derive … from the outlawing of acts of aggression, and of genocide … [and] including protection from slavery and racial discrimination". See also conclusion (33) of the conclusions of the Study Group on the fragmentation of international law (footnote 54 above). The conclusions also appear in *Yearbook … 2006*, vol. II (Part Two), para. 251. Although in the context of e*rga omnes inter partes*, see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Provisional Measures (The Gambia* v. *Myanmar)* (footnote 17 above).

breaches of peremptory norms) to breaches of such *erga omnes* obligations.[199] The Commission itself has been more explicit in recognizing a close relationship between obligations *erga omnes* and peremptory norms of general international law (*jus cogens*).[200] The relationship between peremptory norms and obligations *erga omnes* has also been recognized in scholarly writings.[201]

(3) Although all peremptory norms of general international law (*jus cogens*) give rise to obligations *erga omnes,* it is widely considered that not all obligations *erga omnes* arise from peremptory norms of general international law (*jus cogens*).[202] For example, certain rules relating to common spaces, in particular common heritage regimes, may produce *erga omnes* obligations independent of whether they have peremptory status. The International Tribunal for the Law of the Sea determined that the obligations of States parties relating to preservation of the environment of the high seas and the deep seabed under the 1982 United Nations Convention on the Law of the Sea had an *erga omnes* character.[203]

(4) Paragraph 1 of draft conclusion 17 is intended to capture, in a general way, the relationship described above between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*. It states that peremptory norms of general international law (*jus cogens*) "give rise to" obligations *erga omnes*. This wording is based on the Commission's articles on responsibility of States for internationally wrongful acts, in which obligations *erga omnes* are described as including those obligations which "arise under

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[199] See the articles on responsibility of States for internationally wrongful acts (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76, and the commentaries thereto, para. 77). The articles also appear in General Assembly resolution 56/83 of 12 December 2001, annex, as modified by A/56/49(Vol. I)/Corr.4. See, in particular, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (footnote 198 above), at p. 139, para. 180; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 132 above), para. 159.

[200] See Part Two, chapter III, of the articles on responsibility of States for internationally wrongful acts, especially paragraph (4) of the general commentary to that chapter, in which "the recognition of the concept of peremptory norms of international law" is said to be a development "closely related" to obligations *erga omnes*, and paragraph (7) of the general commentary, in which the Commission states that "there is at the very least substantial overlap between" obligations *erga omnes* and peremptory norms of general international law (*jus cogens*) (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 111–112).

[201] See, for example, R. J. Barber, "Cooperating through the General Assembly to end serious breaches of peremptory norms", *International and Comparative Law Quarterly*, vol. 71 (2022), pp. 1–35, at p. 4; A. Pigrau, "Peremptory norms in the advisory opinion of the International Court of Justice on the decolonisation of Mauritius and the Chagos Archipelago", *in* T. Burri and J. Trinidad (eds.), *The International Court of Justice and Decolonisation: New Directions from the* Chagos *Advisory Opinion*, Cambridge University Press, 2021, at p. 119; Ene (footnote 55 above), at p. 302; M. Cherif Bassiouni, "International crimes: *jus cogens* and *obligatio erga omnes*" (footnote 141 above); I. Scobbie, "The invocation of responsibility for the breach of 'obligations under peremptory norms of general international law'", *European Journal of International* Law, vol. 13, No. 5 (2002), p. 1210 ("Following *Barcelona Traction,* the Commission has taken the view that peremptory norms and obligations 'owed to the international community as a whole' are essentially two sides of the one coin"); F. Forrest Martin, "Delineating a hierarchical outline of international law sources and norms", *Saskatchewan Law Review*, vol. 65 (2002), p. 353; S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, Paris, Presses Universitaires de France, 2005, p. 106; Tomuschat, "Reconceptualizing the debate …" (footnote 55 above), p. 430; A. Pellet, "Conclusions", *in* Tomuschat and Thouvenin (*ibid*.); and M. M. Bradley, "*Jus cogens'* preferred sister: obligations *erga omnes* and the International Court of Justice—fifty years after *Barcelona Traction* case", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 193–226.

[202] See, for example, Villalpando (footnote 201 above); Forrest Martin (footnote 201 above); and P. Lorenzo, "The protection of the environment as an imperative norm of international law (*ius cogens*)", *Revista de derecho de la Universidad de Montevideo*, vol. 37 (2020), pp. 41–69, at p. 48.

[203] *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the area, Advisory Opinion, ITLOS [International Tribunal for the Law of the Sea] Reports 2011*, at p. 59, para. 180.

peremptory norms of general international law".[204] The phrase "in relation to which all States have a legal interest" describes the main consequence of the *erga omnes* character of peremptory norms of general international law (*jus cogens*).[205] The words "legal interest" encompass the protection of the legal norm as such, including rights and obligations.

(5) The phrase "in relation to which" is intended to capture the variety of ways that States may have an interest in obligations *erga omnes* (including obligations *erga omnes partes*). In *Barcelona Traction*, for example, the International Court of Justice referred to the legal interest in the "protection" of the rights covered by *erga omnes* obligations.[206] That formulation has also been used in *Questions Relating to the Obligation to Prosecute or Extradite*,[207] the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[208] the advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*[209] and the *East Timor (Portugal* v. *Australia)* judgment.[210] In its judgment in the *Barcelona Traction* case, which has been subsequently reiterated, the Court referred to the legal interest of all States in the "observance" of the obligation in question.[211] The notion that all States have an interest in the "observance" or "compliance" with the obligation has also been reflected in *Questions Relating to the Obligation to Prosecute or Extradite*[212] and in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*.[213] The Court has also referred to the legal interest of States in the prevention of acts covered by *erga omnes* obligations.[214] In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court referred to the "common interest" in the "accomplishment of those high purposes which are the *raison d'être* of the

[204] Paragraph (7) of the general commentary to Part Two, chapter III, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 111–112.

[205] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (see footnote 198 above), at p. 139, para. 180 ("all States have a legal interest in protecting that right"); and *Barcelona Traction* (see footnote 132 above), p. 32, para. 33 ("all States can be held to have a legal interest in their protection)". See also *Prosecutor* v. *Blaškić, Case No. IT-95-14-AR108* bis, *Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, Judgment of 29 October 1997*, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, ILR, vol. 110 (1998), p. 688, at para. 26 ("Article 29 [of the Statute of the International Criminal Tribunal for the Former Yugoslavia] imposes an 'obligation *erga omnes partes*' … . By the same token, Article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in Article 29").

[206] See *Barcelona Traction* (footnote 132 above), p. 32, para. 33.

[207] *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 80 above), at p. 449, para. 68 ("These obligations may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case").

[208] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 132 above), at para. 155.

[209] See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (footnote 198 above), at p. 139, para. 180.

[210] See *East Timor (Portugal* v. *Australia)* (footnote 132 above), p. 102, para. 29.

[211] See *Barcelona Traction* (footnote 132 above), at p. 32, para. 35 ("It cannot be held, when one such obligation in particular is in question [diplomatic protection], in a specific case, that all States have a legal interest in its observance."). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar),* Preliminary Objections, International Court of Justice, Judgment of 22 July 2022, para. 107.

[212] *Questions Relating to the Obligation to Prosecute or Extradite* (see footnote 80 above), at p. 449, para. 68 ("These obligations may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case").

[213] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)* (see footnote 17 above), p. 17, para. 41 ("these provisions generated 'obligations [which] may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case'").

[214] *Ibid.* ("In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity").

convention".[215] The phrase "in relation to which" is intended to capture all these different formulations.

(6) Paragraph 2 of draft conclusion 17 builds on paragraph 1 by describing a distinct consequence of the connection between obligations *erga omnes* and peremptory norms of general international law (*jus cogens*). It describes, in more precise terms, the implications of the phrase "in which all States have a legal interest" in paragraph 1. This consequence is that any State is entitled to invoke the responsibility of another State for the latter's breach of a peremptory norm of general international law (*jus cogens*). The words used in paragraph 2 of draft conclusion 17 follow the text of article 48 of the Commission's articles on responsibility of States for internationally wrongful acts, which provides that "[a]ny State … is entitled to invoke the responsibility of another State … if … the obligation breached is owed to the international community as a whole".[216]

(7) The rule contained in paragraph 2 of draft conclusion 17 is consistent with judicial decisions of international courts and tribunals. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, the International Court of Justice determined that a State party to the Convention on the Prevention and Punishment of the Crime of Genocide, even if not "a specially affected State, may invoke the responsibility of another State party" in respect of "the alleged failure to comply with its obligations *erga omnes partes*".[217] On this basis, the Court concluded that the Gambia had *prima facie* standing to submit a dispute concerning violations of the obligations under the Convention, alleged to have been committed in Myanmar, even though it was not specially affected by those breaches.[218] The Court subsequently confirmed that the Gambia had standing to invoke the responsibility of Myanmar for alleged violations of its obligations under the Convention.[219] While the case concerned obligations *erga omnes partes*, the principle applies equally to *erga omnes* obligations generally. Similarly, in *Responsibilities and Obligations of States Sponsoring Persons and Entities*, the International Tribunal for the Law of the Sea determined that each State party to the Convention might be entitled to submit a claim for damage, "in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area".[220]

(8) According to paragraph 2 of draft conclusion 17, the right of a State to invoke the responsibility of another State for the latter's breach of a peremptory norm of general international law (*jus cogens*) is to be exercised in accordance with the rules on responsibility of States for internationally wrongful acts. This qualification is intended to emphasize the distinction between the invocation of responsibility by an injured State and the invocation of responsibility by any other State. Under the articles on responsibility of States for internationally wrongful acts, the right of an injured State to invoke the responsibility of another State for the breach of a peremptory norm of general international law (*jus cogens*) is to be exercised according to article 42, whereas any State other than an injured State is entitled to invoke the responsibility for such a breach under article 48.[221] A State other than an injured State may claim "cessation of the internationally wrongful act, and assurances and

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[215] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 14 above), at p. 23.

[216] Article 48, paragraph 1 (*b*), *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 126.

[217] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)* (see footnote 17 above), p. 17, para. 41. In the Preliminary Objections phase, the Court used the term "special interest": *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Preliminary Objections (see footnote 211 above), para. 108.

[218] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)* (see footnote 17 above), p. 17, para. 42; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Preliminary Objections (see footnote 211 above), para. 108.

[219] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Preliminary Objections (see footnote 211 above), para. 114.

[220] *Responsibilities and Obligations of States Sponsoring Persons and Entities* (see footnote 203 above), at p. 59, para. 180.

[221] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 126, paragraph (1) of the commentary to article 48.

guarantees of non-repetition".[222] When invoking the responsibility of another State in its capacity as an injured State, the injured State is entitled to claim all the forms of reparation provided for in chapter II of Part Two of the articles on responsibility of States for internationally wrongful acts. In contrast, a State other than an injured State may only claim "performance of the obligation of reparation … in the interest of the injured State or of the beneficiaries of the obligation breached" and not for its own benefit.[223]

(9) While draft conclusion 17 provides for the entitlement of States to invoke the responsibility of other States, it is without prejudice to the rules of international law concerning the invocation of the responsibility of other actors. Draft conclusion 17 is also without prejudice to the entitlement of international organizations to invoke the responsibility of States or other international organizations.[224]

Conclusion 18
Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness

No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

Commentary

(1) Draft conclusion 18 addresses circumstances precluding wrongfulness in relation to a breach of a peremptory norm of general international law (*jus cogens*). As a general rule, the existence of certain circumstances can serve to preclude the wrongfulness of an act of a State that would otherwise be unlawful.[225] Draft conclusion 18 sets out an exception to this general rule on responsibility under international law by providing that where the breach in question concerns a peremptory norm of general international law (*jus cogens*), the circumstances precluding wrongfulness may not be invoked.

(2) Draft conclusion 18 is based on article 26 of the articles on responsibility of States for internationally wrongful acts,[226] which excludes the invocation of grounds precluding wrongfulness, as spelled out in chapter V of Part One of the articles, for any act that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*). The effect of this rule is that, where the responsibility of a State for a breach of a peremptory norm of general international law (*jus cogens*) is invoked, the State against which the breach is invoked cannot seek to excuse itself from responsibility by raising any circumstance that might ordinarily preclude wrongfulness. This applies even where the circumstance precluding wrongfulness itself involves a peremptory norm of general international law (*jus cogens*). As the Commission has previously stated, a genocide cannot be invoked as a justification for the commission of a counter-genocide.[227]

(3) This rule was applied in *Bernhard von Pezold and others* v. *Republic of Zimbabwe* where a Tribunal of the International Centre for Settlement of Investment Disputes (ICSID) held that Zimbabwe could not raise any of the grounds precluding wrongfulness, in that case necessity, for breaches of the prohibition of discrimination, which the Tribunal described as an obligation *erga omnes*.[228] While the Tribunal did not conclude that prohibition of racial discrimination is a peremptory norm of general international law (*jus cogens*), it did rely on

[222] *Ibid.*, art. 48, para. 2 (*a*).
[223] *Ibid.*, art. 48, para. 2 (*b*).
[224] *Yearbook … 2011*, vol. II (Part Two), pp. 89–91.
[225] See, generally, Part One, chapter V, of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 71 *et seq*. Paragraph (1) of the general commentary to Part One, chapter V, states that the existence of these grounds "provides a shield against an otherwise well-founded claim for the breach of an international obligation" (*ibid.*, p. 71).
[226] *Ibid*., pp. 84–85.
[227] See *ibid.*, p. 85, paragraph (4) of the commentary to article 26.
[228] See *Bernhard von Pezold and others* v. *Republic of Zimbabwe, Case No. ARB/10/15, Award of 28 July 2015*, ICSID, at para. 657.

article 26 of the articles on responsibility of States for internationally wrongful acts for its finding that necessity was not available for Zimbabwe.[229] In another award, in *CMS Gas Transmission Company* v. *the Argentine Republic*, the ICSID Tribunal found that it could not refuse to admit necessity because a peremptory norm of general international law (*jus cogens*) was not in issue.[230] The Federal Constitutional Court of Germany also stated, on the strength of article 26, that circumstances precluding wrongfulness did not apply to obligations arising from peremptory norms of general international law (*jus cogens*).[231]

(4) Article 26 of the articles on the responsibility of international organizations[232] also provides that the wrongfulness of an act of an international organization not in conformity with a peremptory norm of general international law (*jus cogens*) will not be precluded by the invocation of a circumstance precluding the wrongfulness of that act.

Conclusion 19
Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)

1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*).

2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation.

3. A breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.

4. This draft conclusion is without prejudice to the other consequences that any breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*) may entail under international law.

Commentary

(1) Draft conclusion 19 concerns particular consequences of serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*). It is based on article 41 of the articles on responsibility of States for internationally wrongful acts. Draft conclusion 19 is concerned only with "additional consequences" arising from serious breaches of peremptory norms of general international law (*jus cogens*).[233] It does not address consequences arising from breaches of rules of international law that are not of a peremptory character, nor does it address the consequences of breaches of peremptory norms that are not serious in nature.

(2) The first particular consequence of serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) is provided in paragraph 1 of draft conclusion 19. Paragraph 1 of the draft conclusion, which is based on article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts, provides that States shall cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*). The obligation to "cooperate to bring to an end through lawful means" serious breaches of peremptory norms of general international law (*jus cogens*) builds on the general obligation to cooperate under

[229] *Ibid.*

[230] *CMS Gas Transmission Company* v. *the Argentine Republic, Case No. ARB/01/08, Award of 12 May 2005*, ICSID, at para. 325.

[231] See *Order of 26 October 2004*, Federal Constitutional Court of Germany (footnote 25 above), para. 121.

[232] *Yearbook … 2011*, vol. II (Part Two), p. 75.

[233] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paragraph (7) of the general commentary to Part Two, chapter III, of the articles on responsibility of States for internationally wrongful acts, pp. 111–112. See also C. Gutiérrez Espada, *De la alargada sombra del 'ius cogens'*, Granada, Comares, 2021, p. 3.

international law.[234] Although at the time of the adoption of its articles on responsibility of States for internationally wrongful acts, the Commission expressed some doubt as to whether the obligation expressed in paragraph 1 of article 41 constituted customary international law,[235] the obligation to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) is now recognized under international law.

(3) This obligation has been recognized in judicial decisions. The United Kingdom House of Lords in *A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening)* v. *Secretary of State for the Home Department,* for example, referred explicitly to the obligation under international law "to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law", and cited both article 41 of the articles on responsibility of States for internationally wrongful acts and the advisory opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[236] The Federal Constitutional Court of Germany, in a 2004 order, referred to the articles on responsibility of States for internationally wrongful acts when setting out the duty to cooperate.[237]

(4) An example from a regional court can be found in the *Case of La Cantuta* v. *Peru,* wherein the Inter-American Court of Human Rights identified "the duty of cooperation among States for" the purpose of eradicating breaches as itself a consequence of breaches of obligations arising under peremptory norms of general international law (*jus cogens*).[238]

(5) In its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court determined that there is an obligation to cooperate to bring to an end breaches of "obligations to respect the right … to self-determination, and certain … obligations under international humanitarian law".[239] The Court determined that one of the obligations arising from the breaches of such obligations was an obligation on other States "while respecting the [Charter of the United Nations] and international law, to see to it that any impediment, resulting from" the breaches are "brought to an end".[240] Similarly, in its advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court determined that all States "must co-operate

[234] See, for example, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1 ("States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences"). See also the draft articles on the protection of persons in the event of disasters, *Yearbook … 2016*, vol. II (Part Two), paragraph (1) of the commentary to draft article 7, p. 37 ("The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments").

[235] See paragraph (3) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 114.

[236] *A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening)* v. *Secretary of State for the Home Department, Judgment of the House of Lords of 8 December 2005*, [2006] 1 All ER 575, para. 34.

[237] See *Order of 26 October 2004*, Federal Constitutional Court of Germany (footnote 25 above), para. 98.

[238] *Case of La Cantuta* v. *Peru, Merits, Reparations and Costs, Judgment of 29 November 2006*, Inter-American Court of Human Rights, para. 160 ("As pointed out repeatedly, the acts involved in the instant case have violated peremptory norms of international law (jus cogens). … In view of the nature and seriousness of the events … the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states").

[239] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 132 above), para. 155.

[240] *Ibid.*, para. 159.

with the United Nations" to bring to an end the breach of obligations arising from the right of self-determination.[241]

(6) While in both advisory opinions on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* the Court does not make an explicit reference to peremptory norms of general international law (*jus cogens*), the norms to which the Court attached the duty to cooperate to bring to an end serious breaches are peremptory in character. As noted above in the commentary to draft conclusion 17, paragraphs 1 and 2, there is a significant overlap between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* such that the deduction that the Court in these decisions was referring to peremptory norms of general international law (*jus cogens*) is not unwarranted.[242] A similar deduction, that the International Court of Justice was referring to peremptory norms, was made by the House of Lords in *A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening)* v. *Secretary of State for the Home Department*.[243] At any rate, since in judicial decisions *erga omnes* obligations have been said to produce the duty to cooperate to bring to an end all serious breaches, given the character and importance of the rights and obligations involved,[244] and since all peremptory norms of general international law (*jus cogens*) produce *erga omnes* obligations, it follows that all peremptory norms would also produce this duty.

(7) The obligation to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) is to be carried out "through lawful means". This means that the breach of a peremptory norm of general international law (*jus cogens*) may not serve as a justification for the breach of other rules of international law. Although international law does not prohibit unilateral measures to bring to an end a serious breach of a peremptory norm of general international law (*jus cogens*) if such unilateral measures are consistent with international law, the emphasis in paragraph 1 of draft conclusion 19 is on collective measures. This is the essence of "cooperation".[245]

(8) Depending on the type of breach and the type of the peremptory norm in question, the collective system of the United Nations is the preferred framework for cooperative action.[246] It is for this reason that, in light of the determination by the International Court of Justice of a breach of "self-determination" and "basic principles of humanitarian law", the Court stated that "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation".[247] Similarly, in its advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court referred to the obligation of "all Member

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[241] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (see footnote 198 above), at pp. 139–140, para. 182.

[242] See Pigrau (see footnote 201 above), at p. 129.

[243] *A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening)* v. *Secretary of State for the Home Department* (see footnote 236 above).

[244] See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 132 above), para. 159.

[245] See, for example, paragraph (3) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 114 ("What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches").

[246] See, for example, article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948, *ibid.*, vol. 78, No. 1021, p. 277) ("Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III"), and article VIII of the International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973, United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243) ("Any State Party to the present Convention may call upon any competent organ of the United Nations to take such action under the Charter of the United Nations as it considers appropriate for the prevention and suppression of the crime of apartheid").

[247] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 132 above), para. 160.

States" to "co-operate with the United Nations" to end the breach in question.[248] Other international organizations may also adopt measures, consistent with international law, to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) if their mandates permit them to do so.[249]

(9) There are numerous examples of resolutions of organs of international organizations, in particular the United Nations, that illustrate the duty to cooperate to bring to an end serious breaches of obligations that are widely recognized as arising from peremptory norms of general international law (*jus cogens*). These include resolutions condemning breaches of

[248] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (see footnote 198 above), pp. 139–140, para. 182.

[249] See, for example, art. 4, subpara. (*h*), of the Constitutive Act of the African Union (Lomé, 11 July 2000, United Nations, *Treaty Serie*s, vol. 2158, No. 37733, p. 3) ("the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity"). See also Treaty on the European Union (consolidated version), *Official Journal*, C 326, p. 13, 26 October 2012, arts. 21, para. 2, and 29. See further Treaty on the Functioning of the European Union (consolidated version), *Official Journal*, C 326, p. 47, 26 October 2012, art. 215. See further Regulation (EU) 2018/1727 of the European Parliament and the Council of 14 November 2018, replacing and repealing Council Decision 2002/187/JHA, *Official Journal*, L 295, p. 138, 21 November 2018, and Regulation (EU) 2022/838 of the European Parliament and the Council of 30 May 2022 amending Regulation (EU) 2018/1727, *Official Journal*, L 148, p. 1, 31 May 2022.

such obligations,[250] resolutions calling for the cessation of breaches of such obligations,[251] and resolutions establishing accountability mechanisms to address such breaches.[252]

[250] See General Assembly resolution 2022 (XX) of 5 November 1965, para. 4 ("Condemns the policies of racial discrimination and segregation practised in Southern Rhodesia, which constitute a crime against humanity"); General Assembly resolution 2184 (XXI) of 12 December 1966, para. 3 ("Condemns, as a crime against humanity, the policy of the Government of Portugal, which violates the economic and political rights of the indigenous population by the settlement of foreign immigrants in the Territories and by the exporting of African workers to South Africa"); General Assembly resolution ES-8/2 of 14 September 1981, para. 4 ("Strongly condemns South Africa for its continued illegal occupation of Namibia"); General Assembly resolution 36/27 of 13 November 1981, concerning Israeli aggression against Iraqi nuclear installations, para. 1 ("Strongly condemns Israel for its premeditated and unprecedented act of aggression in violation of the Charter of the United Nations and the norms of international conduct"); General Assembly resolution 38/7 of 2 November 1983, para. 1 ("Deeply deplores the armed intervention in Grenada which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State"); General Assembly resolution 41/35 A of 10 November 1986, para. 1 ("Strongly condemns once again the policies and practices of apartheid of the racist régime of South Africa, in particular its brutal oppression, repression and genocidal violence against the people of South Africa"), para. 10 ("Vehemently condemns the racist régime of South Africa for its continued illegal occupation of Namibia"); General Assembly resolution 43/50 A of 5 December 1988, para. 3 ("Condemns the racist régime and its policies and practices of apartheid"); General Assembly resolution 44/240 of 29 December 1989, para. 1 ("Strongly deplores the intervention in Panama by the armed forces of the United States of America, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States"); General Assembly resolution 46/47 of 9 December 1991, para. 5 ("Condemns the continued and persistent violation by Israel of the Geneva Convention relative to the Protection of Civilian Persons in Time of War … and condemns in particular those violations which the Convention designates as 'grave breaches' thereof"); General Assembly resolution ES-11/1 of 2 March 2022, para. 2 ("Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" of the United Nations), para. 5 ("Deplores the 21 February 2022 decision by the Russian Federation related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter" of the United Nations), and para. 11 ("Condemns all violations of international humanitarian law and violations and abuses of human rights"); Human Rights Council resolution 49/1 of 4 March 2022, para. 1 ("Condemns in the strongest possible terms the human rights violations and abuses and violations of international humanitarian law resulting from the aggression against Ukraine by the Russian Federation").

[251] See General Assembly resolution 2184 (XXI) of 12 December 1966, para. 5 ("Calls upon Portugal to apply immediately the principle of self-determination to the peoples of the Territories under its administration"), para. 6 ("Appeals to all States to give the peoples of the Territories under Portuguese domination the moral and material support necessary for the restoration of their inalienable rights and to prevent their nationals from cooperating with the Portuguese authorities, especially in regard to investment in the Territories"); General Assembly resolution 36/27 of 13 November 1981, para. 3 ("Reiterates its call to all States to cease forthwith any provision to Israel of arms and related material of all types which enable it to commit acts of aggression against other States"); General Assembly resolution 38/7 of 2 November 1983, para. 4 ("Calls for an immediate cessation of the armed intervention and the immediate withdrawal of the foreign troops from Grenada"); General Assembly resolution 44/240 of 29 December 1989, para. 2 ("Demands the immediate cessation of the intervention and the withdrawal from Panama of the armed invasion forces of the United States"), para. 4 ("Calls upon all States to uphold and respect the sovereignty, independence and territorial integrity of Panama"); Security Council resolution 2334 (2016) of 23 December 2016, para. 2 ("Reiterates its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard"); General Assembly resolution ES-11/2 of 24 March 2022, paras. 1–2 ("Demands an immediate cessation of the hostilities by the Russian Federation against Ukraine, in particular of any attacks against civilians and civilian objects"); General Assembly resolution ES-11/3 of 7 April 2022, para. 1 ("Decides to suspend the rights of membership in the Human Rights Council of the Russian Federation"); Human Rights Council resolution 49/28 of 11 April 2022, seventh preambular para. ("Reaffirming the right of the Palestinian people to self-determination in accordance with the provisions of the Charter, relevant United Nations resolutions and declarations, and the provisions of international covenants and instruments relating to the right to

(10) It is not only measures under institutionalized cooperation mechanisms that may be adopted. The obligation to cooperate to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) may also be implemented through non-institutionalized cooperation, including through *ad hoc* arrangements by a group of States acting together to bring to an end a breach of a peremptory norm.[253] Indeed, the International Court of Justice, in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, seems to suggest that, over and above collective action, there is an obligation on individual States to make efforts to bring situations created by the breach to an end.[254] In that opinion, in addition to referring to the measures that may be adopted by the General Assembly and the Security Council, the Court stated that "[i]t is *also* for all States" to take measures to end the breach of a peremptory norm of general international law (*jus cogens*).[255] The requirement, however, is that such measures should be consistent with international law.[256]

(11) The obligation of States to act collectively to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) has particular consequences for cooperation within the organs of the United Nations and other international organizations. It means that, in the face of serious breaches of peremptory norms of general international law (*jus cogens*), international organizations should act, within their respective mandates and when permitted to do so under international law, to bring to an end such breaches. Thus, where an international organization has the discretion to act, the obligation to cooperate imposes a duty on the members of that international organization to act with a view to the

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self-determination as an international principle and as a right of all peoples in the world, and emphasizing that this *jus cogens* norm of international law is a basic prerequisite for achieving a just, lasting and comprehensive peace in the Middle East"), para. 7 ("Calls upon all States to ensure their obligations of non-recognition, non-aid or assistance with regard to the serious breaches of peremptory norms of international law by Israel, in particular of the prohibition of the acquisition of territory by force, in order to ensure the exercise of the right to self-determination, and also calls upon them to cooperate further to bring, through lawful means, an end to these serious breaches and a reversal of Israel's illegal policies and practices").

252 See Human Rights Council resolution S-17/1 of 22 August 2011, para. 13 ("Decides to dispatch urgently an independent international commission of inquiry, to be appointed by the President of the Human Rights Council, to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable"); Human Rights Council resolution 39/2 of 27 September 2018, para. 22 ("Decides to establish an ongoing independent mechanism to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011"); Human Rights Council resolution S-33/1 of 17 December 2021, para. 9 ("Decides to establish, for a period of one year, renewable as necessary, an international commission of human rights experts on Ethiopia, comprising three human rights experts, to be appointed by the President of the Human Rights Council, to complement the work undertaken by the joint investigative team"); Human Rights Council resolution 49/1 of 4 March 2022, para. 11 ("Decides to urgently establish an independent international commission of inquiry, comprising three human rights experts ... to investigate all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes in the context of the aggression against Ukraine by the Russian Federation, and to establish the facts, circumstances and root causes of any such violations and abuses").

253 See paragraph (2) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 114.

254 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 132 above), at p. 200, para. 159.

255 *Ibid*. See also Barber (footnote 201 above), at p. 23 ("The unique powers and responsibility of the Security Council do not obviate the obligations of other States to cooperate to end serious breaches of peremptory norms, using all means available to them, including their membership of other international organisations").

256 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 132 above), at p. 200, para. 159 ("It is also for all States, *while respecting the [Charter of the United Nations] and international law*, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end") (emphasis added).

organization exercising that discretion in a manner to bring to an end the breach of a peremptory norm of general international law (*jus cogens*).[257] A duty of international organizations to exercise discretion in a manner that is intended to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) is a necessary corollary of the obligation to cooperate provided for in paragraph 1 of draft conclusion 19.

(12) Paragraph 2 of draft conclusion 19 states that States shall not "recognize as lawful" a situation created by a breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) nor "render aid or assistance" in the maintenance of such a situation. Paragraph 2 of draft conclusion 19, which is derived from article 41, paragraph 2, of the articles on responsibility of States for internationally wrongful acts, contains two separate obligations. The first is the obligation not to recognize as lawful situations created by a serious breach of a peremptory norm of international law (*jus cogens*). The second is the obligation not to render aid or assistance in maintaining the situation created by the serious breach of a peremptory norm of general international law (*jus cogens*). While these two obligations are separate and distinct obligations, they are related in the sense that the obligation of non-assistance is a logical consequence of the obligation of non-recognition of a situation as lawful. Unlike the obligation in paragraph 1 of draft conclusion 19, the duties of non-recognition and non-assistance are negative duties. In other words, while paragraph 1 of draft conclusion 19 requires States to do something – to cooperate to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) – the duties of non-recognition and non-assistance in paragraph 2 require States to refrain from acting. The duties in paragraph 2 of draft conclusion 19 are thus less onerous.

(13) Already in 2001, the Commission had recognized that the duties of non-recognition and non-assistance were part of customary international law.[258] In *Kuwait Airways Corporation* v. *Iraqi Airways Company and Others*, the United Kingdom House of Lords refused to give legal validity to acts resulting from the Iraqi invasion of Kuwait, a breach of the peremptory norm of general international law (*jus cogens*) relating to the use of force.[259] The obligation of non-recognition had been recognized in decisions of the International Court of Justice and in the practice of States acting in international organizations. In its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, for example, the Court recalled that "qualification of a situation as illegal does not by itself put an end to" the situation.[260] The Court held that there was an obligation on all

[257] See Barber (footnote 201 above), at p. 23 ("And as for members of the Security Council, duly diligent members of the General Assembly should normally be expected to support resolutions aimed at ending serious breaches of peremptory norms, unless they can provide good reason for not doing so"). See also R. M. Essawy, "The responsibility not to veto revisited under the theory of 'consequential *jus cogens*'", *Global Responsibility to Protect*, vol. 12 (2020), pp. 299–335, at p. 303.

[258] See paragraphs (6), (11) and (12) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 114–115. See O. Corten and V. Koutroulis, "The *jus cogens* status of the prohibition on the use of force: what is its scope and why does it matter?", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 629–667, at p. 664, suggesting that it is beyond doubt that the duty of non-recognition for serious breaches of international law is accepted as part of international law. See, further, A. Lagerwall, "The non-recognition of Jerusalem as Israel's capital: a condition for international law to remain relevant?", *Questions of International Law*, vol. 50 (2018), pp. 33–46, arguing that the duty of non-recognition applies, beyond serious breaches of peremptory norms of general international law (*jus cogens*), to breaches of international law. See also Barber (footnote 201 above), at p. 16. See, however, H. P. Aust, "Legal consequences of serious breaches of peremptory norms in the law of State responsibility: observations in the light of the recent work of the International Law Commission", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 227–255, at p. 254, suggesting that "not everything [in relation to the duty] is well and support[ed]".

[259] *Kuwait Airways Corporation* v. *Iraqi Airways Company and Others*, (Nos. 4 and 5) [2002] UKHL 19, [2002] 2 AC 883, para. 29. See also *A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening)* v. *Secretary of State for the Home Department* (footnote 236 above), para. 34.

[260] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 122 above), para. 111.

States "to recognize the illegality and invalidity of South Africa's continued presence".[261] Similarly, in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court determined that "all States are under an obligation not to recognize the illegal situation resulting from" the breach of an obligation widely recognized as having peremptory character.[262] In the same vein, the International Criminal Court in *The Prosecutor* v. *Bosco Ntaganda* also recalled that "as a general principle of law, there is a duty not to recognise situations created by certain serious breaches of international law".[263]

(14) The Security Council has also recognized the obligation of States not to recognize the situation created by a breach of the prohibition of apartheid and the obligation to respect self-determination.[264] Similarly, the General Assembly has made decisions calling for the non-recognition of situations created by the breach of acts widely accepted as constituting breaches of peremptory norms of general international law (*jus cogens*).[265] The obligation not to assist or render aid to the maintenance of a situation created by a serious breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) has also been recognized in the decisions of the International Court of Justice and resolutions of the

[261] *Ibid.*, para. 119.

[262] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 132 above), para. 159.

[263] *The Prosecutor* v. *Bosco Ntaganda, Case No. ICC-01/04-02/06-1707, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, of January 2017*, Trial Chamber VI, International Criminal Court, para. 53.

[264] See Security Council resolution 276 (1970) of 30 January 1970. On the duty not to recognize the "Turkish Republic of Northern Cyprus", see Security Council resolution 541 (1983) of 18 November 1983, para. 7 ("Calls upon all States not to recognize any Cypriot State other than the Republic of Cyprus"). In relation to the occupation of Kuwait, see Security Council resolution 662 (1990) of 9 August 1990, para. 2 ("Calls upon all States, international organizations and specialized agencies not to recognize that annexation [of Kuwait by Iraq], and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation"). Likewise, see General Assembly resolution 73/295, paras. 6-7 ("Calls upon the United Nations and all its specialized agencies … to refrain from impeding that process [of decolonization] by recognizing, or giving effect to any measure taken by or on behalf of, the 'British Indian Ocean Territory'", and "Calls upon all other international, regional and intergovernmental organizations … to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the 'British Indian Ocean Territory'").

[265] General Assembly resolution 3411 (XXX) D of 28 November 1975, para. 3. See, especially, General Assembly resolution ES-10/19 of 21 December 2017, para. 1 ("Affirms that any decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded in compliance with relevant resolutions of the Security Council, and in this regard calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem"); General Assembly resolution 46/47 of 9 December 1991, para. 19 ("Reiterates its call upon all States… not to recognize any changes carried out by Israel, the occupying Power, in the occupied territories and to avoid actions… that might be used by Israel in its pursuit of the policies of annexation and colonization"). See, in relation to the duty not to recognize unlawfully established settlements in Jerusalem, Security Council resolution 2334 (2016), para. 3 ("Underlines that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations"). See, for the duty not to recognize situations created by the unlawful use of force and threats to territorial integrity in relation to the situation in Crimea, General Assembly resolution 68/262 of 27 March 2014, para. 6 ("Calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status").

United Nations for example, in respect of the application of apartheid by South Africa in Namibia[266] and in respect of the situation in Ukraine.[267]

(15) While the obligation of non-recognition is settled, this duty is not to be implemented to the detriment of the affected population and deprive it of any advantages derived from international cooperation.[268] In its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the International Court of Justice declared that the consequences of non-recognition should not negatively affect or disadvantage the affected population and, consequently, that acts related to the civilian population, such as registration of births, deaths and marriages, ought to be recognized notwithstanding the breach.[269]

(16) It is important to emphasize that the duty in paragraph 2 of draft conclusion 19 is concerned with a "situation created by a serious breach", rather than the breach itself. Thus, contribution or support of the actual breach, while possibly entailing responsibility for that breach, is not covered under this draft conclusion.[270]

(17) The obligations in draft conclusion 19 apply to serious breaches of peremptory norms of general international law (*jus cogens*). A serious breach is defined in paragraph 3 of draft conclusion 19 as a breach that "involves a gross or systematic failure by the responsible State to fulfil [the obligation in question]". This definition is taken from article 40, paragraph 2, of the articles on responsibility of States for internationally wrongful acts.[271] It is important to underscore that, by referring to "serious breaches", the Commission did not mean to indicate that there were breaches of peremptory norms of general international law (*jus cogens*) that were less than serious.[272] Rather, it is intended to convey the sense that particular consequences flowed from breaches of peremptory norms of general international law (*jus cogens*) that met the threshold in paragraph 3.

(18) Paragraph 4 of draft conclusion 19 provides that the obligations in draft conclusion 19 are without prejudice to other consequences that any breach by a State of an obligation arising out of a peremptory norm (*jus cogens*) may entail under international law.[273] Draft

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[266] See, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (footnote 122 above), para. 119, stating that States are under an obligation "to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia". See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 132 above), para. 159; and General Assembly resolution 3411 D (XXX), para. 3.

[267] See General Assembly resolution ES-11/1, para. 10 ("Deplores the involvement of Belarus in this unlawful use of force against Ukraine, and calls upon it to abide by its international obligations"). See also General Assembly resolution 2022 (XX) para. 5 ("Condemns any support or assistance rendered by any State to the minority régime in Southern Rhodesia") and para. 6 ("Calls upon all States to refrain from rendering any assistance whatsoever to the minority régime in Southern Rhodesia"); General Assembly resolution 36/27 para. 3 ("Reiterates its call to all States to cease forthwith any provision to Israel of arms and related material of all types which enable it to commit acts of aggression against other States").

[268] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 122 above), para. 125.

[269] *Ibid*.

[270] See *Humanitarian Intervention and Political Support for Interstate Use of Force: Report of the Expert Group established by the Minister of Foreign Affairs of the Netherlands*, December 2019, at para. 43. This position has been supported by the Government of the Netherlands in a letter of 17 April 2020 to the Chairperson of the House of Representatives of the Netherlands, although noting that an international tribunal might come to a different conclusion ("Although the Cabinet shares this interpretation, it cannot be ruled out in advance that an international tribunal might come to a different conclusion").

[271] A detailed elaboration of the elements of seriousness – gross or systematic violations – can be found in paragraphs (7) and (8) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 113.

[272] See paragraph (7) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts, *ibid.* ("The word 'serious' … is not intended to suggest that any violation of these obligations is not serious or is somehow excusable").

[273] See, generally, paragraph (13) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts, *ibid*., p. 115.

conclusion 19, for example, does not specifically address the consequences of breaches, whether meeting the threshold in paragraph 3 or not, for the responsible State. The International Court of Justice has routinely declared an obligation of cessation on the responsible State.[274] Other examples of consequences of breaches of obligations under international law that are not addressed can be found in chapters I and II of Part Two of the articles on responsibility of States for internationally wrongful acts.[275] Thus, the draft conclusions do not address the question of whether the peremptory character of the obligation breached will affect, for example, the issue of the amount of compensation.[276] Although not addressed in the present draft conclusions, these other consequences of responsibility continue to apply.

(19) As with draft conclusions 17 and 18, draft conclusion 19 applies, as appropriate, to international organizations.[277] Consequently, if States are under an obligation not to recognize as lawful situations created by a serious breach of a peremptory norm or to assist in the maintenance of such situations, it stands to reason that international organizations are under a similar obligation.

Part Four
General provisions

Conclusion 20
Interpretation and application consistent with peremptory norms of general international law (*jus cogens*)

Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former.

Commentary

(1) Draft conclusion 20 contains an interpretative rule applicable in the case of potential conflicts between peremptory norms of general international law (*jus cogens*) and other rules of international law. Draft conclusions 10, 14, 15 and 16 provide for the invalidity or non-existence of rules of international law that conflict with peremptory norms of general international law (*jus cogens*). Whether or not a rule of international law conflicts with a peremptory norm of general international law (*jus cogens*) is a matter to be determined through interpretation. The rule in draft conclusion 20 applies as part of the process of interpretation under applicable rules on interpretation to determine whether a conflict in fact exists.[278] The draft conclusions do not define conflict, but it may be understood, in this

[274] See, for example, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (footnote 198 above), at p. 139, para. 178; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (footnote 132 above), paras. 149 *et seq.*; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (footnote 122 above), para. 118.

[275] See, generally, Part Two of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 86 *et seq*. The consequences include cessation and non-repetition (art. 30) and reparation (art. 31). Reparation itself may take different forms, including restitution (art. 35), compensation (art. 36), satisfaction (art. 37) and interest (art. 38).

[276] See, for discussion, R. Elphick (with J. Dugard), "*Jus cogens* and compensation", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 413–440.

[277] See, in respect of international organizations, articles 41 and 42 of the articles on the responsibility of international organizations. The articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

[278] See D. Costelloe, "Peremptory norms and resolutions of the United Nations Security Council", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 441–467, at pp. 443 *et seq.*

context, as the situation where two rules of international law cannot both be simultaneously applied without infringing on, or impairing, the other.[279]

(2) Draft conclusion 20 is not to be applied in all cases concerning the interpretation of a rule or the determination of its content. It is to be applied only in the limited instances where "it appears that there may be a conflict" between a rule of international law not of a peremptory character and a peremptory norm of general international law (*jus cogens*).[280] In such a case, the interpreter is directed to interpret the rule of international law that is not of a peremptory character in such a way that it is consistent with the peremptory norm of general international law (*jus cogens*). The words "as far as possible" in the draft conclusion are intended to emphasize that, in the exercise of interpreting rules of international law in a manner consistent with peremptory norms of general international law (*jus cogens*), the bounds of interpretation may not be exceeded. In other words, the rule in question may not be given a meaning or content that does not flow from the normal application of the rules and methodology of interpretation in order to achieve consistency with peremptory norms of general international law (*jus cogens*).

(3) Draft conclusion 20 uses the words "interpreted and applied". The interpretation and application of a rule are interrelated but separate concepts. The words "interpretation and application" were also used in paragraph (3) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, which addressed this interpretative effect of peremptory norms of general international law (*jus cogens*). It recognizes that, in some cases, what may be at issue is not the interpretation of the rule in question but its application. This may be the case, for example, where a rule is, on its face, consistent with the relevant peremptory norm of general international law (*jus cogens*), but its application in a particular way would be contrary to the relevant peremptory norm.

(4) In the context of treaty rules, the rule in draft conclusion 20 may be seen as an application of article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, which provides that in the interpretation of treaties "[a]ny relevant rules of international law applicable in the relations between the parties … shall be taken into account". Peremptory norms of general international law (*jus cogens*) are rules of international law applicable in relations primarily between States and international organizations and must therefore, where relevant, be taken into account in the interpretation of treaties.[281]

(5) Although the interpretative rule in draft conclusion 20 constitutes a concrete application of article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, it does not apply only in relation to treaties but to the interpretation and application of all other rules of international law. In this respect, the Commission has stated that "[w]hen there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must

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[279] See, for discussion, E. Vranes, "The definition of 'norm conflict' in international law and legal theory", *The European Journal of International Law*, vol. 17, No. 2 (2006), pp. 395–418. See also V. Jeutner, "Rebutting four arguments in favour of resolving *ius cogens* conflicts by means of proportionality tests", *Nordic Journal of International Law*, vol. 89, No. 3 (2020), pp. 453–470, at p. 455.

[280] S. B. Traoré, "Peremptory norms and interpretation in international law", *in* Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)…* (footnote 26 above), pp. 132–176.

[281] See, for example, the report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (footnote 54 above), p. 85, para. 414. This was done for example in *Council of the European Union* v. *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario), Case C-104/16 P, Judgment of 21 December 2016*, Grand Chamber, Court of Justice of the European Union, *Official Journal of the European Union*, C 53/19 (20 February 2017), at paras. 88 *et seq.*, especially para. 114, in which the Court, having determined that the principle of self-determination was "one of the essential principles of international law" and one establishing *erga omnes* obligations (para. 88), proceeded to interpret a treaty between the European Commission and Morocco in such a way as to respect this rule: "It follows that the Liberalisation Agreement could not be understood at the time of its conclusion as meaning that its territorial scope included the territory of Western Sahara" (para. 114).

prevail … [P]eremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts".[282]

(6) As noted in paragraph (2) of this commentary, the words "as far as possible" are meant to indicate that the rule in this draft conclusion does not permit the limits of interpretation to be exceeded. Where it is not possible to arrive at an interpretation of the rule not of a peremptory character that is consistent with the peremptory norm of general international law (*jus cogens*), the rule that is not of a peremptory character is to be invalidated in accordance with draft conclusions 10, 14, 15 and 16.

(7) The phrase "another rule of international law" in draft conclusion 20 is to be understood as referring to obligations under international law, whether arising under a treaty, customary international law, a general principle of law, a unilateral act or a resolution, decision or other act of an international organization. Draft conclusion 20 therefore applies in the interpretation of the rules or obligations identified in draft conclusions 10, 14, 15 and 16.

Conclusion 21
Recommended procedure

1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law should do so by notifying other States concerned of its claim. The notification should be in writing and should indicate the measure proposed to be taken with respect to the rule of international law in question.

2. If none of the other States raises an objection within a period which, except in cases of special urgency, will not be less than three months, the invoking State may carry out the measure which it has proposed.

3. If, however, any State concerned raises an objection, the States concerned should seek a solution through the means indicated in Article 33 of the Charter of the United Nations. If no solution is reached within a period of twelve months, and the objecting State offers to submit the matter to the International Court of Justice or to some other procedure entailing binding decisions, the invoking State should not carry out the measure which it has proposed until the dispute is resolved.

4. This draft conclusion is without prejudice to the procedures set forth in the Vienna Convention on the Law of Treaties, to the relevant rules concerning the jurisdiction of the International Court of Justice, or to other applicable dispute settlement provisions agreed by the States concerned.

Commentary

(1) Draft conclusion 21 concerns the procedure that is recommended for the invocation of, and the reliance on, the invalidity of rules of international law, including treaties, by reason of being in conflict with peremptory norms of general international law (*jus cogens*). It is important to recall that during the United Nations Conference on the Law of Treaties, States generally supported the provisions relating to peremptory norms of general international law (*jus cogens*), but concerns arose that the right to invoke the invalidity of treaties could be abused by States unilaterally invoking articles 53 and 64 and thus threatening the stability of treaty relations.[283] To address the concerns, the 1969 Vienna

[282] Paragraph (3) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85. See also conclusion (42) of the conclusions of the Study Group on the fragmentation of international law (footnote 54 above); and Mik (footnote 176 above), pp. 73 *et seq*.

[283] See *Official Records of the United Nations Conference on the Law Treaties, First Session* ... (see footnote 53 above), 4 May 1968, statements by: France, 54th meeting, para. 29 ("[t]he article as it stood gave no indication how a rule of law could be recognized as having the character of *jus cogens*, on the content of which divergent, even conflicting interpretations had been advanced during the discussion. … Also, no provision had been made for any jurisdictional control over the application of such a new and imprecise notion"); and Norway, 56th meeting, para. 37 ("[t]he article gave no

Convention subjects any reliance on articles 53 and 64 to a process involving judicial settlement procedures. In the context of the present draft conclusions, invocation of the rules set forth in Part Three without some type of mechanism to avoid unilateral measures raises similar concerns as those raised at the United Nations Conference on the Law of Treaties. Draft conclusion 21 is thus aimed at avoiding, or minimizing, the potential for unilateralism and auto-interpretation in connection with peremptory norms of general international law (*jus cogens*).[284]

(2) The formulation of an appropriate provision for the purposes of the present draft conclusions is, however, not without its difficulties. The principal difficulty is that detailed dispute resolution provisions are embedded in treaties and do not operate as a matter of customary international law. They operate in the context of treaty law, applicable only to States that have accepted the application of those rules. Thus, with respect to peremptory norms of general international law (*jus cogens*), the 1969 Vienna Convention contains an elaborate dispute settlement framework.[285] Under this framework, a State party that claims that a treaty is invalid on any ground, including for reason of being in conflict with a peremptory norm of general international law (*jus cogens*), must notify other States parties of its claim. If, after the expiry of a specified period, no objections to its notification are received, the consequences of invalidity may be implemented. If, however, there is an objection, the 1969 Vienna Convention requires that the States parties concerned seek a solution through the means provided for in the Charter of the United Nations. These means include negotiation, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or other peaceful means.[286] If the claim of invalidity is based on a conflict with a peremptory norm under article 53 or article 64 and a solution to the conflict is not found using such means, then any party to the dispute may refer the matter to the International Court of Justice unless there is an agreement to submit it instead to arbitration.

(3) In the *Gabčíkovo–Nagymaros Project* case, the International Court of Justice stated that "both Parties agree that [a]rticles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary international law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith".[287] This observation by the Court refers primarily to the consultation process leading up to any termination of the agreement. The Court did not, by this statement, determine that there was a customary international law rule concerning the establishment of jurisdiction of the Court for the settlement of disputes relating to invalidation of treaties on the basis of peremptory norms of general international law (*jus cogens*). The provisions of articles 65 to 67 of the 1969 Vienna Convention, in particular the provisions pertaining to the submission to the International Court of Justice of a dispute, cannot be said to reflect customary international law. As treaty provisions, they cannot be imposed on States that are not party to the 1969 Vienna Convention. Moreover, even amongst States that are party to the Convention, a number of States have formulated reservations to the application of the dispute settlement mechanism, particularly as it relates to the submission of disputes to the International Court of Justice and arbitration (art. 66 (*a*) of the 1969 Vienna Convention).[288]

(4) In formulating a provision for dispute settlement in relation to the invalidation of rules of international law on account of inconsistency with peremptory norms of general international law (*jus cogens*), the Commission had to ensure, on the one hand, that it did not purport to impose treaty rules on States not bound by such rules while, on the other hand, that the concerns regarding the need to avoid unilateral invalidation of rules was taken account of. Moreover, the Commission also had to ensure that the procedures established

guidance on some important questions, namely, what were the existing rules of *jus cogens* and how did such rules come into being? The Commission's text stated the effects of those rules but did not define them, so that serious disputes might arise between States; and it provided no effective means of settling such disputes").

284 See, generally, Wood (footnote 190 above).

285 See articles 65 and 66 of the 1969 Vienna Convention.

286 See Article 33, paragraph 1, of the Charter of the United Nations.

287 *Gabčíkovo–Nagymaros Project* (see footnote 66 above), at p. 66, para. 109.

288 For a full list of the reservations to the 1969 Vienna Convention, see United Nations, *Treaty Series*, vol. 1155, p. 131.

under the 1969 Vienna Convention, or any other treaty provision, were not undermined by the inclusion of the present provision. Draft conclusion 21 sets forth a recommended procedure designed to achieve such a balance. The draft conclusion is couched in hortatory terms, to avoid any implication that its content is binding on States.

(5) Paragraphs 1 and 2 of draft conclusion 21 follow article 65 of the 1969 Vienna Convention. Paragraph 1 provides that a State which seeks to impugn a rule of international law for being in conflict with a peremptory norm of general international law (*jus cogens*) should notify other States of its claim. Although this paragraph follows closely the wording of the 1969 Vienna Convention, there are two important differences. First, as is the case throughout the draft conclusion, the word "should" is used to indicate that the provision is a non-binding one. Second, the paragraph refers to "a rule of international law", to signify that it applies to treaties and other international obligations deriving from other sources of international law. Consequently, the paragraph refers to "States concerned" to indicate that the potential addressees of the notification are broader than the parties to a treaty. The phrase "States concerned" is also used to indicate that in relation to treaties with limited membership, the requirement to notify is limited to the parties to the treaties. In line with paragraph (10) of the commentary to draft conclusion 1, the words "State" and "States concerned" in this draft conclusion should be understood to include *mutatis mutandis* international organizations that may be affected by any measures that may be adopted.

(6) Paragraph 1 of draft conclusion 21 also provides that the notification is to indicate the measures proposed to remedy the conflict. Such measures may be those referred to in Part Three of the draft conclusions. The requirement to specify the measures proposed is in keeping with the purposes of the notification, which is to enable other States to respond appropriately, if necessary. The notification can be distributed to other States through a variety of means, including through the Secretary-General of the United Nations.

(7) Paragraph 2 of draft conclusion 21 states that if no other State raises an objection to the notification, then the State making the claim may carry out the measure it has proposed. The right to carry out these measures, however, can only be exercised after "a period which, except in cases of special urgency, shall not be less than three months". This means, in the first place, that the notification referred to in paragraph 1 should specify a period within which an objection must be made to the notification. The period should be a reasonable period and the Commission determined that, as a general rule, a minimum of three months was a reasonable period. Second, it is only after the expiry of the said period, and if there has been no objection, that the State invoking the invalidity of a treaty can carry out the measure proposed. There may be cases where a three-month period may be too long. For this purpose, paragraph 2 of draft conclusion 21 sets out the possibility of a shorter period "in cases of special urgency". The draft conclusions do not define "cases of special urgency". This is to be determined on the basis of the facts in each particular case. However, it can be said that "cases of special urgency" will be those in which time is of the essence.

(8) Paragraph 3 of draft conclusion 21 addresses those cases in which any State concerned raises an objection against a claim that a rule of international law is void as a result of a conflict with a peremptory norm of general international law (*jus cogens*). If there is such an objection, then the invoking State cannot unilaterally implement the proposed measures. In such a case, the invoking State and the other States concerned are then required to seek a solution of their choice amongst the means indicated in Article 33 of the Charter of the United Nations.

(9) Paragraph 3 of draft conclusion 21 also addresses those cases in which the States concerned are not able to find a solution through the means indicated in Article 33 of the Charter of the United Nations. It provides that, in such cases, where the objecting State has offered to submit the matter to the International Court of Justice or some other procedure of a binding nature, the invoking State should not carry out the measure it had proposed until the dispute is resolved. The Commission proceeded from the basis that the invocation of the invalidity of a rule of international law as a result of inconsistency with a peremptory norm of general international law (*jus cogens*) did not, as such, constitute the basis for the

jurisdiction of the International Court of Justice.[289] However, in the spirit of avoiding unilateralism, the Commission found it appropriate, without obliging submission to the International Court of Justice, to encourage submission of the dispute to the International Court of Justice. The purpose of paragraph 3 of the draft conclusion is thus to encourage submission of an unresolved dispute to judicial settlement of disputes.

(10) Draft conclusion 21 is a procedural provision, without implication for the lawfulness of any measures that may be carried out. If, after the expiration of the twelve-month period, no offer to submit the matter to the International Court of Justice is made by the other States concerned, the invoking State is no longer precluded by the procedural provisions of draft conclusion 21 from taking the proposed measures. It is important to emphasize that there is, under this provision, no obligation to submit the matter to the International Court of Justice, nor does this provision establish compulsory jurisdiction. Instead, the provision precludes the State invoking invalidity from carrying out the proposed measures if the other concerned States offer to submit the matter to the International Court of Justice. In the event that such an offer to submit the matter to the International Court of Justice is made, the State invoking invalidity will then only be entitled to carry out the proposed measures after the dispute is resolved and in accordance with a determination by the Court that the measures are justified under international law.

(11) Paragraph 4 is a "without prejudice" clause. As explained above, draft conclusion 21 does not establish the jurisdiction of the International Court of Justice, nor does it create an obligation for any State to submit a matter to the Court or to accept the Court's jurisdiction. By the same token, draft conclusion 21 does not affect any basis for jurisdiction that may exist under any other rule in international law, including the dispute settlement mechanisms under the 1969 Vienna Convention or other applicable dispute settlement provisions agreed to by the States concerned (including the invoking State).

Conclusion 22
Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail

The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law.

Commentary

(1) Draft conclusion 22 is a "without prejudice" clause. It provides that the current draft conclusions are without prejudice to the consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law.

(2) The scope of the present draft conclusions concerns the identification and legal consequences of peremptory norms of general international law (*jus cogens*). As described in paragraph (3) of the commentary to draft conclusion 1, the present draft conclusions are not intended to address the content of individual peremptory norms of general international law (*jus cogens*). In addition to the methodology and process for identifying peremptory norms of general international law (*jus cogens*), the draft conclusions also address, in general, the legal consequences flowing from peremptory norms of general international law (*jus cogens*). These include consequences for treaty rules, customary international law, unilateral acts and binding resolutions, decisions or other acts of international organizations. The contents of individual peremptory norms of general international law (*jus cogens*) may themselves have legal consequences that are distinct from the general legal consequences identified in the present draft conclusions. Hence, draft conclusion 22 is intended to convey that the draft conclusions are without prejudice to any such legal consequences that may otherwise arise from specific peremptory norms of general international law (*jus cogens*).

[289] *Armed Activities on the Territory of the Congo* (see footnote 58 above), at p. 32, para. 64 ("The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court").

(3) One area in which the issue of legal consequences for specific peremptory norms has been raised concerns the consequences of crimes the commission of which are prohibited by peremptory norms of general international law (*jus cogens*), such as the prohibition of genocide, war crimes and crimes against humanity, and, in particular, the possible consequences for immunity and the jurisdiction of national courts. These consequences are not general consequences of peremptory norms of general international law (*jus cogens*), but rather relate to specific peremptory norms of general international law. As such, they are not addressed in the present draft conclusions.

Conclusion 23
Non-exhaustive list

Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Commentary

(1) Draft conclusion 1 sets out the scope of the present draft conclusions as concerning the identification and legal consequences of peremptory norms of general international law (*jus cogens*). As indicated in paragraph (3) of the commentary to draft conclusion 1 and paragraph (2) of the commentary to draft conclusion 22, the present draft conclusions are methodological in nature and do not attempt to address the content of individual peremptory norms of general international law (*jus cogens*). As a result, the present draft conclusions do not seek to elaborate a list of peremptory norms of general international law (*jus cogens*).

(2) To elaborate a list of peremptory norms of general international law (*jus cogens*), even a non-exhaustive list, would require a detailed and rigorous study of many potential norms to determine which of those potential norms meet the criteria set out in Part Two of the present draft conclusions. Such an exercise falls beyond the scope of the exercise of elaborating draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).

(3) Although the identification of specific norms that have a peremptory character falls beyond the scope of the present draft conclusions, the Commission has decided to include in an annex a non-exhaustive list of norms previously referred to by the Commission as having peremptory character. Draft conclusion 23 refers to this annex. The Commission emphasizes that, in putting together this list, it did not apply the methodology it set forth in draft conclusions 4 to 9. The list is intended to illustrate, by reference to previous work of the Commission, the types of norms that have routinely been identified as having peremptory character, without itself, at this time, making an assessment of those norms.

(4) Draft conclusion 23 provides, first, that this annex is without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*). The phrase "[w]ithout prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*)" is meant to indicate that the inclusion of the list in the annex in no way precludes the existence at present of other norms that may have peremptory character or the emergence of other norms in the future having that character. Second, draft conclusion 23 provides, as a statement of fact, that the norms contained in the annex are those that have been previously referred to by the Commission as having peremptory status. Finally, draft conclusion 23 states that the list contained in the annex is non-exhaustive, which serves to reinforce the fact that this list is without prejudice to other norms having the same character.[290] It is non-exhaustive in two ways. It is non-

[290] See also paragraph (6) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts addressing the non-exhaustive nature of the norms referred to in those articles, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 113 ("It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a

exhaustive, first, in the sense that beyond the norms identified in the list, there are or may be other peremptory norms of general international law (*jus cogens*). Second, it is non-exhaustive in the sense that, in addition to the norms listed in the annex, the Commission has also referred previously to other norms as having peremptory character. The annex should therefore not be seen as excluding the peremptory character of these other norms.

(5) The fact that the annex referred to in draft conclusion 23 contains norms previously referred to by the Commission has two implications for the list. First, the formulation of each norm is based on a formulation previously used by the Commission. The Commission has therefore not attempted to reformulate the norms on the list. As will be seen in the following paragraphs of the commentary to draft conclusion 23, in some cases the Commission has used different formulations in its previous works. The second implication is that there has been no attempt to define the scope, content or application of the norms identified. The annex merely lists norms previously identified by the Commission, relying on the same formulations and without seeking to address any aspects of the content of the rules.

(6) In its previous works, the Commission has used different phrases to qualify the norms to which it has referred. In its commentary to draft article 50 of the draft articles on the law of treaties, it used the phrases "conspicuous example" and "example" respectively when referring to two of the norms.[291] In its commentary to article 26 of the draft articles on responsibility of States for internationally wrongful acts, the Commission referred to the norms on its list as those "clearly accepted and recognized",[292] while in its commentary to article 40 of the same articles, it used the phrase "generally agreed" to qualify the norm of "prohibition of aggression" as peremptory, and said there "seems to be widespread agreement" with regard to other norms listed in that paragraph.[293]

(7) The first norm identified in the annex is the prohibition of aggression. The prohibition of aggression was referred to by the Commission in the commentary to the articles on responsibility of States for internationally wrongful acts.[294] In 1966, the Commission stated that the "law of the Charter [of the United Nations] concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*".[295] Although not strictly the output of the Commission itself, the 2006 work of its Study Group on the fragmentation of international law is also noteworthy. Like the commentary to the articles on responsibility of States for internationally wrongful acts, the conclusions of the Study Group on the fragmentation of international law referred to the prohibition of aggression as a peremptory norm.[296] The report of the Study Group on the fragmentation of international law, after referring to the Commission's identification of the prohibition of aggression, included "the prohibition of aggressive use of force" on its list of the "most frequently cited candidates for the status of *jus cogens*".[297]

(8) The second norm identified in the annex is the prohibition of genocide. The prohibition of genocide has been referred to by the Commission with a consistent formulation

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whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53").

291 Paragraphs (1) and (3) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 247–248.

292 Paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85.

293 *Ibid.*, paragraph (4) of the commentary to article 40, pp. 112–113.

294 See *ibid.* ("Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory"). See also paragraph (5) of the commentary to article 26, *ibid.*, p. 85 ("Those peremptory norms that are clearly accepted and recognized include the [prohibition] of aggression").

295 See paragraph (1) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 247. In paragraph (3) of the same commentary, the Commission referred to the "unlawful use of force contrary to the principles of the Charter" of the United Nations.

296 See conclusion (33) of the conclusions of the Study Group on the fragmentation of international law (footnote 54 above).

297 Report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (footnote 54 above), p. 77, para. 374. It should be noted that the report of the Study Group also refers, as a separate norm, to the right to self-defence.

in all its relevant work. In particular, the articles on responsibility of States for internationally wrongful acts, both in the commentary to article 26 and in the commentary to article 40, referred to the prohibition of genocide.[298] Similarly, both the conclusions and the report of the Study Group on the fragmentation of international law refer to the prohibition of genocide.[299]

(9) The prohibition of crimes against humanity is the third norm included in the annex. The fourth paragraph of the preamble to the 2019 draft articles on prevention and punishment of crimes against humanity recalled that "the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)".[300] In the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, the Commission referred not to the prohibition of crimes against humanity separately, but to the prohibition of "crimes against humanity and torture".[301] The prohibition of crimes against humanity is also referred to in the report of the Study Group on the fragmentation of international law as one of the "most frequently cited candidates" for norms with *jus cogens* status.[302]

(10) The basic rules of international humanitarian law, the fourth norm in the annex, has been referred to by the Commission in its commentary to article 40 of its articles on responsibility of States for internationally wrongful acts.[303] The conclusions of the Study Group on the fragmentation of international law refer to basic rules of international humanitarian law applicable in armed conflict.[304] The report of the Study Group on the fragmentation of international law, on the other hand, refers to "the prohibition of hostilities directed at civilian population ('basic rules of international humanitarian law')".[305]

(11) The fifth norm in the annex is the prohibition of racial discrimination and apartheid. The prohibition of racial discrimination and apartheid is referred to in the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts.[306] The commentary to article 26 of the same articles, however, only refers to the prohibition of racial discrimination, without any reference to apartheid.[307] The report of the Study Group on the fragmentation of international law also refers to the prohibition of racial discrimination and apartheid.[308] The conclusions of the Study Group on the fragmentation of international law, however, refer to the prohibition of apartheid along with torture, without any reference to racial discrimination.[309]

(12) The annex also includes the prohibition of slavery as the sixth norm on the list of peremptory norms of general international law (*jus cogens*) previously referred to by the

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[298] See paragraph (5) of the commentary to article 26 and paragraph (4) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 85 and 112–113.

[299] Conclusion (33) of the conclusions of the Study Group on the fragmentation of international law (see footnote 54 above) and the report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (footnote 54 above), p. 77, para. 374.

[300] See the preamble to the draft articles on prevention and punishment of crimes against humanity, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), chap. IV, sect. E.1, para. 44.

[301] Paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85.

[302] Report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (see footnote 54 above), p. 77, para. 374.

[303] Paragraph (5) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 113.

[304] See conclusion (33) of the conclusions of the Study Group on the fragmentation of international law (footnote 54 above).

[305] Report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (see footnote 54 above), p. 77, para. 374.

[306] Paragraph (4) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 112–113.

[307] *Ibid.*, p. 85, paragraph (5) of the commentary to article 26.

[308] See the report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (footnote 54 above), p. 77, para. 374.

[309] See conclusion (33) of the conclusions of the Study Group on the fragmentation of international law (footnote 54 above).

Commission. The prohibition of slavery was referred to by the Commission as a peremptory norm of general international law (*jus cogens*) in the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts.[310] The commentary to article 40 of the same articles refers to the prohibition of slavery and the slave trade.[311] The commentary to the draft articles on the law of treaties, for its part, refers to the prohibition of the trade in slaves.[312]

(13) The prohibition of torture is the seventh norm in the annex. The prohibition of torture is referred to by the Commission in its commentary to article 40 of the articles on responsibility of States for internationally wrongful acts.[313] In the commentary to article 26 of the same articles, the Commission refers to the prohibition of "crimes against humanity and torture".[314] The conclusions of the Study Group on the fragmentation of international law, on the other hand, refer to the prohibition of "apartheid and torture".[315]

(14) The final norm listed in the annex is the right of self-determination. In describing the norm as having peremptory character, the Commission has used the formulation "the right of self-determination", although it has at times referred to the "right to self-determination".[316]

(15) As explained in paragraph (2), the list is non-exhaustive not only in the sense that it does not purport to cover all peremptory norms of general international law (*jus cogens*) that may exist or that may emerge in the future, but also in the sense that it does not reflect all the norms that have been referred to in some way by the Commission as having a peremptory character. This includes those norms that the Commission has considered in the course of its deliberations. For example, in its commentary to article 50 of the draft articles on the law of treaties, the Commission referred, *inter alia*, to the prohibition of piracy and to the principle of the sovereign "equality of States" – a fundamental principle under the Charter of the United Nations.[317] The Commission had also referred to the important role of the Charter of the United Nations, especially its provisions setting out the purposes and principles of the United Nations for the development of peremptory norms of general international law (*jus cogens*). In draft article 19, adopted in 1976 during the first reading of the topic "State responsibility", the Commission also referred to obligations "of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of

[310] Paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85.

[311] *Ibid.*, pp. 112–113, paragraph (4) of the commentary to article 40. This is the formulation used in the report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (see footnote 54 above), p. 77, para. 374.

[312] Paragraph (3) of the commentary to article 50 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 248.

[313] Paragraph (5) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 113. The report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (see footnote 54 above), p. 77, para. 374, also referred to the prohibition of torture as an example of a peremptory norm of general international law (*jus cogens*).

[314] Paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85.

[315] See conclusion (33) of the conclusions of the Study Group on the fragmentation of international law (footnote 54 above).

[316] See paragraph (5) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts, in which the Commission referred to the "the obligation to respect the right of self-determination", *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 113. See also conclusion (33) of the conclusions of the Study Group on the fragmentation of international law (footnote 54 above) and the report of the Study Group on the fragmentation of international law (finalized by Martti Koskenniemi) (*ibid.*), p. 77, para. 374. In paragraph (3) of the commentary to article 50 of the draft articles on the law of treaties, the Commission referred to the "principle of self-determination", *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 248. In paragraph (5) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts, the Commission referred to the right to self-determination, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85.

[317] Paragraph (3) of the commentary to article 50 of the draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 248.

the atmosphere or of the seas" as peremptory norms of general international law (*jus cogens*).[318]

(16) The norms in the annex are presented in no particular order. Their order does not, in any way, signify a hierarchy among them.

Annex

(*a*) The prohibition of aggression;

(*b*) the prohibition of genocide;

(*c*) the prohibition of crimes against humanity;

(*d*) the basic rules of international humanitarian law;

(*e*) the prohibition of racial discrimination and apartheid;

(*f*) the prohibition of slavery;

(*g*) the prohibition of torture;

(*h*) the right of self-determination.

[318] See article 19, paragraph 3 (*d*), of the draft articles on State responsibility, *Yearbook … 1976*, vol. II (Part Two), pp. 95–96, read in conjunction with paragraphs (17) and (18) of the commentary to that article (*ibid*., p. 102).

Chapter V
Protection of the environment in relation to armed conflicts

A. Introduction

45. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur.[319]

46. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixty-sixth session (2014), the second report at its sixty-seventh session (2015) and the third report at its sixty-eighth session (2016).[320] On the basis of the draft principles proposed by the Special Rapporteur in the preliminary, second and third reports, the Commission provisionally adopted sixteen draft principles.[321]

47. At its sixty-ninth session (2017), the Commission established a Working Group, chaired by Mr. Marcelo Vázquez-Bermúdez, to consider the way forward in relation to the topic, as Ms. Jacobsson was no longer a member of the Commission.[322] The Working Group recommended to the Commission the appointment of a new Special Rapporteur to assist with the successful completion of its work on the topic.[323] Following an oral report by the Chair of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.[324]

48. At its seventieth (2018) session, the Commission received and considered the first report of the Special Rapporteur[325] and took note of draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee.[326] At its seventy-first session (2019), the Commission provisionally adopted draft principles 19, 20 and 21, which had been provisionally adopted by the Drafting Committee at the seventieth session and taken note of by the Commission at the same session.[327] The Commission considered the second report of the Special Rapporteur.[328]

49. Also at its seventy-first session (2019), the Commission adopted, on first reading, the entire set of draft principles on protection of the environment in relation to armed conflicts, which comprised 28 draft principles, together with commentaries thereto.[329] It decided, in

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319 The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 167). For the syllabus of the topic, see *Yearbook ... 2011*, vol. II (Part Two), annex V.

320 Documents A/CN.4/674 and Corr.1 (preliminary report), A/CN.4/685 (second report) and A/CN.4/700 (third report).

321 See *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 59-61.

322 *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 255. The Working Group had before it the draft commentaries prepared by the Special Rapporteur, even though she was no longer a member of the Commission, on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session.

323 *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 260.

324 *Ibid.*, para. 262.

325 Document A/CN.4/720. At its seventieth session (2018), the Commission established a Working Group, chaired by Mr. Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to draft principles 4, 6 to 8, and 14 to 18, provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session. See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 167.

326 *Ibid.*, para. 172.

327 *Official Records of the General Assembly, Seventh-fourth Session, Supplement No. 10* (A/74/10), para. 62.

328 Document A/CN.4/728.

329 *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 62–67.

accordance with articles 16 to 21 of its statute, to transmit the draft principles, through the Secretary-General, to Governments, international organizations and others for comments and observations.[330]

B. Consideration of the topic at the present session

50. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/750), as well as comments and observations received from Governments, international organizations and others (A/CN.4/749).

51. At its 3571st to 3578th meetings, from 28 April to 10 May 2022, the Commission considered the third report of the Special Rapporteur and instructed the Drafting Committee to commence the second reading of the entire set of draft principles, together with a draft preamble, on the basis of the proposals by the Special Rapporteur, taking into account the comments and observations of Governments, international organizations and others, as well as the debate in plenary on the Special Rapporteur's report.

52. The Commission considered the report of the Drafting Committee (A/CN.4/L.968) at its 3584th meeting, held on 27 May 2022, and adopted the entire set of draft principles, together with a preamble, on protection of the environment in relation to armed conflicts on second reading (sect. E.1 below).

53. At its 3602nd to 3606th meetings, from 28 July to 2 August 2022, the Commission adopted the commentaries to the draft principles and the preamble (see sect. E.2 below).

54. In accordance with its statute, the Commission submits the draft principles, together with the preamble, to the General Assembly, with the recommendation set out below.

C. Recommendation of the Commission

55. At its 3606th meeting, on 2 August 2022, the Commission decided, in conformity with article 23 of its statute, to recommend that the General Assembly:

(*a*) take note of the draft principles on protection of the environment in relation to armed conflicts in a resolution, to annex the principles to the resolution, and to encourage their widest possible dissemination;

(*b*) commend the draft principles, together with the commentaries thereto, to the attention of States and international organizations and all who may be called upon to deal with the subject.

D. Tribute to the Special Rapporteur

56. At its 3606th meeting, held on 2 August 2022, the Commission, after adopting the draft principles on protection of the environment in relation to armed conflicts, adopted the following resolution by acclamation:

"*The International Law Commission*,

Having adopted the draft principles on protection of the environment in relation to armed conflicts,

Expresses to the Special Rapporteur, Ms. Marja Lehto, its deep appreciation and warm congratulations for the outstanding contribution she has made to the preparation of the draft principles through her tireless efforts and devoted work, and for the results achieved in the elaboration of draft principles on protection of the environment in relation to armed conflicts."

57. The Commission also reiterated its deep appreciation for the valuable contribution of the previous Special Rapporteur, Ms. Marie G. Jacobsson, to the work on the topic.

[330] *Ibid*., para. 68.

E. Text of the draft principles on protection of the environment in relation to armed conflicts

1. Text of the draft principles

58. The text of the draft principles adopted by the Commission, on second reading, at its seventy-third session is reproduced below.

Protection of the environment in relation to armed conflicts

…

Recalling the urgent need and common objectives to reinforce and advance the conservation, restoration and sustainable use of the environment for present and future generations,

Recalling also that Principle 24 of the Rio Declaration on Environment and Development provides, *inter alia*, that States shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development,

Recognizing that environmental consequences of armed conflicts may be severe and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss,

Aware of the importance of the environment for livelihoods, food and water security, maintenance of traditions and cultures, and the enjoyment of human rights,

Emphasizing that environmental factors are to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict,

Conscious of the need to enhance the protection of the environment in relation to both international and non-international armed conflicts, including in situations of occupation,

Considering that effective protection of the environment in relation to armed conflicts requires that measures are taken by States, international organizations and other relevant actors to prevent, mitigate and remediate harm to the environment before, during and after an armed conflict,

…

Part One
Introduction

Principle 1
Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict, including in situations of occupation.

Principle 2
Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment.

Part Two
Principles of general application

Principle 3
Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflicts.

2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflicts.

Principle 4
Designation of protected zones

States should designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance.

Principle 5
Protection of the environment of indigenous peoples

1. States, international organizations and other relevant actors shall take appropriate measures, in the event of an armed conflict, to protect the environment of the lands and territories that indigenous peoples inhabit or traditionally use.

2. When an armed conflict has adversely affected the environment of the lands and territories that indigenous peoples inhabit or traditionally use, States shall undertake appropriate and effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

Principle 6
Agreements concerning the presence of military forces

States and international organizations should, as appropriate, include provisions on environmental protection in relation to armed conflict in agreements concerning the presence of military forces. Such provisions should address measures to prevent, mitigate and remediate harm to the environment.

Principle 7
Peace operations

States and international organizations involved in peace operations established in relation to armed conflicts shall consider the impact of such operations on the environment and take, as appropriate, measures to prevent, mitigate and remediate the harm to the environment resulting from those operations.

Principle 8
Human displacement

States, international organizations and other relevant actors should take appropriate measures to prevent, mitigate and remediate harm to the environment in areas where persons displaced by armed conflict are located, or through which they transit, while providing relief and assistance for such persons and local communities.

Principle 9
State responsibility

1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.

2. The present draft principles are without prejudice to the rules on the responsibility of States or of international organizations for internationally wrongful acts.

3. The present draft principles are also without prejudice to:

(*a*) the rules on the responsibility of non-State armed groups;

(*b*) the rules on individual criminal responsibility.

Principle 10
Due diligence by business enterprises

States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict. Such measures include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner.

Principle 11
Liability of business enterprises

States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, can be held liable for harm caused by them to the environment, including in relation to human health, in an area affected by an armed conflict. Such measures should, as appropriate, include those aimed at ensuring that a business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

Part Three
Principles applicable during armed conflict

Principle 12
Martens Clause with respect to the protection of the environment in relation to armed conflicts

In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Principle 13
General protection of the environment during armed conflict

1. The environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

2. Subject to applicable international law:

(*a*) care shall be taken to protect the environment against widespread, long-term and severe damage;

(*b*) the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited.

3. No part of the environment may be attacked, unless it has become a military objective.

Principle 14
Application of the law of armed conflict to the environment

The law of armed conflict, including the principles and rules on distinction, proportionality and precautions shall be applied to the environment, with a view to its protection.

Principle 15
Prohibition of reprisals

Attacks against the environment by way of reprisals are prohibited.

Principle 16
Prohibition of pillage

Pillage of natural resources is prohibited.

Principle 17
Environmental modification techniques

In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

Principle 18
Protected zones

An area of environmental importance, including where that area is of cultural importance, designated by agreement as a protected zone shall be protected against any attack, except insofar as it contains a military objective. Such protected zone shall benefit from any additional agreed protections.

Part Four
Principles applicable in situations of occupation

Principle 19
General environmental obligations of an Occupying Power

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.

2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory, including harm that is likely to prejudice the health and well-being of protected persons of the occupied territory or otherwise violate their rights.

3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Principle 20
Sustainable use of natural resources

To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the protected population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes harm to the environment.

Principle 21
Prevention of transboundary harm

An Occupying Power shall take appropriate measures to ensure that activities in the occupied territory do not cause significant harm to the environment of other States or areas beyond national jurisdiction, or any area of the occupied State beyond the occupied territory.

Part Five
Principles applicable after armed conflict

Principle 22
Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged as a result of the conflict.

2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Principle 23
Sharing and granting access to information

1. To facilitate measures to remediate harm to the environment resulting from an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under applicable international law.

2. Nothing in paragraph 1 affects the right to invoke the grounds for refusal to share or grant access to information provided for in applicable international law. Nevertheless, States and international organizations shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Principle 24
Post-armed conflict environmental assessments and remedial measures

Relevant actors, including States and international organizations, should cooperate with respect to post-armed conflict environmental assessments and remedial measures.

Principle 25
Relief and assistance

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States and relevant international organizations should take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

Principle 26
Remnants of war

1. Parties to an armed conflict shall seek, as soon as possible, to remove or render harmless toxic or other hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic or other hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Principle 27
Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

2. Text of the draft principles and commentaries thereto

59. The text of the draft principles and commentaries thereto adopted by the Commission on second reading at its seventy-third session is reproduced below.

Protection of the environment in relation to armed conflicts

Commentary

(1) As is always the case with the Commission's outputs, the draft principles are to be read together with the commentaries.

(2) After the preamble, the draft principles are divided into five parts, including Part One entitled "Introduction" which contains draft principles on the scope and purpose of the draft principles. Part Two deals with the protection of the environment *before* the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for more than one temporal phase: before, during or after an armed conflict. Part Three pertains to the protection of the environment *during* armed conflict, and Part Four pertains to the protection of the environment in situations of occupation. Part Five contains draft principles relative to the protection of the environment *after* an armed conflict.

(3) The provisions have been cast as draft "principles". The Commission has previously chosen to formulate the output of its work as draft principles, both for provisions that set forth principles of international law and for non-binding declarations of principles intended to contribute to the progressive development of international law and provide appropriate guidance to States.[331] The present set of draft principles contains provisions of different normative value, including those that reflect customary international law, and those containing recommendations for its progressive development.

(4) The draft principles were prepared bearing in mind that the law of armed conflict, where applicable, is *lex specialis* but that other rules of international law, to the extent that they do not enter into conflict with it, also remain applicable. Such rules may generally complement and inform the application of the law of armed conflict. In addition, the fact that the law of armed conflict (*jus in bello*) and the law on the use of force (*jus ad bellum*) may apply at the same time does not affect their distinct nature.

(5) The draft principles use the term "law of armed conflict". While this term and the more commonly used term "international humanitarian law" can be seen as synonyms in international law,[332] the term "law of armed conflict" was preferred to ensure consistency with the Commission's articles on the effects of armed conflicts on treaties.[333]

Preamble

…

Recalling the urgent need and common objectives to reinforce and advance the conservation, restoration and sustainable use of the environment for present and future generations,

Recalling also that Principle 24 of the Rio Declaration on Environment and Development provides, *inter alia*, that States shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development,

Recognizing that environmental consequences of armed conflicts may be severe and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss,

Aware of the importance of the environment for livelihoods, food and water security, maintenance of traditions and cultures, and the enjoyment of human rights,

[331] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook … 1950*, vol. II, document A/1316, Part III, p. 374. See also principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook … 2006*, vol. II (Part Two), paras. 66–67, pp. 58–90; and the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook … 2006*, vol. II (Part Two), para. 176, p. 161.

[332] For a description of the semantics, see Y. Dinstein (ed.), *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed. (Cambridge, Cambridge University Press, 2016), at paras. 56–57 and 60–67.

[333] *Yearbook … 2011*, vol. II (Part Two), paras. 89–101.

Emphasizing that environmental factors are to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict,

Conscious of the need to enhance the protection of the environment in relation to both international and non-international armed conflicts, including in situations of occupation,

Considering that effective protection of the environment in relation to armed conflicts requires that measures are taken by States, international organizations and other relevant actors to prevent, mitigate and remediate harm to the environment before, during and after an armed conflict,

…

Commentary

(1) The preamble seeks to provide a conceptual framework for the draft principles, setting out the general context in which they were developed, as well as their main purposes. The preamble, consisting of seven paragraphs, provides a general introduction to the draft principles without reflecting the detail of the specific issues covered by them.

(2) The first paragraph contains a general statement of the urgency of the protection of the environment and of its importance for both present and future generations. This statement has been modelled on a preambular paragraph of the Political declaration of the special session of the United Nations Environmental Assembly to commemorate the fiftieth anniversary of the establishment of the United Nations Environment Programme.[334] Given the universal membership of the United Nations Environmental Assembly, the reference to the advancement and reinforcement of the conservation, restoration and sustainable use of the environment as "common objectives" indicates a global commitment taken by States, together with international organizations and other stakeholders.

(3) The second paragraph contains an express reference to international law and the protection of the environment in times of armed conflict. It recalls principle 24 of the Rio Declaration on Environment and Development, which provides, *inter alia*, that States shall respect international law providing protection for the environment in times of armed conflict and cooperate in its further development.[335] In addition to principle 24, other principles of the Rio Declaration are related to the present set of draft principles. Principle 2 concerns the responsibility of States to ensure that activities under their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction, principle 10 concerns access to environmental information, and principle 23 concerns the protection of the environment and natural resources of people under oppression, domination or occupation. Principles of the Rio Declaration have also been referred to in the previous work of the Commission.[336]

(4) The third preambular paragraph refers to environmental consequences of armed conflicts, which may be severe and have the potential to exacerbate global environmental

[334] United Nations Environmental Assembly, Special Session resolution 1/4 of 3 March 2022, "Political declaration of the special session of the United Nations Environmental Assembly to commemorate the fiftieth anniversary of the United Nations Environment Programme" (UNEP/EA.SS:1/4), fifth preambular paragraph.

[335] See the Rio Declaration on Environment and Development, (Rio Declaration), Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions adopted by the Conference (United Nations publication, Sales No. E.93.I.8 and corrigendum; A/CONF/151/26/Rev.1 (vol. I) and Corr.1), resolution 1, annex I, p. 5, principle 24: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary".

[336] Articles on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 97, fourth preambular paragraph; principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook … 2006*, vol. II (Part Two), para. 66, first preambular paragraph; draft articles on the law of transboundary aquifers, *Yearbook … 2008*, vol. II (Part Two), para. 53, fourth preambular paragraph.

challenges, such as climate change and biodiversity loss. It was understood that the word "severe" also encompasses that the effects can be long-term or irreversible.[337] This is particularly evident in the context of the loss of biological diversity; when a species becomes extinct, it cannot be restored. The paragraph also refers to the fact that environmental effects of armed conflicts are not only local but may have broader ramifications. Research shows that armed conflicts have frequently taken place in biodiversity hotspots.[338] Deforestation as a result of armed conflict may similarly have serious local effects, but also contributes to climate change.[339]

(5) The fourth paragraph refers to the interrelationship between the environment on the one hand and livelihoods, food and water security, maintenance of traditions and cultures, and the enjoyment of human rights, on the other. This general statement is in line with the recognition by the International Court of Justice "that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[340] The link between human rights and the environment has also been recognized by States, most recently in the General Assembly resolution on the human right to a clean, healthy and sustainable environment.[341] Reference can also be made to the two resolutions of the United Nations Environmental Assembly on the protection of the environment in areas affected by an armed conflict, which recognize "that sustainable development and the protection of the environment contribute to human well-being and the enjoyment of human rights".[342]

(6) The fifth paragraph borrows language from the Advisory Opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, which emphasizes that environmental factors are to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict,[343] for instance with respect to the assessment of what is necessary and proportionate in the pursuit of legitimate military objectives.[344] The Advisory Opinion also contains further important clarifications concerning the interconnections between the law of armed conflict, on the one hand, and international environmental law and international human rights law, on the other.

(7) The sixth and seventh paragraphs seek to direct the reader to the scope and purpose of the draft principles as contained in draft principles 1 and 2, respectively. The sixth paragraph reflects the general applicability of the draft principles to different types of conflicts, as well as the enhancement of the protection of the environment in relation to armed conflicts as the purpose of the draft principles. The seventh paragraph focuses on the notion of measures to prevent, mitigate and remediate harm to the environment, which forms an important component of the draft principles. The paragraph refers to States, international organizations and other relevant actors, as different draft principles are addressed to them.

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337 See *Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 78, para. 140, in which the International Court of Justice refers to "the often irreversible character of damage to the environment".

338 T. Hansson *et al*., "Warfare in biodiversity hotspots", *Conservation Biology*, vol. 23 (2009), pp. 578–587 (between 1950 and 2000, more than 80 per cent of armed conflicts took place in biodiversity hotspots: *ibid*., p. 578). See also ICRC, *When Rain Turns into Dust. Understanding and Responding to the Combined Impact of Armed Conflict and the Climate and Environment Crisis in People's Lives* (2020).

339 See IPCC, *Climate Change and Land: an IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (2019). See also S. Maljean-Dubois, "Le droit international de biodiversité" , *Collected Courses of the Hague Academy of International Law*, vol. 407 (2020), pp. 123–542.

340 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 241, para. 29.

341 See General Assembly resolution 76/300 of 28 July 2022. See also Human Rights Council resolution 48/13 of 8 October 2021.

342 United Nations Environmental Assembly resolutions 2/15 of 27 May 2016 on "Protection of the environment in areas affected by armed conflict" (UNEP/EA.2/Res.15), thirteenth preambular paragraph, and 3/1 of 6 December 2017 on "Pollution mitigation and control in areas affected by armed conflict or terrorism" (UNEP/EA.3/Res.1), eighth preambular paragraph.

343 *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 243, para. 33.

344 *Ibid*., paras. 30 and 33.

Part One
Introduction

Principle 1
Scope

The present draft principles apply to the protection of the environment before, during or after an armed conflict, including in situations of occupation.

Commentary

(1) This provision describes the scope of the draft principles. It provides that they cover three temporal phases: before, during, and after armed conflict. Situations of occupation are covered as a special type of international armed conflicts. The disjunctive "or" seeks to underline that not all draft principles would be applicable during all phases. However, it is worth emphasizing that there is, at times, a certain degree of overlap between these three phases.

(2) The division of the principles into the temporal phases described above (albeit without strict dividing lines) sets out the scope *ratione temporis* of the draft principles. Regarding the scope *ratione materiae* of the draft principles, reference is made to the term "protection of the environment" as it relates to the term "armed conflict". No distinction is generally made in these draft principles between international armed conflicts and non-international armed conflicts.

(3) In addition to States, several draft principles are addressed to international organizations, or to parties to an armed conflict, including non-State armed groups, or to other relevant actors, such as civil society organizations. The scope *ratione personae* of the draft principles is clear from the wording of each provision, together with the commentary.

Principle 2
Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment.

Commentary

(1) This provision outlines the fundamental purpose of the draft principles. It makes it clear that the draft principles aim to enhance the protection of the environment in relation to armed conflicts and signals the general kinds of measures that would be required to offer the necessary protection. Such measures include preventive measures, which aim to avoid or in any event to minimize damage to the environment during armed conflict, and measures which aim to mitigate or remediate harm that has already been caused as a result of armed conflict.

(2) Similar to the provision on scope, the present provision covers all three temporal phases, including situations of occupation. While the three phases are closely connected, the reference to prevention relates primarily to the situation before and during armed conflict, and the references to mitigation and remediation principally concern the post-conflict phase. It should be noted that a State may take remedial measures to restore the environment even before the conflict has ended.

(3) While prevention requires action to be taken at an early stage, the notion of mitigation refers to reduction of harm that has already occurred. The notion of remediation, in turn, encompasses any measure of remediation that may be taken to restore the environment. This might include, *inter alia*, taking into account loss or damage by impairment to the environment, costs of reasonable measures of reinstatement, as well as reasonable costs of clean-up associated with the costs of reasonable response measures.

Part Two
Principles of general application

Principle 3
Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflicts.

2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflicts.

Commentary

(1) Draft principle 3 recognizes that States are required to take effective measures to enhance the protection of the environment in relation to armed conflicts. Paragraph 1 recalls obligations under international law and paragraph 2 encourages States to voluntarily take further effective measures. The phrase "to enhance the protection of the environment", included in both paragraphs, corresponds to the purpose of the set of draft principles. Similarly, the phrase "in relation to armed conflicts", also inserted in both paragraphs, is intended to underline the connection of environmental protection to armed conflict.

(2) Paragraph 1 reflects that States have obligations under international law to enhance the protection of the environment in relation to armed conflicts and addresses the measures that States are obliged to take to this end. The word "shall" is qualified by the expression "pursuant to their obligations under international law", indicating that the provision does not require States to take measures that go beyond their international obligations. The specific obligations of a State under this provision will differ according to the relevant obligations under international law by which it is bound and may change over time.

(3) Consequently, paragraph 1 is formulated broadly in order to cover a wide range of measures. The provision includes examples of the types of measures that can be taken by States, namely, "legislative, administrative, judicial and other measures". The examples are not exhaustive, as indicated by the open category "other measures". Instead, the examples aim to highlight the most relevant types of measures to be taken by States.

(4) The law of armed conflict imposes several obligations on States that directly or indirectly contribute to the aim of enhancing the protection of the environment in relation to armed conflicts.[345] The notion "under international law" is nevertheless broader and covers also other relevant treaty-based or customary obligations related to the protection of the environment before, during or after an armed conflict, whether derived from international environmental law, human rights law or other areas of law.[346] Several of the present draft principles refer to existing customary or treaty-based obligations of States relevant to the protection of the environment in relation to armed conflicts.

(5) As far as the law of armed conflict is concerned, the obligation to disseminate the law of armed conflict to armed forces and, to the extent possible, also to the civilian population contributes to the protection of the environment.[347] This obligation can also be linked to

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[345] See ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary* (Geneva, 2020), available from https://shop.icrc.org/guidelines-on-the-protection-of-the-natural-environment-in-armed-conflict-rules-and-recommendations-relating-to-the-protection-of-the-natural-environment-under-international-humanitarian-law-with-commentary.html (accessed on 2 August 2022).

[346] For the effective implementation of environmental and human rights obligations, also in relation to armed conflicts, see UNEP, *Environmental Rule of Law: First Global Report* (2019), available at www.unep.org/resources/assessment/environmental-rule-law-first-global-report (last accessed on 2 August 2022).

[347] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty*

common article 1 of the Geneva Conventions, in which States parties undertake to respect and ensure respect for the Conventions in all circumstances.[348] Such dissemination can take place for instance through integrating the relevant rules into legislation, as well as administrative and institutional measures, such as their inclusion in military manuals[349] and codes of conduct.[350]

(6) The obligation to respect and ensure respect is also interpreted to require that States, to the extent possible, exert their influence to prevent and stop violations of the law of armed conflict.[351] As far as the protection of the environment is concerned, this could entail, for instance, sharing of scientific expertise as to the nature of the damage caused to the environment by certain types of weapons, or making available technical advice as to how to protect areas of particular ecological importance or fragility.

(7) A further obligation to conduct "a weapons review" is found in article 36 of Additional Protocol I. According to this provision, a State party is under an obligation to determine whether the employment of a new weapon would, in some or all circumstances, be prohibited by Additional Protocol I or "by any other rule of international law applicable" to the State party.[352] It is notable that the obligation covers the study, development, acquisition or adoption of all means or methods of warfare: both weapons and the way in which they can

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Series, vol. 1125, No. 17512, p. 3 (hereinafter, Additional Protocol I), art. 83. See also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 (hereinafter, First Geneva Convention), art. 47; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85 (hereinafter, Second Geneva Convention), art. 48; Geneva Convention relative to the Treatment of Prisoners of War (Convention III) (Geneva, 12 August 1949), *ibid*., No. 972, p. 135 (hereinafter, Third Geneva Convention), art. 127; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287 (hereinafter, Fourth Geneva Convention), art. 144; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Additional Protocol II) (Geneva, 8 June 1977), *ibid*., No. 17513, p. 609, art. 19; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Additional Protocol III) (Geneva, 8 December 2005), *ibid.*, vol. 2404, No. 43425, p. 261, art. 7; and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons) (Geneva, 10 October 1980), *ibid.*, vol. 1342, No. 22495, p. 137, art. 6. See also J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge, Cambridge University Press, 2005), rule 143, pp. 505–508.

348 First Geneva Convention, art. 1; Second Geneva Convention, art. 1; Third Geneva Convention, art. 1; Fourth Geneva Convention, art. 1.

349 Examples of States that have introduced such provisions in their military manuals include Argentina, Australia, Belgium, Benin, Burundi, Canada, Central African Republic, Chad, Colombia, Côte d'Ivoire, France, Germany, Italy, Kenya, the Netherlands, New Zealand, Peru, the Russian Federation, South Africa, Spain, Sweden, Switzerland, Togo, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45 (accessed on 31 May 2022).

350 See ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), paras. 303–304. See also more generally Rules 26 and 27.

351 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 114–115, para. 220; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at pp. 199–200, paras. 158–159; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* … (footnote 347 above), rule 144, p. 509. See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), paras. 303–304. For a more comprehensive overview, including on different positions regarding the existence and extent of positive obligations in this regard, see ICRC commentary (2020) to the Third Geneva Convention, art. 1, para. 202 (the commentaries on the Geneva Conventions of 1949 and the Protocols thereto are available from www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions (accessed on 2 August 2022).

352 Additional Protocol I, art. 36.

be used.[353] According to the International Committee of the Red Cross (ICRC) commentary on the Additional Protocols, article 36 "implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality". A number of States, including States not party to Additional Protocol I, are known to have established such procedures.[354]

(8) The obligation to conduct "a weapons review" binds all States parties to Additional Protocol I. The reference to "any other rule of international law applicable" makes it clear that the obligation goes beyond merely studying whether the employment of a certain weapon would be contrary to Additional Protocol I, including articles 35 and 55, which are of direct relevance to the protection of the environment. In other words, there is a need to analyse whether any other rules of the law of armed conflict, treaty or customary, or any other areas of international law might prohibit the employment of a new weapon, means or method of warfare. Such examination also includes taking into account any applicable international environmental law and human rights obligations.[355]

(9) While Additional Protocol I applies only to international armed conflicts, the weapons review provided for in article 36 also promotes respect for the law in non-international armed conflicts. For instance, the use of weapons that are inherently indiscriminate and the use of means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering are prohibited under customary international law.[356] These rules are not limited to international armed conflict.[357] It follows that new weapons as well as methods of warfare are to be reviewed against all applicable international law, including the law governing non-international armed conflicts, in particular as far as the protection of civilians and the principle of distinction are concerned. Furthermore, with regard to both international and non-international armed conflicts, the prohibitions of certain weapons, means and methods of warfare (such as biological and chemical weapons) under treaty or customary international law must be observed when engaging in a weapons review.

(10) States also have the obligation to investigate war crimes that may have been committed by their nationals or armed forces, or on their territory, or over which they have

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[353] C. Pilloud and J. Pictet, "Article 35: Basic rules", in Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), p. 398, para. 1402. The commentary on "Article 36: New weapons" refers to this section for an explanation of means and methods on p. 425, para. 1472.

[354] Based on information received from ICRC in June 2022, 13 States are known to have in place national mechanisms to review the legality of weapons and have made public their review mechanisms through domestic legislation, military manuals, public statements or other sources: Australia, Belgium, Denmark, Germany, Israel, Italy, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom and the United States. Another six States have indicated publicly that they conduct legal reviews without making public national review procedures or the instruments setting up such procedures: Argentina, China, Canada, Finland, France and the Russian Federation. Five other States have indicated to ICRC that they carry out reviews pursuant to Ministry of Defence's mandate and instructions. Additionally, Spain is in the process of revising an instruction in order to implement weapons review.

[355] Some States, such as Sweden, Switzerland and the United Kingdom, see a value in considering international human rights law in the review of military weapons because military personnel may in some situations (e.g. peacekeeping missions) use the weapon to conduct law enforcement missions. For further commentary, see S. Casey-Maslen, N. Corney and A. Dymond-Bass, "The review of weapons under international humanitarian law and human rights law", in Casey-Maslen (ed.), *Weapons under International Human Rights Law* (Cambridge, Cambridge University Press, 2014).

[356] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* … (see footnote 347 above), rules 70 and 71, pp. 237–250.

[357] By virtue of the rule of customary international law that civilians must not be made the object of attack, weapons that are by nature indiscriminate are also prohibited in non-international armed conflicts. The prohibition of weapons that are by nature indiscriminate is also set forth in several military manuals applicable in non-international armed conflicts, for instance those of Australia, Colombia, Ecuador, Germany, Nigeria and the Republic of Korea. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule71#Fn_1_19 (accessed on 2 August 2022). See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 32 and commentary thereto.

jurisdiction, and, if appropriate, prosecute the suspects.[358] This obligation extends to war crimes that concern the environment, for instance the pillaging of natural resources,[359] and the extensive destruction and appropriation of property that is not justified by military necessity and is carried out wantonly and unlawfully.[360]

(11) Paragraph 2 of the draft principle addresses voluntary measures that would further enhance the protection of the environment in relation to armed conflict. Like the measures referred to in paragraph 1, the measures taken by States may be of legislative, judicial, administrative or other nature. To the extent that they do not reflect customary or treaty-based obligations of States, the current draft principles provide examples of effective voluntary measures to enhance the protection of the environment in relation to armed conflicts.

(12) Paragraph 2 also covers situations in which a State is not bound by a certain treaty but applies its provisions as a matter of policy. It may furthermore refer to situations in which certain treaty provisions or rules of customary international law applicable to international armed conflicts are applied as a matter of policy to the protection of the environment irrespective of the type of armed conflict in question. The ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict include a recommendation to this effect.[361] States could furthermore conclude special agreements providing additional protection to the environment in situations of armed conflict.[362]

(13) In addition to encouraging States to take voluntary measures to enhance the protection of the environment in relation to armed conflicts beyond their obligations under international law, the paragraph captures recent developments in the practice of States to this end.[363] Other

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[358] First Geneva Convention, art. 50; Second Geneva Convention, art. 51; Third Geneva Convention, art. 130; Fourth Geneva Convention, art. 147; Additional Protocol I, arts. 11 and 85; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rules 157 and 158, pp. 604–610. According to these two rules, States must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to territorial and personal jurisdiction, or including also universal jurisdiction, which is obligatory for grave breaches. See also Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 8, para. 2 (a) (iv), and (b) (ii), (v), (xiii), (xvi), (xvii) and (xviii), as well as art. 8, para. 2 (e) (v), (xii), (xiii), and (xiv). See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 28 and commentary thereto.

[359] Convention (IV) Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907), Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, *Consolidated Treaty Series*, vol. 207, p. 277 (the Hague Regulations), arts. 28 and 47; Fourth Geneva Convention, art. 33, para. 2; Additional Protocol I, art. 4, para. 2 (g); ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 14.

[360] Hague Regulations, art. 23 (g); Fourth Geneva Convention, art. 53; ICRC, Guidelines on the Protection of the Natural Environment (footnote 345 above), Rule 13.

[361] ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Recommendation 18: "If not already under the obligation to do so under existing rules of international humanitarian law, each party to a non-international armed conflict is encouraged to apply to that conflict all or part of the international humanitarian law rules protecting the natural environment in international armed conflicts". See also ICRC, resolution 1 adopted by the 33rd International Conference of the Red Cross and Red Crescent, 9–12 December 2019 (33IC/19/R1), "Bringing IHL home: A road map for better national implementation of international humanitarian law": para. 13 of the resolution "invites States to share examples of and exchange good practices of national implementation measures taken in accordance with IHL obligations as well as other measures that may go beyond States' IHL obligations".

[362] For special agreements, see First Geneva Convention, art. 6; Second Geneva Convention, art. 6; Third Geneva Convention, art. 6; Fourth Geneva Convention, art. 7. See also common art. 3 of the Geneva Conventions. See further ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Recommendation 17, "Conclusion of agreements to provide additional protection to the natural environment".

[363] See, e.g., Slovenia, Rules of Service in the Slovenian Armed Forces, item 210, available at https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2009-01-3757?sop=2009-01-3757 (accessed on 2 August 2022); Paraguay, National Defence Council, *Política de Defensa Nacional de la Republica de Paraguay* [National Defence Policy of the Republic of Paraguay], 7 October 1999, para. I (A), available at

measures that should be taken by States can aim at enhancing cooperation, as appropriate, with other States, as well as with relevant international organizations.

Principle 4
Designation of protected zones

States should designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance.

Commentary

(1) Draft principle 4 is entitled "Designation of protected zones" and provides that States should designate, by agreement or otherwise, areas of environmental importance as protected zones, including where those areas are of cultural importance. Part Two ("Principles of general application"), where this provision is placed, deals with the pre-conflict stage, when peace is prevailing, but also contains principles of a more general nature that are relevant to more than one temporal phase. While the designation of protected zones could take place at any time, it should preferably be done before or at least at the outset of an armed conflict. The phrase "in the event of an armed conflict" indicates that the designation of an area as a protected zone may be made with a possible future event of an armed conflict in mind. In addition, draft principle 4 has a corresponding draft principle (draft principle 18) which is placed in Part Three "Principles applicable during armed conflict".

(2) The areas referred to in draft principle 4 may be designated by agreement or otherwise. The types of situations foreseen may include, *inter alia*, an agreement concluded verbally or in writing, or through reciprocal and concordant declarations, as well as those created through a unilateral declaration or designation through an international organization. It should be noted that the word "State" does not preclude the possibility of agreements being concluded with non-State actors.

(3) It is not uncommon that geographic areas are assigned a special legal status as a means to ensure their protection and preservation. This can be done through international agreements or through national legislation. In some instances such areas are not only protected in peacetime, but are also protected from attack during an armed conflict.[364] As a rule, this is the case with demilitarized and neutralized zones. Demilitarized zones are established by the parties to a conflict and imply that the parties are prohibited from extending their military operations to that zone if such an extension is contrary to the terms of their agreement.[365] Demilitarized zones can also be established and implemented in peacetime.[366] Most notably from the point of view of environmental protection, no particular criteria have been set regarding the type of area that can be designated as a demilitarized zone, which therefore can be established even outside populated areas.

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https://www.mdn.gov.py/application/files/1114/4242/5025/Politica_de_Defensa.pdf (accessed on 2 August 2022). See also contributions in the Sixth Committee from Croatia (A/C.6/70/SR.24), para. 89, Cuba (*ibid.*), para. 10, Czech Republic (*ibid.*), para. 45, New Zealand, (A/C.6/74/SR.26), para. 92, Palau (A/C.6/70/SR.25), paras. 27–28.

364 A/CN.4/685, para. 210.

365 See Additional Protocol I, art. 60. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* … (footnote 347 above), rule 36, p. 120. The ICRC study on customary law considers that this constitutes a rule under customary international law and is applicable in both international and non-international armed conflicts.

366 See e.g. Antarctic Treaty (Washington, 1 December 1959), United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71, art. I. See, e.g., the definition found in M. Björklund and A. Rosas, *Ålandsöarnas Demilitarisering och Neutralisering* (Åbo, Åbo Academy Press, 1990). The Åland Islands are both demilitarized and neutralized. Björklund and Rosas list as further examples of demilitarized and neutralized areas Spitzbergen, Antarctica and the Strait of Magellan (*ibid.*, p. 17). See also L. Hannikainen, "The continued validity of the demilitarized and neutralized status of the Åland Islands", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 54 (1994), p. 614, at p. 616.

(4) Granting special protection to areas of ecological importance was suggested at the time of the drafting of the Additional Protocols to the Geneva Conventions.[367] Reference can furthermore be made to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which encouraged the parties to the conflict "to agree that no hostile actions will be conducted in marine areas containing: (a) rare or fragile ecosystems; or (b) the habitat of depleted, threatened or endangered species or other forms of marine life."[368] The United Nations Environment Programme also recommended in 2009 that a new legal instrument be elaborated "for place-based protection of critical natural resources and areas of ecological importance during armed conflicts".[369] Most recently, the ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict recommended that areas of particular environmental significance or fragility could be designated as demilitarized zones.[370]

(5) Certain multilateral environmental conventions also establish area-based protection of the environment. For instance, the Convention on Biological Diversity requests States parties, as far as possible and appropriate, to "establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity".[371] Under the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention),[372] endangered sites can be listed in the Montreux Records "where an adverse change in ecological character has occurred, is occurring, or is likely to occur, and which are therefore in need of priority conservation attention".[373] According to the Convention concerning the Protection of the World Cultural and Natural Heritage, a site can be included by the World Heritage Committee on the List of World Heritage in Danger.[374] Sites threatened or affected by an armed conflict are included in both the World Heritage Convention and the Ramsar Convention lists.[375]

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[367] The working group of Committee III of the Conference submitted a proposal for a draft article 48 *ter* providing that "publicly recognized nature reserves with adequate markings and boundaries declared as such to the adversary shall be protected and respected except when such reserves are used specifically for military purposes". See C. Pilloud and J. Pictet, "Article 55: Protection of the natural environment" in Sandoz *et al*., *ICRC Commentary on the Additional Protocols …* (footnote 353 above), p. 664, paras. 2138–2139.

[368] L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (International Institute of Humanitarian Law, Cambridge, Cambridge University Press, 1995), para. 11. The paragraph reflects art. 194, para. 5, of the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, p. 397.

[369] United Nations Environment Programme, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (Nairobi, United Nations Environment Programme, 2009), Recommendation 9, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&amp%3BisAllowed= (accessed on 2 August 2022).

[370] ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Recommendation 17 and commentary thereto.

[371] Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79, art. 8 ("In-situ conservation"). See also S.L. Maxwell *et al*., "Area-based conservation in the twenty-first century", *Nature*, No. 586 (2020), pp. 217–227.

[372] Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 2 February 1971), United Nations, *Treaty Series*, vol. 996, No. 14583, p. 245.

[373] Ramsar Convention, resolution VI.1 (1996) adopted by the 6th Meeting of the Conference of the Contracting Parties (Brisbane, Australia, 19–27 March 1996), annex 3, Guidelines for operation of the Montreux Record, art. 3.1.

[374] Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (Paris, 16 November 1972), United Nations, *Treaty Series*, vol. 1037, No. 15511, p. 151, art. 11, para. 4. See also the UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (8 July 2015) WHC.15/01.

[375] Out of the 52 properties listed in accordance with article 11, paragraph 4, of the World Heritage Convention, 33 are endangered because of an armed conflict. The list is available at https://whc.unesco.org/en/danger/ (last accessed on 14 June 2022). The Montreux Records are available at www.ramsar.org/search?search_api_views_fulltext=montreux+records (last accessed on 2 August 2022).

(6) When designating protected zones under this draft principle, particular weight should be given to the protection of areas of environmental importance that are susceptible to the adverse consequences of hostilities.[376] In line with the conventions referred to above, the provision does not contain any further qualifier, such as "major", which could be seen as unnecessarily raising the threshold beyond existing standards, and takes into account that any area can be designated as a demilitarized zone under the law of armed conflict.

(7) Protected zones designated in accordance with the current draft principle may also be areas of cultural importance, as it is sometimes difficult to draw a clear line between areas which are of environmental importance and areas which are of cultural importance. This is also recognized in the World Heritage Convention: the fact that the heritage sites under this Convention are selected on the basis of a set of 10 criteria, including both cultural and natural (without differentiating between them), illustrates this point.[377] The International Union for Conservation of Nature and Natural Resources (IUCN) furthermore defines a protected area as "a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values".[378]

(8) It should be recalled that, prior to an armed conflict, States parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict[379] (1954 Hague Convention) and its Protocols, are under the obligation to establish inventories of cultural property items that they wish to enjoy protection in the case of an armed conflict, in accordance with article 11, paragraph 1, of the 1999 Protocol to the Convention.[380] In peacetime, States parties are required to take other measures that they find appropriate to protect their cultural property from anticipated adverse impacts of armed conflicts, in accordance with article 3 of the Convention.

(9) The purpose of the present draft principle is not to affect the regime of the 1954 Hague Convention, which is distinct in its scope and purpose. While draft principle 4 does not extend to cultural objects *per se*, the term "cultural" is used in this context to indicate the existence of a close linkage to the environment. The term would include, for example, ancestral lands of indigenous peoples, who depend on the environment for their sustenance and livelihood.

(10) The designation of the areas foreseen by this draft principle can be related to the rights of indigenous peoples, particularly if the protected area also serves as a sacred area which warrants special protection. In some cases, the protected area may also serve to conserve the particular culture, knowledge and way of life of the indigenous populations living in the area concerned. The importance of preserving indigenous culture and knowledge has been formally recognised in international law under the Convention on Biological Diversity.[381] In addition, the United Nations Declaration on the Rights of Indigenous Peoples[382] refers to the right to manage, access and protect religious and cultural sites.

(11) The term "cultural importance", which is also used in draft principle 18, builds on the recognition of the close connection between the environment, cultural objects and

[376] See A/CN.4/685, para. 225. See also C. Droege and M.-L. Tougas, "The protection of the natural environment in armed conflict – existing rules and need for further legal protection", *Nordic Journal of International Law*, vol. 82 (2013), pp. 21–52, at p. 43.

[377] UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (see footnote 374 above), para. 77.1. At present, 197 sites representing natural heritage across the world are listed on the World Heritage List. A number of these also feature on the List of World Heritage in Danger in accordance with article 11, paragraph 4, of the World Heritage Convention.

[378] Available at https://portals.iucn.org/library/sites/library/files/documents/PAG-019.pdf (last accessed 2 August 2022).

[379] Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), United Nations, *Treaty Series*, vol. 249, No. 3511, p. 240.

[380] Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol) (The Hague, 26 March 1999), *ibid.*, vol. 2253, No. 3511, p. 172.

[381] Convention on Biological Diversity, art. 8 (*j*). See also Intergovernmental Science-Policy Panel on Biodiversity and Ecosystem Services, Summary for policymakers of the methodological assessment of the diverse values and valuation of nature, IPBES/9/L.13, 9 July 2022.

[382] General Assembly resolution 61/295, annex, art. 12.

characteristics in the landscape in environmental protection instruments such as the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.[383] Reference can also be made to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which stipulates that "effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".[384] Moreover, the Convention on Biological Diversity acknowledges the cultural value of biodiversity.[385]

(12) A few examples of domestic legislation referring to the protection of both cultural and environmental areas can also be mentioned in this context. For example, the Act on the Protection of Cultural Property of 29 August 1950 of Japan, provides for animals and plants which have a high scientific value to be listed as "protected cultural property".[386] The National Parks and Wildlife Act of 1974 of New South Wales in Australia may apply to any area of natural, scientific or cultural significance,[387] and the Italian Protected Areas Act of 6 December 1991 defines "nature parks" as areas of natural and environmental value constituting homogeneous systems characterised by their natural components, their landscape and aesthetic values and the cultural tradition of the local populations.[388]

Principle 5
Protection of the environment of indigenous peoples

1. States, international organizations and other relevant actors shall take appropriate measures, in the event of an armed conflict, to protect the environment of the lands and territories that indigenous peoples inhabit or traditionally use.

2. When an armed conflict has adversely affected the environment of the lands and territories that indigenous peoples inhabit or traditionally use, States shall undertake appropriate and effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

Commentary

(1) Draft principle 5 concerns the protection of the environment of indigenous peoples in relation to armed conflicts. The draft principle recognizes the crucial role that these peoples, lands and territories play in the conservation of biological diversity.[389] According to

[383] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993), Council of Europe, *European Treaty Series*, No. 150, art. 2, para. 10 (defining the term "environment" for the purpose of the Convention to include: "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape").

[384] Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269, art. 1, para. 2.

[385] Convention on Biological Diversity, preamble and annex I, para. 1.

[386] Japan, Law for the Protection of Cultural Property, Law No. 214, 30 May 1950. Available from www.unesco.org/culture/natlaws/media/pdf/japan/japan_lawprotectionculturalproperty_engtof.pdf (accessed on 2 August 2022).

[387] Australia, New South Wales Consolidated Acts, National Parks and Wildlife Act, Act 80 of 1974. Available from www.austlii.edu.au/au/legis/nsw/consol_act/npawa1974247/ (accessed on 2 August 2022).

[388] Italy, Act No. 394 laying down the legal framework for protected areas, 6 December 1991. Available from http://faolex.fao.org (accessed on 2 August 2022).

[389] While indigenous peoples account for just 6 per cent of the total human population, they hold tenure over 25 per cent of the world's land surface and safeguard 80 per cent of the global land biodiversity. See The World Bank, "Indigenous peoples", 14 April 2022, available at www.worldbank.org/en/topic/indigenouspeoples (accessed on 16 June 2022). See also Department of Economic and Social Affairs, "Challenges and opportunities for indigenous peoples' sustainability",

paragraph 1, States, international organizations and other relevant actors shall, due to the special relationship between indigenous peoples and their environment, take appropriate measures to protect the lands and territories of indigenous peoples in the event of an armed conflict.

(2) As a general reminder of the need to protect the environment of indigenous peoples, paragraph 1 addresses a broad range of actors: States, international organizations and other relevant actors. Paragraph 1 takes into account the role of international organizations when administering territory, as well as the role that certain non-State armed groups may play when exercising *de facto* control over a territory. Regarding the latter, it should be recalled that parties to an armed conflict have an obligation to protect the environment in accordance with the law of armed conflict. While the extent to which non-State armed groups have obligations under human rights law is still debated, their obligations are well established in situations in which they exercise control over a territory.

(3) Paragraph 2, however, is only addressed to States. It recognizes that where armed conflict has adversely affected the environment of indigenous peoples' lands and territories, States shall undertake remedial measures. In light of the special relationship between indigenous peoples and their environment, these steps shall be taken in a manner that respects this relationship and in consultation and cooperation with such peoples, in particular through their own leadership and representative institutions.

(4) The special relationship between indigenous peoples and their environment has been recognized, protected and upheld by international instruments such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples,[390] as well as in the practice of States and in the jurisprudence of international courts and tribunals. To this end, the lands of indigenous peoples have been recognized as having a fundamental importance for their collective physical and cultural survival as peoples.[391]

(5) Paragraph 1 is based on article 29, paragraph 1, of the United Nations Declaration on the Rights of Indigenous Peoples, which expresses the right of indigenous peoples to "the conservation and protection of the environment and the productive capacity of their lands or territories and resources",[392] and article 7, paragraph 4, of ILO Convention No. 169, which recognizes that "Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit". It furthermore builds on the jurisprudence of regional courts and tribunals.[393] Reference can

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23 April 2021, available at www.un.org/development/desa/dspd/2021/04/indigenous-peoples-sustainability/ (accessed on 16 June 2022).

390 See International Labour Organization (ILO), Convention concerning Indigenous and Other Tribal Peoples in Independent Countries (Geneva, 27 June 1989) (Indigenous and Tribal Peoples Convention, 1989 (No. 169)), which revised the Indigenous and Tribal Populations Convention, 1957 (No. 107); United Nations Declaration on the Rights of Indigenous Peoples, art. 26. See also American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016, Organization of American States, General Assembly, *Report of the Forty-Sixth Regular Session, Santo Domingo, Dominican Republic, June 13–15, 2016*, XLVI-O.2, *Proceedings*, vol. I, resolution AG/RES. 2888 (XLVI-O/16).

391 The Inter-American Court of Human Rights recognized "the culture of the members of the indigenous communities corresponds to a specific way of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral component of their cosmovision, religious beliefs and, consequently, their cultural identity", see *Río Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), Series C, Case No. 250, 4 September 2012, para. 177, footnote 266. See also *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), Series C, Case No. 125, 17 June 2005, para. 135, and *Case of Chitay Nech et al. v. Guatemala*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, Case No. 212, 25 May 2010, para. 147, footnote 160.

392 See also American Declaration on the Rights of Indigenous Peoples, art. XIX, para. 4.

393 Inter-American Court of Human Rights: *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), Series C, No. 146, 29 March 2006; *Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 172, 28 November 2007,

also be made to the obligation under the Convention on Biological Diversity to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.[394]

(6) The specific rights of indigenous peoples over certain lands or territories are the subject of different legal regimes in different States. Further, in international instruments concerning the rights of indigenous peoples, various formulations are used to refer to the lands and territories connected to indigenous peoples, and over which they have various rights and protected status. The phrase "lands and territories which indigenous peoples inhabit or traditionally use" builds on established language on the relevant international instruments.[395]

(7) Armed conflict may have the effect of increasing existing vulnerabilities to environmental harm or creating new types of environmental harm on the lands and territories concerned and thereby affecting the survival and well-being of the peoples connected to them. Under paragraph 1, in the event of an armed conflict, States, international organizations and other relevant actors shall take appropriate measures to protect the relationship that indigenous peoples have with their ancestral lands and territories. The appropriate protective measures referred to in paragraph 1 may be taken, in particular, before or during an armed conflict. Under this provision, States, international organizations and other relevant actors are expected to take measures only if they have a connection to the indigenous people and environment at issue. The word "appropriate" also qualifies the obligation and allows for the measures to be adjusted according to the circumstances.

(8) According to the United Nations Declaration on the Rights of Indigenous Peoples, the concerned State shall take steps to ensure that military activities do not take place in the lands or territories of indigenous peoples unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned.[396] This could be achieved through avoiding placing military installations in indigenous peoples' lands or territories, and by designating their territories as protected areas, as set out in draft principle 4. In general, the concerned State shall consult effectively with the indigenous peoples concerned prior to using their lands or territories for military activities.[397] During an armed conflict, the rights, lands and territories of indigenous peoples also enjoy the protections provided by the law of armed conflict and applicable human rights law.[398]

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para. 134; *Río Negro Massacres v. Guatemala* (see footnote 391 above); and *Kaliña y Lokono Peoples v. Suriname* (Merits, Reparations and Costs), Series C, No. 309, 25 November 2015. See further *African Commission on Human and Peoples' Rights v. Republic of Kenya*, African Court on Human and Peoples' Rights, Case No. 006/2012, Judgment, 25 May 2017, paras. 122–131, and *Centre for Minority Rights in Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, African Commission on Human and Peoples' Rights, Decision, 4 February 2010.

394 Convention on Biological Diversity, art. 8 (*j*). See also para. (10) of the commentary to draft principle 4 above.

395 See, for example, "lands or territories, or both as applicable, which they occupy or otherwise use" used in art. 13, para. 1, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), or "lands, territories and resources" used in the preamble of the United Nations Declaration on the Rights of Indigenous Peoples.

396 See United Nations Declaration on the Rights of Indigenous Peoples, art. 30:

"1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities."

397 *Ibid.*

398 See the American Declaration on the Rights of Indigenous Peoples, art. XXX, paras. 3 and 4, which read:

(9) Paragraph 2 focuses on the harm caused as a result of an armed conflict. The purpose of this provision is to facilitate the taking of remedial measures in the event that an armed conflict has adversely affected the environment of the lands and territories that indigenous peoples inhabit or traditionally use.[399] In doing so, it seeks to ensure the participatory rights of indigenous peoples in issues relating to their territories in a post-conflict context.

(10) In such a case, the concerned States shall undertake appropriate and effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and, in particular, through their own representative institutions. The word "shall" reflects the established nature of the obligation of consultation.[400]

(11) The reference to appropriate procedures and representative institutions of indigenous peoples has been included to acknowledge the diversity of the existing procedures within different States that allow for effective consultation and cooperation with indigenous peoples, and the diversity of their modes of representation in order to obtain their free, prior and informed consent before adopting measures that may affect them.[401] The reference to appropriate consultations allows for the representative structures to be adjusted to the particular situation. It also draws attention to the need for the consultations to be culturally appropriate.[402] The consultations must in any event be effective in practice in order not to put in jeopardy the substantive right of indigenous peoples to redress.[403]

"3. Indigenous peoples have the right to protection and security in situations or periods of internal or international armed conflict, in accordance with international humanitarian law.

4. States, in compliance with international agreements to which they are party, in particular those of international humanitarian law and international human rights law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War, and Protocol II thereof relating to the protection of victims of non-international armed conflicts, shall, in the event of armed conflicts, take adequate measures to protect the human rights, institutions, lands, territories, and resources of indigenous peoples and their communities ...".

399 According to the United Nations Declaration on the Rights of Indigenous Peoples, article 28, "[i]ndigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent". Similarly, the American Declaration on the Rights of Indigenous Peoples, art. XXXIII, states: "Indigenous peoples and individuals have the right to effective and suitable remedies, including prompt judicial remedies, for the reparation of any violation of their collective and individual rights. States, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right."

400 See for instance, United Nations Declaration on the Rights of Indigenous Peoples, art. 19. The Inter-American Court of Human Rights has established safeguards requiring States to obtain the "free, prior, and informed consent [of indigenous peoples], according to their customs and traditions". See *Saramaka People v. Suriname* (footnote 393 above), para. 134. See also the Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 6, para. 1. See further ILO, "Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite constituents" (Geneva, International Labour Office, 2013), which refers to the consultations using such words as "good faith", "genuine dialogue" and "meaningful". In Canada, the duty to consult with indigenous peoples has been interpreted to mean good faith consultation with requirements depending on the potential adverse effect. See, e.g. Canada, Supreme Court of Canada, *Haida Nation v. British Columbia (Minister of Forests),* Judgment, 18 November 2004.

401 See for instance, United Nations Declaration on the Rights of Indigenous Peoples, art. 19. The Inter-American Court of Human Rights has established safeguards requiring States to obtain the "free, prior, and informed consent [of indigenous peoples], according to their customs and traditions". See *Saramaka People v. Suriname* (footnote 393 above), para. 134.

402 Report of the Special Rapporteur on the Rights of Indigenous Peoples (A/HRC/45/34), para. 55.

403 For the right of redress of indigenous peoples, see United Nations Declaration of the Rights of Indigenous Peoples, art. 28, and the American Declaration on the Rights of Indigenous Peoples, art. XXXIII.

Principle 6
Agreements concerning the presence of military forces

States and international organizations should, as appropriate, include provisions on environmental protection in relation to armed conflict in agreements concerning the presence of military forces. Such provisions should address measures to prevent, mitigate and remediate harm to the environment.

Commentary

(1) Draft principle 6 addresses agreements concluded between States or between States and international organizations, concerning the presence of military forces. The phrase "in relation to armed conflict" reflects the purpose of the draft principles: to enhance the protection of the environment in relation to armed conflict. Consequently, the provision does not refer to situations in which military forces are being deployed without any relation to an armed conflict.

(2) The draft principle is cast in general terms to refer to "agreements concerning the presence of military forces". The specific designation and purpose of such agreements can vary, and may, depending on the particular circumstances, include status-of-forces and status-of-mission agreements. The purpose of the draft principle is to reflect recent developments whereby matters relating to environmental protection have been included in agreements concerning the presence of military forces concluded with host States.[404] The word "should" indicates that the principle is not mandatory in nature, but rather aims at acknowledging and encouraging this development.

(3) Examples of environmental provisions in agreements concerning the presence of military forces include the United States-Iraq agreement on the withdrawal from and temporary presence of United States forces in Iraq, which contains an explicit provision on the protection of the environment.[405] Another example is the status-of-forces agreement between the North Atlantic Treaty Organization (NATO) and Afghanistan, in which the parties agree to pursue a preventative approach to environmental protection.[406] The status-of-mission agreement under the European Security and Defence Policy also makes several references to environmental obligations.[407] Relevant treaty practice not directly related to armed conflicts includes the agreement between Germany and other NATO States, which provides that potential environmental effects shall be identified, analysed and evaluated, in

[404] The Agreement between the European Union and the former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former Yugoslav Republic of Macedonia (*Official Journal* L 082, 29/03/2003 P. 0046 – 0051, annex; hereinafter, "*Concordia* status-of-forces agreement"), art. 9, provided a duty to respect international norms regarding, *inter alia*, the sustainable use of natural resources. See Agreement between the European Union and the former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former Yugoslav Republic of Macedonia, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329(01) (accessed on 2 August 2022).

[405] Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq (Baghdad, 17 November 2008), art. 8 (hereinafter, "United States-Iraq Agreement"). Available at https://www.dcaf.ch/sites/default/files/publications/documents/US-Iraqi_SOFA-en.pdf (accessed on 2 August 2022).

[406] Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan (Kabul, 30 September 2014), *International Legal Materials*, vol. 54 (2015), pp. 272–305, art. 5, para. 6, art. 6, para. 1, and art. 7, para. 2.

[407] Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in article 17, paragraph 2, of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) (Brussels, 17 November 2003). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42003A1231%2801%29 (accessed on 2 August 2022).

order to avoid environmental burden.[408] Similarly, the Memorandum of Special Understanding between the United States and the Republic of Korea contains provisions on environmental protection.[409] Furthermore, in 2015, Japan and the United States concluded a Supplementary Agreement on cooperation in the field of environmental stewardship relating to the United States Armed Forces in Japan.[410] Reference can further be made to the status-of-forces agreement between the United States and Australia, which contains a relevant provision on damage claims,[411] and the Enhanced Defense Cooperation Agreement between the United States and the Philippines, which contains provisions seeking to prevent environmental damage and provides for a review process.[412] Certain arrangements applicable to short-term presence of foreign armed forces in a country for the purpose of exercises, transit by land or training, also contain environmental provisions.[413]

(4) The measures referred to in the draft principle may address a variety of relevant aspects. Some precise examples that deserve specific mention as reflected in treaty practice are: the recognition of the importance of environmental protection, including the prevention of pollution from facilities and areas granted to the deploying State;[414] an understanding that the agreement will be implemented in a manner consistent with protecting the environment;[415] cooperation and sharing of information between the host State and the sending State regarding issues that could affect the health and environment of citizens;[416] measures to prevent environmental damage;[417] spill response and prevention,[418] periodic environmental performance assessments;[419] review processes;[420] application of the

[408] Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Bonn, 3 August 1959), United Nations, *Treaty Series*, vol. 481, No. 6986, p. 329, amended by the Agreements of 21 October 1971 and 18 March 1993 (hereinafter, "NATO-Germany Agreement"), art. 54A. See also Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of 19 June 1951, art. XV.

[409] Memorandum of Special Understanding on Environmental Protection, concluded between the United States and the Republic of Korea (Seoul, 18 January 2001) (hereinafter, "United States-Republic of Korea Memorandum"). Available at www.usfk.mil/Portals/105/Documents/SOFA/A12_MOSU.Environmental.Protection.pdf (accessed on 2 August 2022).

[410] Agreement between Japan and the United States of America on cooperation in the field of environmental stewardship relating to the United States Armed Forces in Japan, Supplementary to the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, regarding Facilities and Areas and the Status of United States Armed Forces in Japan (Washington, D.C., 28 September 2015), Treaties and Other International Acts Series 15-928, available at https://purl.fdlp.gov/GPO/gpo66458 (accessed on 2 August 2022).

[411] Agreement concerning the Status of United States Forces in Australia (Canberra, 9 May 1963), United Nations, *Treaty Series*, vol. 469, No. 6784, p. 55 (United States-Australia Agreement), art. 12, para. 7.

[412] Agreement between the Philippines and the United States on enhanced defense cooperation (United States-Philippines Agreement) (Quezon City, 28 April 2014), art. IX. Available at www.officialgazette.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/ (accessed on 2 August 2022).

[413] See, e.g., Memorandum of Understanding between Finland and NATO regarding the provision of host nation support for the execution of NATO operations/exercises/similar military activity (4 September 2014). Available at www.defmin.fi/files/2898/HNS_MOU_FINLAND.pdf (accessed on 9 June 2022) reference HE 82/2014. According to art. 5.3 (*g*), sending nations must follow host nation environmental regulations as well as any host nation's regulations for the storage, movement, or disposal of hazardous materials.

[414] See United States-Republic of Korea Memorandum.

[415] See United States-Iraq Agreement, art. 8.

[416] See United States-Republic of Korea Memorandum.

[417] See United States-Philippines Agreement, art. IX, para. 3, and NATO-Germany Agreement, art. 54A.

[418] Supplementary Agreement between Japan and the United States, art. 3, para. 1.

[419] These assessments could identify and evaluate the environmental aspects of the operation and can be accompanied by a commitment to plan, program and budget for these requirements accordingly, as in done the United States-Republic of Korea Memorandum.

[420] See United States-Philippines Agreement, art. IX, para. 2.

environmental laws of the host State[421] or, similarly, a commitment by the deploying State to respect the host State's environmental laws, regulations and standards;[422] a duty to respect international norms regarding the sustainable use of natural resources;[423] the taking of restorative measures where detrimental effects are unavoidable;[424] and the regulation of environmental damage claims.[425]

(5) The phrase "as appropriate" signals two different considerations. First, it takes into account that sometimes it may be especially important that the agreement contains provisions on environmental protection, for instance where a protected zone would be at risk of being adversely affected by the presence of military forces. Second, the draft principle does not apply to agreements in which it would not be appropriate to refer to armed conflicts. The phrase "as appropriate" therefore provides nuance to this provision and allows it to capture different situations.

Principle 7
Peace operations

States and international organizations involved in peace operations established in relation to armed conflicts shall consider the impact of such operations on the environment and take, as appropriate, measures to prevent, mitigate and remediate the harm to the environment resulting from those operations.

Commentary

(1) Peace operations can relate to armed conflicts in multiple ways. Previously, many peace operations were deployed following the end of hostilities and the signing of a peace agreement.[426] As the High-level Independent Panel on Peace Operations noted, today many missions operate in environments where no such political agreements exist, or where efforts to establish one have failed.[427] Moreover, modern United Nations peacekeeping missions are multidimensional and address a range of peacebuilding activities, from providing secure environments to monitoring human rights or rebuilding the capacity of a State.[428] Mandates also include the protection of civilians.[429] Draft principle 7 intends to cover all such peace operations that may relate to multifarious parts or aspects of an armed conflict, and may vary in temporal nature.

(2) There is no clear or definitive definition for "peace operation" or "peacekeeping" in existing international law. The current draft principle is intended to cover broadly all such peace operations that are established in relation to armed conflict. The Agenda for Peace highlighted that "peacemaking" was action to bring hostile parties to agreement, especially

[421] See NATO-Germany Agreement, art. 54A, and United States-Australia Agreement, art. 12, para. 7 (*e*) (i).
[422] See United States-Iraq agreement, art. 8.
[423] As is done in art. 9 of the *Concordia* status-of-forces agreement.
[424] See NATO-Germany Agreement, art. 54A.
[425] NATO-Germany Agreement, art. 41, and United States-Australia Agreement, art. 12, para. 7 (*e*) (i).
[426] Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people (contained in A/70/95-S/2015/446), para. 23.
[427] *Ibid*.
[428] V. Holt and G. Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, independent study jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs (United Nations publication, Sales No. E.10.III.M.1), pp. 2–3. See also A. Geslin, "Les organisations internationales et régionales de sécurité et de défense face à la problématique environnementale" in S. J. Kirschbaum, *Les défis du système de sécurité* (Brussels, Bruylant, 2014), pp. 77–94.
[429] See for example the following mandates of United Nations-led missions found in Security Council resolutions: United Nations Mission in Sierra Leone (1289 (2000)); United Nations Observer Mission in the Democratic Republic of the Congo (1291 (2000)); United Nations Mission in Liberia (1509 (2003) and 2215 (2015)); United Nations Operation in Burundi (1545 (2004)); United Nations Stabilization Mission in Haiti (1542 (2004)); United Nations Operation in Côte d'Ivoire (1528 (2004) and 2226 (2015)); United Nations Mission in the Sudan (1590 (2005)); African Union-United Nations Hybrid Operation in Darfur (1769 (2007)); and United Nations Mission in the Central African Republic and Chad (1861 (2009)).

through peaceful means;[430] "peacekeeping" was the deployment of a United Nations presence in the field, involving military and/or police personnel, and frequently civilians as well;[431] while "peacebuilding" was to take the form of cooperative projects in a mutually beneficial undertaking to enhance the confidence fundamental to peace.[432] The report of the High-level Independent Panel on Peace Operations includes, for its purposes, "a broad suite of tools … from special envoys and mediators; political missions, including peacebuilding missions; regional preventive diplomacy offices; observation missions, including both ceasefire and electoral missions; to small, technical-specialist missions such as electoral support missions; multidisciplinary operations".[433] The Security Council understands "United Nations peace operations as peacekeeping operations and special political missions".[434] The term "peace operations" aims to cover all these types of operations, and operations broader than United Nations peacekeeping operations, including peace enforcement operations and operations by regional organizations.

(3) The words "established in relation to armed conflicts" delineate the scope of draft principle 7. They make clear the need for a connection to armed conflict so as to ensure that the obligations are not to be interpreted too broadly (i.e. as potentially applying to every action of an international organization related to the promotion of peace). While the term is to be understood from a broad perspective in the context of the draft principle, it is recognized that not all peace operations have a direct link to armed conflict. Where a peace operation deployed in armed conflict becomes involved in hostilities, obligations under the law of armed conflict apply.

(4) The present draft principle covers operations where States and international organizations are involved in peace operations established in relation to armed conflicts and where multiple actors may be present. All these actors will have some effect on the environment. The different departments and bodies within the United Nations recognize the potential damage by peacekeeping operations to the local environment.[435]

(5) The environmental impact of a peace operation may stretch from the planning phase through its operational part, to the post-operation phase. The desired goal is that peace operations undertake their activities in such a manner that the impact of their activities on the environment is minimized. The draft principle thus focuses on activities to be undertaken in situations where the environment could be negatively affected by a peace operation. At the same time, it is understood that "appropriate" measures to be taken may differ depending on the context of the operation. Relevant considerations may include, in particular, whether such measures relate to the pre-, in-, or post- armed conflict phase, and what measures are feasible under the circumstances.

(6) The draft principle reflects the enhanced recognition by States and international organizations such as the United Nations, the European Union,[436] and NATO,[437] of the

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[430] "An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping" (A/47/277-S/24111), para. 20. See also the supplement thereto, a position paper by the Secretary-General on the occasion of the fiftieth anniversary of the United Nations (A/50/60-S/1995/1).

[431] *Ibid*.

[432] *Ibid*., para. 56.

[433] A/70/95-S/2015/446, para. 18.

[434] Security Council resolution 2594 (2021), fourth preambular paragraph.

[435] United Nations, Department of Operational Support, "DOS environment strategy for peace operations (2017-2023)". Available at https://operationalsupport.un.org/sites/default/files/dos_environment_strategy_execsum_phase_two.pdf (accessed on 9 June 2022). See also United Nations, Chief Executives Board for Coordination, "Strategy for sustainability management in the UN system 2020–2030" (CEB/2019/3/Add.2). Available at https://unemg.org/wp-content/uploads/2019/09/INF_3_Strategy-for-Sustainability-Management-in-the-UN-System.pdf (accessed on 2 August 2022).

[436] See, e.g., European Union, "Military concept on environmental protection and energy efficiency for EU-led military operations", 14 September 2012, document EEAS 01574/12.

[437] See, e.g., NATO, "Joint NATO doctrine for environmental protection during NATO-led military activities", 8 March 2018, document NSO(Joint)0335(2018)EP/7141. NATO has also developed a number of standardization agreements concerning, for instance, environmental protection during

environmental impact of peace operations and the need to take necessary measures to prevent, mitigate and remediate negative effects. The phrase "shall consider the [environmental] impact" corresponds to the standard formulation used by the Security Council in the mandates of peace operations, which explicitly tasks the operations to consider the environmental impact of their operations.[438] Such operations are expected to budget for and implement multi-year plans regarding waste, energy infrastructure and water and wastewater management, and to ensure that environmental impact assessments are routinely implemented.[439] Some United Nations field missions have dedicated environmental units to develop and implement mission-specific environmental policies and oversee environmental compliance.[440] Reference can also be made to the developing practice regarding climate action, for instance recent NATO decisions concerning the reduction of military emissions.[441] The phrase "as appropriate" indicates a level of flexibility concerning the types of measures to be taken in different situations.

(7) Draft principle 7 is distinct in character from draft principle 6. Peace operations, unlike agreements concerning the presence of military forces, do not necessarily involve armed forces or military personnel. Other types of actors such as civilian personnel and various types of specialists may also be present and covered by such operations. Draft principle 7 is also intended to be broader and more general in scope, and to direct focus on the activities of such peace operations.

Principle 8
Human displacement

States, international organizations and other relevant actors should take appropriate measures to prevent, mitigate and remediate harm to the environment in areas where persons displaced by armed conflict are located, or through which they transit, while providing relief and assistance for such persons and local communities.

Commentary

(1) Draft principle 8 addresses the inadvertent environmental effects of conflict-related human displacement. The draft principle recognizes the interconnectedness of providing

NATO-led military activities (NATO STANAG 7141), available at https://standards.globalspec.com/std/10301156/STANAG%207141 (accessed on 2 August 2022) and environmental protection best practices and standards for military camps in NATO operations (NATO STANAG 2582), available at https://standards.globalspec.com/std/9994281/STANAG%202582 (accessed on 2 August 2022).

438 See, for instance, Security Council 2612 (2021), para. 45 ("Requests MONUSCO to consider the environmental impacts of its operations when fulfilling its mandated tasks"). Similar phraseology can be found, for instance, in Security Council resolutions 2531 (2020), para. 59; 2502 (2019), para. 44; 2448 (2018), para. 54; 2423 (2018), para. 67; 2348 (2017), para. 48; 2364 (2017), para. 41; 2295 (2016), para. 39.

439 Department for Operational Support, "DOS environment strategy for peace operations …" (see footnote 435 above).

440 "The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations", Report of the Secretary-General (A/70/357-S/2015/682), para. 129.

441 See Brussels Summit Communiqué issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Brussels 14 June 2021, para. 6 ("To that end we agree: … g) … to significantly reduce greenhouse gas emissions from military activities and installations"). See also NATO Climate Change and Security Action Plan, 14 June 2021, para. 6, which refers to the obligations of the member States under the United Nations Framework Convention on Climate Change (New York, 9 May 1992, United Nations, *Treaty Series*, vol. 1771, No. 30882, p. 107), and the Paris Agreement of 2015 (Paris, 4 November 2016, United Nations, *Treaty Series*, vol. 3156, No. 54113). Both NATO documents are available at www.nato.int/cps/en/natohq/news_185000.htm?selectedLocale=en (accessed on 2 August 2022). See further United Nations, United Nations Secretariat Climate Action Plan 2020-2030, September 2019. Available at www.un.org/management/sites/www.un.org.management/files/united-nations-secretariat-climate-action-plan.pdf (accessed on 2 August 2022).

relief for those displaced by armed conflict and reducing the impact of displacement on the environment. The draft principle covers both international and internal displacement.

(2) Population displacement typically follows the outbreak of an armed conflict, giving rise to significant human suffering as well as environmental damage.[442] The United Nations Environment Programme has reported on "the massive movement of refugees and internally displaced people … across the country" as perhaps "the most immediate consequence of the conflict [in Liberia]",[443] as well as of "clear and significant" "links between displacement and the environment" in the Sudan.[444] In Rwanda, the population displacement and resettlement related to the 1990–1994 conflict and genocide "had a major impact on the environment, substantially altering land cover and land use in many parts of the country",[445] as well as causing extensive environmental damage in the neighbouring Democratic Republic of the Congo.[446]

(3) Reference can also be made to a 2014 study on the protection of the environment during armed conflict, which emphasizes the humanitarian and environmental impacts of displacement in various conflicts.[447] The study notes with reference to the Democratic Republic of the Congo that "massive conflict-induced displacement of civilian populations associated with protracted conflict may have even more destructive effects [on] the environment than actual combat operations".[448] Non-international armed conflicts, in particular, have caused important effects in terms of displacement, including the environmental strain in the affected areas.[449] In a similar manner, research based on the post-conflict environmental assessments conducted since the 1990s by the United Nations Environment Programme, the United Nations Development Programme and the World Bank has identified human displacement as one of the six principal pathways for direct environmental damage in conflict.[450]

(4) As the Office of the United Nations High Commissioner for Refugees (UNHCR) has pointed out, considerations relating to access to water, the location of refugee camps and settlements, as well as food assistance by relief and development agencies, "all have a direct bearing on the environment".[451] Uninformed decisions concerning the siting of a refugee camp in or near a fragile or internationally protected area may result in irreversible – local and distant – impacts on the environment. Areas of high environmental value suffer particularly serious impacts that may be related to the area's biological diversity, its function

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[442] See UNHCR, *UNHCR Environmental Guidelines* (Geneva, 2005). Available at www.refworld.org/docid/4a54bbd10.html (accessed on 2 August 2022). See also UNHCR, CARE International and IUCN, "Environmental perspectives of camp phase-out and closure: a compendium of lessons learned from Africa", 1 August 2009. Available at www.unhcr.org/en-us/protection/environment/4a967ce69/environmental-perspectives-camp-phase-out-closure-compendium-lessons-learned.html?query=environmental (accessed on 2 August 2022).

[443] United Nations Environment Programme, *Desk Study on the Environment in Liberia* (United Nations Environment Programme, 2004), p. 23. Available at http://wedocs.unep.org/handle/20.500.11822/8396 (accessed on 2 August 2022).

[444] United Nations Environment Programme, *Sudan Post-Conflict Environmental Assessment* (Nairobi, 2007), p. 115. Available at https://wedocs.unep.org/handle/20.500.11822/22234 (accessed on 2 August 2022).

[445] United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (Nairobi, 2011), p. 74. Available at https://postconflict.unep.ch/publications/UNEP_Rwanda.pdf (accessed on 2 August 2022).

[446] As more than 2 million people moved in and out of the country, up to 800,000 people in camps along the border to the Democratic Republic of the Congo had to rely on firewood from the nearby Virunga national park. *Ibid*., pp. 65–66.

[447] International Law and Policy Institute, *Protection of the Natural Environment in Armed Conflict: An Empirical Study*, Report 12/2014 (Oslo, 2014).

[448] *Ibid*., p. 5.

[449] *Ibid.*, p. 6.

[450] D. Jensen and S. Lonergan, "Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues", in Jensen and Lonergan (eds.), *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (Abingdon, Earthscan from Routledge, 2012), pp. 411–450, p. 414.

[451] *UNHCR Environmental Guidelines* (footnote 442 above), p. 5. See also G. Lahn and O. Grafham, "Heat, light and power for refugees: saving lives, reducing costs" (Chatham House, 2015).

as a haven for endangered species or for the ecosystem services these provide.[452] The United Nations Environment Programme[453] and the United Nations Environmental Assembly have similarly drawn attention to the environmental impact of displacement.[454] The General Assembly adopted in 2016 the New York Declaration for Refugees and Migrants, which, *inter alia*, draws attention to the need to combat environmental degradation and contains a commitment to "support environmental, social and infrastructural rehabilitation in areas affected by large movements of refugees",[455] and in 2018 the global compact on refugees.[456] ICRC, too, raises the issue in the updated Guidelines on the Protection of the Natural Environment in Armed Conflict.[457]

(5) The African Union Convention for the Protection of Internally Displaced Persons in Africa, also known as the Kampala Convention, stipulates that States parties shall "[t]ake necessary measures to safeguard against environmental degradation in areas where internally displaced persons are located, either within the jurisdiction of the State Parties, or in areas under their effective control".[458] The Kampala Convention applies to internal displacement "in particular as a result of or in order to avoid the effects of armed conflict, situation of generalized violence, violations of human rights or natural or human-made disasters".[459]

(6) Other recent developments related to displacement and the environment include the Task Force on Displacement, which was established by the Conference of the Parties to the United Nations Framework Convention on Climate Change, and mandated to produce recommendations on integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.[460] In 2015, States adopted the Sendai Framework for Disaster Risk Reduction, which calls, *inter alia*, for the promotion of transboundary cooperation to build resilience and reduce the risk of disasters and the risk of displacement.[461] The more recent Global Compact for Safe, Orderly and Regular Migration likewise includes a section on the relationship between migration and environmental degradation.[462] Although some of these developments focus on the environmental reasons for – rather than the environmental effects of – displacement, they are indicative of a recognition

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[452] *Ibid.*, p. 7.

[453] See United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (footnote 445 above). See also United Nations Environment Programme, *Sudan Post-Conflict Environmental Assessment* (footnote 444 above).

[454] See United Nations Environmental Assembly resolution 2/15 (see footnote 342 above), para. 1.

[455] New York Declaration for Refugees and Migrants, General Assembly resolution 71/1 of 19 September 2016, paras. 43 and 85.

[456] Global compact on refugees, General Assembly resolution 73/151 of 17 December 2018: see Report of the United Nations High Commissioner for Refugees: Part II: Global compact on refugees, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 12* (A/73/12 (Part II)), paras. 78–79.

[457] ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), paras. 3, 151 and 152.

[458] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala, 23 October 2009), art. 9, para. 2 (*j*). Available at https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa (accessed on 2 August 2022). The Convention entered into force on 6 December 2012.

[459] *Ibid.*, art. 1 (*k*).

[460] Conference of the Parties of the United Nations Framework Convention on Climate Change, Decision 1/CP.21 "Adoption of the Paris Agreement", para. 49, in Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Addendum (FCCC/CP/2015/10/Add.1). See also the Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. 1 (2015). Available at https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf (accessed on 8 July 2019).

[461] Sendai Framework for Disaster Risk Reduction 2015–2030, para. 28 (adopted at the Third United Nations World Conference on Disaster Risk Reduction and endorsed by the General Assembly in resolution 69/283 of 3 June 2015). Available at https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf (accessed on 2 August 2022).

[462] General Assembly resolution 73/195 of 19 December 2018, annex. See also General Assembly resolution 73/326 of 19 July 2019 and Global Compact for Safe, Orderly and Regular Migration: Report of the Secretary-General (A/76/642).

among States of the nexus between environment and displacement, and the need to foster cooperation and regulation in that field.

(7) Draft principle 8 addresses States, international organizations and other relevant actors, including non-State armed groups, which may exercise *de facto* control over territories in which displaced persons are located or through which they transit. International organizations involved in the protection of displaced people and the environment in conflict-affected areas include UNHCR, the United Nations Environment Programme and other United Nations agencies, as well as the European Union, the African Union, and NATO. "Other relevant actors" referred to in the draft principle may include, *inter alia*, international donors, ICRC, and international non-governmental organizations. All these actors are to take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict are located, while providing relief and assistance for such persons and local communities in accordance with their international obligations. The terms "relief and assistance" refer generally to the kind of assistance involved where human displacement occurs. These terms are not intended to convey any different meaning from how they are understood in humanitarian work.

(8) Draft principle 8 includes a reference to relief for displaced persons and local communities. The UNHCR Environmental Guidelines note in this regard that the "state of the environment … will have a direct bearing on the welfare and well-being of people living in that vicinity, whether refugees, returnees or local communities".[463] Providing livelihoods for displaced people is intimately connected with preserving and protecting the environment in which local and host communities are located. Better environmental governance increases resilience for host communities, displaced persons, and the environment as such.

(9) Similarly, the International Organization for Migration has highlighted the importance of "reducing the vulnerability of displaced persons as well as their impacts on the receiving society and ecosystem" as an emerging issue that requires addressing,[464] and has furthermore developed an Atlas of Environmental Migration.[465] The World Bank has drawn attention to the issue in its 2009 report "Forced displacement – The development challenge".[466] The report highlights the development impacts that displacement can have on environmental sustainability and development, including through environmental degradation.[467] Reference can also be made to the Draft International Covenant on Environment and Development of IUCN, which includes a paragraph on displacement reading as follows: "Parties shall take all necessary measures to provide relief for those displaced by armed conflict, including internally displaced persons, with due regard to environmental obligations".[468]

(10) The reference to "providing relief" to persons displaced by conflict and to local communities in draft principle 8 should also be read in light of the Commission's previous work on the topic "Protection of persons in the event of disasters".[469] As explained in the relevant commentary, the draft articles would apply in situations of displacement that, because of their magnitude, can be viewed as "complex emergencies", including where a disaster occurs in an area where there is an armed conflict.[470]

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463 *UNHCR Environmental Guidelines* (footnote 442 above), p. 5.

464 International Organization for Migration, *Compendium of Activities in Disaster Risk Reduction and Resilience* (Geneva, 2013), as referenced in *IOM Outlook on Migration, Environment and Climate Change* (Geneva, 2014), p. 82.

465 D. Ionesco, D. Mokhnacheva, F. Gemenne, *The Atlas of Environmental Migration* (Abingdon, Routledge 2019).

466 A. Christensen and N. Harild, "Forced displacement – The development challenge" (Social Development Department, The World Bank Group, Washington, D.C., 2009).

467 *Ibid.*, pp. 4 and 11.

468 IUCN, Draft International Covenant on Environment and Development (2015), art. 40, on military and hostile activities (formerly art. 38). Available from www.iucn.org.

469 Draft articles on the protection of persons in the event of disasters, *Yearbook … 2016*, vol. II (Part Two), paras. 48–49. See also General Assembly resolution 73/209 of 20 December 2018.

470 Para. (9) of the commentary to art. 18, para. 2, *ibid.*, at p. 58. See also draft art. 3 (a): "disaster" was defined, for the purposes of the draft articles, as "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society". *Ibid.*, at p. 25.

(11) Draft principle 8 concerns both areas where displaced persons are located and areas through which they transit. The notions "location" and "transit" are widely used in the context of human displacement but are rarely given a specific interpretation.[471] UNHCR recognizes in its practice both formal and institutionalized settings, such as camps, and non-camp informal and non-institutionalized settlements as areas where displaced persons are located and thus includes within the term "located" both permanent and temporary arrangements.[472] In the application of the Kampala Convention, international organizations have similarly interpreted the phrase "where internally displaced persons are located"[473] to include a broad spectrum of camps, as well as urban and rural settings.[474] The International Organization for Migration defines "transit" as a stopover of passage of varying length while travelling between two or more countries.[475] It defines a "country of transit" as a country through which migratory flows, whether regular or irregular, move.[476] The terms of "transit camp" and "transit centre", furthermore, refer to temporary arrangements to accommodate displaced persons securely.[477] For the present draft principle, the distinction between location and transit is not relevant as such. The terms "located" and "transit" are not meant to be interpreted in a strict way, but rather should be taken as broadly and comprehensively as possible, encompassing the idea of movement of persons.

(12) Draft principle 8 is located in Part Two given that conflict-related human displacement is a phenomenon that may have to be addressed both during and after an armed conflict, including in situations of occupation.

Principle 9
State responsibility

1. An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself.

2. The present draft principles are without prejudice to the rules on the responsibility of States or of international organizations for internationally wrongful acts.

3. The present draft principles are also without prejudice to:

(*a*) the rules on the responsibility of non-State armed groups;

(*b*) the rules on individual criminal responsibility.

[471] See, for instance, UNHCR, "Global trends: forced displacement in 2018" (2019), available at www.unhcr.org/5d08d7ee7.pdf (accessed on 15 June 2022); UNHCR, Global Protection Cluster Working Group, *Handbook for the Protection of Internally Displaced Persons* (2007); OHCHR, "Situation of migrants in transit" (2016), available at www.ohchr.org/sites/default/files/2021-12/INT_CMW_INF_7940_E.pdf (accessed on 2 August 2022); International Organization for Migration, "Glossary on migration" (2019); UNHCR, "Site planning for transit centres" in *Emergency Handbook*, 4th ed. (2015), available from https://emergency.unhcr.org/entry/31295/site-planning-for-transit-centres; UNHCR, "Master glossary of terms" (2006), available at www.unhcr.org/glossary/#t (accessed on 2 August 2022).

[472] UNHCR, "Global trends: forced displacement …" (see previous footnote), pp. 59 and 62; UNHCR, *Handbook for the Protection of Internally Displaced Persons* (see previous footnote), p. 333.

[473] Kampala Convention, art. 9, para. 2 (j).

[474] African Union *et al.*, "Making the Kampala Convention work for IDPs" (2010), p. 27. Available at www.internal-displacement.org/sites/default/files/publications/documents/2010-making-the-kampala-convention-work-thematic-en.pdf (accessed on 2 August 2022).

[475] International Organization for Migration, "Glossary on migration" (see footnote 471 above), p. 217.

[476] *Ibid.* pp. 39–40.

[477] United Nations Environment Programme, *Environmental Considerations of Human Displacement in Liberia: A Guide for Decision-Makers and Practitioners* (Geneva, 2006) p. ix. Available at https://postconflict.unep.ch/publications/liberia_idp.pdf (accessed on 2 August 2022).

Commentary

(1) Draft principle 9 focuses on the international responsibility of States for damage caused to the environment in relation to an armed conflict. Paragraph 1 is based on the general rule that every internationally wrongful act of a State entails its international responsibility and gives rise to an obligation to make full reparation for the damage that may be caused by the act. The paragraph reaffirms the applicability of this principle to internationally wrongful acts in relation to armed conflict that cause environmental damage, including damage caused to the environment in and of itself.

(2) Paragraph 1 has been modelled on articles 1 and 31, paragraph 1, of the articles on responsibility of States for internationally wrongful acts. Although no reference is made to other articles, the draft principle is to be applied in accordance with the rules on the responsibility of States for internationally wrongful acts, including those specifying the conditions for internationally wrongful acts. This means, *inter alia*, that conduct amounting to an internationally wrongful act may consist of action or omission. Furthermore, for the international responsibility of a State to arise in relation to an armed conflict, the act or omission must be attributable to that State and amount to a violation of its international obligation.[478]

(3) An act or omission attributable to a State that causes harm to the environment in relation to an armed conflict is wrongful if two conditions are met. First, the act or omission in question violates the law on the use of force or one or more of the substantive rules of the law of armed conflict providing protection to the environment,[479] or other rules of international law applicable in the situation, including but not limited to international human rights law.[480] Second, such a rule, or rules, are binding on the State. The scope of the responsibility of the State, as well as the threshold for compensable environmental harm, may vary depending on the applicable primary rules.

(4) The rules of the law of armed conflict concerning the responsibility of States are clear and well-established. The law of armed conflict extends the responsibility of a State party to an armed conflict to "all acts committed by persons forming part of its armed forces".[481] As far as the law on the use of force is concerned, a violation of Article 2, paragraph 4, of the Charter of the United Nations entails responsibility for damage caused by that violation,

[478] Art. 1 of the articles on responsibility of States for internationally wrongful acts: "Every internationally wrongful act of a State entails the international responsibility of that State", *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, pp. 32–34.

[479] This includes articles 35, paragraph 3, and 55 of Additional Protocol I and their customary counterparts, the principles of distinction, proportionality, military necessity and precautions in attack, as well as other rules concerning the conduct of hostilities, and the law of occupation, also reflected in the present draft principles.

[480] Furthermore, to the extent that international criminal law provides protection to the environment in armed conflict, the relevant international crimes may trigger State responsibility. See art. 1 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, and para. (3) of the commentary to art. 58, *ibid.*, at p. 142. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 116, para. 173.

[481] Convention (IV) Respecting the Laws and Customs of War on Land (Hague Convention IV) (The Hague, 18 October 1907), J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1915), p. 100, art. 3: "[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." See also Additional Protocol I, art. 91; See ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 26, para. 303. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 149, at p. 550. This rule also extends to private acts of armed forces, see M. Sassòli, "State responsibility for violations of international humanitarian law", *International Review of the Red Cross*, vol. 84 (2002), pp. 401–434; C. Greenwood, "State responsibility and civil liability for environmental damage caused by military operations", in R.J. Grunawalt, J.E. King and R.S. McClain (eds.), "Protection of the environment during armed conflict", *International Law Studies*, vol. 69 (1996), pp. 397–415, at pp. 405–406.

whether or not resulting from a violation of the law of armed conflict.[482] A further basis for responsibility for conflict-related environmental harm – in particular but not exclusively – in situations of occupation may be found in international human rights obligations. Degradation of environmental conditions may violate a number of specific human rights, including the right to life, the right to health and the right to food, as has been reflected in the jurisprudence of regional human rights courts and human rights treaty bodies.[483] In situations of occupation, furthermore, the Occupying Power is responsible for acts in violation of human rights law or the law of armed conflict even when they are committed by private actors, unless it can establish that the particular injury occurred notwithstanding its due diligence in seeking to prevent such violations.[484]

(5) Environmental damage caused in armed conflict was recognized as compensable under international law when the United Nations Compensation Commission (UNCC) was established by the Security Council in 1991 to deal with claims concerning the Iraqi invasion and occupation of Kuwait.[485] The UNCC jurisdiction was based on Security Council resolution 687 (1991), which reaffirmed the responsibility of Iraq under international law "for any direct loss or damage – including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait".[486]

(6) The experience of UNCC in dealing with environmental claims has been groundbreaking in the area of reparations for wartime environmental harm, and an important point of reference beyond armed conflicts.[487] One example is related to how environmental

[482] See Eritrea-Ethiopia Claims Commission, Decision No. 7, Guidance Regarding Jus ad Bellum Liability, 26 UNRIAA (2009), p. 631, para. 13. See also ICRC commentary (1987) to Additional Protocol I, art. 91, para. 3650. See also *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, 16 March 2022, General List No. 182, paras. 60 and 74.

[483] See *Yanomami v. Brazil*, Case No. 12/85, Inter-American Commission on Human Rights, resolution No. 12/85, Case No. 7615, 5 March 1985; *Öneryildiz v. Turkey*, Application No. 48939/99, Judgment, European Court of Human Rights, 30 November 2004, ECHR 2004-XII; *Powell and Rayner v. the United Kingdom*, Application No. 9310/81, Judgment, European Court of Human Rights, 21 February 1990; *López Ostra v. Spain*, Application No. 16798/90, Judgment, European Court of Human Rights, 9 December 1994; *Guerra and Others v. Italy*, Application No. 116/1996/735/532, Judgment, European Court of Human Rights, 19 February 1998; *Fadeyeva v. Russia*, Application No. 55723/00, Judgment, European Court of Human Rights, 9 June 2005; *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR)* v. *Federal Republic of Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96 (2002), paras. 64-66, available at https://www.escr-net.org/sites/default/files/serac.pdf (accessed on 22 July 2022). See also footnotes 769–771 below. See further R. Pavoni, "Environmental jurisprudence of the European and Inter-American Courts of Human Rights: comparative insights", in B. Boer, *Environmental Law Dimensions of Human Rights* (Oxford, Oxford University Press, 2015), pp. 69–106.

[484] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, Reparations, 9 February 2022, General List No. 116, paras. 95 and 364, in which the Court distinguishes the responsibility of Uganda as an Occupying Power for all acts of looting, plundering and exploitation of natural resources in Ituri, which resulted from its failure to exercise its duty of vigilance, from its responsibility outside Ituri, which was limited to acts attributable to it. See also para. 78 ("As an Occupying Power, Uganda had a duty of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account"). See further *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda, Judgment, I.C.J. Reports 2005*, p. 168, at pp. 253 and 280–281, paras. 250 and 345 (4), and Eritrea-Ethiopia Claims Commission, Partial Award: Central Front – Eritrea's Claims 2,4,6,7,8, and 22, 28 April 2004, *Reports of International Arbitral Awards*, vol. XXVI, pp. 115–153, at para. 67.

[485] Security Council resolution 692 (1991) of 20 May 1991.

[486] Security Council resolution 687 (1991) of 3 April 1991, para. 16.

[487] D.D. Caron, "The profound significance of the UNCC for the environment", in C.R. Payne and P.H. Sand (eds.), *Gulf War Reparations and the UN Compensation Commission Environmental Liability* (Oxford, Oxford University Press, 2011), pp. 265–275; P. Gautier, "Environmental damage and the United Nations Claims Commission: new directions for future international environmental cases?", in T.M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law, and Settlement of Disputes.*

damage can be quantified. UNCC did not attempt to define the concepts of "direct environmental damage" and "depletion of natural resources" in Security Council resolution 687 (1991) but accepted claims for a non-exhaustive list of losses or expenses resulting from:

(a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;

(b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;

(c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;

(d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and

(e) Depletion of or damage to natural resources.[488]

(7) Paragraph 1 of draft principle 9 reaffirms the compensability under international law of damage to the environment *per se*. This statement is in line with the Commission's previous work on State responsibility[489] as well as on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[490] Reference can also be made to the statement of UNCC that "there is no justification for the contention that general international law precludes compensation for pure environmental damage".[491] Paragraph 1 of the draft principle is furthermore inspired by the judgment of the International Court of Justice in the *Certain Activities (Costa Rica v. Nicaragua)* case, in which the Court found that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself".[492]

(8) The notion of "damage to the environment in and of itself" has been explained to refer to "pure environmental damage".[493] The latter term was used by UNCC in the above citation.

Liber Amicorum Judge Thomas A. Mensah (Leiden, Martinus Nijhoff, 2007), pp. 177–214; P.H. Sand, "Compensation for environmental damage from the 1991 Gulf War", *Environmental Policy and Law*, vol. 35 (2005), pp. 244–249. J.-C. Martin, "La pratique de la Commission d'indemnisation des Nations Unies pour l'Irak en matière de réclamations environnementales", *Le droit international face aux enjeux environnementaux*, Colloque d'Aix-en-Provence, Société Française pour le Droit International (Paris, Pedone, 2010).

488 Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992 (S/AC.26/1991/7/Rev.1), para. 35.

489 Para. (15) of the commentary to art. 36 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 101: "environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc. – sometimes referred to as 'non-use values') is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify".

490 Para. (6) of the commentary to principle 3 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67, at p. 73: "it is important to emphasize that damage to environment *per se* could constitute damage subject to prompt and adequate compensation".

491 United Nations Compensation Commission, Governing Council, Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims (S/AC.26/2005/10), para. 58.

492 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment*, International Court of Justice, *I.C.J. Reports 2018*, p. 15, at p. 28, para. 41. See also *Armed Activities*, Reparations (footnote 484 above), para. 348.

493 *Certain Activities, Compensation, Judgment* (see previous footnote), Separate Opinion of Judge Donoghue, para. 3: "Damage to the environment can include not only damage to physical goods, such as plants and minerals, but also to the 'services' that they provide to other natural resources (for

Both concepts, as well as the notion of "harm to the environment *per se*" that the Commission used in the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, have the same meaning. They refer to harm to the environment that does not, or not only, cause material damage, but that leads to the impairment or loss of the ability of the environment to provide ecosystem services, such as sequestration of carbon from the atmosphere, air quality services and biodiversity.[494]

(9) The reference to "full reparation" in paragraph 1 is to be understood in accordance with the articles on responsibility of States for internationally wrongful acts as taking the form of restitution, compensation, and satisfaction, either singly or in combination, as required by the circumstances.[495] As pointed out above, damage to environmental values (such as biodiversity) is, as a matter of principle, no less real and compensable than damage to property.[496] While the form of reparation for environmental damage has typically been limited to compensation,[497] restoration measures and other distinct forms of reparation complementary to compensation are in no way excluded.[498]

(10) Paragraph 2 of draft principle 9 clarifies that the draft principles are without prejudice to the rules on the responsibility of States or of international organizations for internationally wrongful acts. The purpose of the saving clause is to make it clear that the draft principles do not deviate from the rules of State responsibility as codified by the Commission's articles on responsibility of States for internationally wrongful acts. A need for such clarification could arise in relation to an individual draft principle[499] or in relation to the articles on responsibility of States for internationally wrongful acts regarding questions not dealt with in the current draft principle or commentary.[500] Taking into account that the responsibility for internationally wrongful acts not only of States but also of international organizations is the object of previous work by the Commission,[501] both bodies of law are addressed in the same paragraph.

(11) Paragraph 3 contains another saving clause providing that the present draft principles are also without prejudice to (*a*) the rules on the responsibility of non-State armed groups; and (*b*) the rules on individual criminal responsibility. The paragraph is closely linked to the mention of international organizations in paragraph 2. Mentioning the three additional areas of international responsibility serves to indicate that the substantive focus of the current draft principle on the responsibility of States is not intended to downplay the role other actors may

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example, habitat) and to society. Reparation is due for such damage, if established, even though the damaged goods and services were not being traded in a market or otherwise placed in economic use. Costa Rica is therefore entitled to seek compensation for 'pure' environmental damage, which the Court calls 'damage caused to the environment, in and of itself'."

494 See J.B. Ruhl and J. Salzman, "The law and policy beginnings of ecosystem services", *Journal of Land Use and Environmental Law*, vol. 22 (2007), pp. 157–172. See also *Certain Activities*, Compensation Judgment (footnote 492 above), para. 75.

495 Art. 34 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76.

496 Para. (15) of the commentary to art. 36, *ibid.*, at p. 101.

497 See reparations awarded by the United Nations Compensation Commission, Governing Council, Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims (see footnote 491 above); compensation sought by Ethiopia before the Claims Commission in the Eritrea–Ethiopia dispute, see Eritrea–Ethiopia Claims Commission, Damages Claim, Final Award – Ethiopia's Claims, 17 August 2009, UNRIAA, vol. XXVI, pp. 631–770, at p. 754, para. 421. See also *Certain Activities*, *Compensation, Judgment* (footnote 492 above), p. 37, para 80.

498 *Certain Activities, Compensation, Judgment* (footnote 492 above), Separate opinion of Judge Cançado Trindade, para. 2. See also Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 for a detailed discussion of the forms of reparation, i.e. restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), annex X).

499 See para. (1) of the commentary to draft principle 25, below.

500 See, for instance, art. 39 of the articles on responsibility of States for internationally wrongful acts on contribution to injury, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76.

501 Articles on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), pp. 39–105, paras. 87–88 and General Assembly resolution 66/100 of 9 December 2011, annex.

have in causing or contributing to environmental damage in the context of an armed conflict. Their role has also been acknowledged in several other draft principles that address not only States but "parties to an armed conflict", international organizations, or "other relevant actors".

(12) The responsibility of non-State armed groups and individual criminal responsibility are addressed separately in order to distinguish between two different areas of international law. Individual criminal responsibility for environmental damage during an armed conflict is recognized in the Rome Statute[502] and was highlighted in a 2016 policy paper of the Office of the Prosecutor.[503] The 2020 ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict include a rule concerning the repression of war crimes that concern the natural environment.[504] A proposal has been made in the Assembly of States Parties of the International Criminal Court to include "ecocide" as the fifth category of crimes in the Rome Statute,[505] and an international panel appointed by the Stop Ecocide campaign has issued a draft definition of the crime of ecocide.[506] The international responsibility of non-State armed groups is still a less settled area in international law.[507] No difference has been indicated in the text of subparagraphs (a) and (b), as the applicable rules may evolve over time.

(13) Draft principle 9 is located in Part Two containing draft principles related to the phase before armed conflict, and draft principles that are applicable to more than one phase, including provisions of general applicability. Draft principle 9 belongs to the latter category.

Principle 10
Due diligence by business enterprises

States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area affected by an armed conflict. Such measures include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner.

Commentary

(1) Draft principle 10 recommends that States take appropriate measures to ensure that business enterprises operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to the protection of the environment, including in relation to human health, in areas affected by an armed conflict. The second sentence of draft principle 10 specifies that such measures include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner. The draft principle does not reflect a generally binding legal obligation and has been phrased accordingly as a recommendation.

(2) The concept of "due diligence by business enterprises" refers to a wide network of normative frameworks that seek to promote responsible business practices, including respect for human rights and international environmental standards. Such frameworks include non-

[502] Rome Statute, art. 8, para. 2 (b) (iv).

[503] International Criminal Court, Office of the Prosecutor, "Policy paper on case selection and prioritization", 15 September 2016, para. 41.

[504] ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 28.

[505] At the eighteenth session of the International Criminal Court Assembly of States Parties, on 2–7 December 2019, Maldives and Vanuatu proposed that a new crime of ecocide be added to the Rome Statute: documents of the general debate available at https://asp.icc-pi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_18th_session.aspx. For the statement of Vanuatu, see https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.VAN.2.12.pdf. For the statement of the Maldives, see https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.MDV.3.12.pdf (last accessed on 16 January 2022).

[506] An independent expert panel convened by Stop Ecocide International issued a possible legal definition of the crime of ecocide in June 2021, see www.stopecocide.earth/legal-definition (last accessed on 16 January 2022).

[507] See the second report of the Special Rapporteur, A/CN.4/728, paras. 51–56.

binding guidelines as well as binding regulations at the national or regional level, and extend to codes of conduct created by the businesses themselves. Draft principle 10 builds on and seeks to complement the existing regulatory frameworks which do not always display a clear environmental focus, or a focus on armed conflict and post-armed conflict situations.

(3) The United Nations Guiding Principles on Business and Human Rights[508] are based on the obligations of States to respect, protect and fulfil human rights and fundamental freedoms, and their implementation largely relies on State action.[509] The Guiding Principles propose a number of measures that States can take to ensure that business enterprises operating in conflict-affected areas are not involved with gross human rights abuses.[510] This includes "[e]nsuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses".[511]

(4) The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises[512] expressly address environmental concerns, recommending that enterprises "take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development".[513] The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas of 2016,[514] *inter alia*, encourages companies operating in or sourcing minerals from conflict-affected and high-risk areas to assess and avoid the risk of being involved in serious human rights violations.[515] Regulatory frameworks more specifically related to natural resources and areas of armed conflict also include the Certification Mechanism of the International Conference of the Great Lakes Region[516] and the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains.[517] Due diligence frameworks have also been created for specific businesses, including extractive industries, in cooperation between States, businesses and civil society.[518]

(5) In some cases, such initiatives have provided the impetus for States to incorporate similar standards into their national legislation, making them binding on corporations subject

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[508] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex). The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

[509] So far, 21 States have published national action plans on the implementation of the Guiding Principles, 23 are in the process of preparing such a plan or have committed to preparing one. In nine other States, either the national human rights institute or civil society has taken steps towards preparing a national action plan. Information available at www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (accessed on 2 August 2022).

[510] Guiding Principles on Business and Human Rights (footnote 508 above), principle 7.

[511] *Ibid*., principle 7, para. (*d*).

[512] OECD, *OECD Guidelines for Multinational Enterprises*. The updated guidelines and the related decision were adopted by the 42 Governments adhering thereto on 25 May 2011. Available at www.oecd.org/corporate/mne (accessed on 2 August 2022).

[513] *Ibid*., chap. VI "Environment", p. 42.

[514] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (Paris, 2016). Available at www.oecd.org/daf/inv/mne/mining.htm (accessed on 2 August 2022).

[515] *Ibid.*, p. 16.

[516] See *Manual of the Regional Certification Mechanism (RCM) of the International Conference on the Great Lakes Region (ICGLR)*, 2nd ed. (2019). Available at https://alphaminresources.com/wp-content/uploads/2021/04/ICGLR-Regional-Certification-Mechanism-Manual-2nd-edittion.pdf (accessed on 2 August 2022).

[517] China, Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*. The guidelines apply to all Chinese companies extracting and/or using mineral resources and their related products and come into play at any point in the supply chain of minerals. Available at http://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm (accessed on 2 August 2022).

[518] For Extractive Industries Transparency Initiative, which aims at increasing transparency in the management of oil, gas, and mining revenues, see http://eiti.org; for Voluntary Principles on Security and Human Rights for extractive industry companies, see at www.voluntaryprinciples.org; for the Equator Principles of the financial industry for determining, assessing and managing social and environmental risk in project financing, see www.equator-principles.com.

to their jurisdiction that operate in, or deal with, conflict-affected areas. Legally binding instruments have also been developed at the regional level. Examples of such legally binding frameworks, either at the regional or national level, include the US Dodd-Frank Act of 2010,[519] the Lusaka Protocol of the International Conference on the Great Lakes Region,[520] the regulation of the European Union on conflict minerals[521] and the European Union timber regulation.[522]

(6) The wording of draft principle 10 builds on the existing frameworks of corporate due diligence, *inter alia* regarding how natural resources are purchased and obtained. At the same time, in accordance with the scope of the topic, it specifically focuses on the protection of the environment in areas affected by an armed conflict. The phrase has been inspired by the concept of "conflict-affected and high-risk areas" used in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals,[523] as well as in the conflict minerals regulation of the European Union.[524] The scope of draft principle 10 does not extend to high-risk situations, as these may not always have a connection to an armed conflict. The phrase "area[s] affected by an armed conflict" should be understood in the sense of the concepts of "armed conflict",[525] including situations of occupation,[526] and "post-armed conflict"[527] as used in the draft principles.

(7) According to the first sentence of draft principle 10, States should take "appropriate measures". This reference should be understood to encompass a variety of measures States

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519 An Act to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes (Dodd–Frank Act), 11 July 2010, Pub.L.111–203, 124 Stat. 1376–2223. Section 1502 of the Dodd-Frank Act on conflict minerals originating from the Democratic Republic of the Congo requires that companies registered in the United States exercise due diligence on certain minerals originating from the Democratic Republic of the Congo.

520 Protocol against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region (Nairobi, 30 November 2006), available at https://ungreatlakes.unmissions.org/sites/default/files/icglr_protocol_against_the_illegal_exploitation_of_natural_resourcess.pdf (accessed on 10 June 2022). Art. 17, para. 1, requires States parties to establish the liability of legal entities for participating in the illegal exploitation of natural resources.

521 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, *Official Journal of the European Union*, L130, vol. 60, p. 1 (European Union conflict minerals regulation). The regulation entered into force on 1 January 2021. The regulation lays down supply chain due diligence obligations for European Union importers of certain minerals originating from conflict-affected and high-risk areas. See also the European Commission's proposal for a Directive on Corporate Sustainability Due Diligence, 23 February 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145 (accessed on 2 August 2022).

522 Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down obligations of operators who place timber and timber products on the market (12 November 2010), *Official Journal of the European Union*, L 295, p. 23. The timber regulation requires that operators exercise due diligence so as to minimize the risk of placing illegally harvested timber, or timber products containing illegally harvested timber, on the European Union market.

523 *OECD Due Diligence Guidance …* (footnote 514 above), p. 13. The Guidance explains that "Armed conflict may take a variety of forms such as a conflict of international or non-international character, which may involve two or more States, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law."

524 European Union conflict minerals regulation (footnote 521 above), art. 2, para. (f), gives the following definition: "areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses".

525 See para. (7) of the commentary to draft principle 13 below.

526 See paras. (1)–(5) of the Introduction to Part Four.

527 More frequently referred to as "after an armed conflict". This phrase has not been defined. It is nevertheless clear that it cannot, for the purpose of the protection of the environment, be limited to the immediate aftermath of an armed conflict.

can take, such as legislative, administrative and judicial. Reference can be made in this regard to draft principle 3, which contains an illustrative list of the most relevant types of measures that States can take to enhance the protection of the environment in relation to armed conflicts. The qualification "appropriate" also indicates that the measures taken at the national level may differ from one country to another. While seeking to ensure due diligence by business enterprises would usually require legislative action,[528] this may not always be the case. Such measures should in any event be aimed at ensuring that business enterprises operating in or from the country in question, or in a territory under its jurisdiction, exercise due diligence with respect to the protection of the environment when acting in an area affected by an armed conflict.[529]

(8) There is no uniform practice on how to refer to business entities. The different regulatory frameworks use terms ranging from "transnational corporations and other business enterprises"[530] to "multinational enterprises",[531] "business enterprises"[532] or "companies".[533] The reference to "business enterprises" was chosen for the draft principle as a broad notion that is also used in the Guiding Principles on Business and Human Rights. How this notion is interpreted would primarily depend on the national law of each State. There are similarly several ways to describe the connection between a corporation or other business enterprise and a State.[534] The reference to "operating in or from their territories" follows the standard phrase in the OECD Due Diligence Guidance.[535] While the phrase may be interpreted to cover both territory and jurisdiction,[536] the explicit reference to territories under the jurisdiction of the State in question takes into account that States may have obligations under international law to ensure the observance of certain rights of persons under their jurisdiction. The phrase is also consistent with the previous work of the Commission on other topics.[537]

(9) Draft principle 10 also applies to private military and security companies, understood as "private business entities that provide military and/or security services, irrespective of how

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[528] See, for instance, the French law on corporate duty of vigilance, Act No. 2017-399 of 27 March 2017 on the on the duty of care of parent and contracting companies [loi n° 2017-399 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre], available at www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte (accessed on 2 August 2022).

[529] For instance, the measures taken may differ depending on whether a business enterprise is operating in or from the territory of a State. Where an armed conflict has occurred in a host State that lacks legislative and regulatory frameworks for the protection of the environment from hazardous materials, including radioactive material, adoption of relevant international safety standards, such as the International Atomic Energy Agency Safety Standards, may assist it in introducing appropriate regulation.

[530] Human Rights Council resolution 26/9 of 26 June 2014 setting up a Working Group to elaborate a legally binding instrument on transnational corporations and other business entities.

[531] *OECD Guidelines for Multinational Enterprises* (footnote 512 above).

[532] Guiding Principles on Business and Human Rights (footnote 508 above).

[533] *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (footnote 517 above).

[534] For instance, the Guiding Principles on Business and Human Rights (footnote 508 above) use the notion "business enterprises domiciled in their territory and/or jurisdiction", see e.g. principle 2.

[535] *OECD Due Diligence Guidance* (footnote 514 above), p. 9; and Recommendation of the Council on the OECD Due Diligence Guidance for Responsible Business Conduct (2018), pp. 92–94, available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0443 (accessed on 8 July 2019). See also OECD, Implementing the OECD Due Diligence Guidance, Executive Summary (Paris, 28 May 2018), p. 6, para. 16. Available at https://tuac.org/wp-content/uploads/2018/05/140PS_E_10_duediligence.pdf (accessed on 31 May 2022); *OECD Due Diligence Guidance* (footnote 514 above), p. 8.

[536] OECD, *The FATF Recommendations 2012* (2012, updated 2020), pp. 47, 54 and 119. Available at www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html (accessed on 2 August 2022). See also OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (Paris, 2018), pp. 8 and 94, available at www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-responsible-supply-chains-in-the-garment-and-footwear-sector_9789264290587-en (accessed on 31 May 2022).

[537] See, for instance, art. 2, subpara. (*d*), of the articles on the prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 97; art. 3, subpara. (b) of the articles on the protection of persons in the event of disasters, *Yearbook … 2016*, vol. II (Part Two), para. 48.

they may describe themselves".[538] The services that private military and security companies provide range from logistic support, intelligence services, training of troops, and protection of personnel and military assets to protection of commercial shipping from piracy.[539] In addition to States, international organizations in the context of peace operations, private corporations in the area of extractive industries and humanitarian organizations, for instance, commonly use the services of private military and security companies.[540] In transitional phases and post-conflict situations, private contractors may furthermore be involved in different kinds of reconstruction work, including disposal of military waste and conflict debris.[541] The special features of such services, which have traditionally been provided by the military, or other public authorities of a State, require additional comments. Most notably, in a situation of an armed conflict, the personnel of a private military company may have obligations under the law of armed conflict that go beyond what is provided in the current draft principle. This is the case, for instance, when a private military company is empowered to exercise governmental authority and may act as a party to the conflict.[542] Furthermore, in addition to the home State of a private military and security company and the host State, the State or organization that has contracted that company has international legal obligations.[543] Reference can be made, for instance, to the contracting State's obligation to ensure respect for the law of armed conflict by the private military and security companies with whom they contract.[544] When a contracting State is an Occupying Power, moreover, it has a general obligation to exercise vigilance in preventing violations of the law of armed conflict and international human rights law.[545]

(10) The notion of "due diligence" as used in the draft principle refers to due diligence expected of business entities when acting in areas affected by an armed conflict. This notion is not used differently from the due diligence frameworks referred to in paragraphs (2) to (4) above. As for its content, reference can be made to the parameters of "human rights due diligence" as explained in the Guiding Principles on Business and Human Rights:

> Human rights due diligence:
>
> (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
>
> (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
>
> (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.[546]

The European Union conflict minerals regulation defines supply chain due diligence in similar terms as "an ongoing, proactive and reactive process through which economic

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538 *Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* (Montreux, ICRC, 2008) (Montreux Document), p. 9.

539 C. Lehnhardt, "Private military contractors", in. A. Nollkaemper and I. Plakokefalos (ed.), *The Practice of Shared Responsibility in International Law* (Cambridge, Cambridge University Press, 2017), pp. 761–780.

540 See L. Cameron, "Private military companies: their status under international humanitarian law and its impact on their regulation", *International Review of the Red Cross*, vol. 88 (2006), pp. 573–598, pp. 575–577.

541 O. Das and A. Kellay, "Private security companies and other private security providers (PSCs) and environmental protection in jus post bellum: policy and regulatory challenges", in C. Stahn, J. Iverson, and J.S. Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford, Oxford University Press, 2017), pp. 299–325.

542 Montreux Document, Part One, p. 12, para. 7. As for the responsibility of the contracting State, see art. 5 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76.

543 Montreux Document, Part One, pp. 11–13, paras. 1–17.

544 Montreux Document, p. 11, para. 3.

545 See footnote 486 above.

546 Guiding Principles on Business and Human Rights (footnote 508 above), principle 17.

operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict or the adverse impacts thereof".[547] Furthermore, the OECD Guidelines for Multinational Enterprises and the related documentation include detailed guidance on international environmental standards.[548]

(11) The phrase "including in relation to human health" underlines the close link between environmental degradation and human health as affirmed by international environmental instruments,[549] regional treaties and case law,[550] the work of the Committee on Economic, Social and Cultural Rights,[551] as well as of the Special Rapporteur on human rights and the

[547] See European Union conflict minerals regulation (footnote 521 above), eleventh preambular para. See also *OECD Due Diligence Guidance …* (footnote 514 above), p. 13: "Due diligence is an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict".

[548] *OECD Guidelines for Multinational Enterprises* (footnote 512 above), part I, chap. VI "Environment", pp. 42–46. See also OECD, "Environment and the OECD Guidelines for Multinational Enterprises. Corporate tools and approaches". Available at https://oecd.org/env/34992954.pdf (accessed on 2 August10 June 2022).

[549] For instance, the following instruments refer to "human health and the environment": Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979), United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217, art. 7 (d); Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), *ibid.*, vol. 1513, No. 26164, p. 293, preamble and art. 2, para. 2 (a); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, 22 March 1989), *ibid*., vol. 1673, No. 28911, p. 57, preamble, art. 2, paras. 8 and 9, art. 4, paras. 2 (c), (d) and (f) and para. 11, art. 10, para. 2 (b), art. 13, paras. 1 and 3 (d), art. 15, para. 5 (a); Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir, 1 October 1996), *ibid*., vol. 2942, No. 16908, p. 155, art. 1 (j) and (k); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998), *ibid.*, vol. 2244, No. 39973, p. 337, preamble, art. 1 and art. 15, para. 4; Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), *ibid.*, vol. 2256, No. 40214, p. 119, preamble, art. 1, art. 3, para. 2 (b) (iii) a, art. 6, para. 1, art. 11, para. 1 (d), art. 13, para. 4; Minamata Convention on Mercury (Kumamoto, 10 October 2013), *ibid.*, No. 54669 (volume number has yet to be determined), available from https://treaties.un.org (accessed on 2 August 2022), preamble, art. 1, art. 3, para. 6 (b) (i), art. 12, paras. 2 and 3 (c), art. 18, para. 1 (b), art. 19, para. 1 (c); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú, 4 March 2018) (Escazú Agreement), *ibid.*, No. 56654 (volume number has yet to be determined), available from https://treaties.un.org (accessed on 2 August 2022), art. 6, para. 12.

[550] For instance, the African Charter on Human and Peoples' Rights incorporates both the right to health and the explicit right to a healthy environment. See African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 16, para. 1 (the right to health), and art. 24 ("the right to a general satisfactory environment favourable to [each person's] development"). These rights were resorted to in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Federal Republic of Nigeria* (see footnote 483 above) and *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, Community Court of Justice, Economic Community of West African States, 14 December 2012. Similarly, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988), Organization of American States, *Treaty Series*, No. 69, includes the right to health. The regional jurisprudence acknowledges that the right to health includes an element of environmental protection, such as a pollution-free environment. See Inter-American Commission on Human Rights, Annual Report 1984–1985, chap. V "Areas in which further steps are needed to give effect to the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights", OEA/Ser.L/V/II.66; see also Inter-American Commission on Human Rights, Report on the situation of human rights in Cuba, 4 October 1983, OEA/Ser.L/V/II.61, Doc. 29 rev. 1, chap. XIII "The right to health", para. 41; Inter-American Commission on Human Rights, resolution No. 12/85 in Case No. 7615, 5 March 1985; Inter-American Court of Human Rights, *Indigenous Community Yakye Axa v. Paraguay*, para. 167.

[551] Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), *Official Records of the Economic and Social Council, 2001, Supplement No. 2* (E/2001/22-E/C.12/2000/21), annex IV, para. 30.

environment.[552] Reference can also be made to the broad recognition of the right to a safe, clean, healthy and sustainable environment both at the national[553] and international[554] levels. The phrase thus refers to "human health" in the context of the protection of the environment.

(12) According to the second sentence of draft principle 10, the measures to be taken include those aimed at ensuring that natural resources are purchased or otherwise obtained in an environmentally sustainable manner. The requirement of responsible sourcing is included in a number of documents referred to above. The OECD Guidance, for instance, recommends that States promote the observance of the Guidance by companies operating from their territories and sourcing minerals from conflict-affected and high-risk areas "with the aim of ensuring that they respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development".[555] The Chinese guidelines require that companies identify and assess the risks of contributing to conflict and serious human rights abuses associated with extracting, trading, processing, and exporting resources from conflict-affected and high-risk areas,[556] as well as risks associated with serious misconduct in environmental, social and ethical issues.[557] The European Union conflict minerals regulation defines "supply chain due diligence" as meaning "the obligations of Union importers … in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high-risk areas to prevent or mitigate adverse impacts associated with their sourcing activities".[558]

(13) Draft principle 10 refers to activities of business enterprises in areas affected by an armed conflict, but addresses what are essentially preventive measures. The draft principle is therefore located in Part Two which includes principles relating to the time before conflict, and principles that are applicable in more than one phase including general principles not tied to any particular phase.

Principle 11
Liability of business enterprises

States should take appropriate measures aimed at ensuring that business enterprises operating in or from their territories, or territories under their jurisdiction, can be held liable for harm caused by them to the environment, including in relation to human health, in an area affected by an armed conflict. Such measures should, as appropriate, include those aimed at ensuring that a business enterprise can be held liable to the extent that such harm is caused by its subsidiary acting under its *de facto* control. To this end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

Commentary

(1) Draft principle 11 is closely related to draft principle 10 concerning due diligence by business enterprises. The purpose of draft principle 11 is to address situations in which harm has been caused by business enterprises to the environment, including in relation to human health, in areas affected by an armed conflict. States should take appropriate measures aimed at ensuring that business enterprises operating in or from the State's territory, or territory under its jurisdiction, can be held liable for having caused such harm. The concepts of "appropriate measures", "business enterprises", "the environment, including in relation to human health", "operating in or from their territories, or territories under their jurisdiction"

[552] See the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59).

[553] UNEP, Environmental Rule of Law (see footnote 346 above), p. 10 ("150 countries have enshrined environmental protection or the right to a healthy environment in their constitutions"), p. viii.

[554] See General Assembly resolution 76/300 of 28 July 2022 on the human right to a clean, healthy and sustainable environment. See also Human Rights Council resolution 48/13 of 8 October 2021.

[555] *OECD Due Diligence Guidance* (footnote 514 above), recommendation, pp. 7–9.

[556] *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (see footnote 517 above), sect. 5.1.

[557] *Ibid*., sect. 5.2.

[558] European Union conflict minerals regulation (footnote 521 above), art. 2 (d).

and "in an area affected by an armed conflict" are to be interpreted in the same way as in draft principle 10.

(2) The notions of "harm" and "caused by them" are to be interpreted in accordance with the applicable law, which may be the law of the home State of the business enterprise, or the law of the State in which the harm has been caused. In this regard, reference can be made to the legal regime applicable in the European Union,[559] which provides that the law applicable to a claim shall in general be that of the State in which the damage occurred.[560]

(3) The second sentence of draft principle 11 follows the wording of draft principle 10 in that it begins with a reference to the preceding sentence and adds a further consideration that is included within its remit. The phrase "as appropriate", which does not appear in draft principle 10, provides nuance as to how the elements of the provision are to be applied at the national level. The second sentence of draft principle 11 recommends measures aimed at ensuring that a business enterprise can, under certain circumstances, be held liable if its subsidiary has caused harm to the environment, including in relation to human health in an area affected by an armed conflict. More specifically, this should be possible when and to the extent that the subsidiary acts under the *de facto* control of the parent company. To illustrate the importance of such control, reference can be made to the statement of the United Kingdom Supreme Court in the *Vedanta v. Lungowe* case regarding the possible liability of the British multinational group Vedanta Resources for the release of toxic substances by its subsidiary to a watercourse in Zambia: "Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary."[561]

(4) The concept of *de facto* control is to be interpreted in accordance with the requirements of each national jurisdiction. The OECD Guidelines for Multinational Enterprises point out in this regard that the companies or other entities forming a multinational enterprise may coordinate their operations in different ways. "While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another."[562]

(5) Reference can in this regard also be made to national judicial cases that have shed light on the relevant aspects of the relationship between the parent company and its subsidiary. For instance, U.S. courts are sometimes willing to hold a parent company accountable for the actions of a foreign subsidiary on the basis of a principal-agent relationship. In the *In re Parmalat Securities Litigation* case,[563] the United States District Court for the Southern District of New York explained that such an agency relationship exists if there is agreement between the parent and the subsidiary that the subsidiary will act for the parent, and the parent retains control over the subsidiary.[564] In a further case,[565] the same court stated that a parent may be held legally accountable for the actions of a foreign subsidiary if the corporate relationship between the two is sufficiently close.[566] Relevant factors in determining whether

[559] As well as in Iceland, Norway and Switzerland.

[560] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July on the law applicable to non-contractual obligations (Rome II Regulation), *Official Journal of the European Union*, L 199, p. 40, art. 4, para. 1. See also Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano, 30 October 2007), *Official Journal of the European Union*, L 339, p. 3.

[561] *Vedanta Resources PLC and another v. Lungowe and others*, Judgment, 10 April 2019, [2019] UKSC 20, On appeal from [2017] EWCA Civ 1528.

[562] *OECD Guidelines for Multinational Enterprises* (footnote 512 above), chap. I, para. 4, p. 17.

[563] United States, District Court, Southern District New York, *In re Parmalat Securities Litigation*, 594 F. Supp. 2d 444 (S.D.N.Y. 2009).

[564] *Ibid*., pp. 451-453.

[565] United States, District Court, Southern District New York, *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). In this case, South African plaintiffs sued Daimler AG and Barclays National Bank Ltd. for aiding and abetting through their subsidiaries the Government of South Africa in its apartheid policy.

[566] *Ibid.*, p. 271.

this was the case included disregard of corporate formalities, intermingling of funds and overlap of ownership, officers, directors and personnel.[567] In the *Chandler v. Cape* case, the England and Wales Court of Appeal concluded that, in appropriate circumstances, the parent company may have a duty of care in relation to the health and safety of the employees of its subsidiary. That may be the case, for instance, when the business of the parent and the subsidiary are in a relevant aspect the same and the parent has, or ought to have, superior knowledge of the relevant aspects of health and safety in the particular industry, as well as of the shortcomings in the subsidiary's system of work.[568]

(6) The third sentence of draft principle 11 concerns both the previous sentences. Its purpose is to recall that States should provide adequate and effective procedures and remedies for the victims of environmental and health-related harm caused by business enterprises or their subsidiaries in areas affected by an armed conflict. The sentence thus refers to situations, in which the host State may not be in the position to effectively enforce its legislation. Reference can in this regard also be made to the general comment of the Committee on Economic, Social and Cultural Rights which interprets the obligation to protect as extending to corporate wrongdoing abroad, "especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective".[569]

(7) It may be recalled that the collapse of State and local institutions is a common consequence of armed conflict and one that often casts a long shadow in the aftermath of conflict, undermining law enforcement and the protection of rights as well as the integrity of justice. The important role that home States of business enterprises can play in such situations is illustrated by a reference to the *Katanga Mining* case,[570] in which the dispute related to events in the Democratic Republic of the Congo. The company Katanga Mining Ltd. was incorporated in Bermuda and resident in Canada for tax purposes[571] and had all its actual business operations in the Democratic Republic of the Congo.[572] The parties had furthermore agreed in a previous contract that any disputes would be settled in the Tribunal de grande instance of Kolwezi (Democratic Republic of the Congo). The English Court nevertheless decided, in view of the situation in which "attempted interference with the integrity of justice" was "apparently widespread and endemic",[573] that the Democratic Republic of the Congo would not be "a forum in which the case may be tried suitably for the interests of all the parties and for the ends of justice".[574]

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567 *Ibid.*, pp. 271-272.

568 *Chandler v. Cape* PLC, [2012] EWCA (Civ) 525 (Eng.), para. 80. It was furthermore required that the parent company knew or ought to have known that the subsidiary or its employees relied on it for protection. See also R. McCorquodale, "Waving not drowning: *Kiobel* outside the United States", *American Journal of International Law*, vol. 107 (2013), pp. 846–51. See also *Lubbe and others v. Cape PLC Afrika and others v. Same*, 20 July 2000, 1 Lloyd's Rep. 139, as well as P. Muchlinski, "Corporations in international litigation: problems of jurisdiction and United Kingdom *Asbestos* cases", *International and Comparative Law Quarterly*, vol. 50 (2001), pp. 1–25. See also *Akpan v. Royal Dutch Shell PLC*, The Hague District Court, case No. C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854), 30 January 2013. See further Canada, Supreme Court of Canada, *Nevsun Resources Ltd. v. Araya* et al., Judgment, 28 February 2020, SCC 5, para. 17. See further C. Bright, "Quelques réflexions à propos de l'affaire Shell aux Pays-Bas", *in* Société Française pour le Droit International, *L'entreprise multinationale et le droit international* (Paris, Pedone, 2016), pp. 127-142.

569 Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 30. The general comment links such measures to the obligation to protect Covenant rights.

570 *Alberta Inc. v. Katanga Mining Ltd*. [2008] EWHC 2679 (Comm), 5 November 2008 (Tomlinson J.).

571 *Ibid.*, para. 19.

572 *Ibid.*, para. 20.

573 *Ibid.*, para. 34.

574 *Ibid.*, para. 33. Similarly, in the United States case of *In re Xe Services*, the District Court dismissed the private military company's claim that Iraq would be an appropriate forum and held that it was not shown that an alternative forum existed. See *In re Xe Services Alien Tort Litigation*, 665 F. Supp. 2d

(8) The human rights treaty bodies within the United Nations have also addressed the issue in their comments on the situation in individual States. The Human Rights Committee, for instance, has encouraged the relevant State party "to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations" and "to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad".[575] Similarly, the Committee on the Elimination of Racial Discrimination has drawn attention to instances where the rights of indigenous peoples to land, health, environment and an adequate standard of living have been adversely affected by the operations of transnational corporations. In that context, it has encouraged the relevant State party to "ensure that no obstacles are introduced in the law that prevent the holding of … transnational corporations accountable in the State party's courts when [violations of the Covenant] are committed outside the State party".[576]

(9) Reference can furthermore be made to the Montreux Document which recalls the obligations that contracting States, as well as home States and host States, of private military and security companies have under the law of armed conflict and international human rights law.[577] In particular, States are required to take measures to prevent, investigate and provide effective penal sanctions for persons committing grave breaches of the applicable law of armed conflict and to investigate and, as appropriate, prosecute persons suspected of other crimes under international law. To give effect to their human rights obligations, States "have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of [private military and security companies] and their personnel".[578] While the draft principle has been phrased as a recommendation, it is without prejudice to such obligations of States, which are not limited to private military and security companies. For instance, to the extent that a business enterprise is engaged in illegal exploitation of natural resources that amounts to pillage, the law of armed conflict provides a basis for preventing and punishing such acts.[579]

(10) The term "victims" refers to persons whose health or livelihood has been harmed by the environmental damage referred to in draft principle 11. Environmental damage may also affect other human rights such as the right to life and the right to food.[580] The phrase "in particular for the victims" indicates, in the first place, that the adequate and effective remedies should be available for the victims of the environmental harm. In the second place, the phrase acknowledges that such remedies may also be available on a broader basis depending on the national legislation. This may be a case of public interest litigation by environmental associations or groups of persons, who cannot allege a violation of their individual rights or interests.[581] In addition, environmental damage can also give rise to civil claims in which the

569, 602 (E.D. Va. 2009). See also Canada, *Nevsun Resources Ltd.* (footnote 568 above), para. 18, referring to "a real risk of an unfair trial occurring in Eritrea".

575 Human Rights Committee, concluding observations on the report of Germany (CCPR/C/DEU/CO/6), para. 16.

576 Committee on the Elimination of Racial Discrimination, concluding observations on the report of the United Kingdom (CERD/C/GBR/CO/18-20), para. 29.

577 Montreux Document. Part One, paras. 5, 6, 10–12, 16, 17.

578 *Ibid.*, para. 15. See also Federal Department of Foreign Affairs of Switzerland and Geneva Centre for the Democratic Control of Armed Forces (DCAF), "Legislative guidance tool for States to regulate private military and security companies" (Geneva, 2016), which contains also examples of best practices, available at www.dcaf.ch/sites/default/files/publications/documents/Legislative-Guidance-Tool-EN_1.pdf (accessed on 8 July 2019). For national legislation, see also the Office of the United Nations High Commissioner for Human Rights (OHCHR) study, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/218/09/PDF/G1721809.pdf?OpenElement. The following link can be referred to for the various parts of the study and other related documents- https://www.ohchr.org/en/special-procedures/wg-mercenaries/annual-thematic-reports (accessed on 2 August 2022). See also *Al-Quraishi et al. v. Nahkla and L-3 Services*, 728 F Supp 2d 702 (D Md 2010) at 35–37, 29 July 2010. A settlement was reached in this case, after years of litigation, in 2012.

579 See draft principle 16 below.

580 See footnotes 756 and 758 below.

581 See L. Rajamani, "Public interest environmental litigation in India: exploring issues of access, participation, equity, effectiveness and sustainability", *Journal of Environmental Law*, vol. 19 (2007),

term "victim" would not be normally used. Furthermore, in cases of pure environmental damage, compensation could be awarded to the affected communities.

(11) The words "adequate and effective procedures and remedies" are general in nature and, together with the phrase "as appropriate", allow States a certain flexibility when applying this provision at the national level.

(12) Draft principle 11 is located in Part Two as a provision of general application for the same reasons as draft principle 10.

Part Three
Principles applicable during armed conflict

Commentary

(1) Part Three contains draft principles applicable during armed conflict, irrespective of classification. This includes international armed conflicts, understood in the traditional sense of an armed conflict fought between two or more States, including situations of occupation, armed conflicts in which peoples are fighting against colonial domination, alien occupation and racist régimes in the exercise of their right of self-determination, and non-international armed conflicts, which are fought either between a State and organized armed group(s) or between organized armed groups within the territory of a State.[582]

(2) While the focus of Part Three is on principles and rules of international law that are only applicable in armed conflict, there are a few exceptions. Paragraph 1 of draft principle 13 applies to all three phases to the extent that the law of armed conflict is applicable. Draft principle 17 on environmental modification techniques is based on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques,[583] the scope of which is not limited to armed conflicts. The primary context in which States would engage in military or any other hostile use of such techniques "as a means of destruction, damage or injury to another State"[584] is nevertheless an armed conflict. While the Martens Clause, too, has mainly been codified in the law of armed conflict,[585] in particular the environmental Martens Clause may be regarded as being applicable also in peacetime.[586]

(3) Part Three contains draft principles that reflect some of the most relevant rules and principles of the law of armed conflict providing protection to the environment. Other provisions that are relevant to the protection of the environment in relation to armed conflicts

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pp. 293–321. Available at www.researchgate.net/publication/316876795_Public_Interest_Environmental_Litigation_in_India_Exploring_Issues_of_Access_Participation_Equity_Effectiveness_and_Sustainability (accessed on 8 July 2019). See also India Environmental Portal, Public Interest Litigation, at www.indiaenvironmentportal.org.in/category/1255/thesaurus/public-interest-litigation-pil (accessed on 8 July 2019). See also the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447, art. 6, as well as Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

582 First Geneva Convention; Second Geneva Convention, Third Geneva Convention; Fourth Geneva Convention, common articles 2 and 3; Additional Protocol I, art. 1; and Additional Protocol II, art. 1.

583 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976), United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151.

584 *Report of the Conference of the Committee on Disarmament*, vol. I, *Official records of the General Assembly, Thirty-first session, Supplement No. 27* (A/31/27), annex, Understanding relating to article II, p. 92.

585 See footnotes 642 and 643 below. The Martens Clause has nevertheless also been included in the Convention on Certain Conventional Weapons, fifth preambular paragraph, as well as in the Convention on Cluster Munitions (Dublin, 30 May 2008), United Nations, *Treaty Series*, vol. 2688, p. 39, eleventh preambular paragraph.

586 See para. (6) of the commentary to draft principle 12 below. See also D. Shelton and A. Kiss, "Martens Clause for environmental protection", *Environmental Policy and Law*, vol. 30 (2000), pp. 285–286, at p. 286.

have been referred to in the commentaries to several draft principles. They include, for instance, that "in any armed conflict, the right of the Parties to choose methods and means of warfare is not unlimited",[587] the prohibitions regarding objects indispensable to the survival of the civilian population,[588] the prohibitions regarding works and installations containing dangerous forces,[589] and the prohibition of the destruction of property not justified by military necessity.[590] A comprehensive compilation of the principles and rules of the law of armed conflict providing protection to the environment is contained in the 2020 ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict.[591]

(4) The focus on the law of armed conflict in Part Three does not indicate that, in the Commission's view, other rules of international law would have no role to play. The general applicability of international human rights law[592] and international environmental law[593] in armed conflicts has provided an obvious point of departure for the Commission's work on the topic. It is furthermore recognized that the law of armed conflict, where it constitutes *lex specialis*, prevails when there is a conflict with another applicable rule of international law. Where there is no such conflict, other relevant rules of international law, such as international environmental law and international human rights law, may apply concurrently.

(5) Unlike the treaty provisions that they reflect, draft principles 13, 14 and 15 use the term "environment" rather than the term "natural environment". The draft principles refer consistently to the "environment", in line with the established terminology of international environmental law. This change should not be understood as altering the scope of the existing conventional and customary law of armed conflict, or to expand the scope of the notion of "natural environment" in that law.

Principle 12
Martens Clause with respect to the protection of the environment in relation to armed conflicts

In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Commentary

(1) Draft principle 12 is inspired by the Martens Clause, which originally appeared in the preamble to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land,[594] and has been restated in several later treaties.[595] The Martens Clause provides, in essence, that even in cases not covered by specific international agreements, civilians and

[587] Additional Protocol I, art. 35, para. 1.
[588] Additional Protocol I, art. 54, and Additional Protocol II, art. 14.
[589] Additional Protocol I, art. 56, and Additional Protocol II, art. 15.
[590] Hague Regulations, art. 23 (g); Fourth Geneva Convention. art. 147.
[591] ICRC, Guidelines on the Protection of the Environment in Armed Conflict (footnote 345 above).
[592] *Legal Consequences of the Construction of a Wall* (see footnote 351 above), p. 178, para. 106; *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 240, para. 25.
[593] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 243, para. 33; draft articles on the effects of armed conflicts on treaties, *Yearbook … 2011*, vol. II (Part Two), pp. 106–130, paras. 100–101, commentary to the annex, para. (55), at p. 127.
[594] Convention (II) with Respect to the Laws and Customs of War on Land (The Hague, 29 July 1899), J.B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*. The 1899 Martens Clause reads: "Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." For a general overview, see memorandum by the Secretariat on the effect of armed conflicts on treaties: an examination of practice and doctrine (A/CN.4/550), paras. 140–142.
[595] See First Geneva Convention, art. 63; Second Geneva Convention, art. 62; Third Geneva Convention, art. 142; Fourth Geneva Convention, art. 158. Additional Protocol I, art. 1, para. 2, and Additional Protocol II, preamble, para. 4.

combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[596] The International Court of Justice has stated that the clause forms part of customary international law.[597] While originally conceived in the context of belligerent occupation, the clause has today a broader application, covering all areas of the law of armed conflict.[598]

(2) The function of the Martens Clause is generally seen as providing residual protection in cases not covered by a specific rule.[599] The International Court of Justice referred to the Martens Clause in its Advisory Opinion on the *Legality of Nuclear Weapons* to strengthen the argument about the applicability of international humanitarian law to the threat or use of nuclear weapons.[600] Similarly, the ICRC commentary to the First Geneva Convention mentioned, as a dynamic aspect of the clause, that it confirms "the application of the principles and rules of humanitarian law to new situations or to developments in technology, also when those are not, or not specifically, addressed in treaty law".[601] The clause thus precludes the argument that any means or methods of warfare that are not explicitly prohibited by the relevant treaties[602] are permitted, or, in a more general manner, that acts of war not expressly addressed by treaties or general international law are *ipso facto* permissible.[603]

(3) Beyond that, however, views differ as to the legal consequences of the Martens Clause. It has been seen as a reminder of the role of customary international law in the absence of applicable treaty law, and of the continued validity of customary international law alongside treaty law.[604] The Martens Clause has also been seen to offer additional interpretative guidance "whenever the legal regulation provided by a treaty or customary rule is doubtful, uncertain or lacking in clarity".[605] A further interpretation links the Martens Clause to a method of identifying customary international law in which particular emphasis is given to

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596 Additional Protocol I, art. 1, para. 2.

597 *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 259, para. 84.

598 T. Meron, "The Martens Clause, principles of humanity, and dictates of public conscience", *American Journal of International Law*, vol. 94 (2000), pp. 78–89, at p. 87.

599 Para. (3) of the commentary to art. 29 of the articles on the law of the non-navigational uses of international watercourses with commentaries and resolution on transboundary confined groundwater, *Yearbook … 1994*, vol. II (Part Two), at p. 131; para. (3) of the commentary to draft art. 18 of the draft articles on the law of transboundary aquifers, *Yearbook… 2008*, vol. II (Part Two), para. 54, at p. 43: "In cases not covered by a specific rule, certain fundamental protections are afforded by the 'Martens clause'".

600 "Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons", *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 260, para. 87.

601 ICRC commentary (2016) to the First Geneva Convention, art. 63, para. 3298. See also C. Greenwood, "Historical developments and legal basis", in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford, Oxford University Press, 2008), pp. 33–34, at p. 34: "as new weapons and launch systems continue to be developed, incorporating ever more sophisticated robotic and computer technology, the venerable Martens Clause will ensure that the technology will not outpace the law."

602 ICRC commentary (1987) to Additional Protocol I, art. 1, para. 2, para. 55; ICRC commentary to the First Geneva Convention (2016), para. 3297.

603 According to the German Military Manual, "[i]f an act of war is not expressly prohibited by international agreements or customary law, this does not necessarily mean that it is actually permissible". See Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts – Manual*, para. 129 (ZDv 15/2, 1992).

604 Greenwood, "Historical developments and legal basis" (footnote 601 above), p. 34. See also the ICRC commentary (2016) to the First Geneva Convention, art. 63, para. 3296, which characterizes this as the minimum content of the clause.

605 A. Cassese, "The Martens Clause: half a loaf or simply pie in the sky?", *European Journal of International Law*, vol. 11 (2000), pp. 187–216, at pp. 212–213; G. Distefano and E. Henry, "Final provisions, including the Martens Clause", in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015), pp. 155–188, at pp. 185–186. See also *Prosecutor v. Kupreškić* et al., Case No. IT-95-16-T, Judgment, 14 January 2000, paras. 525 and 527.

opinio juris.[606] The inclusion of the present draft principle in the set of draft principles does not mean, or imply, that the Commission is taking a position on the various views regarding the legal consequences of the Martens Clause.

(4) Draft principle 12 is entitled "Martens Clause with respect to the protection of the environment in relation to armed conflicts". The title draws attention to the environmental focus of the draft principle, the purpose of which is to provide subsidiary protection to the environment in relation to armed conflicts.

(5) This is not the first time the Martens Clause has been invoked in the context of the protection of the environment in armed conflict.[607] The ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Armed Conflict of 1994 include a provision stating the following: "In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience."[608] In 1994, the General Assembly invited all States to disseminate the ICRC guidelines widely and to "give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel".[609] The 2020 ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict retain the same formulation.[610]

(6) The second IUCN World Conservation Congress, furthermore, in 2000 urged Member States of the United Nations to endorse a policy reading as follows:

> Until a more complete international code of environmental protection has been adopted, in cases not covered by international agreements and regulations, the biosphere and all its constituent elements and processes remain under the protection and authority of the principles of international law derived from established custom, from dictates of the public conscience, and from the principles and fundamental values of humanity acting as steward for present and future generations.[611]

The recommendation was adopted by consensus[612] and was meant to apply during peacetime as well as during armed conflicts.[613]

(7) The present draft principle follows the wording of the Martens Clause in Additional Protocol I to the Geneva Conventions (art. 1, para. 2), which states: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." In particular, the reference to "the dictates of public conscience", as a general notion not intrinsically limited to one specific meaning, justifies the application of the Martens Clause

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606 Cassese, "The Martens Clause: half a loaf or simply pie in the sky?" (see previous footnote), p. 214; Meron, "The Martens Clause, principles of humanity, and dictates of public conscience" (see footnote 598 above), p. 88.

607 See P. Sands *et al.*, *Principles of International Environmental Law*, 4th ed. (Cambridge, Cambridge University Press, 2018), p. 832: "In modern international law, there is no reason why [the dictates of public conscience] should not encompass environmental protection". Similarly M. Bothe *et al.*, "International law protecting the environment during armed conflict: gaps and opportunities", *International Review of the Red Cross*, vol. 92 (2010), pp. 569–592, at pp. 588–589; Droege and Tougas, "The protection of the natural environment in armed conflict …" (footnote 376 above), pp. 39–40; M. Tignino, "Water during and after armed conflicts: what protection in international law?", *Brill Research Perspectives in International Water Law*, vol. 1.4 (2016), pp. 1–111, at pp. 26, 28 and 41.

608 ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (A/49/323, annex), guideline 7.

609 General Assembly resolution 49/50 of 9 December 1994, para. 11.

610 ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), Rule 16.

611 World Conservation Congress, resolution 2.97, entitled "A Martens Clause for environmental protection" (Amman, 4–11 October 2000).

612 The United States and United States agency members did not join the consensus.

613 Shelton and Kiss, "Martens Clause for environmental protection" (footnote 586 above) p. 286.

to the environment.[614] In this regard, reference can be made to the importance, as generally recognized, of environmental protection, as well as to the growth and consolidation of international environmental law. More specifically, the understanding of the environmental impacts of conflict has developed considerably since the adoption of the treaties codifying the law of armed conflict. The term "public conscience" can furthermore be seen to encompass the notion of intergenerational equity as an important part of the ethical basis of international environmental law.

(8) Another essential component of the Martens Clause, the reference to "the principles of humanity", displays a more indirect relationship to the protection of the environment. It may even be asked whether the environment can remain under the protection of "the principles of humanity", given that the function of such principles is to specifically serve human beings. It should be recalled in this regard that humanitarian and environmental concerns are not mutually exclusive, as pointed out by the International Court of Justice: "The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[615] The intrinsic link between the survival of people and the environment in which they live has also been recognized in other authoritative statements.[616] Similarly, modern definitions of the environment as an object of protection do not draw a strict dividing line between the environment and human activities but encourage definitions that include components of both.[617] The mention of the principles of humanity is moreover an integral part of the Martens Clause.

(9) The term "the principles of humanity" is distinct from "the principle of humanity" as one of the two cardinal principles of the law of armed conflict, together with military necessity. The reference to "the principles of humanity" in the Martens Clause is broader and can be connected to the concept of "elementary considerations of humanity", which, according to the International Court of Justice, are "even more exacting in peace than in war".[618] In practice, the two terms are often used interchangeably.[619] Reference can be also be

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614 Similarly, ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 201, and footnotes 455 and 456.

615 See *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 241, para. 29.

616 The World Charter for Nature stated that "[m]ankind is a part of nature and life depends on the uninterrupted functioning of natural systems". General Assembly resolution 37/7 of 28 October 1982, annex, preamble. The Special Rapporteur on human rights and the environment has furthermore linked human dignity with the environment as a "minimum standard of human dignity": "Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity." See, OHCHR, "Introduction", available at www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx (accessed on 2 August 2022). ICRC has also recognized this intrinsic link, see ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 201.

617 See Sands, *Principles of International Environmental Law* (footnote 607 above), p. 14: The concept of the environment, however, encompasses "both the features and the products of the natural world and those of human civilisation." See also C.R. Payne, "Defining the environment: environmental integrity", in Stahn, Iverson and Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace …* (footnote 541 above), pp. 40–70, at p. 69, calling for a consideration of "how human activities and environment function as an interactive system", not focusing exclusively on one element.

618 *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at p. 22. See also ICRC commentary (2016) to the First Geneva Convention, art. 63, para. 3291. See also *La Nostra Segnora de la Piedad* (1801), 25 Merlin, Jurisprudence, Prise Maritime, sect. 3, art. 1.3, which established that the capture of such vessels was contrary to "the principles of humanity, and the maxims of international law". See further *The Paquete Habana v. United States*, 175 U.S. 677 (1900), pp. 695 and 708, in which the United States Supreme Court recognized that customary international law prohibited the capture of coastal fishing vessels engaged in sustaining the civilian population, and cited with approval the *La Nostra Segnora de la Piedad* case.

619 Together with such other concepts as "laws of humanity", "humaneness" and "spirit of humanity"; see K.M. Larsen *et al*. (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge, Cambridge University Press 2012), pp. 4 and p. 6. The link of these concepts with human rights has been recognized both in practice and in doctrine. See, for instance, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka "Zenga") ("Celebici* case*")* Case No. IT-96-3-A,

made to "fundamental minimum standards of humanity" recognized, *inter alia*, in the practice of the International Criminal Tribunal for the former Yugoslavia[620] and the Commission on Human Rights.[621] The term "the principles of humanity" can therefore also be taken to refer more generally to humanitarian standards that are found not only in international humanitarian law but also in international human rights law,[622] which provides important protections to the environment.[623]

(10) Draft principle 12 is located in Part Three containing draft principles applicable during an armed conflict, including in situations of occupation.

Principle 13
General protection of the environment during armed conflict

1. The environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

2. Subject to applicable international law:

(*a*) care shall be taken to protect the environment against widespread, long-term and severe damage;

(*b*) the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited.

3. No part of the environment may be attacked, unless it has become a military objective.

Commentary

(1) Draft principle 13 comprises three paragraphs which broadly provide for the protection of the environment during armed conflict, whether international or non-international. It reflects the obligation to respect and protect the environment, the duty of care and the prohibition of the use of certain methods and means of warfare, as well as the prohibition of attacks against any part of the environment, unless it has become a military objective.

(2) Paragraph 1 sets out the general position that in relation to armed conflict, the environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

Judgment, 20 February 2001, para. 149; International Tribunal for the Law of the Sea, *M/V Saiga (No. 2), St Vincent and the Grenadines v. Guinea, Judgment, ITLOS Reports 1999*, p. 10, at para. 155; I. Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press), 1998, p. 575.

620 *Celebici* case (see previous footnote), para. 149.

621 Commission on Human Rights, Promotion and Protection of Human Rights: fundamental standards of humanity, Report of the Secretary-General (E/CN.4/2006/87).

622 Cassese, "The Martens Clause: half a loaf or simply pie in the sky?" (footnote 605 above), p. 212, refers to "general standards of humanity" as deduced from international human rights standards. See also P.-M. Dupuy, "'Les considérations élémentaires d'humanité' dans la jurisprudence de la Cour internationale de Justice", in L.-A. Sicilianos and R.-J. Dupuy (eds.), *Mélanges en l'honneur de Nicolas Valticos: Droit et justice* (Paris, Pedone, 1998), pp. 117–130.

623 Several courts and tribunals have explicitly recognized the interdependence between human beings and the environment by affirming that environmental harm affects the right to life. *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, Community Court of Justice, Economic Community of West African States, 14 December 2012; *Öneryildiz v. Turkey*, Application No. 48939/99, Judgment, European Court of Human Rights, 30 November 2004, ECHR 2004-XII, para. 71. As the most recent such ruling, the advisory opinion of the Inter-American Court of Human Rights *Medio Ambiente y Derechos Humanos* established that there is an inalienable relationship between human rights and environmental protection. Inter-American Court of Human Rights, Advisory Opinion No. OC 23-17, *Medio Ambiente y Derechos Humanos* [The environment and human rights], 15 November 2017, Series A, No. 23. See also the resolution of the Inter-American Commission on Human Rights in *Yanomami v. Brazil*, resolution No. 12/85, Case No. 7615, 5 March 1985.

(3) The words "respected" and "protected" were chosen for the present draft principle as they have been used in several legal instruments in the law of armed conflict, international environmental law and international human rights law.[624] The International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* held that "respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principle of necessity".[625]

(4) As far as the term "applicable international law" is concerned, the words "in particular, the law of armed conflict" reflect the fact that it is this set of rules that has been specifically designed for armed conflicts. At the same time, other rules of international law providing environmental protection, such as international environmental law and international human rights law, retain their relevance.[626] Paragraph 1 of draft principle 13 is applicable during all three phases (before, during and after an armed conflict) to the extent that the law of armed conflict applies.

(5) Paragraph 2 is inspired by article 55, paragraph 1, and article 35, paragraph 3, of Additional Protocol I to the Geneva Conventions. Subparagraph (a) provides the rule that care shall be taken in warfare to protect the environment against widespread, long term and severe damage. Subparagraph (b) provides that the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited. The chapeau "subject to applicable international law" applies to both subparagraphs.

(6) The chapeau recognizes that there are still different views regarding the customary status of both the duty of care and the prohibition as enshrined in Additional Protocol I.[627] Paragraph 2 does not seek to extend the treaty obligations to States not parties to Additional Protocol I. It also takes into account that some States Parties to Additional Protocol I have made declarations or reservations concerning the scope of application of Additional Protocol I.[628]

(7) Regarding subparagraph (a), article 55, paragraph 1, of Additional Protocol I provides that care shall be taken to protect the environment against widespread, long-term and severe damage in international armed conflicts.[629] The term "care shall be taken" indicates that there is a duty on the parties to an armed conflict to be vigilant of the potential impact that military activities can have on the environment.[630] The considerations to be taken into account for this purpose are related both to the foreseeable effect of the methods and means of warfare used, and to the characteristics of the terrain in which military activities take place, such as the importance of ecologically rich environmental areas, or vulnerable or fragile ecosystems. The

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624 A considerable number of instruments on the law of armed conflict, environmental law and human rights law contain the terms "respect" and "protect". Of most relevance is the World Charter of Nature, General Assembly resolution 37/7 of 28 October 1982, in particular the preamble and principle 1, and Additional Protocol I, art. 48, para. 1, which provides that civilian objects shall be respected and protected. See also, for example, the International Covenant on Civil and Political Rights (New York, 16 December 1964), United Nations, *Treaty Series*, vol. 999, p. 171, art. 2; Additional Protocol I, art. 55, and the Rio Declaration (footnote 335 above), principle 10.

625 *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), para. 30.

626 *Ibid*., , pp. 240–242, paras. 25 and 27–30.

627 See Protection of the environment in relation to armed conflicts: comments and observations received from governments, international organizations and others (A/CN.4/749): comments on draft principle 13 of Canada, France, Israel, Switzerland, the United Kingdom, the United States and ICRC.

628 The declarations regarding articles 35, paragraph 3, and 55 are available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (accessed on 2 August 2022).

629 Article 55 – Protection of the natural environment reads:

"1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

630 Pilloud and Pictet, "Article 55: Protection of the natural environment" (see footnote 353 above), p. 663, para. 2133. See also K. Hulme, "Taking care to protect the environment against damage: a meaningless obligation?" in *International Review of the Red Cross*, vol. 92 (2010), pp. 675–691.

duty of care is also related to the obligation to take "constant care … to spare … civilians and civilian objects"[631] and the principle of precautions.[632]

(8) Like article 55, paragraph 1, and article 35, paragraph 3, subparagraphs (a) and (b) of draft principle 13 include a triple cumulative standard: "widespread, long-term and severe". These terms are not defined in Additional Protocol I. While the same terms are used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which also provides clarification on how they should be understood,[633] the ICRC commentary to article 35, paragraph 1, indicates that the two instruments do not give the same meaning to the three terms.[634] It is also obvious that, by opting for the conjunctive "and" instead of the disjunctive "or" used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, the States participating in the negotiations on Additional Protocol I wished to set a high threshold.

(9) At the same time, the interpretation of this standard should not rely solely on how the concept of "environmental damage" was understood in the 1970s[635] but must take into account current scientific knowledge of ecological processes. In this regard, risk of damage should not be conceptualized only in terms of harm to a specific object but should also take into account the possibility of affecting a fragile interdependent system of both living and non-living components.[636] ICRC has similarly noted: "[w]hat is certain is that in assessing the degree to which damage meets the threshold, current knowledge, including on the connectedness and interrelationships of different parts of the natural environment as well as on the effects of the harm caused, must be considered".[637]

(10) Paragraph 3 of draft principle 13 is based on the fundamental rule under the law of armed conflict that a distinction must be made between military objectives and civilian objects.[638] It underlines the inherently civilian nature of the environment. Paragraph 3 of draft principle 13 is to be read with article 52, paragraph 2, of Additional Protocol I, which defines the term "military objective" as:

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631 Additional Protocol I, art. 57, para. 1.

632 See para. (8) of the commentary to draft principle 14 below.

633 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, art. 2. In the understanding relating to article I thereof, the terms "widespread", "long-term" and "severe" are understood as follows: "'widespread': encompassing an area on the scale of several hundred square kilometers"; "'long-lasting': lasting for a period of months, or approximately a season"; "'severe': involving serious or significant disruption or harm to human life, natural and economic resources or other assets" (*Report of the Conference of the Committee on Disarmament, Official Records of the General Assembly, Thirty-first Session, Supplement No. 27* (A/31/27), vol. I, pp. 91–92).

634 ICRC Commentary (1987) to Additional Protocol I, art. 35, para. 1452.

635 It should also be taken into account, as Bothe notes, that at the time of the negotiations of Additional Protocol I (1974–1977), the participants had limited experience and expertise in relation to environmental damage in general and wartime environmental damage in particular. See M. Bothe, "The protection of the environment in times of armed conflict: legal rules, uncertainty, deficiencies and possible developments", *German Yearbook on International Law*, vol. 34 (1991), pp. 54–62, at p. 56.

636 "Ecosystem" is defined in the Convention on Biological Diversity, art. 2, as a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit. See also ICRC commentary (1987) to Additional Protocol I, art. 35, para. 1462, according to which the standard was meant to be applicable to "ecological warfare". See further L.-A. Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge, Cambridge University Press, 2018), p. 75, and B. Sjöstedt, *The Role of Multilateral Environmental Agreements: A Reconciliatory Approach to Environmental Protection in Armed Conflict* (Oxford, Hart Publishing, 2020), pp. 43–47.

637 A/CN.4/749, comments of ICRC on draft principle 13, summarizing ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 54. As for the meaning of the three terms, see *ibid*., paras. 56–72.

638 See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 7 and rule 43, pp. 25–29 and 143, respectively.

> … [T]hose objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[639]

The term "civilian object" is defined as "all objects which are not military objectives".[640] In terms of the law of armed conflict, attacks may only be directed against military objectives, and not civilian objects.[641] There are several binding and non-binding instruments which indicate that this rule is applicable to parts of the environment.[642]

(11) Paragraph 3 is, however, temporally qualified with the words "has become", which emphasize that this rule is not absolute: the environment may become a military objective in certain instances, and could thus be lawfully targeted.[643] In this regard, it should be pointed out that paragraph 3 must be read together with draft principle 14, which specifically references the application of the law of armed conflict, rules and principles of distinction, proportionality and precautions.

Principle 14
Application of the law of armed conflict to the environment

The law of armed conflict, including the principles and rules on distinction, proportionality and precautions shall be applied to the environment, with a view to its protection.

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639 Additional Protocol I, art. 52, para. 2. A similar definition is provided in Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices annexed to the Convention on Certain Conventional Weapons (Geneva, 10 October 1980) hereinafter (Protocol II to the Convention on Certain Conventional Weapons), United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 137, at p. 168; amended Protocol II to the Convention on Certain Conventional Weapons and Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol III to the Convention on Certain Conventional Weapons), *ibid*., vol. 1342, No. 22495, p. 171 as well as the 1999 Second Protocol.

640 See art. 52, para. 1, of Additional Protocol I, as well as art. 2, para. 5 of the Protocol II to the Convention on Certain Conventional Weapons; art. 2, para. 7, of the amended Protocol II to the Convention on Certain Conventional Weapons; and art. 1, para. 4, of the Protocol III to the Convention on Certain Conventional Weapons.

641 See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 7, pp. 25–29. The principle of distinction is codified, *inter alia*, in article 48 and 52, paragraph 2, of Additional Protocol I, as well as the amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons. It is recognized as a rule of customary international humanitarian law in both international and non-international armed conflict.

642 The following instruments have been cited, *inter alia*: art. 2, para. 4, of Protocol III to the Convention on Certain Conventional Weapons, ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (footnote 608 above), the ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), the Final Declaration adopted by the International Conference for the Protection of War Victims, General Assembly resolutions 49/50 and 51/157, annex, the military manuals of Australia and the United States, as well as national laws of Nicaragua and Spain. See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 43, pp. 143–144.

643 See e.g. Bothe *et al.*, "International law protecting the environment during armed conflict: gaps and opportunities" (footnote 607 above); R. Rayfuse, "Rethinking international law and the protection of the environment in relation to armed conflict" in *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, R. Rayfuse (ed.) (Leiden, Brill Nijhoff, 2015), p. 6; see also C. Droege and M.-L. Tougas, "The protection of the natural environment in armed conflict …" (footnote 376 above), pp. 17–19; D. Fleck, "The protection of the environment in armed conflict: legal obligations in the absence of specific rules", *ibid*., pp. 47–52; E. Koppe, "The principle of ambiguity and the prohibition against excessive collateral damage to the environment during armed conflict", *ibid*., pp. 76–82; and M. Bothe, "The ethics, principles and objectives of protection of the environment in times of armed conflict", *ibid*., p. 99.

Commentary

(1) Draft principle 14 is entitled "Application of the law of armed conflict to the environment" and deals with the application of principles and rules of the law of armed conflict to the environment with a view to its protection.

(2) Draft principle 14 mentions the principles and rules on distinction, proportionality and precautions. The draft principle itself is of a general character and does not elaborate on how these well-established principles and rules under the law of armed conflict should be interpreted. They are included in draft principle 14 because they have been identified as being the most relevant principles and rules of the law of armed conflict relating to the protection of the environment.[644] However, this reference should not be interpreted as indicating a closed list, as all other rules of the law of armed conflict which relate to the protection of the environment in relation to armed conflict remain applicable and cannot be disregarded.[645]

(3) One of the cornerstones of the law of armed conflict[646] is the principle of distinction which obliges parties to an armed conflict to distinguish between civilian objects and military objectives at all times, and that attacks may only be directed against military objectives.[647] It is considered a rule under customary international law, applicable in both international and non-international armed conflict.[648] As explained in the commentary to draft principle 13, the environment is inherently civilian in nature and therefore benefits from the rules governing civilian objects. However, there are certain circumstances in which parts of the environment may become a military objective, in which case such parts may be lawfully targeted.

(4) The principle of proportionality establishes that an attack against a legitimate military target is prohibited if it may be expected to cause incidental damage to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.[649] The principle of proportionality is codified in several instruments of the law of armed conflict, and the International Court of Justice has also recognized its applicability in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*.[650] It is considered a rule of customary international law, applicable in both international and non-international armed conflict.[651]

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644 See R. Rayfuse, "Rethinking international law and the protection of the environment in relation to armed conflict" (footnote 643 above), p. 6; United Nations Environment Programme, *Protecting the Environment During Armed Conflict …* (footnote 369 above), pp. 12–13.

645 See ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above) as a comprehensive collection of the existing rules of the law of armed conflict protecting the environment. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*… (footnote 347 above), rules 43 and 44.

646 *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 257, para. 78; M.N. Schmitt, "Military necessity and humanity in international humanitarian law: preserving the delicate balance", *Virginia Journal of International Law*, vol. 50 (2010), pp. 795–839, at p. 803.

647 The principle of distinction is now codified in arts. 48, 51, para. 2, and 52, para. 2, of Additional Protocol I; art. 13, para. 2, of Additional Protocol II; amended Protocol II to the Convention on Certain Conventional Weapons; Protocol III to the Convention on Certain Conventional Weapons; and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

648 See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 7, p. 25.

649 Art. 51, para. 5 (b), of Additional Protocol I. See also Y. Dinstein, "Protection of the environment in international armed conflict" *Max Planck Yearbook of United Nations Law*, vol. 5 (2001), pp. 523–549, at pp. 524–525. See also L. Doswald-Beck, "International humanitarian law and the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons", *International Review of the Red Cross*, vol. 37 (1997), pp. 35–55, at p. 52.

650 Additional Protocol I, arts. 51 and 57, Additional Protocol II, and amended Protocol II to the Convention on Certain Conventional Weapons as well as the Statute of the International Criminal Court, art. 8, para. 2 (b) (iv). See also *Legality of the Threat or Use of Nuclear Weapons* (footnote 340 above), p. 242, para. 30.

651 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 14, p. 46.

(5) When the rules relating to proportionality are applied in relation to the protection of the environment, an attack against a legitimate military objective must not be undertaken if it would cause incidental environmental damage that would be excessive in relation to the concrete and direct military advantage anticipated.[652] At the same time, it has been concluded that "if the target is sufficiently important, a greater degree of risk to the environment may be justified".[653] This standard therefore accepts that "collateral damage" to the environment may be lawful in certain instances.

(6) As the environment is often indirectly rather than directly affected by armed conflict, rules relating to proportionality are of particular importance in relation to the protection of the environment in armed conflict.[654] Their importance in this regard has been emphasized by the International Court of Justice, which has held that: "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that goes into assessing whether an action is in conformity with the principles of necessity and proportionality".[655]

(7) Since knowledge of the environment and its ecosystems is constantly increasing, better understood and more widely accessible, environmental considerations cannot remain static over time but should develop as understanding of the environment develops.

(8) The principle of precautions lays out that constant care must be taken to spare the civilian population, civilians and civilian objects from harm during military operations.[656] In addition to this general principle, which applies to all military operations, the rule concerning precautions in attack requires that all feasible precautions must be taken with a view to avoiding and in any event minimizing incidental loss of civilian life, injury to civilians, as well as damage to civilian objects, that may occur.[657] The rule is codified in several instruments of the law of armed conflict[658] and is also considered to be a rule of customary international law in both international and non-international armed conflict.[659] Parties to the conflict must furthermore take all feasible precautions to protect civilian objects under their control against the effects of attacks.[660] These so-called passive precautions may also be taken

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652 See also Dinstein, "Protection of the environment …" (footnote 649 above), pp. 524–525; Doswald-Beck, "International humanitarian law and the advisory opinion of the International Court of Justice …" (footnote 649 above); United Nations Environment Programme, *Protecting the Environment During Armed Conflict …* (footnote 369 above), p. 13; Rayfuse, "Rethinking international law and the protection of the environment in relation to armed conflict" (footnote 643 above), p. 6; Droege and Tougas, "The protection of the natural environment in armed conflict …" (footnote 376 above), pp. 19–23.

653 International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, para. 19. Available from www.icty.org/x/file/Press/nato061300.pdf (accessed on 8 July 2019). See also Dinstein, "Protection of the environment …" (footnote 649 above), pp. 524–525.

654 *Ibid*., rule 44, p. 150; Droege and Tougas, "The protection of the natural environment in armed conflict …" (footnote 376 above), p. 19; see also United Nations Environment Programme, *Desk Study on the Environment in Liberia* (footnote 443 above) and United Nations Environment Programme, *Environmental Considerations of Human Displacement in Liberia …* (footnote 475 above).

655 *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), p. 242, para. 30.

656 For the obligation of constant care, see Additional Protocol I, art. 57, para. 1. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 15, first sentence, p. 51.

657 Additional Protocol I, art. 57. See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), rule 8.

658 The principle of precautions is codified in art. 2, para. 3, of the Convention (IX) of 1907 concerning Bombardment by Naval Forces in Time of War (The Hague, 18 October 1907), J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (see footnote 481 above); art. 57, para. 1, of Additional Protocol I, as well as art. 3, para. 10 of amended Protocol II to the Convention on Certain Conventional Weapons.

659 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 15, p. 51.

660 Additional Protocol I, art. 58 (c).

in peacetime and apply, for instance, to decisions concerning the siting of fixed military installations.[661]

(9) The phrase "shall be applied to the environment, with a view to its protection" is consistent with the purpose of the draft principles and introduces an objective which those involved in armed conflict or military operations should strive towards.

Principle 15
Prohibition of reprisals

Attacks against the environment by way of reprisals are prohibited.

Commentary

(1) Draft principle 15, entitled "Prohibition of reprisals", is based on paragraph 2 of article 55 of Additional Protocol I, which states that "attacks against the natural environment by way of reprisals are prohibited".

(2) As a treaty provision, the prohibition of attacks against the natural environment by way of reprisals is a binding rule for the 174 States parties to Additional Protocol I.[662] Certain States have included the prohibition in their military manuals.[663]

(3) Even though Additional Protocol I is widely ratified, it has not yet reached universal status, and the customary nature of the prohibition of attacks against the environment by way of reprisals is not settled. State practice in this area is sparse, but some States parties have made their legal positions known through reservations or declarations to Additional Protocol I. The extent to which these declarations or reservations are relevant to the application of paragraph 2 of article 55 must be evaluated on a case-by-case basis, since only a few States have made an explicit reference to this provision.[664] The ICRC Guidelines on the Protection

[661] See ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), rule 9 and commentary.

[662] See the ICRC website (www.icrc.org/ihl/INTRO/470 (accessed on 12 June 2022)).

[663] See S.-E. Pantazopoulos, "Reflections on the legality of attacks against the natural environment by way of reprisals", *Goettingen Journal of International Law*, vol. 10 (2020), pp. 47-66, at p. 59, footnote 49: Australia, *The Manual of the Law of Armed Conflict* (2006), ADDP 06.4, para. 5.50 ("[a]ttacks against the environment by way of reprisal are prohibited"); Canada, National Defence, *Law of Armed Conflict at the Operational and Tactical Levels* (2001), B-GJ-005-104/FP-021, sect. 1507, para. 4 (i); Denmark, Ministry of Defence and Defence Command Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (2016), p. 425, sect. 2.16; Germany, Federal Ministry of Defence, *Joint Service Regulation (ZDv) 15/2: Law of Armed Conflict: Manual* (2013), para. 434; New Zealand, Defence Force, *Manual of Armed Forces Law*, vol. 4, *Law of Armed Conflict* (2008), para. 17.10.4 (e); Spain, Ministry of Defence, *Orientaciones: El Derecho de los Conflictos Armados*, vol. I (2007) [*Guidance: The Law of Armed Conflict*], para. 3.3.c.(5); United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383 (2004), paras. 16.19.1 and 16.19.2. The ICRC study on customary international humanitarian law further references the following: Croatia, Ministry of Defence, Law of Armed Conflicts Compendium (1991), p. 19; Hungary, Military Manual (1992), p. 35; Italy, Military Appeals Court, *Hass* and *Priebke* case, Judgment, 7 March 1998; Kenya, Law of Armed Conflict Manual, 1997, Précis No. 4, p. 4; Netherlands, Military Manual (1993), p. IV-6. See J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. II, *Practice* (Cambridge, Cambridge University Press, 2005), pp. 3473–3474, paras. 1090, 1095–1097 and 1099. See, however, United States of America, Department of Defense, *Law of War Manual* (Office of General Counsel, Washington D.C., 2015, updated 2016), pp. 1115–1117, paras. 18.18.3.4 and 18.18.4.

[664] For declarations and reservations made by States in connection with art. 55, para. 2, of Additional Protocol I, see Henckaerts and Doswald-Beck (eds.), *Customary International Humanitarian Law* (see previous footnote), practice related to Rule 147, sect. D (Reprisals against protected objects), Natural environment, p. 3471. All declarations and reservations concerning Additional Protocol I are available at the ICRC database https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2 (accessed on 2 August 2022). Most clearly related to art. 55 para. 2, is the reservation of the United Kingdom: "The obligations of Articles 51 and 55 are accepted on the

of the Natural Environment in Armed Conflict contain the following statement: "While, under treaty law, the vast majority of States have now specifically committed not to take reprisal action against such objects [including the natural environment], the ICRC Study on Customary International Humanitarian Law did not find these prohibitions to be established as rules of customary international law".[665]

(4) At the same time, it should be recalled that the environment is protected by other rules – beyond article 55, paragraph 2, of Additional Protocol I – that contain prohibitions regarding the use of reprisals. In particular, draft principle 15 is also related to article 51, paragraph 6, of Additional Protocol I, which prohibits attacks against the civilian population or civilians by way of reprisals, and article 52, paragraph 1, which states that civilian objects shall not be the object of reprisals. The 1949 Geneva Conventions also prohibit the use of reprisals against, *inter alia*, civilians and civilian objects.[666] These customary prohibitions apply to reprisals against the environment as a civilian object, where it has not become a military objective.

(5) Additional Protocol I further prohibits the use of reprisals against cultural property[667] and objects indispensable to the survival of the civilian population.[668] The 1954 Hague Convention also protects cultural property from reprisals.[669] These prohibitions apply to reprisals against the environment when the relevant protected objects are part of the environment. In addition, the rules protecting works or installations containing dangerous forces from reprisals[670] have particular importance in protecting, for instance nuclear power plants, an attack on which would lead to severe environmental consequences.

(6) As a treaty provision, article 55, paragraph 2, applies only to international armed conflicts. There is no corresponding rule in either common article 3 to the four Geneva Conventions or Additional Protocol II, which would explicitly prohibit reprisals in non-international armed conflicts (including against civilians, the civilian population, or civilian objects).

(7) In light of the drafting history of Additional Protocol II, it can nevetheless be questioned, whether a right to resort to reprisals in non-international armed conflicts has ever emerged. Some States in the diplomatic conference were of the view that reprisals of any kind are prohibited under all circumstances in non-international armed conflicts. At the same time, several States voted against the prohibition because they thought that the concept of

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basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result." The conditions under which belligerent reprisals against the environment may be taken are partly described in United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), paras. 16.18–16.19.1.

665 ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 93.

666 First Geneva Convention, art. 46; Second Geneva Convention, art. 47; Third Geneva Convention, art. 13; Fourth Geneva Convention, art. 33.

667 Additional Protocol I, art. 53 (c).

668 *Ibid*., art. 54, para. 4.

669 1954 Hague Convention, art. 4.

670 Additional Protocol I, art. 56, para. 4.

reprisals had no place in non-international armed conflicts.[671] According to the ICRC study on customary international humanitarian law, there is "insufficient evidence that the very concept of lawful reprisal in non-internatiuonal armed conflict has ever materialized in international law". It furthermore notes that the relevant practice that has formed the rules on reprisals refers exclusively to inter-State relations.[672] Recent practice of non-international armed conflicts has not changed the situation but has rather stressed the importance of the protection of civilians, respect for human rights and diplomatic means to stop violations.[673]

(8) The ICRC study on customary international humanitarian law found that parties to non-international armed conflicts do not have the right to resort to belligerent reprisals.[674] The International Criminal Tribunal for the Former Yugoslavia has also considered that the prohibition against reprisals against civilian populations constitutes a customary international law rule "in armed conflicts of any kind".[675] The present draft principle is intended to apply in all armed conflicts irrespective of classification.

(9) The current draft principle follows the wording of Additional Protocol I without any additions as it was considered that any other formulation could be interpreted as weakening the existing rule under the law of armed conflict. This would be an undesirable result, given the fundamental importance of the existing rules of the law of armed conflict concerning reprisals.

(10) While draft principle 15 reflects binding law in international armed conflicts for the wide majority of States, and seems to be consistent with *lex lata* in non-international armed conflicts, there is, at present, uncertainty concerning its customary status. There is thus reason to state that the principle is not intended to qualify or alter the scope and meaning of existing rules on reprisals under either conventional or customary international law.

Principle 16
Prohibition of pillage

Pillage of natural resources is prohibited.

Commentary

(1) The purpose of draft principle 16 is to restate the prohibition of pillage as well as its applicability to natural resources. Illegal exploitation of natural resources has been a driving force for many, in particular non-international, armed conflicts in recent decades,[676] and has

[671] See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974–1977) vol. IX, available from www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html (accessed on 2 August 2022). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 148, p. 526, and related practice, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule148 (accessed on 2 August 2022).

[672] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* … (footnote 347 above), rule 148, pp. 527–528.

[673] *Ibid*. Reference is furthermore made to the military manuals of several States, which define reprisals as an enforcement measure against another State.

[674] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (footnote 347 above), Rule 148, p. 526, and related practice. See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 94.

[675] *Prosecutor v. Duško Tadić*, case No. IT-94-1-A72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2 October 1995, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, p. 353, at pp. 475–478, paras. 111–112. See also in general Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), pp. 526–529.

[676] According to the United Nations Environment Programme, 40 per cent of internal armed conflicts over the past 60 years were related to natural resources, and since 1990, at least 18 armed conflicts have been fuelled directly by natural resources. See *Renewable Resources and Conflict: Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts* (New York, United Nations Interagency Framework Team for Preventive Action, 2012), p. 14. Available at www.un.org/en/land-natural-resources-conflict/renewable-resources.shtml (accessed on 2 August 2022).

caused severe environmental strain in the affected areas.[677] In this context, the prohibition of pillage was identified as one of the rules of the law of armed conflict that provide protection to the environment.

(2) Pillage is an established violation of the law of armed conflict and a war crime. The Fourth Geneva Convention contains an absolute prohibition of pillage, both in the territory of a party to an armed conflict, and in an occupied territory.[678] Additional Protocol II to the Geneva Conventions confirms the applicability of this general prohibition in non-international armed conflicts meeting the criteria set out in the Protocol and, in that context, "at any time and in any place whatsoever".[679] The prohibition has been widely incorporated into national legislation as well as in military manuals.[680] There is considerable case law from both post-Second World War and modern international criminal tribunals confirming the criminal nature of pillage.[681] The war crime of pillaging is also prosecutable under the Rome Statute, in both international and non-international armed conflicts.[682] The prohibition of pillage has been found to constitute a rule of customary international law in both types of conflicts.[683]

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677 Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (S/2002/565), para. 52. See also United Nations Environment Programme, *The Democratic Republic of the Congo: Post-Conflict Environmental Assessment. Synthesis Report for Policy Makers* (Nairobi, United Nations Environment Programme, 2011), pp. 26–28, available at http://wedocs.unep.org/handle/20.500.11822/22069 (accessed on 2 August 2022); Report of the Panel of Experts pursuant to paragraph 25 of Security Council resolution 1478 (2003) concerning Liberia (S/2003/779), para. 14; United Nations Environment Programme, *Desk Study on the Environment in Liberia* (footnote 443 above), pp. 16–18 and 42–51; C. Nellemann *et al.* (eds.), *The Rise of Environmental Crime – A Growing Threat to Natural Resources Peace, Development and Security* (United Nations Environment Programme–INTERPOL, 2016), p. 69.

678 The Hague Regulations, art. 28 and art. 47; Fourth Geneva Convention, art. 33, para. 2. See also the First Geneva Convention, art. 15, first para., according to which "At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage". See also African Charter on Human and Peoples' Rights, art. 21, para. 2: "In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation". Furthermore, the Lusaka Protocol of the International Conference on the Great Lakes Region reproduces the same provision. See Protocol Against the Illegal Exploitation of Natural Resources of the International Conference on the Great Lakes Region art. 3, para. 2.

679 Additional Protocol II, art. 4, para. 2 (g).

680 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 52, "Pillage is prohibited", pp. 182–185.

681 See, e.g., *In re Krupp and Others*, Judgment of 30 June 1948, *Trials of War Criminals before the Nürnberg Military Tribunals*, Vol. IX, p. 1337–1372; *U.S.A. v. von Weizsäcker et al. (Ministries case)*, *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. XIV, p. 741; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 14 December 1999; *The Prosecutor v. Zejnil Delalić, Zdravko Mucić a/k/a "Pavo", Hazim Delić and Esad Landžo a/k/a "Zenga"*, Case No. IT-96-21-T, Judgement, International Criminal Tribunal for the Former Yugoslavia, 16 November 1998, and Sentencing Judgement, International Criminal Tribunal for the Former Yugoslavia, 9 October 2001; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement (with Declaration of Judge Shahabuddeen), Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 3 March 2000, *Judicial Reports 2000*; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 26 February 2001; *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T-1234, Judgment, Trial Chamber, Special Court for Sierra Leone, 2 March 2009; *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-1-T, Judgment, 18 May 2012 (*Taylor* Trial Judgment); *Prosecutor against Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment, Appeals Chamber, Special Court for Sierra Leone, 26 September 2013.

682 Rome Statute, art. 8, para. 2 (b) (xvi) and (e) (v).

683 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above) rule 52, pp. 182–185.

(3) According to the ICRC commentary to Additional Protocol II, the prohibition applies to all categories of property, whether public or private.[684] The scope of the present draft principle is limited to the pillage of natural resources, which is a common phenomenon in armed conflicts, and one that leads to severe environmental impacts. While pillage only applies to natural resources that can be subject to ownership and constitute "property", this requirement is easily met where natural resources offer the potential for significant enrichment. The prohibition covers pillage of natural resources, whether owned by the State, communities or private persons.[685] The applicability of the prohibition of pillage to natural resources has been confirmed by the International Court of Justice, which found in the *Armed Activities* judgment, that Uganda was internationally responsible "for acts of looting, plundering and exploitation of the [Democratic Republic of the Congo]'s natural resources" committed by members of the Ugandan Armed Forces in the territory of the Democratic Republic of the Congo.[686]

(4) Pillage is a broad term that applies to any appropriation or obtention of property in armed conflict that violates the law of armed conflict. According to the ICRC commentary to Additional Protocol II, the prohibition of pillage covers both organized pillage and individual acts,[687] whether committed by civilians or military personnel.[688] Acts of pillage do not necessarily involve the use of force or violence.[689] At the same time, the law of armed conflict provides a number of exceptions under which appropriation or destruction of property may be lawful.[690]

(5) The terminology used for illegal appropriation of property, including natural resources, in armed conflict has not been consistent. The International Court of Justice, in the *Armed Activities* judgment, referred to "looting, plundering and exploitation",[691] the Statute of the International Criminal Tribunal for the Former Yugoslavia referred to "plunder",[692] while the African Charter uses the term "spoliation".[693] Research shows, however, that the terms "pillage", "plunder", "spoliation" and "looting" have a common legal meaning and been used

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[684] ICRC commentary (1987) on Additional Protocol II, art. 4, para. 2 (g), para. 4542 of the commentary. See also ICRC commentary (1958) to the Fourth Geneva Convention, art. 33, para. 2. See also ICRC, Guidelines on the Protection of the Natural Environment (footnote 345 above), para. 182, which recognize that the prohibition of pillage also applies to "components of the natural environment [which] can be subject to ownership such that they are 'property'".

[685] Property rules have also been widely used at the national level "for settling disputes concerning access, use and control of resources" and constitute therefore "a critical mechanism for environmental protection". T. Hardman Reis, *Compensation for Environmental Damage under International Law. The Role of the International Judge* (Alphen aan den Rijn, Wolters Kluwer, 2011), p. 13.

[686] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment … 2005* (see footnote 484 above), p. 253, para. 250.

[687] ICRC commentary (1987) on Additional Protocol II, art. 4, para. 2 (g), para. 4542 of the commentary. See also ICRC commentary (1958) to the Fourth Geneva Convention, art. 33, para. 2.

[688] ICRC commentary (2016) to the First Geneva Convention, art. 15, para. 1495. See also International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zejnil Delalić* et al., Case No. IT-96-21-T,Trial Chamber, Judgment, 16 November 1998, para. 590, pointing out that the prohibition of pillage "extends both to acts of looting committed by individual soldiers for their private gain, and to organized seizure of property undertaken within the framework of a systemic economic exploitation of occupied territory".

[689] *Ibid*., para. 1494.

[690] For capture of an adversary's movable public property that can be used for military purposes, see First Geneva Convention, art. 50. Adversary's property can also be lawfully destroyed or appropriated if required by imperative military necessity; see the Hague Regulations (1907), art. 23 (g). See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), rule 50, pp. 175–177. For the lawful use under the law of armed conflict by an Occupying Power of the resources of the occupied territory for the maintenance and needs of the army of occupation, see commentary to draft principle 21 below.

[691] *Armed Activities on the Territory of the Congo, Judgment … 2005* (see footnote 484 above), para. 248.

[692] Art. 3 (e). Originally adopted by Security Council resolution 827 (1993) on 25 May 1993. The updated Statute is available at www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed on 8 July 2019).

[693] African Charter on Human and Peoples' Rights, art. 21, para. 2.

interchangeably by international courts and tribunals.[694] The Nürnberg Judgment thus used "pillage" and "plunder" as synonyms.[695] While the post-Second World War jurisprudence preferred the term "spoliation", it confirmed that the term was synonymous with "plunder", which was the term used in Control Council Law No. 10.[696] The jurisprudence of the modern international criminal courts and tribunals has further confirmed that "pillage", "plunder" and "looting" all signify unlawful appropriation of public or private property in armed conflict.[697]

(6) The term "pillage" has been used in the Hague Regulations[698] and the Fourth Geneva Convention,[699] Additional Protocol II[700] and the Rome Statute.[701] The Nürnberg Charter[702] used the term "plunder". The concept of pillage has been defined in the ICRC commentaries to the Geneva Conventions and Additional Protocol II, as well as in the jurisprudence of the international criminal tribunals. It has therefore been deemed appropriate to use the term "pillage" in the present draft principle.

(7) Pillage of natural resources is part of the broader context of illegal exploitation of natural resources that thrives in armed conflict and post-armed conflict situations. The Security Council and the General Assembly have drawn attention in this regard to the connections between transnational criminal networks, terrorist groups and armed conflicts, including in relation to illicit trade in natural resources.[703] Frequently characterized by poor governance, widespread corruption and weak protection of resource rights, post-armed conflict situations are vulnerable to exploitation through transnational environmental crime.[704] "Illegal exploitation of natural resources", as used in the relevant Security Council resolutions,[705] is a general notion that may cover the activities of States, non-State armed groups, or other non-State actors, including private individuals. Accordingly, the notion may

694 J.G. Stewart, *Corporate War Crimes. Prosecuting the Pillage of Natural Resources* (Open Society Foundations, 2011), pp. 15–17.

695 *Trial of the Major War Criminals before the International Military Tribunal*, vol. I (Washington D.C., Nürnberg Military Tribunals, 1945), p. 228.

696 See *United States v. Krauch et al*. in *Trials of War Criminals before the Nuernberg Military Tribunals (The I.G. Farben Case)*, vols. VII-VIII (Washington D.C., Nürnberg Military Tribunals, 1952), p. 1081, at p. 1133.

697 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998 (see footnote 681 above), para. 591: "the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation'. … The Trial Chamber reaches this conclusion on the basis of its view that [plunder], as incorporated in the Statute of the International Criminal Tribunal, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'". See also *Prosecutor v. Alex Tamba Brima et al*., Case No. SCSL-04-16-T, Judgment, Special Court for Sierra Leone, 20 June 2007, para. 751; and *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-T, Judgment, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 17 October 2003, para. 98.

698 Arts. 28 and 47 of the 1907 Hague Regulations.

699 Art. 33, para. 2, of the Fourth Geneva Convention.

700 Art. 4, para. 2 (g), of Additional Protocol II.

701 Rome Statute, art. 8, para. 2 (b) (xvi), and art. 8, para. 2 (e) (v), referring to "pillaging".

702 Nürnberg Charter, art. 6 (b).

703 Security Council resolution 2195 (2014) of 19 December 2014, para. 3; General Assembly resolution 69/314 of 30 July 2015, paras. 2–5. See also Security Council resolutions 2134 (2014) of 28 January 2014 and 2136 (2014) of 30 January 2014 on the Security Council's sanctions against persons and entities involved in wildlife poaching and trade. See also United Nations Environmental Assembly resolution 2/15 (see footnote 342 above), para. 4, and resolution 3/1 of 6 December 2017 on "Pollution mitigation and control in areas affected by armed conflict or terrorism" (UNEP/EA.3/Res.1), paras. 2–3.

704 Corruption has been identified as the most important enabling factor behind illegal trade in wildlife and timber. See Nellemann *et al.*, *The Rise of Environmental Crime* … (footnote 677 above), p. 25: transnational environmental crime thrives in permissive environments. See also C. Cheng and D. Zaum, "Corruption and the role of natural resources in post-conflict transitions", in C. Bruch, C. Muffett, and S.S. Nichols (eds.), *Governance, Natural Resources, and Post-Conflict Peacebuilding* (Abingdon, Earthscan from Routledge, 2016), pp. 461–480.

705 See, e.g., Security Council resolution 1457 (2003) of 24 January 2003, para. 2, in which the Council "[s]trongly condemns the illegal exploitation of the natural resources of the Democratic Republic of the Congo".

refer to illegality under international or national law. While the notion of "illegal exploitation of natural resources" is partly overlapping with the concept of pillage, it has not been defined in many instruments[706] and may also refer to environmental crime, whether in times of armed conflict or in times of peace. This broader context underscores the application of the prohibition of pillage to natural resources.

(8) Draft principle 16 is located in Part Three containing draft principles applicable during an armed conflict, including in situations of occupation.

Principle 17
Environmental modification techniques

In accordance with their international obligations, States shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State.

Commentary

(1) Draft principle 17 has been modelled on article 1, paragraph 1, of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. The Convention prohibits military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects.[707] Environmental modification techniques are defined in the convention as "any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space".[708] The present draft principle uses the concept of environmental modification technique in the same sense.

(2) The mention of international obligations in the draft principle refers to the treaty obligations of States parties to the Convention and to any related customary obligation that prohibits the use of the environment as a weapon. According to the ICRC study on customary international humanitarian law, "there is sufficiently widespread, representative and uniform practice to conclude that the destruction of the natural environment may not be used as a weapon", and this irrespective of whether the provisions of the Convention are themselves customary.[709] The ICRC Guidelines for Military Manuals and Instructions for the Protection of the Environment in Times of Armed Conflict reiterate this obligation.[710] The 2020 ICRC

[706] The term "illegal exploitation of natural resources" appears in the Lusaka Protocol of the International Conference on the Great Lakes Region, art. 17, para. 1, but has not been defined. See, however, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014), art. 28L Bis, which defines the term "illicit exploitation of natural resources" as meaning "any of the following acts if they are of a serious nature affecting the stability of a state, region or the Union: a) Concluding an agreement to exploit resources, in violation of the principle of peoples' sovereignty over their natural resources; b) Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned; c) Concluding an agreement to exploit natural resources through corrupt practices; d) Concluding an agreement to exploit natural resources that is clearly one-sided; e) Exploiting natural resources without any agreement with the State concerned; f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and g) Violating the norms and standards established by the relevant natural resource certification mechanism". For a discussion of the crime, see D. Dam de Jong and J.G. Stewart, "Illicit Exploitation of Natural Resources", in C.C. Jalloh, K.M. Clarke, and V.O. Nmehielle (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (New York, Cambridge, 2019), pp. 519–618.

[707] Art. I, para. 1.

[708] Art. II.

[709] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* … (see footnote 347 above), p. 156.

[710] ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (see footnote 608 above), guideline 12.

Guidelines on the Protection of the Natural Environment in Armed Conflict also contain a rule based on articles I and II of the Convention.[711]

(3) The Convention does not spell out clearly whether the prohibition of the use of environmental modification techniques could be applicable in a non-international armed conflict. The formulation of paragraph 1 of article I only prohibits environmental modification that causes damage to another State party to the Convention. It has been argued that this condition could nevertheless also be fulfilled in a non-international armed conflict provided that a hostile use of an environmental modification technique by a State in the context of such a conflict causes environmental or other damage in the territory of another State party.[712] The environmental modification techniques addressed in the Convention – capable of causing "earthquakes, tsunamis, an upset in the ecological balance of a region, changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer, and changes in the state of the ionosphere"[713] – could well be expected to produce transboundary effects.

(4) The Convention only addresses the hostile or military use of environmental modification techniques by States, excluding hostile use of such techniques by non-State actors. The ICRC study on customary international humanitarian law concludes that the prohibition of the destruction of the natural environment as a weapon is a rule of customary international law "applicable in international armed conflicts and arguably also in non-international armed conflicts".[714]

(5) Draft principle 17 is located in Part Three, which contains draft principles applicable during armed conflict. This location reflects the most likely situations in which the Convention would be applied, even though the prohibition of the Convention is broader, and also covers other hostile uses of environmental modification techniques.

(6) The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques deserves particular attention in the context of the present draft principles as the first and, so far, the only international treaty to specifically address means and methods of environmental warfare. The inclusion of draft principle 17 in the set of draft principles is without prejudice to the existing conventional or customary rules of international law regarding specific weapons that have serious effects on the environment.

Principle 18
Protected zones

An area of environmental importance, including where that area is of cultural importance, designated by agreement as a protected zone shall be protected against

[711] ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (see footnote 345 above), rule 3.B.

[712] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (see footnote 347 above) rule 44, commentary, p. 148: "it can be argued that the obligation to pay due regard to the environment also applies in non-international armed conflicts if there are effects in another State." See also Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (see footnote 332 above), p. 243, referring to cross-border damage caused by environmental modification techniques. See also T. Meron, "Comment: protection of the environment during non-international armed conflicts", in J.R. Grunawalt, J.E. King and R.S. McClain (eds.), *International Law Studies*, vol. 69, *Protection of the Environment during Armed Conflicts* (Newport, Rhode Island, Naval War College, 1996), pp. 353–358, stating, at p. 354, that the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques "is applicable in all circumstances".

[713] Understanding relating to article II, *Official Records of the General Assembly, Thirty-first Session, Supplement No. 27* (A/31/27), p. 92.

[714] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law …* (footnote 347 above), explanation of rule 45, p. 151. See also Part 2 of the ICRC Customary International Humanitarian Law Study (available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45) and related practice (accessed on 2 August 2022).

any attack, except insofar as it contains a military objective. Such protected zone shall benefit from any additional agreed protections.

Commentary

(1) This draft principle corresponds to draft principle 4. It provides that an area of environmental importance designated by agreement as a protected zone shall be protected against any attack, except insofar as it contains a military objective. An area of environmental importance is also often important from a cultural point of view.

(2) Unlike draft principle 4, the current provision only covers areas that are designated by agreement because it entails undertakings by more than one party. There has to be an express agreement on the designation. Such an agreement may be concluded in peacetime or during armed conflict. The term "agreement" should be understood in its broadest sense as including mutual as well as unilateral declarations accepted by the other party, treaties and other types of agreements, as well as agreements with non-State actors. By virtue of their civilian character, such zones are protected from attack during armed conflict. The phrase "except insofar as it contains a military objective" is intended to denote that it may be the entire zone, only parts thereof, or objects located within the zone that become military objectives and lose the protection from attack.

(3) The conditional protection is an attempt to strike a balance between military, humanitarian and environmental concerns. This balance reflects the mechanism for demilitarized zones as foreseen in article 60 of Additional Protocol I to the Geneva Conventions. Article 60 prohibits parties to an armed conflict from extending their military operations to such zones. If a party to an armed conflict uses a protected area for specified military purposes, the protected status is revoked.

(4) Under the 1954 Hague Convention, State parties are similarly under the obligation not to destroy property that has been identified as cultural property in accordance with article 4 of the Convention. However, the protection can only be granted as long as the cultural property is not used for military purposes.

(5) The legal implications of designating an area as a protected area will depend on the origin and contents, as well as the form, of the protection. By virtue of their civilian character, all such zones are protected from attack unless and to the extent that they contain a military objective. A special undertaking to designate an environmentally important zone as protected from attack during an armed conflict should be accompanied with measures that reduce the likelihood that the zone would be affected by military operations. For instance, the agreement may contain provisions prohibiting siting of military installations within the protected area, or extending any military activities therein. The agreement may also contain provisions on the management and operation of the zone. Regarding the form of protection, it is obvious that the *pacta tertiis* rule will limit the application of a treaty to the parties. As a minimum, the designation of an area as a protected zone could serve to inform the planning of parties to an armed conflict such that they do not conduct military operations within the zone, and alert them to take the protected zone into account when applying the principle of proportionality or the principle of precautions in attack in the vicinity of the zone. In addition, preventive and remedial measures may need to be tailored so as to take the special status of the area into account.

(6) The last sentence, according to which "[s]uch protected zone shall benefit from any additional agreed protections" serves two purposes. First, it aims to clarify the relationship between the current draft principle and other applicable draft principles, in particular draft principles 4 and 13, so that it could not be interpreted to lower the general level of protection. Second, it refers to other relevant international obligations, such as those contained in multilateral environmental agreements that establish protected zones. Reference can be made in this regard, for instance, to the 1972 World Heritage Convention,[715] the Convention on

[715] Art. 6, para. 3, obligates States to refrain from "any deliberate measures which might damage directly or indirectly the cultural and natural heritage … situated on the territory of other States Parties" to the Convention.

Biological Diversity,[716] the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, and the United Nations Convention on the Law of the Sea.

Part Four
Principles applicable in situations of occupation

Commentary

(1) The three draft principles applicable in situations of occupation are placed in a separate Part Four. This category of draft principles is not intended as a departure from the temporal approach chosen for the topic, but as a practical solution reflecting the great variety of circumstances that may qualify as a situation of occupation. While military occupation under the law of armed conflict is a specific form of international armed conflict,[717] situations of occupation differ from armed conflicts in many respects. Most notably, occupations are not always characterized by active hostilities and can even take place in situations in which the invading armed forces meet no armed resistance.[718] A stable occupation shares some characteristics with a post-conflict situation and may with time even come to "approximating peacetime" conditions[719] in certain respects, in spite of the continued reality of military dominion of the Occupying Power. Occupations can nevertheless also be volatile and conflict-prone. The Occupying Power may confront armed resistance during the occupation and even temporarily lose control of part of the occupied territory without this affecting the overall characterization of the situation as one of occupation.[720] Furthermore, the beginning of an occupation does not necessarily coincide with the beginning of an armed conflict, nor is there any necessary concurrence between the cessation of active hostilities and the termination of an occupation.

(2) In spite of this variety, all occupations display certain common characteristics, namely that the effective authority over a certain territory is transferred from the territorial State, without its consent, to the Occupying Power. The established understanding of the concept of occupation is based on article 42 of the Hague Regulations,[721] which stipulates that a territory is considered occupied "when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority is established and can be exercised." According to the 2005 judgment in *Armed Activities on the Territory of the Congo* case, it was necessary "that the Ugandan armed forces in the [Democratic Republic of the Congo] were not only stationed in particular locations but also that they had substituted

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716 Convention on Biological Diversity, art. 22 para. 1 ("The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity").

717 It is worth recalling in this context that the end of an international armed conflict is determined by the general close of military operations or, in the case of occupation, the termination of the occupation. See Fourth Geneva Convention, art. 6, and Additional Protocol I, art. 3 (*b*). See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict …* (footnote 664 above), p. 277, para. 11.8, and R. Kolb and S. Vité, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuels* (Brussels, Bruylant, 2009), p. 166.

718 Fourth Geneva Convention, art. 2.

719 A. Roberts, "Prolonged military occupation: the Israeli-occupied territories since 1967", *American Journal of International Law*, vol. 84 (1990), pp. 44–103, p. 47.

720 ICRC commentary (2016) to the First Geneva Convention, art. 2, para. 302. See, similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* … (footnote 664 above), p. 277, para. 11.7.1.

721 Hague Regulations, art. 42. The definition contained in art. 42 has been confirmed by the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, which have referred to it as the exclusive standard for determining the existence of a situation of occupation under the law of armed conflict. See, respectively, *Legal Consequences of the Construction of a Wall* (see footnote 351 above), p. 167, para. 78, and *Prosecutor v. Mladen Naletilić, aka "TUTA" and Vinko Martinović, aka "ŠTELA"*, Case No. IT-98-34-T, Judgment of 31 March 2003, Trial Chamber, para. 215. See also ICRC commentary (2016) to the First Geneva Convention, art. 2, para. 298.

their own authority for that of the Congolese Government".[722] Authority in this context is a fact-based concept: occupation "does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty".[723]

(3) Once established in the territory of an occupied State, at least when the whole territory is occupied, the temporary authority of an Occupying Power extends to the adjacent maritime areas under the territorial State's sovereignty. Similarly, the authority of the Occupying Power may extend to the airspace over the occupied territory and over the territorial sea. Such authority underscores the obligation of the Occupying Power to take appropriate steps to prevent marine pollution and transboundary environmental harm.[724]

(4) The status of a territory as occupied is often disputed, including when the Occupying Power relies on a local surrogate, transitional government or rebel group for the purposes of exercising control over the occupied territory.[725] It is widely acknowledged that the law of occupation applies to such cases provided that the local surrogate acting on behalf of a State exercises effective control over the occupied territory.[726] The possibility of such an "indirect occupation" has been acknowledged by the International Criminal Tribunal for the Former Yugoslavia,[727] the International Court of Justice,[728] and the European Court of Human Rights.[729]

(5) The law of occupation is applicable to situations that fulfil the factual requirements of effective control of a foreign territory irrespective of whether the Occupying Power invokes

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[722] *Armed Activities on the Territory of the Congo, Judgment … 2005* (see footnote 484 above), para. 173; see also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict …* (footnote 664 above), p. 275, para. 11.3.

[723] United States, Department of Defense, *Law of War Manual* (see footnote 663 above), sect. 11.4, pp. 772–774. See also H.-P. Gasser and K. Dörmann, "Protection of the civilian population", in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (footnote 600 above), pp. 231–320, at p. 274, para. 529.

[724] *Manual of the Laws of Naval War* (Oxford, 9 August 1913), sect. VI, art. 88. Available from https://ihl-databases.icrc.org/ihl/INTRO/265?OpenDocument (accessed on 8 July 2019). See also Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), p. 47; E. Benvenisti, *The International Law of Occupation*, 2nd ed. (Oxford University Press, 2012), p. 55, referring to the practice of several occupants, and M. Sassòli, "The concept and the beginning of occupation", *in* A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015), pp. 1389–1419, at p. 1396.

[725] Roberts, "Prolonged military occupation …" (see footnote 719 above), p. 95; Gasser and Dörmann, "Protection of the civilian population" (see footnote 723 above), p. 272.

[726] Benvenisti, *The International Law of Occupation* (see footnote 724 above), pp. 61–62. Similarly, ICRC, "Occupation and other forms of administration of foreign territory", Report of an expert meeting (2012), pp. 10 and 23 (the theory of "indirect effective control" was met with approval). See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict …* (footnote 664 above), p. 276, para. 11.3.1 ("likely to be applicable"). See also Kolb and Vité, *Le droit de l'occupation militaire …* (footnote 717 above), p. 181, as well as ICRC commentary (2016) to the First Geneva Convention, art. 2, paras. 328–332.

[727] See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Judgment, 7 May 1997, *Judicial Reports 1997*, para. 584, which refers to circumstances, in which "the foreign Power 'occupies' or operates in certain territory solely through the acts of local de facto organs or agents". See also *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-T, Judgment, 3 March 2000, *Judicial Reports 2000*, paras. 149–150.

[728] The Court seems to have accepted in the *Armed Activities* case that Uganda would have been an occupying power in the areas controlled and administered by Congolese rebel movements, had these non-State armed groups been "under the control" of Uganda. See *Armed Activities on the Territory of the Congo, Judgment … 2005* (see footnote 484 above), p. 231, para. 177. See also the separate opinion of Judge Kooijmans, *ibid.*, p. 317, para. 41.

[729] The European Court of Human Rights has confirmed that the obligation of a State party to the European Convention on Human Rights to secure the rights and freedoms set out in the Convention in an area outside its national territory, over which it exercises effective control, "derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration", see *Loizidou v. Turkey*, Judgment (Merits), 18 December 1996, *Reports of Judgments and Decisions 1996-VI*, para. 52. See also *Ilaşcu v. Moldova and Russia* [GC], application No. 48787/99, Judgment, 8 July 2004, para. 314, and *Chiragov and others v. Armenia* [GC], application No. 13216/05, Judgment (Merits), ECHR 2015, para. 152.

the legal regime of occupation.[730] It also extends to territories with unclear status that are placed under foreign rule.[731] Similarly, and in accordance with the fundamental distinction between *jus ad bellum* and *jus in bello,* the law of occupation applies equally to all occupations, whether or not they result from a use of force that is lawful in the sense of *jus ad bellum*.[732] The law of occupation may also be applicable to territorial administration by an international organization, provided that the situation meets the criteria of article 42 of the Hague Regulations.[733] The term "Occupying Power" as used in the present draft principles is sufficiently broad to cover such cases. Even where this is not the case, as in operations relying on the consent of the territorial State, the law of occupation, albeit not legally applicable, may provide guidance and inspiration for international territorial administration entailing the exercise of functions and powers over a territory that are comparable to those of an Occupying Power under the law of armed conflict.[734]

(6) While the nature and duration of occupation do not affect the applicability of the law of occupation, the obligations of the Occupying Power under the law of occupation are, to a certain extent, context specific. As pointed out in the ICRC commentary to common article 2 of the Geneva Conventions, negative obligations – mostly prohibitions – under the law of occupation apply immediately, whereas the implementation of positive obligations depends on "the level of control exerted, the constraints prevailing in the initial phases of the occupation, and the resources available to the foreign forces".[735] A certain flexibility is thus recognized in the implementation of the law of occupation until the situation has stabilized and the Occupying Power is placed in a position to fully exercise its authority. Moreover, the exact scope of the respective obligations depends on the nature and duration of the occupation. In other words, the responsibilities falling on the Occupying Power are "commensurate with the duration of the occupation".[736] Furthermore, while protracted occupations remain governed by the law of occupation, other bodies of law, such as human rights law and international environmental law, gain more importance as time goes by and may complement or inform the applicable rules of the law of occupation. In protracted occupations, changes necessitated by economic and social development require the participation of the protected population.

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730 *The Hostages Trial: Trial of Wilhelm List and Others*, Case No. 47, United States Military Tribunal at Nuremberg, *Law Reports of Trial of War Criminals*, vol. VIII (London, United Nations War Crimes Commission, 1949, London), p. 55: "[w]hether an invasion has developed into an occupation is a question of fact". See also *Armed Activities on the Territory of the Congo, Judgment … 2005* (see footnote 484 above), p. 230, para. 173; *Naletilić and Martinović* (footnote 721 above), para. 211; and ICRC commentary (2016) to the First Geneva Convention, art. 2, para. 300.

731 *Legal Consequences of the Construction of a Wall* (see footnote 351 above), pp. 174–175, para. 95.

732 See ICRC, "Occupation and other forms of administration of foreign territory" (footnote 726 above), Foreword by K. Dörmann, p. 4. Similarly, the war crime trials after the Second World War relied on and interpreted the Hague Regulations and customary law.

733 M. Sassòli, "Legislation and maintenance of public order and civil life by Occupying Powers", *European Journal of International Law*, vol. 16 (2005), pp. 661–694, at p. 688; T. Ferraro, "The applicability of the law of occupation to peace forces", ICRC and International Institute of Humanitarian Law, *International Humanitarian Law, Human Rights and Peace Operations*, G.L. Beruto (ed.), 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4–6 September 2008, *Proceedings*, pp. 133–156; D. Shraga, "The applicability of international humanitarian law to peace operations, from rejection to acceptance", *ibid*. pp. 90–99; S. Wills, "Occupation law and multi-national operations: problems and perspectives", *British Yearbook of International Law*, vol. 77 (2006), pp. 256–332, Benvenisti, *The International Law of Occupation* (see footnote 724 above), p. 66; See also ICRC, "Occupation and other forms of administration of foreign territory" (footnote 726 above), pp. 33–34. See, however, also Dinstein, *The International Law of Belligerent Occupation* (footnote 724 above), p. 37 for a more reserved view.

734 Gasser and Dörmann, "Protection of the civilian population" (see footnote 723 above), p. 267; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff, 2009), p. 605; M. Zwanenburg, "Substantial relevance of the law of occupation for peace operations", ICRC and International Institute of Humanitarian Law, *International Humanitarian Law, Human Rights and Peace Operations* (see previous footnote), pp. 157–167.

735 ICRC commentary (2016) to the First Geneva Convention, art. 2, para. 322.

736 *Ibid.*: "If the occupation lasts, more and more responsibilities fall on the Occupying Power."

(7) The draft principles in Parts One, Two, Three and Five apply *mutatis mutandis* to situations of occupation, having regard to the variety of different situations of occupation. For instance, the draft principles in Part Two, which cover measures to be taken with a view to enhancing the protection of the environment in the event of an armed conflict, remain relevant. To the extent that periods of intense hostilities during an occupation are governed by the rules concerning the conduct of hostilities, the draft principles on the conduct of hostilities in Part Three are directly relevant to the protection of the environment in occupation. Additionally, the environment of an occupied territory continues to enjoy the protection afforded to the environment during an armed conflict in accordance with applicable international law and as reflected in draft principle 13, in particular. The draft principles in Part Five addressing post-armed conflict situations would primarily have relevance for situations of prolonged occupation. For each part, the draft principles may require some adjustment, hence the phrase *mutatis mutandis*.

Principle 19
General environmental obligations of an Occupying Power

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.

2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory, including harm that is likely to prejudice the health and well-being of protected persons of the occupied territory or otherwise violate their rights.

3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Commentary

(1) Paragraph 1 of draft principle 19 sets forth the general obligation of an Occupying Power to respect and protect the environment of the occupied territory and to take environmental considerations into account in the administration of such territory. The provision is based on the Occupying Power's obligation to take care of the welfare of the occupied population, derived from article 43 of the Hague Regulations, which requires the Occupying Power to re-establish and insure, as far as possible, public order and security in the occupied territory.[737] The obligation to ensure that the occupied population lives as normal a life as possible in the prevailing circumstances[738] entails environmental protection as a widely recognized public function of the modern State. Moreover, environmental

[737] Hague Regulations, art. 43: "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." The authentic French text of article 43 uses the expression "*l'ordre et la vie publics*", and the provision has been accordingly interpreted to refer not only to physical safety but also to the "'social functions and ordinary transactions which constitute daily life', in other words, to the entire social and economic life of the occupied region", see M. S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion* (New Haven, Yale University, 1961), p. 746. See also Dinstein, *The International Law of Belligerent Occupation* (footnote 724 above), p. 89, and Sassòli, "Legislation and maintenance of public order…" (footnote 733 above). This interpretation is also supported by the *travaux préparatoires*: in the Brussels Conference of 1874, the term "vie publique" was interpreted as referring to "des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours". See Belgium, Ministry of Foreign Affairs, *Actes de la Conférence de Bruxelles de 1874 sur le projet d'une convention internationale concernant la guerre*, p. 23. Available from https://babel.hathitrust.org/ (accessed on 2 August 2022).

[738] T. Ferraro, "The law of occupation and human rights law: some selected issues", in R. Kolb and G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham, Edward Elgar, 2013), pp. 273–293, p. 279.

concerns relate to an essential interest of the territorial sovereign,[739] which the occupying State as a temporary authority must respect.

(2) The law of occupation is a part of the law of armed conflict, and draft principle 19 shall be read in the context of draft principle 13, which provides that the "environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict". Both draft principles refer to the obligation to "respect and protect" the environment in accordance with applicable international law, although draft principle 19 does so in the more specific context of occupation.[740]

(3) The term "applicable international law" refers, in particular, to the law of armed conflict, but also to international environmental law and international human rights law. Concurrent application of human rights law is of particular relevance in situations of occupation. The International Court of Justice has notably interpreted respect for the applicable rules of international human rights law as part of the obligations of the Occupying Power under article 43 of the Hague Regulations.[741] Where both the law of occupation and international human rights law regulate the same subject matter and share the same objective,

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[739] *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (see footnote 337 above), p. 7, p. 41, para. 53.

[740] Reference can furthermore be made to the Rio Declaration, which states that "[t]he environment and natural resources of people under oppression, domination and occupation shall be protected". See the Rio Declaration, principle 23.

[741] *Armed Activities on the Territory of the Congo, Judgment … 2005* (see footnote 484 above), p. 231, para. 178. See also p. 243, para. 216, in which the Court confirms that international human rights agreements are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, "particularly in occupied territories". See also *Legal Consequences of the Construction of a Wall* (footnote 351 above), pp. 177–181, paras. 102–113. The International Criminal Tribunal for the Former Yugoslavia, likewise, has stated that the distinction between a phase of hostilities and a situation of occupation "imposes more onerous duties on an occupying power than on a party to an international armed conflict", see *Naletilić* and *Martinović*, para. 214. See also the European Court of Human Rights: *Loizidou v. Turkey* (Preliminary Objections), Judgment, 23 March 1995, Series A, No. 310, para. 62, and Judgment (Merits), 18 December 1996 (footnote 729 above), para. 52; and *Al-Skeini and others v. United Kingdom* [Grand Chamber], Application No. 55721/07, *Reports of Judgments and Decisions 2011*, para. 94, in which reference was made to the Inter-American Court of Human Rights case *Mapiripán Massacre v. Colombia*, Judgment, 15 September 2005, Series C, No. 134, in support of the duty to investigate alleged violations of the right to life in situations of armed conflict and occupation. The applicability of human rights during occupation has been further recognized by the Human Rights Committee, see, general comment No. 26 (1997) on continuity of obligations, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 40*, vol. I (A/53/40 (Vol. I)), annex VII, para. 4; general comment No. 29 (2001) on derogation during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI, para. 3; general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 10. See also Committee on Economic, Social and Cultural Rights, concluding observations: Israel, E/C.12/1/Add.69, 31 August 2001; and concluding observation: Israel, E/C.12/ISR/CO/3, 16 December 2011, as well as the report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67, E/CN.4/1992/26, 16 June 1992. Such applicability has also been widely endorsed in scholarly writings: see, for example, Dinstein, *The International Law of Belligerent Occupation* (footnote 724 above), pp. 69–71; Kolb and Vité, *Le droit de l'occupation militaire …* (footnote 717 above), pp. 299–332; A. Roberts, "Transformative military occupation: applying the laws of war and human rights", *American Journal of International Law*, vol. 100 (2006), pp. 580–622; J. Cerone, "Human dignity in the line of fire: the application of international human rights law during armed conflict, occupation, and peace operations", *Vanderbilt Journal of Transnational Law*, vol. 39 (2006), pp. 1447–1510; Benvenisti, *The International Law of Occupation* (see footnote 724 above), pp. 12–16; Arai-Takahashi, *The Law of Occupation …* (footnote 734 above); N. Lubell, "Human rights obligations in military occupation", *International Review of the Red Cross*, vol. 94 (2012), pp. 317–337; Ferraro, "The law of occupation and human rights law ..." (footnote 738 above), pp. 273–293; and M. Bothe, "The administration of occupied territory", in Clapham, Gaeta and Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (see footnote 724 above), pp. 1455–1484. For a different view, see M.J. Dennis, "Application of human rights treaties extraterritorially in times of armed conflict and military occupation", *American Journal of International Law*, vol. 99 (2005), pp. 119–141.

it may be possible to draw on one branch of law to enrich and deepen the rules of the other. Sometimes human rights law may provide clearer and more detailed regulation, which can still be adapted to the realities at hand.[742] Human rights law may, for instance, provide specifications for the interpretation of the notion of "civil life", or a more exact formulation of the obligations of States with regard to ensuring "public health". This may also include environmental questions, which have an impact on the welfare of the population.[743]

(4) As for the application of international environmental law, reference can be made to the 1996 Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*, which provides important support to the claim that customary international environmental law and treaties on the protection of the environment continue to apply in situations of armed conflict.[744] Similarly, the Commission's articles on the effects of armed conflicts on treaties indicate that treaties relating to the international protection of the environment, treaties relating to international watercourses or aquifers, and multilateral law-making treaties may continue in operation during armed conflict.[745] Furthermore, to the extent that multilateral environmental agreements address environmental problems that have a transboundary nature, or a global scope, and the treaties have been widely ratified, it may be difficult to conceive of suspension only between the parties to a conflict.[746] Obligations established under such treaties protect a collective interest and are owed to a wider group of States than the ones involved in the conflict or occupation.[747]

(5) The reference to environmental considerations is drawn from and inspired by the Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*. The Court held that "the existing international law relating to the protection and safeguarding of the environment … indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict".[748] An Arbitral Tribunal, furthermore, has stated that "where a State exercises a right under international law within the territory of another State, considerations of environmental protection also apply".[749] As a generic notion, the term "environmental considerations" as used in paragraph 1 is comparable to the terms "environmental factors" or "considerations of environmental protection" in that it has a general content.[750] Furthermore, environmental considerations are context

[742] ICRC, "Occupation and other forms of administration of foreign territory" (footnote 726 above), p. 8, suggesting that international human rights law can be used to complement the law of occupation in matters in which the latter is silent, vague or unclear.

[743] See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 40.

[744] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), pp. 241–243, paras. 27–33.

[745] Articles on the effects of armed conflicts on treaties, *Yearbook … 2011*, vol. II (Part Two), pp. 106–130, paras. 100–101. See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), paras. 33–36.

[746] K. Bannelier-Christakis, "International Law Commission and protection of the environment in times of armed conflict: a possibility for adjudication?", *Journal of International Cooperation Studies*, vol. 20 (2013), pp. 129 –145, at pp. 140–141; D. Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge, Cambridge University Press, 2015), pp. 110–111.

[747] In the sense of art. 48, para. 1 (*a*), of the articles on responsibility of States for internationally wrongful acts, the relevant commentary, para. (7), mentions environmental treaties in this context. See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, pp. 26–143, at p. 126.

[748] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above) p. 243, para. 33.

[749] Award in the Arbitration regarding the *Iron Rhine ("Ijzeren Rijn") Railway* between the Kingdom of Belgium and the Kingdom of the Netherlands, 24 May 2005, *Reports of International Arbitral Awards* (UNRIAA), vol. XXVII, pp. 35–131 (*Iron Rhine*), at paras. 222–223. See also Final Award regarding the *Indus Waters Kishenganga* Arbitration between Pakistan and India, 20 December 2013, UNRIAA, vol. XXXI, pp. 1–358, e.g. at paras. 101, 104 and 105. Available at https://pca-cpa.org/en/cases/20/ (accessed on 2 August 2022).

[750] See, however, United States, Department of Defense, *Dictionary of Military and Associated Terms* (2021), p. 75: "Environmental considerations: The spectrum of environmental media, resources, or programs that may affect the planning and execution of military operations." Available from https://irp.fas.org/doddir/dod/dictionary.pdf (accessed on 2 August 2022).

dependent[751] and evolving.[752] The notion is also understood to refer to post-occupation environmental effects of the occupation.[753]

(6) Paragraph 2 provides that an Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory. This includes harm that is likely to prejudice the health and well-being of protected persons of the occupied territory or otherwise violate their rights. The notion of "health and well-being" refers to the common objectives of economic, social and cultural rights, such as the right to health, on the one hand, and the law of occupation, on the other, such as the well-being of the population. The notion of "health and well-being" is furthermore consistently used by the World Health Organization, which recalls that health and well-being affect both the society at present and future generations and are dependent on a healthy environment.[754] Reference can also be made to the Stockholm Declaration, which reaffirms "the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being".[755] Paragraph 2 should be read in the context of the general obligation in paragraph 1. The purpose of paragraph 2 is to indicate that significant harm to the environment of an occupied territory may have adverse consequences for the population of the occupied territory, in particular with respect to the enjoyment of certain human rights,

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751 For practical examples of environmental considerations in the context of an armed conflict, see D.E. Mosher *et al.*, *Green Warriors: Army Environmental Considerations for Contingency Operations from Planning Through Post-Conflict* (RAND Corporation, 2008), pp. 71–72: "given the importance placed on military expedience during combat, a unit's environmental responsibilities are fairly limited. Experience in recent contingency operations has shown that environmental considerations are significantly more important in other areas, including base camps, stability and reconstruction, and the movement of forces and materiel"; p. 75: "The movement of forces and materiel … can involve significant environmental considerations"; p. 121: "Balancing environmental considerations with other factors that contribute to mission success is a constant undertaking and requires better awareness, training, information, doctrine, and guidelines"; p. 126: "For example, experience in Iraq … points to the need for high-quality information about environmental conditions and infrastructure before an operation is initiated". See also *UNHCR Environmental Guidelines* (footnote 442 above), p. 5: "Environmental considerations need to be taken into account in almost all aspects of UNHCR's work with refugees and returnees." See furthermore European Commission, "Integrating environmental considerations into other policy areas – a stocktaking of the Cardiff process", document COM(2004) 394 final.

752 See para. (7) of the commentary to draft principle 14 above.

753 See Benvenisti, *The International Law of Occupation* (see footnote 724 above), p. 87: "These considerations imply that already during occupation the occupant must take into account the post-occupation period and make the necessary provisions in anticipation of the termination of its control". See also Y. Ronen, "Post-occupation law" in C. Stahn, J.S. Easterday and J. Iverson, Jus Post Bellum*: Mapping the Normative Foundations* (Oxford, Oxford University Press, 2014), pp. 428–446.

754 According to the Constitution of the World Health Organization, "[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, and has been amended in 1977, 1984, 1994 and 2005, the consolidated text is available at www.who.int/governance/eb/who_constitution_en.pdf (accessed on 2 August 2022).

755 Stockholm Declaration, principle 1. See also *UNHCR Environmental Guidelines* (footnote 442 above), p. 5: "The state of the environment … will have a direct bearing on the welfare and well-being of people living in that vicinity".

such as the right to life,[756] the right to health,[757] or the right to food.[758] There is in general a close link between key human rights, on the one hand, and the protection of the quality of the soil and water, as well as biodiversity to ensure viable and healthy ecosystems, on the other.[759]

[756] See International Covenant on Civil and Political Rights, art. 6, para. 1. See also Human Rights Committee, general comment No. 36 (2018), para. 26 (CCPR/C/GC/36), in which the Committee lists "degradation of the environment" among general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. See also Human Rights Committee, concluding observations: Israel (CCPR/C/ISR/CO/3), para. 18. See also Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3, art. 6, para. 1, which provides that "States Parties recognize that every child has the inherent right to life". In general comment No. 16, the Committee on the Rights of the Child has related the child's right to life with environmental degradation and contamination resulting from business activities, see general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights (CRC/C/GC/16), para. 19. See further African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217, art. 4 which stipulates i.e. that human beings are entitled to respect for their life. In *SERAP v. Nigeria* case, the Community Court of Justice of the Economic Community of West African States affirmed that that "[t]he quality of human life depends on the quality of the environment". *See Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, 14 December 2012, para. 100. See also American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 2 May 1948, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 Rev. 9 (2003), art. 1; American Convention on Human Rights (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, art. 4, para. 1, as well as *Yanomami v. Brazil*, Case No. 7615, Inter-American Commission on Human Rights, resolution No. 12/85, 5 March 1985, which acknowledged that a healthy environment and the right to life are interlinked. See also Inter-American Court of Human Rights, *Medio Ambiente y Derechos Humanos* (footnote 623 above), paras. 55 and 59.

[757] See Universal Declaration of Human Rights, art. 25, para. 1; International Covenant on Economic, Social and Cultural Rights, art. 12. See also Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), *Official Records of the Economic and Social Council, 2001, Supplement No. 2* (E/2001/22-E/C.12/2000/21), annex IV, para. 4. See also Committee on the Rights of the Child, general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (CRC/C/GC/15), paras. 49–50. Similarly, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) includes the right to health, and the regional jurisprudence acknowledges the connection between the right to health and environmental protection in the context of the universal periodic reviews. See Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights and Office of the United Nations High Commissioner for Human Rights, "Mapping human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: individual report on the General Assembly and the Human Rights Council, including the universal periodic review process", Report No. 6, December 2013, part III C. See also the Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59).

[758] See *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR)* v. *Federal Republic of Nigeria* (see footnote 483 above), paras. 64-66. International Covenant on Economic, Social and Cultural Rights, art. 11. See also Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food (art. 11), *Official Records of the Economic and Social Council, 2001*, Supplement No. 2 (E/C.12/2000/22-E/C.12/1999/11), annex V, para. 7, which determines that the concept of adequacy is interlinked with the notion of sustainability, meaning that food must also be available for the future generations. See also paras. 8 and 10, which require that available food must be free from adverse substances. Moreover, the right to food has been related to the depletion of natural resources traditionally possessed by indigenous communities. *Official Records of the Economic and Social Council, 2001, Supplement No. 2* (E/2000/22-E/C.12/1999/11), para. 337; *ibid., 2010, Supplement No. 2* (E/2010/22-E/C.12/2009/3), para. 372; *ibid., 2012, Supplement No. 2* (E/2012/22-E/C.12/2011/3), para. 268; *ibid., 2008, Supplement No. 2* (E/2008/22-E/C.12/2007/3), para. 436. See further Human Rights Council resolution 7/14 on the right to food, 27 March 2008, and Report of the Special Rapporteur on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/76/179).

[759] See, for example, World Health Organization, "Our planet, our health, our future: human health and the Rio Conventions: Biological Diversity, Climate Change and Desertification", discussion paper,

The reference to rights also encompasses the rights of protected persons under the law of occupation.

(7) "Significant harm" in paragraph 2 is a widely used standard in international environmental law.[760] The need for a certain threshold of environmental harm,[761] such as "significant harm",[762] in order for the relevant rights to be violated, has also been recognized in regional human rights jurisprudence. As for its content, reference can be made to the Commission's previous work on the prevention of transboundary harm from hazardous activities[763] and the allocation of loss in the case of such harm.[764] "Significant harm" is thus "something more than 'detectable' but need not be at the level of 'serious' or 'substantial'".[765] Such harm must lead to real detrimental effects on the environment. At the same time, "the determination of 'significant damage' involves both factual considerations and objective criteria, and a value determination", which is dependent on the circumstances of the particular case.[766] In the context of paragraph 2, harm that is likely to prejudice the health and well-being of the population of the occupied territory would amount to "significant harm".

(8) Paragraph 2 refers to "protected persons of the occupied territory" in general terms. This reference is consistent with the definition given in article 4 of the Fourth Geneva Convention and encompasses "'the whole population' of occupied territories (excluding nationals of the Occupying Power)".[767] The ICRC Commentary points out that the other distinctions and exceptions contained in article 4 may extend or restrict these limits, but they do not do so "to any appreciable extent".[768]

(9) Paragraph 3 of draft principle 19 provides that an Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.[769]

2012, p. 2, acknowledging the role of biodiversity as the "foundation for human health". Available at www.who.int/globalchange/publications/reports/health_rioconventions.pdf (accessed on 2 August 2022).

760 See paras. (2) and (6) of the commentary to draft principle 21, below, and footnotes 797 and 807.

761 The European Court of Human Rights, see e.g. *Fadeyeva* (footnote 483 above), paras. 68 and 70; *Kyrtatos v. Greece*, No. 41666/98, 22 May 2003, ECHR 2003-VI (extracts), para. 52.

762 Inter-American Court of Human Rights, The Environment and Human Rights (*State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity*: interpretation and scope of articles 4 (1) and 5 (1) in relation to articles 1 (1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, 15 November 2017, pp. 55–57.

763 Paras. (1)–(7) of the commentary to art. 2 of articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 98, at pp. 152–153.

764 Paras. (1)–(3) of the commentary to principle 2 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities *Yearbook … 2006*, vol. II (Part Two), para. 67, at pp. 64–65.

765 Para. (4) of the commentary to art. 2 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 98, at p. 152 (emphasis removed).

766 Para. (3) of the commentary to principle 2 of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook … 2006*, vol. II (Part Two), para. 67, at p. 65. In the context of the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49* (A/51/49), vol. III, resolution 51/229, annex), "significant harm" has been similarly defined as "the real impairment of a use, established by objective evidence. For harm to be qualified as significant it must not be trivial in nature but it need not rise to the level of being substantial; this is to be determined on a case by case basis". See "No significant harm rule", User's Guide Fact Sheet, No. 5. Available at www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule.pdf (accessed on 2 August 2022).

767 ICRC commentary (1958) to the Fourth Geneva Convention, art. 4, p. 46.

768 *Ibid*.

769 Environmental rights have been recognized at the national level in the constitutions of more than a hundred States. There are nevertheless considerable variations in how the respective rights and duties are conceived. See P. Sands, *Principles of International Environmental Law* (footnote 607 above), p.

The term "law and institutions" is intended to also cover the international obligations of the occupied State.[770] The paragraph is based on the last phrase of article 43 of the Hague Regulations, "while respecting, unless absolutely prevented, the laws in force in the country", as well as on article 64 of the Fourth Geneva Convention.[771] These provisions embody the so-called conservationist principle, which underlines the temporary nature of occupation and the need for maintaining the *status quo ante.*

(10) In spite of their strict wording, the two provisions have been interpreted to allow the Occupying Power the competence to legislate when necessary for the maintenance of public order and civil life and to change legislation that is contrary to established human rights standards.[772] The ICRC commentary to article 47 of the Fourth Geneva Convention points out that some changes to the institutions "might conceivably be necessary and even an improvement" and explains that the object of the text in question was "to safeguard human beings and not to protect the political institutions and government machinery of the State as such".[773] It is furthermore evident that "civil life" and "orderly government" are evolving concepts, comparable to the notions of "well-being and development", or "sacred trust" which the International Court of Justice described in the *Namibia* Advisory Opinion as "by definition evolutionary".[774] The longer the occupation lasts, the more evident is the need for

816. A list of relevant constitutions is available in Earthjustice, *Environmental Rights Report 2008*, at http://earthjustice.org/sites/default/files/library/reports/2008-environmental-rights-report.pdf, Appendix (accessed on 2 August 2022).

770 Major multilateral environmental agreements have attracted a high number of ratifications. See https://research.un.org/en/docs/environment/treaties (accessed on 2 August 2022).

771 Art. 64 of the Fourth Geneva Convention reads as follows:

"The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

"The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them." The ICRC commentary points out that, in spite of the reference to penal law, occupation authorities are bound to respect the whole of the law in the occupied territory, see ICRC commentary (1958) to the Fourth Geneva Convention, art. 64, p. 335; see also Sassòli, Legislation and maintenance of public order …" (footnote 733 above), p. 669; similarly, Dinstein, *The International Law of Belligerent Occupation* (footnote 724 above), p. 111; Benvenisti, *The International Law of Occupation* (footnote 724 above), p. 101; Kolb and Vité, *Le droit de l'occupation militaire …* (footnote 717 above), pp. 192–194. See also P. Fauchille, *Traité de droit international public*, vol. II, 8th ed. (Rousseau, Paris, 1921), p. 228 ("Comme la situation de l'occupant est éminemment provisoire, il ne doit pas bouleverser les *institutions* du pays." ["As the situation of the occupier is eminently temporary, he should not disrupt the country's institutions"]).

772 Sassòli, "Legislation and maintenance of public order…" (see footnote 733 above), p. 663. See also United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict …* (footnote 664 above), p. 284, para. 11.25, acknowledging that new legislation may be necessitated by the exigencies of armed conflict, the maintenance of order, or the welfare of the population. Similarly, McDougal and Feliciano, *Law and Minimum World Public Order …* (footnote 737 above), p. 757.

773 ICRC commentary (1958) to the Fourth Geneva Convention, art. 47, p. 274.

774 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 31, para. 53. Similarly *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 32, para. 77, in which the Court stated that the meaning of certain generic terms was "intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time". See also World Trade Organization, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Appellate Body Report), 6 November 1998, *Dispute Settlement Reports*, vol. VII (1998), p. 2755, at para. 129, according to which the expression "exhaustible natural resources" had to be interpreted in light of contemporary concerns about the protection and conservation of the environment. Available at

proactive action and to allow the Occupying Power to fulfil its duties under the law of occupation, including for the benefit of the population of the occupied territory.[775] At the same time, the Occupying Power is not supposed to take over the role of a sovereign legislator.

(11) Paragraph 3 takes into account that armed conflict may have caused significant stress on the environment of the occupied State and resulted in institutional collapse, which is a common feature of many armed conflicts,[776] and recognizes that an Occupying Power may have to take proactive measures to address immediate environmental problems. The more protracted the occupation, the more diversified measures are likely to be necessary for the protection of the environment. As part of the maintenance of public order and civil life of the occupied territory, which requires taking care of the welfare of the occupied population, such proactive action should entail engagement of the population of the occupied territory in decision-making.[777]

(12) While some active interference in the law and institutions concerning the environment of the occupied territory may thus be required, the Occupying Power may not introduce permanent changes in fundamental institutions of the country and shall be guided by a limited set of considerations: the concern for public order, civil life, and welfare in the occupied territory.[778] The phrase "within the limits provided by the law of armed conflict" in paragraph

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https://docs.wto.org (accessed on 2 August 2022); Permanent Court of Arbitration, Award in the Arbitration regarding the *Iron Rhine* (footnote 749 above), at paras. 79–81. See also the Commission's work on subsequent agreements and subsequent practice, commentary to conclusion 3 (Interpretation of treaty terms as capable of evolving over time), *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 10* (A/68/10), para. 39, at pp. 24–30.

775 E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington, D.C., Carnegie Endowment for International Peace, 1942), p. 49, who pointed to the need to modify tax legislation in an occupation that lasts through several years, noting that "[a] complete disregard of these realities may well interfere with the welfare of the country and ultimately with 'public order and safety' as understood in Article 43". Similarly, McDougal and Feliciano, *Law and Minimum World Public Order …* (footnote 737 above), p. 746. See also ICRC, "Occupation and other forms of administration of foreign territory" (footnote 726 above), p. 58, stressing the ability of the occupant to legislate to fulfil its obligations under the Fourth Geneva Convention or to enhance civil life in the occupied territory. Sassòli, "Legislation and maintenance of public order…" (see footnote 733 above), p. 676, nevertheless holds that the occupant should "introduce only as many changes as is absolutely necessary under its human rights obligations".

776 See Jensen and Lonergan, "Natural resources and post-conflict assessment, remediation, restoration and reconstruction: lessons and emerging issues" (footnote 450 above), p. 415. See also K. Conca and J. Wallace, "Environment and peacebuilding in war-torn societies: lessons from the UN Environment Programme's experience with post-conflict assessment" in *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (footnote 450 above), pp. 63–84.

777 See ICRC, "Occupation and other forms of administration of foreign territory" (footnote 726 above), pp. 75–76. Ensuring public participation may also be required as part of the respect for the law of the occupied territory given that participatory rights are widely granted at the national level by domestic legal systems in most regions of the world. See J. Razzaque, "Information, public participation and access to justice in environmental matters" in S. Alam and others (eds.), *Routledge Handbook on International Environmental Law* (Abingdon, Routledge, 2014), pp. 137 –153, at p. 139. See also the Rio Declaration, principle 10: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." See further Framework principles on human rights and the environment (A/HRC/37/59, annex), principle 9: "States should provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process."

778 Feilchenfeld, *The International Economic Law of Belligerent Occupation* (footnote 775 above), p. 89. See also Ferraro, "The law of occupation and human rights law …" (footnote 738 above), pp. 273–293; see similarly the Supreme Court of Israel: H.C. 351/80, *The Jerusalem District Electricity Company Ltd. v. (a) Minister of Energy and Infrastructure, (b) Commander of the Judea and Samaria Region* 35(23), Piskei Din 673, partly reprinted in *Israel Yearbook on Human Rights* (1981), pp. 354–358.

3 also refers to article 64 of the Fourth Geneva Convention. According to this provision, local laws may be changed when it is essential: (*a*) to enable the Occupying Power to fulfil its obligations under the Convention; (*b*) to maintain the orderly government of the territory; or (*c*) to ensure the security of occupying forces or administration.[779]

Principle 20
Sustainable use of natural resources

To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the protected population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes harm to the environment.

Commentary

(1) The purpose of draft principle 20 is to set forth the obligations of an Occupying Power with respect to the sustainable use of natural resources. As indicated in the first part of the sentence, the draft principle applies "[t]o the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory". The phrase refers to the various rules and limitations set forth by the law of armed conflict and other international law to the exploitation of the wealth and natural resources of the occupied territory.

(2) The provision is based on article 55 of the Hague Regulations, under which the Occupying Power is regarded "only as administrator and usufructuary" of immovable public property in the occupied territory.[780] This description is interpreted to forbid "wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation".[781] A similar limitation deriving from the nature of occupation as temporary administration of the territory prevents the Occupying Power from using the resources of the occupied country or territory for its own domestic purposes.[782] Any exploitation of property is permitted only to the extent required to cover the expenses of the

[779] Fourth Geneva Convention, art. 64.

[780] See Hague Regulations, art. 55: "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Natural resources typically constitute immovable property. In particular, natural resources that are not extracted (*in situ*) constitute immovable property.

[781] J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (London, Stevens and Sons Limited, 1954), p. 714. See also G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis, University of Minnesota Press, 1957), p. 177, who emphasizes that the Occupying Power "is not permitted to exploit immovable property beyond normal use, and may not cut more timber than was done in pre-occupation days" and L. Oppenheim, *International Law: A Treatise*, vol. II, *War and Neutrality*, 2nd ed. (London, Longmans, Green and Co., 1912), p. 175, pointing out that the Occupying Power "is … prohibited from exercising his right in a wasteful or negligent way that would decrease the value of the stock and plant" and "must not cut down a whole forest unless the necessities of war compel him". See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 194: "Jurisprudence has recognized that exploitation of natural resources in occupied territories that goes beyond the rules of usufruct, i.e. by way of excessive consumption of resources including when the local economy is not considered, is prohibited".

[782] Singapore, Court of Appeal, *N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, 13 April 1956, Reports: 1956 Singapore Law Reports, p. 65; reprint in *International Law Reports*, vol. 23 (1960), pp. 810–849, p. 822 (*Singapore Oil Stocks* case); *In re Krupp and Others*, Judgment of 30 June 1948, *Trials of War Criminals before the Nürnberg Military Tribunals*, vol. IX, p. 1340.

occupation, and "these should not be greater than the economy of the country can reasonably be expected to bear".[783]

(3) The second sentence of the draft principle mentions explicitly that the Occupying Power's administration and use of natural resources in the occupied territory may only be "for the benefit of the protected population of the occupied territory and for other lawful purposes under the law of armed conflict".[784] The reference to "the protected population of the occupied territory" is to be understood in this context in the sense of article 4 of the Fourth Geneva Convention, which defines protected persons.[785] Unlike for draft principle 19, the word "population" was chosen as the present draft principle does not focus on individual rights but more collectively on the benefit from the use of natural resources. The terms "protected persons" and "protected population" can be used interchangeably. The words "of the occupied territory" underline this meaning.

(4) A further provision that provides protection to the natural resources and certain other components of the environment of the occupied territory is contained in the general prohibition of destruction or seizure of property, whether public or private, movable or immovable, in the occupied territory unless such destruction or seizure is rendered absolutely necessary by military operations.[786] The prohibition of pillage of natural resources is furthermore applicable in situations of occupation.[787] An "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is also defined as a grave breach in article 147 of the Fourth Geneva Convention and as the war crime of "pillaging" in the Rome Statute of the International Criminal Court.[788]

(5) The principle of permanent sovereignty over natural resources also has a bearing on the interpretation of article 55 of the Hague Regulations. According to this principle, as enshrined in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.[789] The International Court of Justice has confirmed the customary nature of the principle.[790] Similarly, the principle of self-determination may be invoked in relation to the exploitation of natural resources in territories under occupation, particularly in the case of territories that are not part of any established State.[791]

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783 The United States of America and Others v. Goering and Others, Judgment of 1 October 1946, in Trial of the Major War Criminals before the International Military Tribunal, vol. I (Nuremberg, 1947), p. 239.

784 As summarized by the Institute of International Law, "the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population". See Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), pp. 285 *et seq*.; available from www.idi-iil.org, Declarations, at p. 288.

785 Fourth Geneva Convention, art. 4. See also ICRC commentary (1958) to the Fourth Geneva Convention, art. 4, p. 45, according to which there are two main classes of civilians whose "protection against arbitrary action on the part of the enemy was essential in time of war – on the one hand, persons of enemy nationality living in the territory of a belligerent State, and on the other, the inhabitants of occupied territories."

786 Art. 23 (*g*) and art. 53 of the Hague Regulations.

787 See draft principle 18 and the commentary thereto above.

788 Rome Statute, art. 8, para. 2 (*a*) (iv) and (*b*) (xiii).

789 International Covenant on Civil and Political Rights, art. 1, para. 2; International Covenant on Economic, Social and Cultural Rights, art. 1, para. 2. See also General Assembly resolutions 1803 (XVII) of 14 December 1962; 3201 (S-VI) of 1 May 1974 (Declaration on the Establishment of a New International Economic Order); 3281 (XXIX) of 12 December 1974 (Charter of Economic Rights and Duties of States).

790 *Armed Activities on the Territory of the Congo, Judgment … 2005* (see footnote 484 above), at p. 251, para. 244.

791 In the *Wall* Advisory Opinion, the International Court of Justice stated that the construction of the wall, as well as other measures by the occupying State, "severely impedes the exercise by the

(6) While the right of usufruct has traditionally been regarded as applicable to the exploitation of all kinds of natural resources, including non-renewable ones,[792] the various limitations outlined above serve to curtail the Occupying Power's rights to exploit the natural resources of the occupied territory. These limitations are also reflected in the use of "permitted".

(7) The last sentence of draft principle 20 addresses situations in which an Occupying Power is permitted to administer and use the natural resources in an occupied territory. It sets forth an obligation to do so in a way that ensures the sustainable use of such resources and minimizes environmental harm. This requirement is based on the Occupying Power's duty under article 55 of the Hague Regulations to safeguard the capital of public immovable property, which has for a long time been interpreted to entail certain obligations with regard to the protection of the natural resources in the occupied territory. In light of the development of the international legal framework for the exploitation and conservation of natural resources, environmental considerations and sustainability are to be seen as integral elements of the duty to safeguard the capital. Reference can in this respect be made to the *Gabčíkovo-Nagymaros* judgment, in which the International Court of Justice, in interpreting a treaty that predated certain recent norms of environmental law, accepted that "the Treaty is not static, and is open to adapt to emerging norms of international law".[793] A court of arbitration has furthermore stated that principles of international environmental law must be taken into account even when interpreting treaties concluded before the development of that body of law.[794]

(8) The notion of sustainable use of natural resources can in this regard be seen as the modern equivalent of the concept of "usufruct", which is in essence a standard of good housekeeping, according to which the Occupying Power "must not exceed what is necessary or usual"[795] when exploiting the relevant resource. This entails that the Occupying Power shall exercise caution in the exploitation of non-renewable resources, not exceeding pre-

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Palestinian people of its right to self-determination": *Legal Consequences of the Construction of a Wall* (see footnote 351 above), at p. 184, para. 122. The right to self-determination was also referred to in the *Namibia, Advisory Opinion* (see footnote 774 above), p. 31, paras. 52–53, in *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at pp. 32–33, paras. 56–59, as well as in the *East Timor* case, in which the Court affirmed the *erga omnes* nature of the principle, see *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

792 Feilchenfeld, *The International Economic Law of Belligerent Occupation* (see footnote 775 above), p. 55. See also Oppenheim, *International Law …* (footnote 781 above), p. 175, and Von Glahn, *The Occupation of Enemy Territory …* (footnote 781 above), p. 177. Similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict …* (footnote 664 above), p. 303, para. 11.86. See, however, N. Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge, Cambridge University Press 1997), p. 268.

793 *Gabčíkovo-Nagymaros* (see footnote 337 above), pp. 67–68, para. 112. See also p. 78, para. 140, in which the Court rules that, whenever necessary for the application of a treaty, "new norms have to be taken into consideration, and … new standards given proper weight." Further, see Permanent Court of Arbitration, Award in the Arbitration regarding the *Iron Rhine* (footnote 749 above), in which the Court applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century.

794 *Indus Waters Kishenganga* (see footnote 749 above), para. 452, in which the Court held that: "It is established that principles of international environmental law must be taken into account even when … interpreting treaties concluded before the development of that body of law … It is therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today". Furthermore, the International Law Association has suggested that treaties and rules of customary international law should be interpreted in light of the principles of sustainable development unless doing so would conflict with a clear treaty provision or be otherwise inappropriate: "[I]nterpretations which might seem to undermine the goal of sustainable development should only take precedence where to do otherwise would be to undermine … fundamental aspects of the global legal order, would otherwise infringe the express wording of a treaty or would breach a rule of *jus cogens.*" See International Law Association, Committee on International Law on Sustainable Development, Resolution No. 7 (2012), annex (Sofia Guiding Statement), para. 2.

795 *The Law of War on Land Being Part III of the Manual of Military Law* (Great Britain, War Office, 1958), sect. 610. Similarly, United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict …* (footnote 664 above), p. 303, para. 11.86.

occupation levels of production, and exploit renewable resources in a way that ensures their long-term use and capacity for regeneration.

(9) The notion of minimization of environmental harm follows from the purpose of the draft principles. Draft principle 2 notably states that the draft principles are aimed at enhancing the protection of the environment in relation to armed conflicts, including through measures to prevent, mitigate and remediate harm to the environment. Preventive measures are understood to aim at avoiding, or in any event minimizing, damage to the environment. While the obligation to ensure the sustainable use of natural resources is most relevant in a long-term perspective, the use of natural resources, and the need to minimize environmental harm, is relevant both in short-term and more protracted occupations.

Principle 21
Prevention of transboundary harm

An Occupying Power shall take appropriate measures to ensure that activities in the occupied territory do not cause significant harm to the environment of other States or areas beyond national jurisdiction, or any area of the occupied State beyond the occupied territory.

Commentary

(1) Draft principle 21 contains the established principle that each State has an obligation not to allow significant harm to be caused from its territory or jurisdiction to the environment of other States or to areas beyond national jurisdiction. The International Court of Justice referred to this principle in the *Legality of the Threat or Use of Nuclear Weapons* case and confirmed its customary nature, stating that the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States and of areas beyond national control constitutes "part of the corpus of international law relating to the environment".[796]

(2) The obligation to prevent significant harm to the environment of other States has an established status in a transboundary context and has been particularly relevant with regard to shared natural resources, such as international watercourses and transboundary aquifers. This obligation is explicitly contained in the Convention on the Law of the Non-navigational Uses of International Watercourses and in the Convention on the Protection and Use of Transboundary Watercourses and International Lakes as well as in the United Nations Framework Convention on Climate Change.[797] Numerous regional treaties establish corresponding obligations of prevention, cooperation, notification or compensation with

[796] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 340 above), pp. 241–242, para. 29. See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14), para. 101; the *Construction of a Road* (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665, paras. 153 and 156. See furthermore Sands, *Principles of International Environmental Law* (footnote 607 above), p. 206, as well as U. Beyerlin, "Different types of norms in international environmental law: policies, principles and rules", in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2008), pp. 425–448, p. 439. See also A. Boyle and C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment*, 4th ed. (Oxford, Oxford University Press, 2021), p. 211.

[797] Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), text available from https://treaties.un.org (Status of Multilateral Treaties Deposited with the Secretary-General, chap. XXVII), art.7; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269, art. 2; United Nations Framework Convention on Climate Change, art. 1, para. 1. See also Convention for the Protection of the Ozone Layer, art. 1, para. 2; Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988), *International Legal Materials*, vol. 27 (1988), p. 868, art. 4, para. 2; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309, art. 1, para. 2.

regard to damage caused to rivers or lakes.[798] The principle has also been confirmed and clarified in international and regional jurisprudence.[799]

(3) The Commission has included this principle in its articles on prevention of transboundary harm from hazardous activities.[800] According to the commentary thereto, the obligation of due diligence can be deduced from a number of international conventions as the standard basis for the protection of the environment from harm.[801]

(4) As regards the applicability of this principle in the specific context of occupation, reference can be made to the International Court of Justice's *Namibia* Advisory Opinion, in which the Court underlined the international obligations and responsibilities of South Africa towards other States while exercising its powers in relation to the occupied territory, stating that "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".[802] Furthermore, the Court has referred to the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control in its judgment concerning the *Pulp Mills on the River Uruguay* case,[803] as well as in the joint cases of *Certain Activities* and *Construction of a Road*.[804]

(5) The Commission's articles on prevention of transboundary harm from hazardous activities state that this obligation applies to activities carried out within the territory or otherwise under the jurisdiction or control of a State.[805] It should be recalled that the Commission has consistently used this formulation to refer not only to the territory of a State but also to activities carried out in other territories under the State's control. As explained in the commentary to article 1, "it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation".[806]

(6) Draft principle 21 reflects the obligation of prevention in customary international environmental law, which only applies to harm above a certain threshold, most often indicated as "significant harm".[807] At the same time, certain treaties incorporate the

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[798] See, e.g., Convention on the Protection of the Rhine (1999), Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System (1987); Agreement on Co-operation for the Sustainable Development of the Mekong River Basin (1995), all available at www.ecolex.org (accessed on 2 August 2022). Revised Great Lakes Water Quality Agreement (United States, Canada, 2012), available at https://ijc.org (accessed on 2 August 2022).

[799] Several of the cases in which the International Court of Justice has clarified environmental obligations have been related to the use and protection of water resources such as wetlands or river; e.g., the joint cases *Construction of a Road*/*Certain Activities Carried Out by Nicaragua in the Border Area* (see footnote 796 above) *and the Pulp Mills case* (see footnote 796 above) as well as the case of *Gabčíkovo-Nagymaros* (see footnote 337 above). See also *Indus Waters Kishenganga* (see footnote 749 above), paras. 449–450. Regional jurisprudence is widely available at www.ecolex.org (accessed on 2 August 2022).

[800] Art. 3 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 146: "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof".

[801] Para. (8) of the commentary to art. 3, *ibid.*, at p. 154.

[802] *Namibia, Advisory Opinion* (see footnote 774 above), p. 54, para. 118.

[803] *Pulp Mills* (see footnote 796 above), pp. 55–56, para. 101.

[804] See footnote 799 above.

[805] Para. (10) of the commentary to art. 2 (use of terms) of the articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 153.

[806] Para. (12) of the commentary to art. 1, *ibid.*, at p. 151.

[807] See, for instance, *Pulp Mills* (see footnote 796 above), pp. 55–56 and 58, para. 101; *Certain Activities* and *Construction of a Road* (footnote 796 above), pp. 720–721, paras. 153 and 156; *South China Sea Arbitration (the Republic of the Philippines v. the People's Republic of China)*, Case No. 2013-19, Permanent Court of Arbitration, Award, 12 July 2016, para. 941. See also United Nations Compensation Commission, Governing Council, Report and recommendations made by the Panel of Commissioners concerning the third instalment of "F4"Claims (S/AC.26/2003/31), para. 33: while the Panel ruled on the basis that Iraq was liable for "any … damage" (Security Council resolution 687

prevention obligation without the threshold of significant harm.[808] The obligation of prevention is an obligation of conduct that requires in situations of occupation that the Occupying Power takes all measures it can reasonably be expected to take.[809] The content of the notion of significant harm is the same as referred to above in the commentary to draft principle 19.[810]

(7) The wording of draft principle 21 follows the established precedents but adds a reference to "any area of the occupied State beyond the occupied territory". The consideration behind this formulation is related to situations in which the occupied territory extends to only a part of the territory of a State and not its entirety. While the phrase "to the environment of other States or areas beyond national jurisdiction" could be interpreted as excluding the territory of other parts of the occupied State, draft principle 21 is intended to cover three situations: the territory of other States, areas beyond national jurisdiction, and any territory of the occupied State not under occupation.

Part Five
Principles applicable after armed conflict

Principle 22
Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged as a result of the conflict.

2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Commentary

(1) Draft principle 22 reflects the fact that environmental considerations are, to a greater extent than before, being taken into consideration in the context of peace processes, including through the regulation of environmental matters in peace agreements. Reference can also be made to the heavy environmental impact of non-international armed conflicts that has led a

(1991)), it did not deny that the commonly accepted threshold for compensable damage was "significant". See further Duvic-Paoli, *The Prevention Principle in International Environmental Law* (footnote 636 above), p. 164; K. Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Leiden, Martinus Nijhoff, 2004), p. 68, pointing out that in case of environmental harm, it is common to use the standard of "significant" damage. Similarly T. Koivurova, "Due diligence", *Max Planck Encyclopedia of Public International Law*, p. 241, para. 23, available from www.mpepil.com. See also J.M. Arbour, S. Lavallée, and H. Trudeau, *Droit International de l'Environnement*, 2nd ed. (Cowansville, Editions Yvon Blais, 20122012), p. 1058; U. Beyerlin and T. Marauhn, *International Environmental Law* (Hart-C.H. Beck-Nomos 2011), p. 41; P.M. Dupuy and J.E. Viñuales, *International Environmental Law*, 2nd ed. (Cambridge, Cambridge University Press, 2018), pp. 64–65 ("Damage that does not reach the threshold of significance will not breach the no-harm principle but States will remain bound by the due diligence duty to prevent it (see prevention principle) as well as by a norm such as the polluter-pays principle, which allocates the burden of tolerable (below threshold) damage to the polluter"); J. Brunnée, "Harm prevention" in L. Rajamani and J. Peel (eds.), *The Oxford Handbook of International Environmental Law*, 2nd ed. (Oxford, Oxford University Press 2021), pp. 271–272 ("although Principle 21 [of the Rio Declaration] did not stipulate a particular threshold of harm, it is accepted today that the rule focuses on 'significant' harm – harm that is more than 'detectable', but not necessarily 'serious' or 'substantial'").

808 See, for instance Convention on Biological Diversity, art. 3; United Nations Convention on the Law of the Sea, art. 194, para. 2. See, however, South China Sea Arbitration (see previous footnote), para. 941: ("Thus States have a positive 'duty to prevent, or at least mitigate, significant harm to the environment when pursuing large-scale construction activities'. The Tribunal considers [that] this duty informs the scope of the general obligation in Article 192.")

809 Second report of the International Law Association, Study Group on Due Diligence in International Law, July 2016, p. 8.

810 See para. (7) of the commentary to para. 2 of draft principle 19 above.

growing number of States to include measures to protect and restore the environment in transitional justice processes.[811]

(2) Including the term "peace process" in the draft principle is intended to broaden its scope to cover the entire peace process, as well as any formal peace agreements concluded.[812] Modern armed conflicts have a variety of outcomes that do not necessarily take the form of formal agreements. For example, at the end of hostilities, a ceasefire agreement, an armistice or a situation of *de facto* peace where no agreement could be reached. The outcome of a peace process often involves different steps and the adoption of a variety of instruments. A peace process may also begin well before the actual end of an armed conflict. The conclusion of a peace agreement thus represents only one aspect, which, if at all, may take place several years after the end of an armed conflict. For this purpose, and to also avoid any temporal *lacuna*, the words "as part of the peace process" have been employed.

(3) The phrase "[p]arties to an armed conflict" is used in paragraph 1 to indicate that the provision covers both international and non-international armed conflicts. This is in line with the general understanding that the draft principles apply to international, as well as non-international armed conflicts. This phrase is understood to also refer to former parties to an armed conflict in case the conflict has ended.

(4) The word "should" is used to reflect the normative ambition of the provision, while also recognizing that it does not correspond to any general legal obligation.

(5) The draft principle is cast in general terms to accommodate the wide variety of situations that may exist as a result of an armed conflict. Armed conflicts often present one or more environmental issues, such as environmental degradation and scarcities as a causal factor in the conflict, exploitation of natural resources as a war-sustaining activity, or environmental damage caused during the conflict. The condition of the environment can vary

[811] "[T]ransitional justice … comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof", Report of the Secretary-General on "The rule of law and transitional justice in conflict and post-conflict societies" (S/2004/616), para. 8; numerous countries affected by post-conflict crises have adopted transitional justice mechanisms to enhance their environmental protection and restoration, some under assistance of the United Nations Environment Programme: see, for instance, United Nations Environment Programme, "Reporting on the state of the environment in Afghanistan: workshop report" (2019); United Nations Environment Programme, *South Sudan: First State of the Environment and Outlook Report 2018* (Nairobi, 2018); A. Salazar *et al*., "The ecology of peace: preparing Colombia for new political and planetary climates", *Frontiers in Ecology and the Environment* (September 2018), available at http://www.researchgate.net/publication/327605932_The_ecology_of_peace_preparing_Colombia_for_new_political_and_planetary_climates/download (accessed on 8 July 2019); United Nations Environment Programme, "Addressing the role of natural resources in conflict and peacebuilding" (Nairobi, 2015); United Nations Environment Programme, *Rwanda: From Post-Conflict to Environmentally Sustainable Development* (footnote 445 above); United Nations Environment Programme, "Sierra Leone: environment, conflict and peacebuilding assessment" (Geneva, 2010); Cambodia, Ministry of Environment, "Cambodia environment outlook" (2009); Sierra Leone, *An Agenda for Change* (2008); United Nations Environment Programme, *Environmental assessment of the Gaza Strip following the escalation of hostilities in December 2008–January 2009* (Nairobi, 2009).

[812] The United Nations peace agreements database, a "reference tool providing peacemaking professionals with close to 800 documents that can be understood broadly as peace agreements and related material", contains a huge variety of documents, such as "formal peace agreements and sub-agreements, as well as more informal agreements and documents such as declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, exchanges of letters and key outcome documents of some international or regional conferences … The database also contains selected legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations". Selected resolutions of the Security Council are also included. The database is available at http://peacemaker.un.org/document-search (accessed on 2 August 2022). See also Language of Peace database which complements and builds on the United Nations peace agreements database, available at www.languageofpeace.org/#/search (accessed on 2 August 2022).

greatly depending on a number of factors.[813] In some instances, the environment may have suffered serious and severe damage which is immediately apparent and which may need to be addressed as a matter of urgency; in others, the damage the environment has suffered may not be so significant as to warrant urgent restoration.[814] Some environmental damage may only become apparent months or even years after the armed conflict has ended.

(6) The draft principle aims to cover all formal peace agreements, as well as other instruments or agreements concluded or adopted at any point during the peace process, whether concluded between two or more States, between State(s) and non-State armed group(s), or between two or more non-State armed group(s). Such agreements and instruments may take different forms, such as sub-agreements to formal peace agreements, informal agreements, declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, as well as relevant legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations.[815]

(7) Some modern peace agreements contain environmental provisions.[816] The types of environmental matters that have been addressed in the instruments concluded during the

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[813] For example, the intensity and duration of the conflict as well as the weapons used can all influence how much environmental damage is caused in a particular armed conflict.

[814] Well-known examples of environmental damage caused in armed conflict is the damage caused by the United States Armed Forces' use of Agent Orange in the Viet Nam War and the burning of Kuwaiti oil wells by Iraqi troops in the Gulf War, which are well documented. Instances of environmental damage, which range in severity, have also been documented in other armed conflicts, such as the conflicts in Colombia, as well as in the Democratic Republic of the Congo, Iraq and Syria. See United Nations Environment Programme Colombia, "UN Environment will support environmental recovery and peacebuilding for post-conflict development in Colombia", available at www.unenvironment.org/news-and-stories/story/un-environment-will-support-environmental-recovery-and-peacebuilding-post (accessed on 2 August 2022); United Nations Environment Programme, "Post-conflict environmental assessment of the Democratic Republic of the Congo", available at https://postconflict.unep.ch/publications/UNEP_DRC_PCEA_EN.pdf (accessed on 2 August 2022); United Nations Environment Programme, "Post-conflict environmental assessment, clean-up and reconstruction in Iraq", available at https://wedocs.unep.org/bitstream/handle/20.500.11822/17462/UNEP_Iraq.pdf?sequence=1&isAllowed=y (accessed on 2 August 2022); "Lebanon Environmental Assessment of the Syrian Conflict" (supported by UNDP and EU), available at https://www.undp.org/sites/g/files/zskgke326/files/migration/lb/EASC-WEB.pdf (accessed on 2 August 2022). See also International Law and Policy Institute, "Protection of the natural environment in armed conflict: an empirical study" (Oslo, 2014), pp. 34–40.

[815] See C. Bell, "Women and peace processes, negotiations, and agreements: operational opportunities and challenges", Norwegian Peacebuilding Resource Centre, Policy Brief, March 2013, available at http://noref.no under "Publications", p. 1 (accessed on 2 August 2022).

[816] Such instruments are predominantly concluded in non-international armed conflicts, between a State and a non-State actor and include the following: Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the National Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP), (Bogotá, 24 November 2016), available at https://www.jep.gov.co/Marco%20Normativo/Normativa_v2/01%20ACUERDOS/N01.pdf (in Spanish); https://www.peaceagreements.org/viewmasterdocument/1845 (in English) (accessed on 2 August 2022).

Agreement on Comprehensive Solutions between the Government of the Republic of Uganda and Lord's Resistance Army/Movement (Juba, 2 May 2007), available at https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070502_AgreementComprehensiveSolutions.pdf (accessed on 2 August 2022, para. 14.6; Darfur Peace Agreement (Abuja, 5 May 2006), available from http://peacemaker.un.org/node/535 (accessed on 2 August 2022), chap. 2, at p. 21, art. 17, para. 107 (g) and (h), and at p. 30, art. 20; Final Act of the Inter-Congolese Political Negotiations (Sun City, 2 April 2003), available from http://peacemaker.un.org/drc-suncity-agreement2003 (accessed on 2 August 2022), resolution No. DIC/CEF/03, pp. 40–41, and resolution No. DIC/CHSC/03, pp. 62–65; Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (Machakos, 20 July 2002), available from http://peacemaker.un.org/node/1369 (accessed on 15

peace process or in peace agreements include, for example, obligations for or encouragement to parties to cooperate regarding environmental issues, and provisions that set out in detail the authority that will be responsible for matters relating to the environment. Such matters include preventing environmental crimes and enforcing national laws and regulations on natural resources and the sharing of communal resources.[817] Environmental aspects in peace processes also include the need to mitigate and minimize the specific negative effects of environmental degradation on people in vulnerable situations, who historically have borne the brunt of long-term environmental damage.[818] Mention should furthermore be made to the important role of local communities in peacebuilding[819] and of the right of women to full and equal participation in decision-making, planning and implementation regarding the restoration and protection of natural resources and the environment.[820] The present draft principle aims to encourage parties to consider including such provisions in the agreements.

(8) Paragraph 2 aims to encourage relevant international organizations to take environmental considerations into account when they act as facilitators in peace processes. The wording of the paragraph is intended to be broad enough to cover situations to which resolutions of the United Nations Security Council apply, as well as situations in which

June 2022), chap. V, p. 71 and chap. III, p. 45, which set out as guiding principles that "the best known practices in the sustainable utilization and control of natural resources shall be followed" (para. 1.10) – further regulations further regulations on oil resources are found in paras. 3.1.1 and 4; Arusha Peace and Reconciliation Agreement for Burundi (Arusha, 28 August 2000), available from http://peacemaker.un.org/node/1207 (accessed on 2 August 2022), Additional Protocol III, at p. 62, art. 12, para. 3 (e), and Additional Protocol IV, at p. 81, art. 8 (h); Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999), available from https://peacemaker.un.org/sierraleone-lome-agreement99 (accessed on 2 August 2022), S/1999/777, annex, art. VII; Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords) (Paris, 18 March 1999), S/1999/648, annex; Peace Agreement between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (Chapultepec Agreement) (Mexico City, 16 January 1992), A/46/864, annex, chap. II.

817 Chapultepec Agreement (see previous footnote), chap. II. Further regulations are found in art. 13 contained in annex II to the Peace Agreement; they prescribe that it is the role of the Environment Division of the National Civil Police to "be responsible for preventing and combating crimes and misdemeanours against the environment". The Arusha Peace and Reconciliation Agreement for Burundi, Protocol III, at p. 62, art. 12, para. 3 (*e*), and at p. 81, art. 8 (*h*), contains several references to the protection of the environment, one of which prescribes that one of the missions of the intelligence services is "[t]o detect as early as possible any threat to the country's ecological environment". Furthermore, it states that "[t]he policy of distribution or allocation of new lands shall take account of the need for environmental protection and management of the country's water system through protection of forests". Whereas between 1989 and 2004, natural resources were mentioned in approximately half of all peace agreements, from 2005 to 2018, natural resource provisions were included in all major peace agreements. See S.J.A. Mason, D.A. Sguaitamatti and M. del Pilar Ramirez Gröbli, "Stepping stones to peace? Natural resource provisions in peace agreements", in Bruch, Muffett and Nichols (eds.), *Governance, Natural Resources, and Post-conflict Peacebuilding* (see footnote 704 above), pp. 71–119.

818 Including children, youth, persons with disabilities, older persons, indigenous peoples, ethnic minorities, refugees and internally displaced persons, and migrants: see United Nations Environmental Assembly resolution 2/15 (see footnote 342 above), fourteenth preambular paragraph.

819 Security Council resolution 2282 (2016) and General Assembly resolution 70/262 of 12 May 2016. See also T. Ide *et al*., "The past and future(s) of environmental peacebuilding", *International Affairs*, vol. 97 (2021), pp. 1–16, at p. 8 ("Local communities are frequently successful in managing natural resources and mitigating or managing environmental conflict").

820 See Security Council resolution 1325 (2000). See also the general recommendations of the Committee on the Elimination of Discrimination against Women: No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations; No. 34 (2016) on the rights of rural women; No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19; No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change. See further United Nations Environmental Assembly resolution 4/17 of 15 March 2019 on "Promoting gender equality and the human rights and empowerment of women and girls in environmental governance" (UNEP/EA.4/Res.17) as well as UNEP/EA.3/Res.1 of 5 December 2017 on "Pollution mitigation and control in areas affected by armed conflict and terrorism", preamble, para. 10.

relevant international organizations play a facilitating role with the consent of the relevant State or parties to an armed conflict in question.

(9) Paragraph 2 refers to "relevant international organizations" to signal that not all organizations are suited to address this particular issue. The organizations that are envisaged as being relevant in the context of this draft principle include those that have been recognized as playing an important role in the peace processes of various armed conflicts in the past, *inter alia*, the United Nations and its organs, as well as the African Union, the European Union and the Organization of American States.[821] The draft principle also includes the words "where appropriate" to reflect the fact that the involvement of international organizations for this purpose is not always required, or wanted by the parties. It is furthermore recognized that international organizations, when involved in facilitation, should do so in cooperation across the humanitarian system, including local communities, national and international actors.

Principle 23
Sharing and granting access to information

1. To facilitate measures to remediate harm to the environment resulting from an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under applicable international law.

2. Nothing in paragraph 1 affects the right to invoke the grounds for refusal to share or grant access to information provided for in applicable international law. Nevertheless, States and international organizations shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Commentary

(1) Draft principle 23 addresses the obligation to share or grant access to relevant information to facilitate measures to remediate harm to the environment resulting from an armed conflict. It refers to "States", as this term is broader than "parties to an armed conflict". States not parties to an armed conflict may be affected as third States, and may have information that is relevant for the taking of remedial measures and that could usefully be provided to other States or international organizations. While States are typically the most relevant subjects, the draft principle also refers to international organizations, with the addition of the qualifier "relevant".

(2) While this obligation to share or grant access to information only applies to States and international organizations, it should be recalled that non-State armed groups also have obligations under the law of armed conflict, for instance regarding the clearance of landmines, that are relevant for the purpose of the draft principle. Non-State armed groups may also

[821] The United Nations has acted as a facilitator in numerous armed conflicts, *inter alia*, the armed conflicts in Angola, the Democratic Republic of the Congo, Libya and Mozambique. Regional organizations have also played a facilitating role in the peace processes across the world. For example, the African Union has been involved in aspects of the peace processes in, *inter alia*, Comoros, Côte d'Ivoire, Guinea-Bissau, Liberia and Somalia. See Chatham House, Africa Programme, "The African Union's role in promoting peace, security and stability: from reaction to prevention?", meeting summary, p. 3, available from www.chathamhouse.org (accessed on 2 August 2022). The Organization of American States was involved in the peace process in, *inter alia*, the Plurinational State of Bolivia and Colombia. See P.J. Meyer, "Organization of American States: background and issues for Congress" (Congressional Research Service, 2014), p. 8, available at www.fas.org (accessed on 2 August 2022). See also African Union and Centre for Humanitarian Dialogue, *Managing Peace Processes: Towards more inclusive processes*, vol. 3 (2013), p. 106. The European Union has been involved in the peace processes in armed conflicts in, *inter alia*, the Middle East and Northern Ireland. See also Switzerland, Federal Department of International Affairs, "Mediation and facilitation in today's peace processes: centrality of commitment, coordination and context", presentation by Thomas Greminger, a retreat of the International Organization of la Francophonie, 15–17 February 2007, available from www.swisspeace.ch, under "Publications" (accessed on 2 August 2022).

possess other environmental information in relation to armed conflict and should be encouraged to share that information.

(3) Draft principle 23 consists of two paragraphs. Paragraph 1 refers to the obligations States and international organizations may have under international law to share and grant access to information with a view to facilitating measures to remediate harm to the environment resulting from an armed conflict. Such measures may also be taken during an armed conflict. Paragraph 2 refers to grounds for refusal to which such sharing or access may be subject.

(4) The expression "in accordance with their obligations under applicable international law" reflects that several treaties contain obligations relevant in the context of the protection of the environment in relation to armed conflicts, which may be instrumental for the purpose of the taking of remedial measures after an armed conflict. It refers to obligations contained in treaties, rather than any corresponding rule of customary international law, and indicates that different States may have different obligations.

(5) While the term "share" refers to information provided by States and international organizations in their mutual relations and as a means of cooperation, the term "granting access" refers primarily to allowing access to individuals to such information, and thus signifies a more unilateral relationship.

(6) The obligation to share and grant access to information pertaining to the environment can be found in numerous texts of international law, both at the global and the regional levels.

(7) The origins of the right to access to information in modern international human rights law can be found in article 19 of the Universal Declaration of Human Rights,[822] as well as in article 19 of the International Covenant on Civil and Political Rights.[823] General comment No. 34 on article 19 of the International Covenant on Civil and Political Rights provides that article 19, paragraph 2, should be read as including a right to access to information held by public bodies.[824]

(8) A right to environmental information has also developed within the context of the European Convention on Human Rights, as exemplified in the case of *Guerra and Others v. Italy*,[825] in which the European Court of Human Rights decided that the applicants had a right to environmental information on the basis of article 8 of the Convention (the right to family life and privacy). Reference can also be made to the European Union directive on public access to environmental information and to a related judgment of the European Court of Justice of 2011.[826] In addition to the right to privacy, a right to environmental information has also been based on the right to freedom of expression (as in e.g. *Claude-Reyes et al. v. Chile* before the Inter-American Court of Human Rights).[827]

(9) Article 2 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) defines "environmental information" as any information pertaining to the state of elements of the environment, factors affecting or likely to affect elements of the environment, as well as the state of human health and safety insofar as it may be affected by these elements.[828] Article 4 of the Aarhus Convention stipulates that State parties must "make such [environmental] information available to the public, within the framework of national legislation". Such an obligation implies a duty for States to collect such environmental

[822] General Assembly resolution 217 (III) A of 10 December 1948.

[823] New York, 16 December 1966, United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.

[824] Human Rights Committee, general comment No. 34 (2011) on article 19 (freedoms of opinion and expression), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V, para. 18.

[825] *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I.

[826] Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information; *Office of Communications v. Information Commissioner*, case C-71/10, judgment of 28 July 2011.

[827] *Case of Claude-Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgement of 19 September 2006 (merits, reparations and costs), Series C, No. 151 (2006).

[828] Aarhus Convention, art. 2.

information for the purposes of making it available to the public if and when requested to do so. In addition, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), adopted on 4 March 2018, contains similar provisions.[829]

(10) Also relevant is paragraph 2 of article 9 on "Recording and use of information on minefields, mined areas, mines, booby-traps and other devices" of Protocol II to the Convention on Certain Conventional Weapons, as well as article 4, paragraph 2, on "Recording, retaining and transmission of information" of Protocol V to the Convention on Certain Conventional Weapons. With regard to some remnants of war, the relevant instruments and customary rules contain requirements on providing environmental information or other information that may contribute to the taking of remedial measures. For instance, a request to extend the deadline for completing the clearance and destruction of cluster munition remnants under the Convention on Cluster Munitions must outline any potential environmental and humanitarian impacts of such an extension.[830] Similar obligations are contained in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.[831] Reference can also be made to the International Mine Action Standards.[832]

(11) Regarding the practice of international organizations, the Environmental Policy for United Nations Field Missions of 2009 stipulates that peacekeeping missions shall assign an Environmental Officer with the duty to "[p]rovide environmental information relevant to the operations of the mission and take actions to promote awareness on environmental issues".[833] The policy also contains a requirement to disseminate and study information on the environment, which would presuppose access to information that can in fact be disseminated and that thus is not classified.

(12) The ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict contain a provision on protection of organizations, which could include environmental organizations gathering environmental data as a means of "contributing to prevent or repair damage to the environment."[834]

(13) In connection with post-armed conflict environmental assessments, it is worth recalling that the United Nations Environment Programme guidelines on integrating environment in post-conflict assessments include a reference to the importance of public participation and access to information, as "natural resource allocation and management is done in an *ad-hoc*, decentralized, or informal manner" in post-conflict contexts.[835]

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[829] See also United Nations Framework Convention on Climate Change, art. 6; Cartagena Protocol on Biosafety to the Biodiversity Convention (Montreal, 29 June 2000), United Nations, *Treaty Series*, vol. 2226, p. 208, art. 23; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, art. 15; Stockholm Convention on Persistent Organic Pollutants, art. 10; Minamata Convention on Mercury, art. 18; Paris Agreement, art. 4, para. 8, and art. 12; United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, 14 October 1994), United Nations, *Treaty Series,* vol. 1954, No. 33480, p. 3, art. 16, also art. 19.

[830] Art. 4, para. 6 (*h*).

[831] Art. 5.

[832] International Mine Action Standards, available from www.mineactionstandards.org (accessed on 2 August 2022).

[833] United Nations, Department of Peacekeeping Operations and Department of Field Support, "Environmental Policy for UN Field Missions", 2009, para. 23.5.

[834] See ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (see footnote 608 above), guideline 19, referring to the Fourth Geneva Convention, art. 63, para. 2, and Additional Protocol I, arts. 61–67. See also ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (footnote 345 above), para. 13, which states that "[t]he content of the 1994 Guidelines remains valid today".

[835] United Nations Environment Programme, Guidance Note, *Integrating Environment in Post-Conflict Needs Assessments* (Geneva, 2009): see United Nations Environment Programme, "Disasters and conflicts programme", p. 3.

(14) The obligation to *share information* and to cooperate in this context is reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses.[836] The Convention on Biological Diversity contains a provision on exchange of information in its article 14, requiring that each contracting party shall, as far as possible and as appropriate, promote "notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate".[837] In addition, article 17 of the Convention calls upon the parties to facilitate the exchange of information relevant to the conservation and sustainable use of biological diversity.

(15) Paragraph 2 contains a saving clause referring to grounds for refusal to share or grant access to information provided for in applicable international law. The first sentence of the paragraph reflects the fact that the obligations to grant access to and/or share information as contained in the relevant treaties are commonly accompanied by exceptions or limitations regarding grounds for which the disclosure of information may be refused. Such grounds relate, *inter alia*, to confidential information concerning "international relations, national defence or public security", or situations in which the disclosure would make it more likely that the environment to which such information related would be damaged.[838] At the same time, many multilateral environmental agreements exclude "information on health and safety of humans and the environment" from the categories of information that may be regarded as confidential.[839] For some international organizations confidentiality requirements may affect the extent of information that they can share or grant access to in good faith.[840] In general, the applicable treaties contain very different conditions and exceptions regarding sharing and granting access to information. Paragraph 2 therefore refers to the existing grounds for refusal and confirms that paragraph 1 of the draft principle does not affect them. The second sentence of the paragraph provides that States and international organizations shall provide as much information as possible under the circumstances, through cooperation in good faith.

Principle 24
Post-armed conflict environmental assessments and remedial measures

Relevant actors, including States and international organizations, should cooperate with respect to post-armed conflict environmental assessments and remedial measures.

Commentary

(1) The purpose of draft principle 24 is to encourage relevant actors to cooperate in order to ensure that environmental assessments and remedial measures can be carried out in post-conflict situations.

(2) The reference to "relevant actors" includes both State and non-State actors. Not only States, but also a wide range of actors, including international organizations, have a role to play in relation to environmental assessments and remedial measures. The word "should" indicates the scarcity of practice regarding post-conflict environmental assessments. Its use

[836] Convention on the Law of the Non-navigational Uses of International Watercourses, arts. 9, 11, 12, 14–16, 19, 30, 31 and 33, para. 7.

[837] Art. 14, para. 1 (*c*).

[838] See Aarhus Convention, art. 4. Other grounds include the confidentiality of commercial and industrial information and the confidentiality of personal data. The grounds for refusal shall furthermore be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the requested information relates to emissions into the environment. See also Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67, art. 9, para. 3 (*g*). See also the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), art. 5, para. 6 (*b*).

[839] See, for instance, Stockholm Convention on Persistent Organic Pollutants, art. 9, para. 5; Cartagena Protocol, art. 21 para. 6 (c); Minamata Convention on Mercury, art. 17, para. 5.

[840] See, for instance, UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (2015).

in the draft principle is without prejudice to the different treaty-based obligations to remediate harm to the environment resulting from an armed conflict.[841]

(3) The term "environmental assessment" is distinct from an "environmental impact assessment", which is typically undertaken *ex ante* as a preventive measure.[842] Such impact assessments play an important role in the preparation and adoption of plans, programmes, and policies and legislation, as appropriate. This may involve the evaluation of the likely environmental effects, including health effects, in a plan or programme.[843]

(4) It is in this context that post-conflict environmental assessment has emerged as a tool to mainstream environmental considerations in the development plans for the post-conflict phase. Such assessments are typically intended to identify major environmental risks to health, livelihoods and security and to provide recommendations to national authorities on how to address them.[844] A post-conflict environmental assessment is intended to meet various needs and policy processes, which, depending on the requirements, are distinct in scope, objective and approach.[845] Such post-conflict environmental assessment, undertaken at the request of a State, may take the form of: (*a*) a needs assessment;[846] (*b*) a quantitative risk assessment;[847] (*c*) a strategic assessment;[848] or (*d*) a comprehensive assessment.[849] The comprehensive assessment of Rwanda, for example, involved a scientific expert evaluation and assessment, covering a range of activities, including scoping, desk study, field work, environmental sampling, geographic information system modelling, analysis and reporting and national consultations. It is readily acknowledged that "conflicts often have

[841] Such obligations may derive from disarmament treaties, such as amended Protocol II to the Convention on Certain Conventional Weapons and Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V) (Geneva, 3 May 1996), United Nations, *Treaty Series*, vol. 2399, No. 22495, p. 100, the Convention on Cluster Munitions or the Treaty on the Prohibition of Nuclear Weapons (New York, 7 July 2017), United Nations, *Treaty Series*, No. 56478 (volume number has yet to be determined), available from https://treaties.un.org. Reference can also be made to environmental law conventions, such as the Convention on Biological Diversity, or the World Heritage Convention, which require environmental assessments after a major event such as an armed conflict. Obligation to cooperate may also be based on the law of armed conflict or international human rights law.

[842] See, for instance, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309.

[843] Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, available at www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish.pdf (2 August 2022).

[844] Post-crisis environmental assessment, available at www.unenvironment.org/explore-topics/disasters-conflicts/what-we-do/preparedness-and-response/post-crisis-environmental (accessed on 2 August 2022).

[845] D. Jensen, "Evaluating the impact of UNEP's post conflict environmental assessments", *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding* (see footnote 125 above), pp. 17–62, at p. 18.

[846] A needs assessment and desk study can be done during or after a conflict, based on a collection of pre-existing secondary information on environmental trends and natural resource management, challenges from international and national sources. Such information, with limited verification field visits, is then compiled into a desk study report that attempts to identify and prioritize environmental needs. *Ibid.*, pp. 18–19.

[847] A quantitative risk assessment, involving field visits, laboratory analysis and satellite imagery, focuses on the direct environmental impact of conflicts caused by bombing and destruction of buildings, industrial sites, and public infrastructure. *Ibid.*, pp. 19–20.

[848] A strategic assessment evaluates the indirect impact of the survival and coping strategies of local people and the institutional problems caused by the breakdown of governance and capacity. These tend to be longer in duration. *Ibid.*, p. 20.

[849] A comprehensive assessment seeks to provide a detailed picture of each natural resource sector and the environmental trends, governance challenges, and capacity needs. Based on national consultations with stakeholders, comprehensive assessments attempt to identify priorities and cost the required interventions over the short, medium, and long term. *Ibid.*, p. 20.

environmental impacts, direct or indirect, that affect human health and livelihoods as well as ecosystem services".[850]

(5) Such assessments are encouraged because, if the environmental impacts of armed conflict are left unattended, there is strong likelihood that they may lead to "further population displacement and socio-economic instability", thereby "undermining recovery and reconstruction in post-conflict zones" and "triggering a vicious cycle".[851] Such assessments may furthermore be crucial in facilitating measures to remediate harm to the environment resulting from an armed conflict.

(6) In order to align the text with other draft principles, in particular draft principle 2, the term "remedial" is used in the present principle even though "recovery" has a more prominent usage in the practice. Once an assessment is completed, the challenge is to ensure that environmental recovery programmes are in place that aim at strengthening the national and local environmental authorities, rehabilitating ecosystems, mitigating risks and ensuring sustainable utilization of resources in the context of the concerned State's development plans.[852]

Principle 25
Relief and assistance

When, in relation to an armed conflict, the source of environmental damage is unidentified, or reparation is unavailable, States and relevant international organizations should take appropriate measures so that the damage does not remain unrepaired or uncompensated, and may consider establishing special compensation funds or providing other forms of relief or assistance.

Commentary

(1) The purpose of draft principle 25 is to encourage States to take appropriate measures aimed at repairing and compensating environmental damage caused during armed conflict. More specifically, it addresses relief and assistance in situations where the source of environmental damage is unidentified or reparation is otherwise not available. Such a situation may arise because of different reasons. The particular features of environmental damage may complicate the establishment of responsibility: the damage may result from a chain of events rather than from a single act, and extend over the course of many years, which makes it difficult to establish a causal link to specific acts.[853] The presence of multiple State and non-State actors in contemporary conflicts may further complicate the allocation of

[850] DAC Network on Environment and Development Cooperation (ENVIRONET), "Strategic environment assessment and post-conflict development SEA toolkit" (2010), p. 4, available at http://content-ext.undp.org/aplaws_publications/2078176/Strategic%20Environment%20Assessment%20and%20Post%20Conflict%20Development%20full%20version.pdf (accessed on 2 August 2022).

[851] *Ibid*.

[852] United Nations Environment Programme, "Disasters and conflicts programme", p. 3

[853] "First, the distance separating the source from the place of damage may be dozens or even hundreds of miles, creating doubts about the causal link even where polluting activities can be identified."; "Second, the noxious effects of a pollutant may not be felt until years or decades after the act."; "Third, some types of damage occur only if the pollution continues over time"; and "Fourth, the same pollutant does not always produce the same detrimental effects due to important variations in physical circumstances.". A.C. Kiss and D. Shelton, *Guide to International Environmental Law* (Leiden, Martinus Nijhoff, 2007), pp. 20–21. See also P.-M. Dupuy, "L'État et la réparation des dommages catastrophiques", in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (Boston, Graham and Trotman, 1991), pp. 125–147, p. 141, who describes the inherent characteristics of ecological damage as follows: "au-delà de ses incidences immédiates et souvent spectaculaires, il pourra aussi être diffus, parfois différé, cumulatif, indirect" ["beyond its immediate and often spectacular consequences, it could also be pervasive, sometimes deferred, cumulative, indirect"]. See also C.R. Payne, "Developments in the law of environmental reparations. A case study of the UN Compensation Commission", in Stahn, Iverson, and Easterday (eds.), *Environmental Protection and Transitions from Conflict to Peace …* (footnote 541 above), pp. 329–366, p. 353. For the definition of environmental harm, see Sands, *Principles of International Environmental Law* (footnote 607 above), pp. 741–748.

responsibility.[854] While such difficulties do not exempt the responsible State from the obligation to make reparation,[855] a situation may arise, in which the responsible actor cannot be identified, or there is no means of implementing the responsibility and obtaining reparation.[856] Environmental damage in armed conflict may moreover result from acts that are lawful under the law of armed conflict.[857]

(2) It is not uncommon that States and international organizations use *ex gratia* payments to make amends for wartime injury and damage without acknowledging responsibility, and possibly also seeking to exclude further liability. Such payments serve different purposes and may be available for damage and injury caused by lawful action.[858] In most cases, amends are paid for civilian injury or death, or damage to civilian property, but they may also entail remediation of harm to the environment, including when parts of the environment constitute civilian property. Victim assistance is a broader and more recent concept used in relation to armed conflicts – but also in other contexts – to respond to harm caused to individuals or communities, *inter alia* by military activities.[859]

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[854] See *Armed Activities*, Reparations (footnote 484 above), para. 94. See also ICRC, "International humanitarian law and the challenges of contemporary armed conflicts", document prepared for the 32nd International Conference of the Red Cross and Red Crescent (2015), *International Review of the Red Cross*, vol. 97 (2015), pp. 1427–1502, at pp. 1431–1432.

[855] *Armed Activities*, Reparation (footnote 484 above), para. 97 ("However, the fact that the damage was the result of concurrent causes is not sufficient to exempt the Respondent from any obligation to make reparation").

[856] For the history of war reparations, see P. d'Argent, *Les réparations de guerre en droit international public. La responsabilité internationale des États à l'épreuve de la guerre* (Brussels, Bruylant, 2002). See also ICRC commentary (1987) to Additional Protocol I, art. 91, para. 3651: "On the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war, as they see fit." The United Nations Compensation Commission's experience was groundbreaking in the area of reparations for wartime environmental harm (see footnote 487 above). The other relevant international instances of either addressing wartime environmental damage or having the potential to do so include: the Eritrea-Ethiopia Claims Commission that was established in 2000 (see Agreement on Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Algiers, 18 June 2000), United Nations, *Treaty Series*, vol. 2138, No. 37273, p. 85, and Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea for the resettlement of displaced persons, as well as rehabilitation and peacebuilding in both countries (Algiers, 12 December 2000), *ibid.*, No. 37274, p. 93); and the 2004 Advisory Opinion of the International Court of Justice concerning the construction of a wall in the Occupied Palestinian Territories, see *Legal Consequences of the Construction of a Wall* (footnote 351 above), p. 189, para. 131, and p. 192, para. 136. See also *Armed Activities on the Territory of the Congo, Judgment … 2005* (see footnote 484 above), p. 257, para. 259.

[857] This would arguably be the case with most environmental harm in conflict, given that the specific prohibitions in the law of armed conflict "do not address normal operational damage to the environment that is left after hostilities cease, from sources such as the use of tracked vehicles on fragile desert surfaces; disposal of solid, toxic, and medical waste; depletion of scarce water resources; and incomplete recovery of ordnance", as pointed out by C.R. Payne, "The norm of environmental integrity in post-conflict legal regimes", in Stahn, Easterday and Iverson (eds.), Jus Post Bellum*: Mapping the Normative Foundation* (footnote 753 above), pp. 502–518, at p. 511. See draft principle 14 and para. (8) of the commentary thereto above.

[858] University of Amsterdam and Center for Civilians in Conflict, "Monetary payments for civilian harm in international and national practice" (2015). See also United States, Government Accountability Office, "Military operations. The Department of Defense's use of solatia and condolence payments in Iraq and Afghanistan", Report, May 2007; and W.M. Reisman, "Compensating collateral damage in elective international conflict", *Intercultural Human Rights Law Review*, vol. 8 (2013), pp. 1–18.

[859] See, e.g., Handicap International, "Victim Assistance in the context of mines and explosive remnants of war", Handicap International (July 2014). Available at https://handicap-international.ch/sites/ch/files/documents/files/assistance-victimes-mines-reg_anglais.pdf (accessed on 2 August 2022). See also International Human Rights Clinic, Harvard Law School, "Environmental remediation under the treaty on the prohibition of nuclear weapons" (April 2018). Available at http://hrp.law.harvard.edu/wp-content/uploads/2018/04/Environmental-Remediation-short-5-17-18-final.pdf (accessed on 2 August 2022). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and

(3) An example of environmental remediation in a situation envisaged in the draft principle is provided by the assistance to Lebanon following the bombing of the Jiyeh power plant in 2006. After the strike on the power plant on the Lebanese coast by Israeli Armed Forces, an estimated 15,000 tons of oil were released into the Mediterranean Sea.[860] Following requests for assistance from the Government of Lebanon, the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea provided remote and on-site technical assistance in the clean-up. Assistance was provided pursuant to the 2002 Protocol concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea, one of protocols to the Barcelona Convention.[861] The amends related to the use of Agent Orange (an herbicide containing the toxic substance dioxin) by the United States in the Viet Nam War provide an example of *ex gratia* response to environmental and health effects of armed conflict.[862]

(4) The term "reparation" is used in the draft principle as a general notion that covers different forms of reparation for an internationally wrongful act.[863] The context, however, is one in which reparation is unavailable, including where there has been no wrongful act. The term "unrepaired" similarly refers to the lack of any reparative measures, while "uncompensated" refers specifically to the lack of monetary compensation. These terms define the specific circumstances in which States are encouraged to take appropriate measures of relief and assistance. Such measures may include establishment of a compensation fund.[864] The terms "relief" and "assistance" should also be read as including remedial measures in the sense in which the term has been used in the present draft principles, encompassing any measure of remediation that may be taken to restore the environment.[865]

Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex. Principle 9 states that "[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted".

860 United Nations Environment Programme, *Lebanon Post-Conflict Environmental Assessment* (2007), pp. 42–45. Available at https://postconflict.unep.ch/publications/UNEP_Lebanon.pdf (accessed on 2 August 2022). See also Office for the Coordination of Humanitarian Affairs, "Environmental emergency response to the Lebanon crisis". Available at https://www.unocha.org/sites/dms/Documents/Report_on_response_to_the_Lebanon_Crisis.pdf (accessed on 2 August 2022).

861 Protocol concerning Cooperation in Preventing Pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea (Valletta, 25 January 2002), United Nations, *Treaty Series*, vol. 2942, annex A, No. 16908, p. 87.

862 See United States, Congressional Research Service, "U.S. Agent Orange/Dioxin Assistance to Vietnam" (updated on 21 February 2019). Available at https://fas.org/sgp/crs/row/R44268.pdf (accessed on 2 August 2022).

863 Art. 34 and commentary thereto of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at pp. 95–96.

864 Draft principle 26 has been modelled after article 12 on "Collective reparation" of the Institute of International Law resolution on responsibility and liability under international law for environmental damage from 1997 reading as follows: "Should the source of environmental damage be unidentified or compensation be unavailable from the entity liable or other back-up sources, environmental regimes should ensure that the damage does not remain uncompensated and may consider the intervention of special compensation funds or other mechanisms of collective reparation, or the establishment of such mechanisms where necessary". International Law Institute, resolution on "Responsibility and liability under international law for environmental damage", *Yearbook*, vol. 67, Part II, Session of Strasbourg (1997), p. 486, at p. 499.

865 See para. (3) of the commentary to draft principle 2 above. See also para. (6) of the commentary to draft principle 24 above. See further S. Hanamoto, "Mitigation and remediation of environmental damage", in Y. Aguila and J. Vinuales (eds.), *A Global Pact for the Environment – Legal Foundations* (Cambridge, Cambridge University Press, 2019), p. 79: "Mitigation and remediation of environmental damage aim at 'avoid[ing], reduc[ing] and, if possible, remedy[ing] significant adverse effects' (Article 5(3)(b), Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment to the environment). More precisely, '[m]itigation is the use of practice, procedure or technology to minimise or to prevent impacts associated with proposed activities' and '[r]emediation consists of the steps taken after impacts have occurred to promote, as much as possible, the return of the environment to its original condition' (Antarctic Treaty Consultative Meeting, Revised Guidelines for Environmental Impact Assessment in Antarctica, 3.5, 2016)."

The provision is without prejudice to existing obligations States may have concerning reparations.

(5) Draft principle 25 has been located in Part Five containing draft principles applicable after an armed conflict. While it was recognized that it could be preferable to take measures to address environmental damage already during an armed conflict, given that environmental damage accumulates and restoration becomes more challenging with time, the draft principle was seen as primarily relevant in post-armed conflict situations.

Principle 26
Remnants of war

1. Parties to an armed conflict shall seek, as soon as possible, to remove or render harmless toxic or other hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic or other hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Commentary

(1) Draft principle 26 aims to strengthen the protection of the environment in a post-conflict situation. It seeks to ensure that toxic or other hazardous remnants of war that are causing or that may cause damage to the environment are removed or rendered harmless after an armed conflict. This draft principle covers toxic or other hazardous remnants of war on land, as well as those which have been placed or left at sea, as long as they fall under the jurisdiction or control of a former party to the armed conflict. The measures taken shall be subject to the applicable rules of international law.

(2) Paragraph 1 is cast in general terms. Remnants of war take various forms. They consist of not only explosive remnants of war but also other hazardous material and objects. Some remnants of war are not dangerous to the environment at all or may be less dangerous if they remain where they are after the conflict is over.[866] In other words, removing the remnants of war may in some situations pose a higher environmental risk than leaving them where they are. It is for this reason that the draft principle contains the words “or render harmless”, to illustrate that in some circumstances it may be appropriate to do nothing, or to take measures other than removal.

(3) The obligation to “seek to” is one of conduct and relates to “toxic or other hazardous remnants of war” that “are causing or risk causing damage to the environment”. The terms “toxic” and “hazardous” are often used when referring to remnants of war which pose a danger to humans or the environment, and it was considered appropriate to use the terms

[866] For example, this is often the case with chemical weapons that have been dumped at sea. See T.A. Mensah, “Environmental damages under the Law of the Sea Convention”, *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, J.E. Austin and C.E. Bruch (eds.) (Cambridge, Cambridge University Press, 2000), pp. 226–249. The Chemical Munitions Search and Assessment (CHEMSEA) is an example of a project of cooperation among the Baltic States, which is partly financed by the European Union. Information on the CHEMSEA project can be found at http://ec.europa.eu/regional_policy/en/projects/finland/chemsea-tackles-problem-of-chemical-munitions-in-the-baltic-sea (accessed on 2 August 2022). See also the Baltic Marine Environment Protection Commission (Helsinki Commission) website at https://helcom.fi/baltic-sea-trends/hazardous-subtances/sea-dumped-chemical-munitions/ (accessed at 2 August 2022).

here.[867] The term "hazardous" is somewhat wider than the term "toxic", in that all remnants of war that pose a threat to humans or the environment may be considered hazardous, but not all are toxic. The term "toxic remnants of war" does not have a definition under international law, but has been used to describe "any toxic or radiological substance resulting from military activities that forms a hazard to humans and ecosystems".[868]

(4) The words "as soon as possible" indicate a time frame for the removal or rendering harmless of toxic or other hazardous remnants of war that is not related to a formal end of an armed conflict. The phrase "as soon as possible" is found in several treaties relevant to the draft principle.[869]

(5) The reference to "jurisdiction or control" is intended to cover areas within *de jure* and *de facto* control even beyond that established by a territorial link. The term "jurisdiction" is intended to cover, in addition to the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority extraterritorially.[870] The term "control" is intended to cover situations in which a State (or party to an armed conflict) is exercising *de facto* control, even though it may lack *de jure* jurisdiction.[871] It therefore "refers to the factual capacity of effective control over activities outside the jurisdiction of a State".[872]

(6) The present draft principle is intended to apply to international as well as non-international armed conflicts, including in situations of occupation. For this reason, paragraph 1 addresses "parties to a conflict". The phrase "party to a conflict" has been used in various provisions of law of armed conflict treaties in the context of remnants of war.[873] This term is used in the present draft principle as it is foreseeable that there may be situations where there are toxic or hazardous remnants of war in an area where a State does not have full control. For example, a non-State actor may have control over territory where toxic and hazardous remnants of war are present.

(7) Paragraph 2 should be read together with paragraph 1. It aims to encourage cooperation and technical assistance amongst parties to render harmless the remnants of war referred to in paragraph 1. Paragraph 2 does not aim to place any new international law obligations on parties to cooperate. It is nevertheless foreseeable that there may be situations in which toxic or other hazardous remnants of war remain in a territory where a State does not have full control and is not in a position to ensure that such remnants are rendered harmless. It was thus considered valuable to encourage parties to cooperate in this regard.

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867 See, for more information, ICRC, "Strengthening legal protection for victims of armed conflicts", report prepared for the Thirty-first International Conference of the Red Cross and Red Crescent in 2011, No. 31IC/11/5.1.1 3, p. 18.

868 See M. Ghalaieny, "Toxic harm: humanitarian and environmental concerns from military-origin contamination", discussion paper (Toxic Remnants of War project, 2013), p. 2. See also https://paxforpeace.nl/media/download/987_icbuw-toxicharmtrwproject.pdf (accessed on 2 August 2022). For more information on toxic remnants of war, see also the Geneva Academy, *Weapons Law Encyclopedia*, available at www.weaponslaw.org (accessed on 2 August 2022) under "Glossary", which cites ICRC, "Strengthening legal protection for victims of armed conflicts", p. 18. See the statements delivered by Austria, Costa Rica, Ireland and South Africa to the First Committee of the General Assembly at its sixty-eighth session.

869 Such as the Convention on the Prohibition, Use, Stockpiling, Production or Transfer of Anti-Personnel Mines and on Their Destruction and the Convention on Cluster Munitions.

870 See para. (9) of the commentary to art. 1 of the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98, at p. 151. See also General Assembly resolution 62/68 of 6 December 2007, annex.

871 Para. (12) of the commentary to art. 1, *ibid.*

872 A/CN.4/692, para. 33. Concerning the concept of "control", see *Namibia, Advisory Opinion* (footnote 774 above), at p. 54, para. 118, where the Court states that: "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."

873 See, for example, Protocol II to the Convention on Certain Conventional Weapons, as well as the Protocol V to the Convention on Certain Conventional Weapons.

(8) Paragraph 3 contains a without prejudice clause that aims to ensure that there would be no uncertainty that existing treaty or customary international law obligations are unaffected. There are various law of armed conflict treaties and obligations under customary international law that concern remnants of war, and different States thus have varying obligations in this regard.[874]

(9) The words "clear, remove, destroy or maintain", as well as the specific remnants of war listed, namely "minefields, mined areas, mines, booby-traps, explosive ordnance and other devices", were specifically chosen and are derived from existing law of armed conflict treaties to ensure that the paragraph is based on the law of armed conflict as it exists at present.[875]

Principle 27
Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

Commentary

(1) Unlike the broader draft principle 26, which deals with remnants of war more generally, draft principle 27 deals with the specific situation of remnants of war at sea including the long-lasting effects on the marine environment. Draft principle 27 has added value as draft principle 26 only covers remnants of war under the jurisdiction or control of a former party to an armed conflict, which means that it is not broad enough to cover all remnants of war at sea. This draft principle expressly encourages international cooperation to ensure that remnants of war at sea do not constitute a danger to the environment.[876]

(2) Owing to the multifaceted nature of the law of the sea, a particular State could have sovereignty, jurisdiction, both sovereignty and jurisdiction, or neither sovereignty nor jurisdiction, depending on where the remnants are located.[877] It is therefore not surprising that remnants of war at sea pose significant legal challenges.[878] There may be a legal obligation on the State or States concerned to take all necessary measures to prevent, reduce

[874] See, for example, amended Protocol II to the Convention on Certain Conventional Weapons; Protocol V to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Convention on Cluster Munitions; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Geneva, 3 September 1992), *ibid.*, vol. 1974, No. 33757, p. 45.

[875] See the wording of the amended Protocol II to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Convention on Cluster Munitions.

[876] The need to take cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea has been explicitly recognized by the General Assembly since 2010, including in General Assembly resolution 71/220. The resolution reaffirms the 2030 Agenda for Sustainable Development and recalls a number of relevant international and regional instruments. It furthermore notes the importance of raising awareness of the environmental effects related to waste originating from chemical weapons dumped at sea and invites the Secretary-General to seek the views of Member States and relevant regional and international organizations on the cooperative measures envisaged in the resolution and identifying the appropriate intergovernmental bodies within the United Nations for further consideration and implementation, as appropriate, of those measures.

[877] See the United Nations Convention on the Law of the Sea. The remnants of war could be located in the internal waters, the territorial sea, archipelagic waters, the continental shelf, the exclusive economic zone or on the high seas, and this will have an impact on the rights and obligations of States.

[878] See A. Lott, "Pollution of the marine environment by dumping: legal framework applicable to dumped chemical weapons and nuclear waste in the Arctic Ocean", *Nordic Environmental Law Journal*, vol. 1 (2015), pp. 57–69, and W. Searle and D. Moody, "Explosive Remnants of War at Sea: Technical Aspects of Disposal", in *Explosive Remnants of War: Mitigating the Environmental Effects*, A. Westing (ed.) (Taylor & Francis 1985).

and control pollution of the marine environment.[879] This is not always the case, however, and the coastal State, whose cooperation is needed in efforts to get rid of remnants, may not even have been a party to the conflict. Furthermore, as with any remnants of war, the parties to the armed conflict may have ceased to exist or the coastal State may not have the resources to ensure that the remnants of war at sea do not constitute a danger to the environment. Another foreseeable challenge is that the party that left the remnants may not have been in violation of its international law obligations at the time when that happened, but these remnants now pose environmental risk.

(3) Accordingly, draft principle 27 addresses States generally, not only those which have been involved in an armed conflict. It aims to encourage all States, as well as relevant international organizations,[880] to cooperate to ensure that remnants of war at sea do not constitute a danger to the environment. The reference to "international organizations" is qualified with the word "relevant", in light of the fact that the issues involved tend to be specialized.

(4) The words "should cooperate" rather than the more prescriptive "shall cooperate" were considered appropriate, given that this is an area where international practice is still developing. Cooperation is an important element concerning remnants of war at sea, as the coastal States negatively affected by remnants of war at sea may not have the resources and thus not be capable of ensuring that remnants of war at sea do not pose environmental risks.

(5) There are various ways in which States and relevant international organizations can cooperate to ensure that remnants of war at sea do not pose environmental risks. For example, they could survey maritime areas and make the information freely available to the affected States, they could provide maps with markers, and they could provide technological and scientific information and information concerning whether the remnants pose risks or may pose risks in the future.

(6) There is increasing awareness concerning the environmental effects of remnants of war at sea.[881] Dangers posed to the environment by remnants of war at sea could cause significant collateral damage to human health and safety, especially of seafarers and fishermen.[882] The clear link between danger to the environment and public health and safety has been recognized in several international law instruments, and it was thus considered particularly important to encourage cooperation amongst States and international organizations to ensure that remnants of war at sea do not pose danger to the environment.[883]

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879 United Nations Convention on the Law of the Sea, art. 194, para. 1 ("States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection."). See also art. 192 and art. 194, para. 2.

880 For example, the CHEMSEA project, which was initiated in 2011 as a project of cooperation among the Baltic States and partly financed by the European Union (see footnote 866 above).

881 See General Assembly resolutions 65/149 of 20 December 2010 and 68/208 of 20 December 2013 and A/68/258. See also Mensah, "Environmental damages under the Law of the Sea Convention", p. 233.

882 The Baltic Marine Environment Protection Commission (Helsinki Commission), governing body of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, issued guidelines for fishermen that encounter sea-dumped chemical munitions at an early stage. For an easily accessible overview, see the work done by the James Martin Center for Nonproliferation Studies at www.nonproliferation.org/chemical-weapon-munitions-dumped-at-sea/ (accessed on 2 August 2022).

883 There is a clear link between danger to the environment and public health and safety. See, for example, article 55, paragraph 1, of Additional Protocol I provides for the protection of the natural environment in international armed conflicts and prohibits the use of means and methods of warfare which are intended or may be expected to cause environmental damage and thereby prejudice the health of the population; article 1, paragraph 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes stipulates that adverse effects on the environment include: "effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".

Chapter VI
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

60. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[884] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).[885]

61. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[886] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[887]

62. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[888] The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015), her fifth report during the sixty-eighth (2016) and sixty-ninth sessions (2017), her sixth report during the seventieth (2018) and seventy-first (2019) sessions, her seventh report during the seventy-first session (2019), and her eighth report during the seventy-second session (2021).[889] On the basis of the draft articles proposed by the Special Rapporteur in the second, third, fourth and fifth and seventh reports, the Commission has provisionally adopted 12 draft articles and commentaries thereto. Draft article 2 on definitions remained under development.[890]

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[884] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[885] *Official Records of the General Assembly*, *Sixty-second Session*, *Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[886] A/CN.4/601, A/CN.4/631 and A/CN.4/646, respectively.

[887] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid.*, *Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[888] *Ibid.*, *Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

[889] A/CN.4/654, A/CN.4/661, A/CN.4/673, A/CN.4/686, A/CN.4/701, A/CN.4/722, A/CN.4/729, and A/CN.4/739, respectively.

[890] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48–49.

At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid.*, *Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48–49).

At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto (*ibid.*, *Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 130–132).

At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid*., *Seventy-first Session, Supplement No. 10* (A/71/10), paras. 194–195 and 250).

B. Consideration of the topic at the present session

63. The Commission had no new report of the Special Rapporteur at the present session. However, the Drafting Committee continued its consideration of the remaining draft articles referred to it previously by the Commission, as contained in the second (A/CN.4/661), seventh (A/CN.4/729) and eighth (A/CN.4/739) reports of the Special Rapporteur.

64. At its 3586th meeting on 3 June 2022, the Commission received and considered the report of the Drafting Committee (A/CN.4/L.969), and adopted the draft articles on immunity of State officials from foreign criminal jurisdiction on first reading (see sect. C.1 below).

65. At its 3604th to 3609th meetings, from 29 July to 3 August 2022, the Commission adopted the commentaries to the aforementioned draft articles (see sect. C.2 below).

66. At its 3609th meeting, on 3 August 2022, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2023.

67. At its 3609th meeting, on 3 August 2022, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Ms. Concepción Escobar Hernández, which had enabled the Commission to bring to a successful conclusion its first reading of the draft articles on immunity of State officials from foreign criminal jurisdiction. The Commission also reiterated its deep appreciation for the valuable contribution of the previous Special Rapporteur, Mr. Roman A. Kolodkin, to the work on the topic.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading

1. Text of the draft articles

68. The text of the draft articles adopted by the Commission on first reading is reproduced below.

Immunity of State officials from foreign criminal jurisdiction

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons

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At its 3378th meeting, on 20 July 2017, the Commission provisionally adopted draft article 7 by a recorded vote and at the 3387th to 3389th meetings on 3 and 4 August 2017, the commentaries thereto (*ibid.*, *Seventy-second Session, Supplement No. 10* (A/72/10), paras. 74, 76 and 140–141).

At its 3501st meeting, on 6 August 2019, the Chair of the Drafting Committee presented the interim report of the Drafting Committee on "Immunity of State officials from foreign criminal jurisdiction", containing draft article 8 *ante* provisionally adopted by the Drafting Committee at the seventy-first session (A/CN.4/L.940). The Commission took note of the interim report of the Drafting Committee on draft article 8 *ante*, which was presented to the Commission for information only (*ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 125 and footnote 1469).

At its 3530th and 3549th meetings, on 3 June and 26 July 2021, respectively, the Commission received and considered the reports of the Drafting Committee (A/CN.4/L.940, A/CN.4/L.953 and Add.1), and provisionally adopted draft articles 8 *ante*, 8, 9, 10, 11 and 12 (*ibid.*, *Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 114).

connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

3. The present draft articles do not affect the rights and obligations of States Parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.

Article 2
Definitions

For the purposes of the present draft articles:

(a) "State official" means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;

(b) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Part Two
Immunity *ratione personae*

Article 3
Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Part Three
Immunity *ratione materiae*

Article 5
Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Article 6
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Article 7
Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of *apartheid*;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Part Four
Procedural provisions and safeguards

Article 8
Application of Part Four

The procedural provisions and safeguards in the present Part shall be applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the present draft articles.

Article 9
Examination of immunity by the forum State

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.

2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:

(a) before initiating criminal proceedings;

(b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

Article 10
Notification to the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.

2. The notification shall include, inter alia, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.

3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

Article 11
Invocation of immunity

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.

2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.

3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

Article 12
Waiver of immunity

1. The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official.

2. Waiver of immunity must always be express and in writing.

3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.

5. Waiver of immunity is irrevocable.

Article 13
Requests for information

1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.

2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.

3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The requested State shall consider any request for information in good faith.

Article 14
Determination of immunity

1. A determination of the immunity of a State official from the foreign criminal jurisdiction shall be made by the competent authorities of the forum State according to its law and procedures and in conformity with the applicable rules of international law.

2. In making a determination about immunity, such competent authorities shall take into account in particular:

(a) whether the forum State has made the notification provided for in draft article 10;

(b) whether the State of the official has invoked or waived immunity;

(c) any other relevant information provided by the authorities of the State of the official;

(d) any other relevant information provided by other authorities of the forum State; and

(e) any other relevant information from other sources.

3. When the forum State is considering the application of draft article 7 in making the determination of immunity:

(a) the authorities making the determination shall be at an appropriately high level;

(b) in addition to what is provided in paragraph 2, the competent authorities shall:

(i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7;

(ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.

4. The competent authorities of the forum State shall always determine immunity:

(a) before initiating criminal proceedings;

(b) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law. This sub-paragraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

5. Any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State.

Article 15
Transfer of the criminal proceedings

1. The competent authorities of the forum State may, acting *proprio motu* or at the request of the State of the official, offer to transfer the criminal proceedings to the State of the official.

2. The forum State shall consider in good faith a request for transfer of the criminal proceedings. Such transfer shall only take place if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution.

3. Once a transfer has been agreed, the forum State shall suspend its criminal proceedings, without prejudice to the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

4. The forum State may resume its criminal proceedings if, after the transfer, the State of the official does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution.

5. The present draft article is without prejudice to any other obligations of the forum State or the State of the official under international law.

Article 16
Fair treatment of the State official

1. An official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law.

2. Any such official who is in prison, custody or detention in the forum State shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State of the official;

(b) to be visited by a representative of that State; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the forum State, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended.

Article 17
Consultations

The forum State and the State of the official shall consult, as appropriate, at the request of either of them, on matters relating to the immunity of an official covered by the present draft articles.

Article 18
Settlement of disputes

1. In the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice.

2. If a mutually acceptable solution cannot be reached within a reasonable time, the dispute shall, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice, unless both States have agreed to submit the dispute to arbitration or to any other means of settlement entailing a binding decision.

Annex

List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

2. Text of the draft articles and commentaries thereto

69. The text of the draft articles and commentaries thereto adopted by the Commission on first reading at its seventy-third session is reproduced below.

General commentary

(1) The present draft articles address the immunity of State officials from foreign criminal jurisdiction. As is always the case with the Commission's outputs, the draft articles are to be read together with the commentaries.

(2) The International Law Commission has addressed the immunity of State officials before, in the context of diplomatic[891] and consular[892] relations and immunities, special missions,[893] relations between States and international organizations,[894] and immunities of States and their property.[895] In addition, the Commission has considered the question of immunity when examining other topics related to the criminal responsibility of individuals, including in the Nürnberg Principles[896] and the different projects that culminated in the adoption of the draft Code of Crimes against the Peace and Security of Mankind[897] and, more recently, the draft articles on prevention and punishment of crimes against humanity.[898]

(3) The present draft articles take a different approach than the above, by specifically addressing the immunity of State officials from foreign criminal jurisdiction. These draft articles define the general legal regime applicable to this type of immunity, which is distinguished by the following features: (a) it is limited to immunity from criminal jurisdiction; (b) it is limited to foreign criminal jurisdiction and does not affect the legal regime applicable before international criminal courts; and (c) it covers all State officials regardless of their position or the specific functions they perform for the State, with the sole exception of those State officials covered by special regimes.

(4) In preparing the present draft articles, the Commission has taken into account the following different elements.

(5) The first of these elements is the need to guarantee respect for the principle of the sovereign equality of States, which is the very foundation of immunity of State officials from

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[891] See the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session, *Yearbook of the International Law Commission* (*Yearbook …*)*, 1958*, vol. II, document A/3859, p. 89, para. 53. See, in particular, draft articles 29, 30 and 36–38 and the commentaries thereto, *ibid*., pp. 98–99 and 101–103.

[892] See the draft articles on consular relations adopted by the Commission at its thirteenth session, *Yearbook … 1961*, vol. II, document A/4843, p. 92, para. 37. See, in particular, draft articles 41–45, 53, 57 and 61 and the commentaries thereto, *ibid*., pp. 115–119, 122–123, 125 and 126.

[893] See the draft articles on special missions adopted by the Commission at its nineteenth session, *Yearbook … 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 347, para. 35. See, in particular, draft articles 9, 29, 31, 36–41 and 44 and the commentaries thereto, *ibid.*, pp. 351–352, 361, 362, 363–365 and 366.

[894] See the draft articles on the representation of States in their relations with international organizations adopted by the Commission at its twenty-third session, *Yearbook … 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284, para. 60. See, in particular, draft articles 22, 28, 30, 31, 36–38, 50, 53, 59, 61, 62, 67–69 and 74 and the commentaries thereto, *ibid.*, pp. 299–300, 302–305, 308–310, 315–316, 317, 319–321, 322–323 and 326.

[895] See the draft articles on jurisdictional immunities of States and their property adopted by the Commission at its forty-third session, *Yearbook … 1991*, vol. II, (Part Two), p. 13, para. 28. See, in particular, draft articles 2 and 3 and the commentaries thereto, *ibid.*, pp. 14–22.

[896] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles), *Yearbook … 1950*, vol. II, document A/1316, part three, pp. 374–378, paras. 97–127. See, in particular, principle III and the commentary thereto, *ibid.*, p. 375.

[897] *Yearbook … 1996*, vol. II (Part Two), para. 50. See, in particular, draft article 7 and the commentary thereto, *ibid.*, pp. 26–27.

[898] The text of the draft articles adopted by the Commission at its seventy-first session and the commentaries thereto are reproduced in *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 44–45. See, in particular, draft article 5 and the commentary thereto (para. (5)).

foreign criminal jurisdiction. Providing immunity under international law to a State official generally seeks to ensure their ability to represent their State or to exercise State functions. Indeed, as affirmed by the International Court of Justice, the immunities accorded to State officials are not granted for their personal benefit, but to protect the rights and interests of the State.[899] Moreover, in view of the different positions that different State officials may hold, the draft articles distinguish between two legal regimes, namely immunity *ratione personae* and immunity *ratione materiae.*

(6) Second, under the principle of the sovereign equality of States, the forum State has the right to exercise its own criminal jurisdiction. As the International Court of Justice has pointed out, there is a close relationship between jurisdiction and immunity, since immunity from foreign criminal jurisdiction can only be understood *vis-à-vis* the exercise of criminal jurisdiction.[900]

(7) Third, immunity of State officials applies bearing in mind that international law is a legal and congruent system.[901] Therefore, in the elaboration of these draft articles, consideration must be given to existing rules in different areas of contemporary international law. In particular, account must be taken of the strides made in international criminal law in terms of defining and punishing the most serious crimes under international law, defining the principle of accountability as one of its constituent elements, and consolidating the fight against impunity as a goal of the international community.[902] While the terms "immunity" and "impunity" are neither equivalent nor interchangeable, it is important to avoid that the immunity of State officials from foreign criminal jurisdiction results in impunity for the most serious crimes under international law.[903]

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899 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 14, para. 31.

900 *Ibid.*, p. 19, para. 46.

901 See conclusion (1) of Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, adopted by the Commission in 2006: "(1) *International law as a legal system*. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time". *Yearbook ... 2006*, vol. II (Part Two), chap. XII, para. 251, pp. 177–178.

902 The important role of accountability and fight against impunity have been emphasized by the General Assembly. In the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, States "commit to ensuring that impunity is not tolerated for genocide, war crimes and crimes against humanity or for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law". See General Assembly resolution 67/1 of 24 September 2012, para. 22. For its part, the Human Rights Council has affirmed the need to "ensure accountability, serve justice [and] provide remedies to victims", in the preamble of its resolution 27/3 of 25 September 2014. The principle of accountability has been also highlighted by the International Court of Justice noting that the oversight system established by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is intended "to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party" (*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 461, para. 120). The relation between immunity, on one hand, and accountability and fight against impunity, on the other hand, was pointed out by Judges Higgins, Kooijmans and Buergenthal in their separate opinion in the *Arrest Warrant* case, noting that the increasing recognition that "perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law" (*Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 85, para. 74).

903 In its judgment on the *Arrest Warrant* case, the International Court of Justice stated that "the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity.

(8) Therefore, the Commission has included several provisions in the draft articles that address: exceptions to the immunity *ratione materiae* of State officials with respect to several crimes under international law; the separation between the present draft articles and the rules applicable to international criminal tribunals; and the existence or the establishment of mechanisms for enabling the potential prosecution of State officials, either by the courts of their own State or of a third State or, where possible, by an international tribunal.

(9) Finally, the Commission has also borne in mind that, under certain circumstances, the exercise of criminal jurisdiction over officials of another State may be politically motivated or abusive, which in turn will create undesirable tension in the relations between the forum State and the State of the official. Consequently, the immunity of State officials from foreign criminal jurisdiction may contribute to the stability of international relations.

(10) Thus, the present draft articles include a set of procedural provisions and safeguards aimed at promoting trust, mutual understanding and cooperation between the forum State and the State of the official and offering safeguards against possible abuses and politicization in the exercise of criminal jurisdiction over an official of another State.

(11) These elements are present in both the content and the structure of the present draft articles and contribute to the balance of the text as a whole. The draft articles are divided into four parts dealing, respectively, with the scope of application and definitions (Part One), immunity *ratione personae* (Part Two), immunity *ratione materiae* (Part Three) and procedural provisions and safeguards (Part Four).

(12) As is usual in the work of the Commission, the draft articles contain proposals for both the codification and the progressive development of international law. Reference is made to this question as appropriate in the commentaries to the draft articles, with a view to providing States with enough information in this regard and ensuring the transparency that must govern the work of the Commission.

(13) Finally, it must be borne in mind that the Commission has not yet decided on the recommendation to be addressed to the General Assembly regarding the present draft articles, be it to commend them to the attention of States in general or to use them as a basis for the negotiation of a future treaty on the topic. As is customary, the Commission will take this decision when it adopts the draft articles on second reading, which will enable it to benefit from any comments made by States on this issue.

Part One
Introduction

Commentary

Part One, entitled "Introduction", contains provisions defining the general framework in which the draft articles apply. Draft article 1 defines the scope of the draft articles, and draft article 2 sets out the definitions of "State official" and "act performed in an official capacity", which, by their very nature, are particularly relevant for the correct understanding of the draft articles as a whole and are used throughout the text.

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons

Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility". The Court adds that "[a]ccordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances". See *Arrest Warrant of 11 April 2000* (footnote 899 above), p. 25, paras. 60 and 61.

connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

3. The present draft articles do not affect the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.

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Commentary

(1) The purpose of draft article 1 is to define the scope of the draft articles on immunity of State officials from foreign criminal jurisdiction. It incorporates in a single draft article the dual perspective, positive and negative, that determines the scope. Paragraph 1 explains the cases to which the draft articles apply, while paragraph 2 contains a "without prejudice" clause listing the situations which, under international law, are governed by special regimes that are not affected by the present draft articles. Paragraph 3 contains a clause referring to international criminal courts and tribunals, which also remain outside the scope of the draft articles. In the past, the Commission has used various techniques for defining this dual perspective of the scope of a set of draft articles,[904] but in this case it was preferable to combine both perspectives in a single draft article, since this presents the advantage of facilitating the simultaneous treatment of both perspectives of scope under a single title.

Paragraph 1

(2) Paragraph 1 establishes the scope of the draft articles in its positive dimension. To this end, in the paragraph, the Commission has decided to use the phrase "[t]he present draft articles apply to", which is the wording used recently in other draft articles adopted by the Commission that contain a provision referring to their scope.[905] On the other hand, the Commission considered that the scope of the draft articles should be defined as simply as possible, so that it could frame the rest of the draft articles and not affect or prejudge the other issues to be addressed later in other provisions. Accordingly, the Commission decided to make a descriptive reference to the scope, listing the elements comprising the title of the topic itself. For the same reason, the phrase "from the exercise of", initially proposed, has been left out of the definition of the scope. This phrase was interpreted by various members of the Commission in different and even contradictory ways, in terms of the consequences for the definition of the scope of immunity from foreign criminal jurisdiction. Account was also taken of the fact that the phrase "exercise of" is used in other draft articles. The Commission was therefore of the view that the phrase was not needed to define the general scope of the

[904] In the draft articles on jurisdictional immunities of States and their property (*Yearbook … 1991*, vol. II (Part Two), para. 28), the Commission chose to deal with the dual dimension of the scope in two separate draft articles, and this was ultimately reflected in the Convention adopted in 2004 (United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), General Assembly resolution 59/38, annex, arts. 1 and 3). On the other hand, in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975), United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87, or *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations, Vienna, 4 February–14 March 1975*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207, document A/CONF.67/16, and in the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997, United Nations, *Treaty Series*, vol. 2999, No. 52106, p. 77), the various aspects of the scope are defined in a single article, which also refers to special regimes. Although the draft articles on the expulsion of aliens, adopted by the Commission on first reading in 2014 (*Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 44–45), also dealt with the scope in a single article consisting of two paragraphs, the same draft articles include other separate provisions whose purpose is to keep certain special regimes within a specific scope.

[905] This wording has been used, for example, in draft article 1 of the draft articles on the expulsion of aliens.

draft articles and has reserved it for use in other parts of the draft articles in which it is more suitably placed.[906]

(3) Paragraph 1 covers the three elements defining the purpose of the draft articles, namely: (a) who are the persons enjoying immunity? (State officials); (b) what type of jurisdiction is affected by immunity? (criminal jurisdiction); and (c) in what domain does such criminal jurisdiction operate? (the criminal jurisdiction of another State).

(4) As to the first element, the Commission has chosen to confine the draft articles to the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of a State. In the Commission's previous work, the persons enjoying immunity have been referred to using the term "officials".[907] However, the use of this term, and its equivalents in the other language versions, has raised certain problems,[908] and it should be noted that the terms used in the various language versions are neither interchangeable nor synonymous. Nonetheless, with a view to simplifying the text, the Commission has decided to retain the term "State official" to refer in general to all persons who benefit from the immunity from foreign criminal jurisdiction contemplated in these draft articles. This term has been defined in draft article 2 (a), to whose text and commentary attention is drawn. The expression "official of another State" used in some draft articles is equivalent to the expression "State official".

(5) Secondly, the Commission has decided to confine the scope of the draft articles to immunity from criminal jurisdiction. Following its practice in other projects in which it has dealt with immunity from criminal jurisdiction, the Commission has not considered it necessary to define what immunity and criminal jurisdiction mean. However, for merely descriptive purposes, it should be noted that the present draft articles address cases in which, by virtue of immunity, criminal jurisdiction is blocked, criminal jurisdiction being the power of States to perform acts of varying nature whose ultimate purpose is to contribute to the determination of the criminal responsibility of an individual.

(6) Thirdly, the Commission decided to confine the scope of the draft articles to immunity from "foreign" criminal jurisdiction, i.e. that which reflects the horizontal relations between States. This means that the draft articles will be applied solely with respect to immunity from the criminal jurisdiction "of another State".

(7) It must be emphasized that paragraph 1 refers to "immunity … from the criminal jurisdiction of another State". The use of the word "from" creates a link between the concepts of "immunity" and "foreign criminal jurisdiction" (or jurisdiction "of another State") that must be duly taken into account. On this point, the Commission is of the view that the concepts of immunity and foreign criminal jurisdiction are closely interrelated: it is impossible to view immunity in abstract terms, without relating it to a foreign criminal jurisdiction which, although it exists, will not be exercised by the forum State precisely because of the existence of immunity. Or, as the International Court of Justice has put it, "it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction".[909]

(8) The Commission regards immunity from foreign criminal jurisdiction as being procedural in nature. Consequently, immunity from foreign criminal jurisdiction cannot constitute a means of exempting the criminal responsibility of a person from the substantive rules of criminal law, a responsibility which accordingly is preserved, even in cases where a State cannot, through the exercise of its jurisdiction, determine that such responsibility exists at a specific moment and with regard to a given person. On the contrary, immunity from

[906] See draft articles 3, 5, 7, 8, 10, 14 and 16.

[907] The words used in the various language versions are as follows: المسؤولون (Arabic), 官员 (Chinese), "officials" (English), "*représentants*" (French), *должностные лица* (Russian) and "*funcionarios*" (Spanish).

[908] Preliminary report, *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, para. 66; and second report, *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, para. 32.

[909] *Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 19, para. 46. See also the Commission's commentary to article 6 of the draft articles on jurisdictional immunities of States and their property, particularly paragraphs (1)–(3) (*Yearbook … 1991*, vol. II (Part Two), pp. 23–24).

foreign criminal jurisdiction is strictly a procedural obstacle or barrier to the exercise of a State's criminal jurisdiction against the officials of another State. This position was affirmed by the International Court of Justice in the *Arrest Warrant* case,[910] which is followed in the majority of State practice and in the literature.

Paragraph 2

(9) Paragraph 2 refers to cases in which there are special rules of international law relating to immunity from foreign criminal jurisdiction. This category of special rules has its most well-known and frequently cited manifestation in the regime of privileges and immunities granted under international law to diplomatic agents and to consular officials.[911] However, there are other examples in contemporary international law, both treaty-based and custom-based, which in the Commission's view should likewise be taken into account for the purposes of defining the scope of the present draft articles. Concerning those special regimes, the Commission considers that these are legal regimes that are well established in international law and that the present draft articles should not affect their content and application. It should be recalled that during the preparation of the draft articles on jurisdictional immunities of States and their property, the Commission acknowledged the existence of special immunity regimes, albeit in a different context, and specifically referred to them in article 3, entitled "Privileges and immunities not affected by the present articles".[912] The relationship between the regime for immunity of State officials from foreign criminal jurisdiction set out in the draft articles and the special regimes just mentioned was established by the Commission with the inclusion of a "without prejudice" clause in paragraph 2, according to which the provisions of the present draft articles are "without prejudice" to what is set out in the special regimes; here the Commission has followed the wording it used before, in the draft articles on jurisdictional immunities of States and their property.

(10) The Commission has used the term "special rules" as a synonym for the words "special regimes" in its earlier work. Although the Commission has not defined the concept of "special regime", attention should be drawn to the conclusions of the Study Group on the fragmentation of international law, particularly conclusions 2 and 3.[913] For the purposes of the present draft articles, the Commission understands "special rules" to mean those international rules, whether treaty- or custom-based, that regulate the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations. The Commission sees such "special rules" as coexisting with the regime defined in the present draft articles, the special regime being applied in the event of any conflict between the two regimes.[914] In any event, the Commission considers that the special regimes in question are only those established by "rules of international law", this reference to international law being essential for the purpose of defining the scope of the "without prejudice" clause.[915]

(11) The special regimes included in paragraph 2 relate in particular to three areas of international practice in which norms regulating immunity from foreign criminal jurisdiction

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910 *Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 25, para. 60. The Court has taken the same position regarding State immunity: see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 124, para. 58, and p. 143, para. 100.

911 See the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95, art. 31; and the Vienna Convention on Consular Relations (Vienna, 24 April 1963), *ibid.*, vol. 596, No. 8638, p. 261, art. 43.

912 *Yearbook ... 1991*, vol. II (Part Two), pp. 21–22, draft article 3 and commentary thereto.

913 *Yearbook ... 2006*, vol. II (Part Two), para. 251.

914 In its commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, the Commission referred to this aspect in the following terms: "[t]he article is intended to leave existing special regimes unaffected, especially with regard to persons connected with the missions listed" (*Yearbook ... 1991*, vol. II (Part Two), p. 22, para. (5) of the commentary). See also paragraph (1) of the commentary.

915 The Commission also included a reference to international law in the above-mentioned article 3 of the draft articles on jurisdictional immunities of States and their property. It should be noted that the Commission drew special attention to this point in its commentary to the draft article, particularly paragraphs (1) and (3) thereof.

have been identified, namely (*a*) the presence of a State in a foreign country through diplomatic missions, consular posts and special missions; (*b*) the various representational and other activities connected with international organizations; and (*c*) the presence of a State's military forces in a foreign country. Although in all three areas treaty-based norms establishing a regime of immunity from foreign criminal jurisdiction may be identified, the Commission has not thought it necessary to include in paragraph 2 an explicit reference to such international conventions and instruments.[916]

(12) The first group includes special rules relating to the immunity from foreign criminal jurisdiction of persons connected with carrying out the functions of representation, or protection of the interests of the State in another State, whether on a permanent basis or otherwise, while connected with a diplomatic mission, consular post or special mission. The Commission takes the view that the rules contained in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions,[917] as well as the relevant rules of customary international law, fall into this category.

(13) The second group includes special rules applicable to the immunity from criminal jurisdiction enjoyed by persons connected with an activity in relation to or in the framework of an international organization. In this category are included the special rules applicable to persons connected with missions to an international organization or delegations to organs of international organizations or to international conferences. [918] The Commission's understanding is that it is unnecessary to include in this group of special rules those that apply in general to the international organizations themselves. However, it considers that this category does include norms applicable to the agents of an international organization, especially in cases when the agent has been placed at the disposal of the organization by a State and continues to enjoy the status of State official during the time when he or she is acting on behalf of and for the organization. Regarding this second group of special regimes, the Commission has taken into account the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, the Convention on the Privileges and Immunities of the United Nations[919] and the Convention on the Privileges and Immunities of the Specialized Agencies,[920] as well as other treaty-based and customary norms applicable in this area.

(14) The third group of special rules includes those according immunity from criminal jurisdiction to persons connected with the military forces of a State located in another State. This category includes the whole set of rules regulating the stationing of troops in the territory of a third State, such as those included in status-of-forces agreements and those included in headquarters agreements or military cooperation accords envisaging the stationing of troops. Also included in this category are agreements made in connection with the short-term activities of military forces in a foreign State.

(15) The list of the special rules described in paragraph 2 is qualified by the words "in particular" to indicate that the clause does not exclusively apply to these three groups of special rules. In this connection, various members of the Commission drew attention to the fact that special rules in other areas may be found in practice, particularly in connection with the establishment in a State's territory of foreign institutions and centres for economic, technical, scientific and cultural cooperation, usually on the basis of specific headquarters

[916] It must be kept in mind that the Commission also did not list such conventions in the draft articles on jurisdictional immunities of States and their property. However, the commentary to draft article 3 (paragraph (2) thereof) referred to the areas in which there are such special regimes and expressly mentioned some of the conventions establishing those regimes.

[917] Convention on Special Missions (New York, 8 December 1969), United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 231.

[918] This list corresponds to the one already formulated by the Commission in draft article 3, paragraph 1 (*a*), of the draft articles on jurisdictional immunities of States and their property.

[919] Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946), United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, and vol. 90, p. 327.

[920] Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), *ibid*., vol. 33, No. 521, p. 261.

agreements. Although the Commission is aware in general terms of these special regimes, it has considered that there is no need to mention them in paragraph 2.

(16) Lastly, it should be noted that the Commission considered the possibility of including in paragraph 2 reference to the practice whereby a State unilaterally grants a foreign official immunity from foreign criminal jurisdiction. However, the Commission decided against such inclusion.

(17) On the other hand, the Commission has considered that the formulation of paragraph 2 should parallel the structure of paragraph 1. It must thus be borne in mind that the present draft articles refer to the immunity from foreign criminal jurisdiction of certain persons described as "State officials" and that, consequently, this subjective element should also be reflected in the "without prejudice" clause. This is why paragraph 2 refers expressly to "persons connected with". The phrase "persons connected with" has been used in line with the terminology in the United Nations Convention on Jurisdictional Immunities of States and Their Property (art. 3). The scope of the term "persons connected with" will depend on the content of the rules defining the special regime that applies to them; it is therefore not possible *a priori* to draw up a single definition for this category. This is also true for civilian personnel connected with the military forces of a State, who will be included in the special regime only to the extent that the legal instrument applicable in each case so establishes.

(18) The combination of the terms "persons connected with" and "special rules" is essential in determining the scope and meaning of the "without prejudice" clause in paragraph 2. The Commission considers that the persons covered in this paragraph (diplomatic agents, consular officials, members of special missions, agents of international organizations and members of the military forces of a State) are automatically excluded from the scope of the present draft articles, not by the mere fact of belonging to that category of officials, but by the fact that one of the special regimes referred to in draft article 1, paragraph 2, applies to them under certain circumstances. In such circumstances, the immunity from foreign criminal jurisdiction that these persons may enjoy under the special regimes applicable to them will not be affected by the provisions of the present draft articles.

Paragraph 3

(19) Paragraph 3 addresses the relationship between the present draft articles and the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.

(20) As pointed out in paragraph (6) above, the present draft articles address the immunity of State officials from the criminal jurisdiction of another State. As a result, issues relating to immunity before international criminal courts and tribunals remain outside the scope of the present draft articles, as such issues are governed by a legal regime of their own.

(21) However, during the Commission's work on the present topic, different questions have been raised that have a bearing on the activity of international criminal courts and tribunals, including the effect that existing international rules imposing an obligation on States to cooperate with such courts and tribunals may have on the present draft articles. Moreover, during the Commission's debates, attention has repeatedly been drawn to the need to preserve the achievements of recent decades in the field of international criminal law, especially the establishment of international criminal courts and tribunals, in particular the International Criminal Court as a permanent international criminal jurisdiction. Members of the Commission have emphasized the need for the present draft articles not to impair such achievements. For their part, some States in the Sixth Committee have also highlighted the need to preserve such achievements, so that their value and significance are not diminished as a result of the elaboration of the present draft articles.

(22) The Commission concluded that an express reference to the issue of international criminal tribunals was necessary in draft article 1, concerning the scope of the draft articles. Paragraph 3 emphasizes the separation and independence of the draft articles and the special legal regimes applicable to international criminal courts and tribunals. In so doing, the Commission does not ignore the important role that international criminal courts and tribunals are playing in international law.

(23) Paragraph 3 is inspired by article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which, under the title "Other international agreements", reads as follows: "[n]othing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements". This provision was considered an appropriate means of addressing the relationship between these draft articles and international criminal courts and tribunals. Its purpose is to preserve "the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements".

(24) The expression "the rights and obligations of States parties" refers to any of the rights and obligations under a specific international agreement establishing an international criminal court or tribunal. The Commission has preferred this wording over other proposals such as "the question of immunity" regulated in such agreements or "the rules governing the functioning of international criminal tribunals", which were considered, respectively, as being too narrow or too broad in relation to the purpose of paragraph 3 of draft article 1.

(25) The phrase "international agreements establishing international criminal courts and tribunals" refers to the international rules considered to be special legal regimes for the purpose of paragraph 3 of draft article 1, bearing in mind the objective pursued by that clause. Therefore, this phrase does not mirror the wording of article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, because the phrase "which relate to matters dealt with in the present Convention" was not sufficiently clear to reflect the relationship between the present draft articles and the legal regimes applicable to international criminal courts and tribunals; the expression "international agreements" means the constituent instrument of each international criminal tribunal, whether these agreements are concluded between States or between States and international organizations, including the Rome Statute of the International Criminal Court.[921] Nevertheless, one member of the Commission has questioned whether the term "international agreements" is adequate to refer to this type of instrument, since some international criminal tribunals, such as the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, have been created by Security Council resolutions adopted under Chapter VII of the Charter of the United Nations, while other tribunals, in particular hybrid or internationalized tribunals, have often been created by provisions of domestic law, including as a result of initiatives originating from universal or regional international organizations.

(26) Paragraph 3 ends with the phrase "as between the parties to those agreements". The intention here is to highlight that conventional legal regimes applicable to international criminal tribunals, as a matter of treaty law, apply only as between the parties to the agreement establishing a particular international criminal court or tribunal. This term does not, however, imply any statement whatsoever in relation to any other obligation that can be imposed upon States under international law, in particular by the Security Council or any other international organization.

Article 2
Definitions

For the purposes of the present draft articles:

(a) "State official" means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;

[921] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

(b) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Commentary

(1) Draft article 2 sets out the definitions of the expressions "State official" (subparagraph (a)) and "act performed in an official capacity" (subparagraph (b)), two categories that are essential for the draft articles as a whole.[922]

(2) Draft article 2 is entitled "Definitions". This title is regarded as being equivalent to "Use of terms", which has been used by the Commission in other draft articles. The use of a different title does not introduce any different meaning with regard of the nature of this provision.

Subparagraph (a)

(3) The purpose of draft article 2, subparagraph (a), is to define the persons to whom the present draft articles apply, namely "State officials". Defining the concept of "State official" facilitates an understanding of one of the normative elements of immunity: the individuals who enjoy immunity. Most members of the Commission thought it would be useful to have a definition of "State official" for the purposes of the present draft articles, given that immunity from foreign criminal jurisdiction is applicable to individuals. Some members of the Commission expressed doubts about the need to include this definition.

(4) The definition of the term "State official" contained in draft article 2, subparagraph (a), is general in nature, applicable to any person who enjoys immunity from foreign criminal jurisdiction under the present draft articles, either immunity *ratione personae* or immunity *ratione materiae*. Consequently, the nature and object of draft article 2, subparagraph (a), must not be confused with the nature and object of draft articles 3 and 5, which define who enjoys each category of immunity.[923] The persons who enjoy immunity *ratione personae* and immunity *ratione materiae* both fall within the definition of "State official", which is common to both categories.

(5) There is no general definition in international law of the term "State official" or "official", although both terms may be found in certain treaties and international instruments.[924] The term "State official", or simply "official", can mean different things in different domestic legal systems. Consequently, the definition of "State official" referred to

[922] The Commission also considered the definitions of "immunity", "criminal jurisdiction", "exercise of criminal jurisdiction" and "inviolability", which were presented by the Special Rapporteur in her second report (*Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661) and in the framework of the Drafting Committee. However, following the practice in its previous work and in the universal conventions regarding immunity, the Commission has not considered it necessary to include these definitions in draft article 2.

[923] Draft article 3 states that "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction". Draft article 5 states that "State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction".

[924] These terms are used in the following multilateral treaties: the Vienna Convention on Diplomatic Relations; the Vienna Convention on Consular Relations; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167; the Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), *ibid.*, vol. 78, No. 1021, p. 277; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid.*, vol. 1465, No. 24841, p. 85; the United Nations Convention against Corruption (New York, 31 October 2003), *ibid.*, vol. 2349, No. 42146, p. 41; the Criminal Law Convention on Corruption (Council of Europe) (Strasbourg, 27 January 1999), *ibid.*, vol. 2216, No. 39391, p. 225; the Inter-American Convention against Corruption (Caracas, 29 March 1996), E/1996/99; and the African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), *International Legal Materials*, vol. 43 (2004), p. 5. For an analysis of these instruments for the purposes of defining "State official", see the third report of the Special Rapporteur (A/CN.4/673), paras. 51–93.

in this commentary is autonomous, and must be understood to be for the purposes of the present draft articles.

(6) The definition of "State official" uses the term "individual" to indicate that the present draft articles cover only natural persons. The draft articles are without prejudice to the rules applicable to legal persons.

(7) As indicated above, the term "State official" must be understood as encompassing persons who enjoy immunity *ratione personae* and those who enjoy immunity *ratione materiae*. In this connection, it must be noted that the Commission identified the persons who enjoy immunity *ratione personae* by listing the individuals cited *eo nomine* in draft article 3, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. However, it has been decided not to mention them expressly in draft article 2, subparagraph (a), since they are deemed to be, *per se*, State officials in the sense of the present draft articles; accordingly, they need not be differentiated from other State officials for the purposes of the definition.

(8) As regards the "State officials" to whom immunity *ratione materiae* is applicable, the Commission considers that it cannot use the technique of identification *eo nomine*. In view of both the diversity of the positions of the individuals to whom immunity may apply and the variety of national legal systems that determine which persons are their officials, the Commission does not consider it possible to draw up an exhaustive list that would include all the individuals covered by immunity *ratione materiae*. For the same reasons, the Commission has also considered it neither possible nor suitable to draw up an indicative list in a draft article of the positions of those individuals to whom such immunity may apply. In both cases, the list would inevitably be incomplete, since all the positions of the State officials included in domestic legal systems cannot be catalogued and the list would have to be constantly updated and might be confusing for the government institutions responsible for applying immunity from foreign criminal jurisdiction. Accordingly, the individuals who may be termed "State officials" for the purposes of immunity *ratione materiae* must be identified on a case-by-case basis, applying the criteria included in the definition, which point to a specific link between the State and the official, namely representation of the State or the exercise of State functions.

(9) Nevertheless, by way of example, the following "State officials" have been mentioned in national and international case law regarding immunity from criminal jurisdiction and, to the extent that it may be relevant, from civil jurisdiction: a former Head of State; a Minister of Defence and a former Minister of Defence; a Vice-President and Minister of Forestry; a Minister of the Interior; an Attorney General and a General Prosecutor; a Head of National Security and a former intelligence service chief; a director of a maritime authority; an Attorney General and various lower-ranking officials of a federal State (a prosecutor and his legal assistants, a detective in the Attorney General's Office and a lawyer in a State agency); military officials of various ranks, and various members of government security forces and institutions, including a police director; border guards; the deputy director of a prison; and the head of a State's central archives.[925]

[925] See Association Fédération nationale des victimes d'accidents collectifs «FENVAC SOS Catastrophe»; *Association des familles des victimes du Joola et al.*, Court of Cassation, Criminal Chamber (France), judgment of 19 January 2010 (09-84.818) (*Bulletin des Arrêts, Chambre criminelle*, No. 1 (January 2010), p. 41); *Jones v. Saudi Arabia*, House of Lords (United Kingdom), 14 June 2006, [2006] UKHL 26 (*International Law Reports*, vol. 129, p. 744); *Agent judiciaire du Trésor v. Malta Maritime Authority et Carmel X*, Court of Cassation, Criminal Chamber (France), judgment of 23 November 2004 (*Bulletin criminel 2004*, No. 292, p. 1096); *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom, The Commissioner of the Metropolitan Police and David Jones*, Supreme Court (Ireland), judgment of 24 April 1997, [1997] 2IR 121; *Church of Scientology*, Federal Supreme Court of Germany, judgment of 26 September 1978 (*International Law Reports*, vol. 65, p. 193); *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, Section Seven, Second Investigating Chamber (France), judgment of 13 June 2013; *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland) (BB.2011.140), judgment of 25 July 2012; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords (United Kingdom), judgment of 24 March 1999

(10) Attention must be drawn to the fact that the Head of State, Head of Government and Minister for Foreign Affairs may enjoy both immunity *ratione personae* and immunity *ratione materiae* in accordance with the present draft articles. The first hypothesis is specifically envisaged in draft article 3. The second is reflected in draft article 4, paragraph 3, according to which "[t]he cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*". The conditions under which the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* or immunity *ratione materiae* will depend on the rules applicable to each of these categories of immunity that are contained in the present draft articles.[926]

(11) The definition of "State official", it must be noted, refers solely to the person who enjoys immunity, without prejudging or implying any statement about the question of what acts may be covered by immunity from foreign criminal jurisdiction. From this standpoint, the essential element to be taken into account in identifying an individual as a State official for the purposes of the present draft articles is the existence of a link between that person and the State. This link is reflected in draft article 2, subparagraph (a), through the reference to the fact that the individual in question "represents the State or … exercises State functions". This is a clear and simple statement regarding the criteria for identifying what constitutes an official, and reiterating the proposition that the Commission accepted in relation to the scope under draft article 1, namely that the present draft articles relate to the immunity from foreign criminal jurisdiction that may be enjoyed by those persons who represent or act on behalf of

(*International Legal Materials*, vol. 38 (1999), p. 581); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), judgment of 29 July 2011 ([2011] EWHC 2029 (Admin), *International Law Reports*, vol. 147, p. 633); *Public Prosecutor v. Adler et al.*, Tribunal of Milan, Fourth Criminal Division (Italy), judgment of 1 February 2010 (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 1492 (IT 2010)]); *United States of America v. Noriega*, Court of Appeals, Eleventh Circuit (United States of America), judgment of 7 July 1997, 117 F.3d 1206 (*International Law Reports*, vol. 121, p. 591); *Border Guards Prosecution*, Federal Supreme Court (Germany), judgment of 3 November 1992 (case No. 5 StR 370/92, *ibid*., vol. 100, p. 364); *In re Mr. and Mrs. Doe*, Court of Appeals, Second Circuit (United States of America), judgment of 19 October 1988 (860 F. 2d 40 (1988), *ibid*., vol. 121, p. 567); *R. v. Lambeth Justices ex parte Yusufu*, Divisional Court (United Kingdom), judgment of 8 February 1985 (*ibid*., vol. 88, p. 323); *Estate of the late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi v. the Islamic Republic of Iran, Ayatollah Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi*, Superior Court, Commercial Division (Canada), judgment of 25 January 2011; *Ali Saadallah Belhas et al. v. Moshe Ya'alon*, Court of Appeals for the District of Columbia Circuit (United States of America), judgment of 15 February 2008, 515 F.3d 1279 (*International Legal Materials*, vol. 47 (2008), p. 144); *Ra'Ed Mohamad Ibrahim Matar, et al. v. Avraham Dichter*, District Court, Southern District of New York (United States of America), judgment of 2 May 2007, 500 F. Supp. 2d 284; *Jaffe v. Miller and Others*, Ontario Court of Appeal (Canada), judgment of 17 June 1993 (*International Law Reports*, vol. 95, p. 446); and case No. 3 StR 564/19, Federal Court of Justice of Germany (*Bundesgerichtshof)*, Judgment of 28 January 2021. With respect to international courts, see *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177; *Jones and Others v. the United Kingdom*, Nos. 34356/06 and 40528/06, European Court of Human Rights, *Reports of Judgments and Decisions* (ECHR) 2014; *Prosecutor v. Tihomir Blaškić*, case No. IT-95-14-AR 108 *bis*, Judgment of 29 October 1997, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1997*, vol. 1, p. 1099; and *In the matter of an arbitration before an Arbitral Tribunal constituted under annex VII to the 1982 United Nations Convention on the Law of the Sea (the Italian Republic v. the Republic of India) concerning the "Enrica Lexie" incident*, Permanent Court of Arbitration, case No. 2015-28, award of 21 May 2020, paras. 839 and 841 (available at https://pca-cpa.org/, under "Cases"). See also the declaration of Judge Kittichaisaree in relation to case No. 26 of the International Tribunal for the Law of the Sea, *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, provisional measures, order of 25 May 2019, *Reports of Judgments, Advisory Opinions and Orders*, vol. 18 (2018–2019), p. 283. The Tribunal's case law is available from its website (www.itlos.org).

926 In this connection, it must be recalled that paragraph (15) of the commentary to draft article 4 below says: "The Commission considers that the 'without prejudice' clause simply acknowledges the application of the rules concerning immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which is developed in Part Three of the draft articles"

a State.[927] Lastly, attention must be drawn to the fact that a State official may fulfil both the requirements of "representing the State" and of "exercising State functions" or only one of them.

(12) The words "who represents the State" must be understood in a broad sense, as including any "State official" who performs representational functions. The reference to representation is of special importance with regard to the Head of State, Head of Government and Minister for Foreign Affairs because, as the commentary to draft article 3 states, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[928] However, the reference to representation of the State may also be applicable to State officials other than the so-called "troika", in conformity with the rules or acts of the national systems themselves. Consequently, whether an official is representing the State or not must be determined on a case-by-case basis. Lastly, it must be noted that the separate reference to representation of the State as one of the criteria for identifying a link with the State makes it possible to cover certain persons, such as those Heads of State who typically do not perform State functions in a narrow sense, but who most certainly represent the State.

(13) The phrase "exercises State functions" must be understood, in a broad sense, to mean the activities carried out by the State. This designation includes the legislative, judicial, executive or other functions performed by the State. Consequently, the "State official" is the individual who is in a position to perform these State functions. The reference to the exercise of State functions defines more precisely the requisite link between the official and the State, allowing for sufficient account to be taken of the fact that immunity is granted to the individual for the ultimate benefit of the State. Although various expressions, such as "elements of the governmental authority", "public functions", "sovereign authority", "governmental authority" or "inherent functions of the State" have been suggested in order to reflect this idea, the Commission has chosen the expression "State functions" as being most suitable. This choice has been made for two reasons: first, it reflects sufficiently well the link between the State and the official, which is related to the latter's duties; and second, the use of the term "functions" rather than "acts performed in the name of the State" avoids potential confusion between the subjective (the official) and objective (the act) elements of immunity. In any case, these terms should be understood in the broadest sense possible, keeping in mind that the exact content of what is understood by "State functions" depends to a large extent on the laws and organizational capacity of the State. Some Commission members stated, however, that the phrase chosen was infelicitous.

(14) It is to be noted that the use of the verbs "represents" and "exercises" in the present tense must not be interpreted as making any statement about the temporal scope of immunity. This verb tense is used in order to identify in general terms the link between the State and the official, and has no bearing on whether the State official must continue to be one at the time when immunity is claimed. The temporal scope of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles.

(15) For the purposes of defining "State official", what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State. However, the majority of Commission members are of the view that the link cannot be interpreted so broadly as to cover all *de facto* officials. The term "*de facto* official" is used to refer to many possible cases, and whether or not an individual may be considered a State official for the purposes of the present draft articles will depend on each specific case. In any event, issues relating to *de facto* officials may be more appropriately addressed in connection with a definition of "act performed in an official capacity".

(16) Given that the concept of "State official" rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the individual within his or her State is irrelevant for the sole purposes of the definition. Although, in many cases, the persons who have been recognized as State officials for the

[927] See paragraph (4) of the commentary to draft article 1 above.
[928] See paragraph (2) of the commentary to draft article 3 below.

purposes of immunity hold a high or middle rank, it is also possible to find examples of such persons at a low level of the hierarchy. Consequently, the hierarchical level is not an integral part of the definition of "State official".

(17) Lastly, it must be borne in mind that the definition of "State official" has no bearing on the type of acts covered by immunity. Consequently, the words "represent" and "exercise State functions" may not be interpreted as defining in any way the substantive scope of immunity.

(18) As to the question of terminology, to refer to persons who enjoy immunity, the Commission has decided to use the terms "مسؤول الدولة" in Arabic, "国家官员" in Chinese, "State official" in English, "*représentant de l'Etat*" in French, "должностное лицо государства" in Russian and "*funcionario del Estado*" in Spanish. Although the Commission is aware that they do not necessarily mean the same thing and are not interchangeable, it has preferred to continue using these terms, especially since the term "State official" in English, used extensively in practice, is suitable for referring to all the categories of persons to which the present draft articles refer. Thus, the fact that different terms are used in each of the language versions is of no semantic significance whatsoever. Rather, the various terms used in each of the language versions have the same meaning for the purposes of the present draft articles, which bears no relation to the meaning that each term may have in domestic legal systems.

(19) As indicated in the final sentence of this subparagraph, the term "State official" refers to both current and former State officials. This draws attention to the fact that immunity may apply to an individual who is a State official at the time when the question of immunity arises, and also to an individual who was a State official but no longer holds this position at the time when the question of immunity arises. However, it should be noted that this phrase is merely intended to explicitly mention the temporal situation in which the State official (current or former) may be in relation to the State, and that this does not preclude the possibility that a person may benefit from immunity even if he or she has ceased to be a State official. On the contrary, the inclusion of the reference to "current" and "former" State officials does not alter the temporal scope of immunity from criminal jurisdiction, which must be determined in accordance with the provisions of draft article 4, paragraph 1, with regard to immunity *ratione personae*, and draft article 6, paragraphs 2 and 3, and draft article 4, paragraph 3, with regard to immunity *ratione materiae*. Therefore, although the term "State official" includes "both current and former State officials" for the purpose of its definition, it should be noted that "former State officials" can only benefit from immunity from foreign criminal jurisdiction *ratione materiae*.

(20) In the same vein, it should be noted that the express reference to a State official, "current or former", in draft article 8 is equivalent to the phrase "to both current and former State officials", and must therefore be interpreted as indicated above. The express mention of this circumstance in draft article 8 is warranted only by the special significance that the Commission attaches to that draft article; it does not alter the scope of the immunity of State officials from foreign criminal jurisdiction, which continues to be covered by the articles cited in the preceding paragraph.

Subparagraph (b)

(21) Draft article 2, subparagraph (b), defines the concept of an "act performed in an official capacity" for the purposes of the present draft articles. Despite the doubts expressed by some members as to whether this provision was necessary, the Commission thought it would be useful to include the definition in the draft articles given the centrality of the concept of an "act performed in an official capacity" in the regime of immunity *ratione materiae*.

(22) The Commission has included in the definition contained in subparagraph (b) the elements that make it possible to identify a particular act as being an "act performed in an official capacity" for the purposes of immunity of State officials from foreign criminal jurisdiction. The Commission understands the term "acts" to refer both to actions and to omissions. Although the terminology to be employed has been the subject of debate, the Commission has chosen to use the term "acts" in line with the English text of the articles on

responsibility of States for internationally wrongful acts, article 1 of which uses the term "acts" on the understanding that an act "may consist in one or more actions or omissions or a combination of both".[929] In addition, the term "act" is commonly used in international criminal law to define conduct (active and passive) that gives rise to criminal responsibility. In the Rome Statute of the International Criminal Court, the term "acts" is used in a general sense in articles 6, 7, 8, and 8.bis, without having elicited questions about whether both actions and omissions are included under that term, since this depends solely on each specific criminal offence. The statutes of the International Criminal Tribunal for the Former Yugoslavia[930] and the International Criminal Tribunal for Rwanda[931] also use the term "act" to refer to conduct, both active and passive, constituting an offence falling within the competence of those tribunals. The term "act" has also been used in treaties that define conduct that may give rise to criminal responsibility. This is the case, for example, with the Convention on the Prevention and Punishment of the Crime of Genocide (art. II) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 1).

(23) The Commission has used the expression "in the exercise of State authority" to reflect the need for a link between the act and the State. In other words, the aim is to highlight the fact that it is not sufficient for a State official to perform an act in order for it automatically to be considered an "act performed in an official capacity". On the contrary, there must also be a direct connection between the act and the exercise of State functions and powers, since it is this connection that justifies the recognition of immunity in order to protect the principle of the sovereign equality of States.

(24) In this regard, the Commission believes that, in order for an act to be characterized as an "act performed in an official capacity", it must first be attributable to the State. However, this does not necessarily mean that only the State can be held responsible for the act. The attribution of the act to the State is a prerequisite for an act to be characterized as having been performed in an official capacity, but does not prevent the act from also being attributed to the individual, in accordance with the "single act, dual responsibility" model (double attribution) that the Commission already applied in its 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 4),[932] the articles on responsibility of States for internationally wrongful acts (art. 58)[933] and the articles on the responsibility of international organizations (art. 66).[934] Under this model, a single act can engage both the responsibility of the State and the individual responsibility of the author, especially in criminal matters.

(25) For the purpose of attributing an act to a State, it is necessary to consider, as a point of departure, the rules included in the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session. Nonetheless, it must be borne in mind that the Commission established those rules in the context and for the purposes of State responsibility. Consequently, their application to the process of attributing an act of an official to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully. For the purposes of immunity, the criteria for attribution set out in articles 7–11 of the articles on responsibility of States for internationally

[929] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 32, para. (1) of the commentary to article 1. It should be pointed out that although the Spanish and French versions use different terms to refer to the same concept (*hecho* and *fait*, respectively), in the part of the Commission's commentary cited above, the three language versions coincide.

[930] Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by the Security Council in its resolution 827 (1993) of 25 May 1993 and contained in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 [and Add.1]), annex.

[931] Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (1994) of 8 November 1994, annex.

[932] *Yearbook ... 1996*, vol. II (Part Two), p. 23.

[933] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 142. The articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session are annexed to General Assembly resolution 56/83 of 12 December 2001.

[934] *Yearbook ... 2011*, vol. II (Part Two), p. 104. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are annexed to General Assembly resolution 66/100 of 9 December 2011.

wrongful acts do not seem generally applicable. In particular, the Commission is of the view that, as a rule, acts performed by officials purely for their own benefit and in their own interest cannot be considered as acts performed in an official capacity, even though they may appear to have been performed officially. In such cases, it is not possible to identify any self-interest on the part of the State, and the recognition of immunity, whose ultimate objective is to protect the principle of the sovereign equality of States, is not justified.[935] This does not mean, however, that an unlawful act as such cannot benefit from immunity *ratione materiae*. Several courts have concluded that unlawful acts are not exempt from immunity simply because they are unlawful,[936] even in cases where the act is contrary to international law.[937]

(26) In order for an act to be characterized as having been "performed in an official capacity", there must be a special connection between the act and the State. Such a link has been defined in draft article 2 (b) using the formulation "State authority", which the Commission considered sufficiently broad to refer generally to acts performed by State officials in the exercise of their functions and in the interests of the State, and is to be understood as covering the functions set out in draft article 2 (a), which refers to any individual who "represents the State or who exercises State functions".

(27) This formulation was considered preferable to the one initially proposed ("exercising elements of the governmental authority") and to others that were successively considered by the Commission, in particular "governmental authority" and "sovereign authority". Although they all equally reflect the requirement that there must be a special connection between the act and the State, there is the difficulty that they may be interpreted as referring exclusively to a type of State activity (governmental or executive), or give rise to the added problem of having to define the elements of governmental authority or sovereignty, which would be extremely difficult and is not considered part of the Commission's mandate. In addition, it was considered preferable not to use the expression "State functions", which is used in draft article 2 (a), in order to make a clear distinction between the definitions contained in subparagraphs (a) and (b) of the draft article. In this regard, it should be recalled that the expression "State functions", together with "represents the State", was used in draft article 2

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[935] The following arguments by a court in the United States, in particular, clarify the reasons for the exclusion of *ultra vires* acts: "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do." According to that court, "[the Foreign Sovereign Immunities Act] does not immunize the illegal conduct of government officials" and thus, "[a]n official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under [the Act]" (In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others v. Estate of Marcos*, United States Court of Appeals, Ninth Circuit, Judgment of 16 June 1994, 25 F.3d 1467 (9th Cir.1994), *International Law Reports* (ILR), vol. 104, p. 119, at pp. 123 and 125). Similarly, another court concluded that *ultra vires* acts are not subject to sovereign immunity, as the perpetrators acted beyond their authority by violating the human rights of the plaintiffs: if officials commit acts that are not officially sanctioned by the State, that is, if they are not "officials acting in an official capacity for acts within the scope of their authority", they cannot benefit from immunity (In re *Jane Doe I, et al. v. Liu Qi, et al.; Plaintiff A, et al., v. Xia Deren, et al.*, United States District Court for the Northern District of California, (2004) 349 F. Supp.2d 1258 C 02-0672 CW (EMC), C 02-0695 CW (EMC)). It is noted that prior to *Samantar v. Yousuf,* 560 U.S. 305 (2010), many United States courts analysed immunity of foreign officials in civil cases by reference to the Foreign Sovereign Immunities Act. In *Samantar* the United States Supreme court held that immunity of foreign State officials was not governed by the Foreign Sovereign Immunities Act but, rather, by common law. However, previous decisions in which United States courts analysed immunity by reference to the Foreign Sovereign Immunities Act continue to offer valuable insight on the scope of such immunity, as the reasoning on which they are based remains cogent.

[936] *Jaffe v. Miller and Others*, Ontario Court of Appeal, 17 June 1993 (see footnote 925 above); *Argentine Republic v. Amerada Hess Shipping Corporation and Others*, United States Supreme Court, 23 January 1989, 488 U.S. 428, *International Law Reports*, vol. 81, p. 658; *McElhinney v. Williams*, Supreme Court of Ireland, 15 December 1995, *ibid.*, vol. 104, p. 691.

[937] *I Congreso del Partido*, House of Lords of the United Kingdom, 16 July 1981, [1983] A.C. 244, *International Law Reports*, vol. 64, p. 307. In *Jones v. Saudi Arabia*, House of Lords of the United Kingdom, 14 June 2006 (see footnote 925 above), Lord Hoffmann rejected the argument that an act contrary to *jus cogens* cannot be an official act.

(a) as a neutral term to define the link between the official and the State, without making any judgment as to the type of acts covered by immunity.[938] The use of the term "authority" rather than "functions" also has the advantage of avoiding the debate on whether or not crimes under international law are "State functions". However, one member was of the view that it would have been more appropriate to use the expression "State functions" in draft article 2 (b).

(28) The Commission did not consider it appropriate to include in the definition of an "act performed in an official capacity" a reference to the fact that the act must be criminal in nature. Its aim was to avoid a possible interpretation that any act performed in an official capacity is, by definition, of a criminal nature. In any case, the concept of an "act performed in an official capacity" must be understood in the context of the present draft articles, which concern the immunity of State officials from foreign criminal jurisdiction.

(29) Lastly, although the definition contained in draft article 2 (b) concerns an "act performed in an official capacity", the Commission considered it necessary to include in the definition an explicit reference to the author of the act; in other words, the State official. It thereby draws attention to the fact that only a State official can perform an act in an official capacity, thus reflecting the need for a link between the author of the act and the State. In addition, the reference to the State official creates a logical continuity with the definition of "State official" in draft article 2 (a).

(30) The Commission does not believe that it is possible to draw up an exhaustive list of acts performed in an official capacity. Such acts must be identified on a case-by-case basis, taking into account the criteria examined previously, namely that the act in question has been performed by a State official, is generally attributable to the State and has been performed in "the exercise of State authority". However, there are examples from judicial practice of acts or categories of acts that may be considered as having been performed in an official capacity, regardless of how the courts specifically refer to them. Such examples can help judges and other national legal practitioners to identify whether a particular act falls into this category.

(31) In general, national courts have found that the following acts fall into the category of acts performed in an official capacity: military activities or those related to the armed forces,[939] acts related to the exercise of police power,[940] diplomatic activities and those relating to foreign affairs,[941] legislative acts (including nationalization),[942] acts related to the

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[938] See paragraph (13) of the present commentary, above. In this context, the Commission has taken the view that State functions include "the legislative, judicial, executive or other functions performed by the State".

[939] *Empire of Iran*, Constitutional Court of the Federal Republic of Germany, 30 April 1963, *International Law Reports*, vol. 45, p. 57; *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes*, US 336 F 2d 354 (Second Circuit, 1964), *ibid.*, vol. 35, p. 110, *Saltany and Others v. Reagan and Others*, United States District Court for the District of Columbia, Judgment of 23 December 1988, 702 F. Supp 319, *ibid.*, vol. 80, p. 19; *Holland v. Lampen-Wolfe* (United Kingdom), [2000] 1 WLR 1573; *Lozano v. Italy*, case No. 31171/2008, Italy, Court of Cassation, Judgment of 24 July 2008 (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 1085 (IT 2008)]). The Arbitral Tribunal constituted within the Permanent Court of Arbitration to consider the *"Enrica Lexie"* case held that acts performed by Italian naval officers to protect a commercial vessel constituted an act performed in an official capacity. See *In the matter of an arbitration before an Arbitral Tribunal constituted under annex VII to the 1982 United Nations Convention on the Law of the Sea* (footnote 926 above), paras. 839 and 841.

[940] *Empire of Iran* (see footnote 939 above); *Church of Scientology*, Federal Supreme Court of Germany, 26 September 1978 (see footnote 925 above); *Saudi Arabia and Others v. Nelson*, United States Supreme Court (1993): 507 U.S. 349, *International Law Reports*, vol. 100, p. 544; *Propend Finance Pty Ltd. v. Sing*, United Kingdom, Court of Appeal, *ibid.*, vol. 111, p. 611; *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom, The Commissioner of the Metropolitan Police and David Jones*, Supreme Court of Ireland, 24 April 1997 (see footnote 925 above); *First Merchants Collection v. Republic of Argentina*, United States District Court for the Southern District of Florida, 31 January 2002, 190 F. Supp. 2d 1336 (S.D. Fla. 2002).

[941] *Empire of Iran* (see footnote 939 above); *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 939 above).

[942] *Empire of Iran* (see footnote 939 above); *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 939 above).

administration of justice,[943] administrative acts of different kinds (such as the expulsion of aliens or the flagging of vessels),[944] acts related to public loans[945] and political acts of various kinds.[946]

(32) Moreover, the immunity of State officials has been invoked before criminal courts in relation to the following acts that were claimed to be committed in an official capacity: torture, extermination, genocide, extrajudicial execution, enforced disappearance, forced pregnancy, deportation, denial of prisoner-of-war status, enslavement and forced labour, and acts of terrorism.[947] Such crimes are sometimes mentioned *eo nomine*, while in other cases the proceedings refer generically to crimes against humanity, war crimes, and serious and systematic human rights violations.[948] Courts have considered other acts committed by members of the armed forces or security services that do not fall into the aforementioned

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[943] *Empire of Iran* (see footnote 939 above); case No. 12-81.676, Court of Cassation, Criminal Chamber (France), Judgment of 19 March 2013, and case No. 13-80.158, Court of Cassation, Criminal Chamber (France), Judgment of 17 June 2014 (see www.legifrance.gouv.fr). The Swiss courts made a similar ruling in case ATF 130 III 136, which concerns an international detention order issued by a Spanish judge.

[944] *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 939 above); *Kline and Others v. Kaneko and Others*, District Court for the Southern District of New York (United States of America), 3 May 1988, US, 685 F Supp. 386 (1988), *International Law Reports*, vol. 101, p. 497; *Agent judiciaire du Trésor v. Malta Maritime Authority et Carmel X*, Court of Cassation, Criminal Chamber (France), 23 November 2004 (see footnote 925 above).

[945] *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (see footnote 939 above).

[946] *Doe I v. Israel*, US, 400 F. Supp. 2d 86, 106 (DCC 2005) (establishment of Israeli settlements in the occupied territories); *Youming Jin et al. v. Ministry of State Security et al.*, US, 557 F. Supp. 2d 131 (DDC 2008) (contracting of "thugs" to threaten members of a religious group, resulting in murders and excessive violence).

[947] In re *Rauter*, Special Court of Cassation of the Netherlands, Judgment of 12 January 1949, *International Law Reports*, vol. 16, p. 526 (crimes committed by German occupation forces in Denmark); *Attorney General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem (case No. 40/61), Judgment of 12 December 1961, and Supreme Court (sitting as a Court of Criminal Appeal), Judgment of 29 May 1962, *ibid.*, vol. 36, pp. 18 and 277 (crimes committed during the Second World War, including war crimes, crimes against humanity and genocide); *Yaser Arafat (Carnevale re. Valente — Imp. Arafat e Salah)*, Italy, Court of Cassation, Judgment of 28 June 1985, *Rivista di diritto internazionale*, vol. 69, No. 4 (1986), p. 884 (sale of weapons and collaboration with the Red Brigades on acts of terrorism); *R. v. Mafart and Prieur/Rainbow Warrior*, New Zealand, High Court, Auckland Registry, 22 November 1985, *International Law Reports*, vol. 74, p. 241 (acts carried out by members of the French armed forces and security forces to mine the ship *Rainbow Warrior*, which led to the sinking of the ship and the death of several people; these were described as terrorist acts); *Former Syrian Ambassador to the German Democratic Republic*, Federal Supreme Court of Germany, Federal Constitutional Court of Germany, Judgment of 10 June 1997, *ibid.*, vol. 115, p. 595 (the case examined legal action against a former ambassador who allegedly stored, on diplomatic premises, weapons that were later used to commit terrorist acts); *Bouterse*, R 97/163/12 Sv and R 97/176/12 Sv, Netherlands, Court of Appeal of Amsterdam, Judgment of 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266–282 (torture, crimes against humanity); *Gaddafi*, Court of Appeal of Paris, Judgment of 20 October 2000, and Court of Cassation, Judgment No. 1414 of 13 March 2001, *Revue générale de droit international public*, vol. 105 (2001) (English version reproduced in *International Law Reports*, vol. 125, pp. 490 and 508) (ordering a plane to be brought down using explosives, which caused the death of 170 people, considered as terrorism); *Hissène Habré*, Court of Appeal of Dakar (Senegal), Judgment of 4 July 2000, and Court of Cassation, Judgment of 20 March 2001, *International Law Reports*, vol. 125, pp. 571 and 577 (acts of torture and crimes against humanity); *Sharon and Yaron*, Court of Appeal of Brussels, Judgment of 26 June 2002, *ibid.*, vol. 127, p. 110 (war crimes, crimes against humanity and genocide); *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (see footnote 925 above) (torture and other crimes against humanity); case No. 3 StR 564/19, Federal Court of Justice of Germany, 28 January 2021 (see footnote 925 above) (torture as a war crime).

[948] In re *Wei Ye, Hao Wang, Does, A, B, C, D, E, F and others similarly situated v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10)*, Court of Appeals, Seventh Circuit (United States of America), judgment of 8 September 2004 (383 F.3d 620) (unlike the cases cited in footnotes 947 above and 949 below, this was a case before a civil court).

categories; such acts include ill-treatment, abuse, unlawful detention, abduction, offences against the administration of justice and other acts relating to policing and law enforcement.[949]

(33) In a number of cases, national courts have concluded that the act in question exceeded the limits of official functions, or functions of the State. For example, in a case related to the assassination of a political opponent, a court has indicated that "conduct designed to result in the assassination of an individual" is not an act covered by immunity.[950] Similarly, national courts have generally denied immunity in cases linked to corruption, whether in the form of diversion or misappropriation of public funds or money-laundering, or any other type of corruption, on the grounds that such acts "are distinguishable from the performance of State functions protected by international custom in accordance with the principles of sovereignty and diplomatic immunity"[951] and "by their nature, do not relate to the exercise of sovereignty or governmental authority, nor are they in the public interest".[952] Following the same logic, courts have not accepted that acts performed by State officials that are closely linked to a private activity and for the official's personal enrichment, not the benefit of the sovereign, are covered by immunity.[953]

(34) With regard to the examples of possible acts performed in an official capacity, special mention should be made of the way in which national courts have dealt with crimes under international law, especially torture. While in some cases they have been considered acts performed in an official capacity (although illegal or aberrations),[954] in others they have been

[949] *Border Guards Prosecution*, Federal Supreme Court of Germany, 3 November 1992 (see footnote 925 above) (death of a young German as a result of shots fired by border guards of the German Democratic Republic when he attempted to cross the Berlin Wall); *Norbert Schmidt v. The Home Secretary of the Government of the United Kingdom*, The Commissioner of the Metropolitan Police and David Jones, Supreme Court (Ireland), 24 April 1997 (see footnote 925 above) (irregular circumstances during the detention of the plaintiff by State officials); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), 29 July 2011 (see footnote 925 above) (kidnapping and unlawful detention).

[950] United States, District Court, District of Colombia, *Letelier* v. *Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), p. 673.

[951] *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, 13 June 2013 (see footnote 925 above).

[952] *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, Section Seven, Second Investigating Chamber, application for annulment, Judgment of 16 April 2015.

[953] *United States of America v. Noriega*, United States Court of Appeals, 7 July 1997 (see footnote 925 above); *Jungquist v. Sheikh Sultan Bin Khalifa al Nahyan,* United States District Court for the District of Columbia, Judgment of 20 September 1996, 94 F. Supp. 312, *International Law Reports*, vol. 113, p. 522; *Mellerio c. Isabel de Bourbon*, Court of Appeal of Paris, 3 June 1872, *Recueil général des lois et des arrêts 1872*, p. 293; *Seyyid Ali Ben Hamond, prince Raschid, c. Wiercinski*, Seine Civil Court, Judgment of 25 July 1916, *Revue de droit international privé et de droit pénal international*, vol. 15 (1919), p. 505; *Ex-roi d'Egypte Farouk c. S.A.R.L. Christian Dior*, Court of Appeal of Paris, Judgment of 11 April 1957, *Journal du droit international*, vol. 84, No. 1 (1957), pp. 716–718; *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, Judgment of 28 April 1961, *Revue générale de droit international public*, vol. 66, No. 2 (1962), p. 418 (reproduced also in *International Law Reports*, vol. 47, p. 275; In re *Estate of Ferdinand E. Marcos Human Rights Litigation; Trajano v. Marcos and Another*, United States Court of Appeals, Ninth Circuit, 21 October 1992, 978 F 2d 493 (1992), *International Law Reports*, vol. 103, p. 521; *Jimenez v. Aristeguieta et al.*, United States Court of Appeals, Fifth Circuit, 311 F 2d 547 (1962), *ibid.*, vol. 33, p. 353; *Evgeny Adamov v. Office fédéral de la justice,* Federal Tribunal of Switzerland, Judgment of 22 December 2005 (1A 288/2005) (available at http://opil.ouplaw.com, International Law in Domestic Courts [ILDC 339 (CH 2005)]); *Republic of the Philippines v. Marcos and Others*, United States Court of Appeals, Second Circuit, 26 November 1986, 806 F.2d 344, *International Law Reports*, vol. 81, p. 581; *Republic of the Philippines v. Marcos and Others (No. 2)*, United States Court of Appeals, Ninth Circuit, 4 June 1987 and 1 December 1988, 862 F.2d 1355, *ibid.*, vol. 81, p. 608; *Republic of Haiti and Others v. Duvalier and Others*, [1990] 1 QB 2002 (United Kingdom), *ibid.*, vol. 107, p. 491.

[954] *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147. Only Lord Goff believed that they were official acts that benefited from immunity. Lord Browne-Wilkinson and Lord Hutton stated that torture cannot be "a public function" or a "governmental function". Lord Goff,

qualified as *ultra vires* acts or acts that are not consistent with the nature of State functions,[955] and should therefore be excluded from the category of acts defined in this paragraph. Moreover, attention should be drawn to the fact that such different treatment of crimes under international law has arisen both in cases in which national courts have recognized immunity and in those in which they have rejected it.

(35) In any case, it should be borne in mind that the definition of an "act performed in an official capacity" set out in draft article 2 (b) refers to the distinct elements of this category of acts and is without prejudice to the question of limitations and exceptions to immunity that is addressed in draft article 7.

Part Two
Immunity *ratione personae*

Commentary

(1) Although immunity of State officials from foreign criminal jurisdiction is a single legal category, differences can be established in accordance with the different types of State officials, especially in light of the different positions that they hold within the State and the different roles that they play. The Commission has taken these circumstances into account in defining two legal regimes, which are addressed in Parts Two and Three of the draft articles under the titles "Immunity *ratione personae*" and "Immunity *ratione materiae*".

(2) Part Two of the draft articles concerns the immunity *ratione personae* of State officials from foreign criminal jurisdiction. This part sets out the normative elements defining the legal regime applicable to this type of immunity, and consists of two draft articles. Draft article 3 addresses the subjective element of immunity *ratione personae* (State officials enjoying immunity), and draft article 4 concerns the substantive element (the acts covered by immunity) and the temporal element (the time during which immunity is applicable). Both draft articles must be read together for a correct understanding of the legal regime applicable to immunity *ratione personae.*

(3) Additionally, paragraph 3 of draft article 4 defines the relationship between the immunity from jurisdiction *ratione personae* and the immunity from jurisdiction *ratione materiae* applicable to Heads of State, Heads of Government and Ministers for Foreign Affairs when they are no longer in office.

Article 3
Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Commentary

(1) Draft article 3 lists the State officials who enjoy immunity *ratione personae* from foreign criminal jurisdiction, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. The draft article confines itself to identifying the persons to whom this type of immunity applies, making no reference to its substantive scope.

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dissenting, concluded that it was a "governmental function", while similar statements were made by Lord Hope (criminal yet governmental), Lord Saville (who referred to "official torture"), Lord Millett ("public and official acts") and Lord Phillips (criminal and official). See also *Jones v. Saudi Arabia*, House of Lords (United Kingdom), 14 June 2006 (footnote 925 above) and *FF v. Director of Public Prosecutions* (*Prince Nasser* case), High Court of Justice, Queen's Bench Division, Divisional Court, Judgment of 7 October 2014, [2014] EWHC 3419 (Admin.). See also case No. 3 StR 564/19, Federal Court of Justice of Germany, 28 January 2021 (footnote 925 above).

[955] *Pinochet*, Belgium, Court of First Instance of Brussels, Judgment of 6 November 1998, *International Law Reports*, vol. 119, p. 345; *Bouterse*, Netherlands, Court of Appeal of Amsterdam, 20 November 2000 (see footnote 947 above); *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadeia (Greece), Judgment of 30 October 1997 (*American Journal of International Law*, vol. 92, No. 4 (1998), p. 765).

(2) The Commission considers that there are two reasons, one representational and one functional, for according immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.[956] Second, they must be able to discharge their functions unhindered.[957] It is irrelevant whether those officials are nationals of the State in which they hold the office of Head of State, Head of Government or Minister for Foreign Affairs.

(3) The statement that Heads of State enjoy immunity *ratione personae* is not subject to dispute, given that this is established in existing rules of customary international law. In addition, various conventions contain provisions referring directly to the immunity from jurisdiction of the Head of State. In this connection, mention should be made of article 21, paragraph 1, of the Convention on Special Missions, which expressly acknowledges that when the Head of State leads a special mission, he or she enjoys, in addition to what is granted in the Convention, the immunities accorded by international law to Heads of State on an official visit. Similarly, article 50, paragraph 1, of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refers to the other "immunities accorded by international law to Heads of State". Along the same lines, albeit in a different field, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes, in the saving clause in article 3, paragraph 2, an express reference to the immunities accorded under international law to Heads of State.

(4) The immunity from foreign criminal jurisdiction of the Head of State has also been recognized in case law at both the international and national levels. Thus, the International Court of Justice has expressly mentioned the immunity of the Head of State from foreign criminal jurisdiction in the *Arrest Warrant*[958] and *Certain Questions of Mutual Assistance in Criminal Matters*[959] cases. It must be emphasized that examples of national judicial practice, although limited in number, are consistent in showing that Heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction, both in the proceedings concerning the immunity of the Head of State and in the reasoning that such courts follow in deciding whether other State officials also enjoy immunity from criminal jurisdiction.[960]

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[956] The International Court of Justice has stated that "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 27, para. 46).

[957] See *Arrest Warrant of 11 April 2000* (footnote 899 above), pp. 21–22, paras. 53–54, in which the International Court of Justice particularly emphasized the second element with respect to the Minister for Foreign Affairs.

[958] *Arrest Warrant of 11 April 2000* (see footnote 899 above), pp. 20–21, para. 51.

[959] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 925 above), pp. 236–237, para. 170.

[960] National courts have on many occasions cited the immunity *ratione personae* from foreign criminal jurisdiction of the Head of State as grounds for their decisions on substance and their findings that criminal proceedings cannot be brought against an incumbent Head of State. In this regard, see Re *Honecker*, Federal Supreme Court, Second Criminal Chamber (Federal Republic of Germany), Judgment of 14 December 1984 (Case No. 2 ARs 252/84), reproduced in *International Law Reports*, vol. 80, pp. 365–366; *Rey de Marruecos*, National High Court (Spain), Criminal Chamber decision of 23 December 1998; *Gaddafi*, Court of Cassation, Criminal Chamber (France), 13 March 2001 (footnote 947 above); *Fidel Castro*, National High Court (Spain), plenary decision of the Criminal Chamber, 13 December 2007 (the Court had already made a similar ruling in two other cases against Fidel Castro, in 1998 and 2005); and *Case against Paul Kagame,* National High Court, Central Investigation Court No. 4 (Spain), indictment of 6 February 2008. Also in the context of criminal proceedings, but as *obiter dicta*, various courts have on numerous occasions recognized immunity *ratione personae* from foreign criminal jurisdiction in general. In those cases, the national courts have not referred to the immunity of a specific Head of State, either because the person had completed his or her term of office and was no longer an incumbent Head of State or because the person was not and had never been a Head of State. See *Pinochet (solicitud de extradición)*, National High Court, Central

(5) The Commission considers that the immunity from foreign criminal jurisdiction *ratione personae* of the Head of State is accorded exclusively to persons who actually hold that office, and that the title given to the Head of State in each State, the conditions under which he or she acquires the status of Head of State (as a sovereign or otherwise) and the individual or collegial nature of the office are irrelevant for the purposes of the present draft articles.[961]

(6) The recognition of immunity *ratione personae* in favour of the Head of Government and the Minister for Foreign Affairs is a result of the fact that, under international law, their functions of representing the State have become recognized as approximate to those of the Head of State. Examples of this may be found in the recognition of full powers for the Head of State, the Head of Government and the Minister for Foreign Affairs for the conclusion of treaties[962] and the equality of the three categories of officials in terms of their international protection[963] and their involvement in the representation of the State.[964] The immunity of Heads of Government and Ministers for Foreign Affairs has been referred to in the Convention on Special Missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and, implicitly, the

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Investigation Court No. 5 (Spain), request for extradition of 3 November 1998; *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords (United Kingdom), 24 March 1999 (footnote 925 above); *H.S.A., et al. v. S.A., et al.* (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), Judgment of 12 February 2003 (P-02-1139.F), reproduced in *International Legal Materials*, vol. 42, No. 3 (2003), pp. 596–605; *Scilingo*, National High Court, Criminal Chamber, Third Section (Spain), decision of 27 June 2003; *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola*, Court of Cassation, Criminal Chamber (France), 19 January 2010 (footnote 925 above); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), 29 July 2011 (footnote 925 above); and *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (footnote 925 above). It should be emphasized that national courts have never stated that a Head of State does not have immunity from criminal jurisdiction, and that this immunity is *ratione personae*. It must also be kept in mind that civil jurisdiction, under which there is a greater number of judicial decisions, consistently recognizes the immunity *ratione personae* from jurisdiction of Heads of State. For example, see *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al.*, Supreme Court of the State of New York (United States of America), judgment of 31 October 1988 (535 N.Y.S.2d 1258) (141 Misc.2d 787); *Mobutu v. SA Cotoni*, Civil Court of Brussels, Judgment of 29 December 1988; *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal (Switzerland), Judgment of 2 November 1989 (ATF 115 Ib 496), partially reproduced in *Revue suisse de droit international et de droit européen* (1991), pp. 534–537 (English version in *International Law Reports*, vol. 102, p. 198); *Lafontant v. Aristide*, District Court for the Eastern District of New York (United States), Judgment of 27 January 1994, 844 F. Supp. 128; *W. v. Prince of Liechtenstein*, Supreme Court (Austria), Judgment of 14 February 2001 (7 Ob 316/00x); *Tachiona v. Mugabe* ("*Tachiona I*"), District Court for the Southern District of New York (United States), Judgment of 30 October 2001 (169 F.Supp.2d 259); *Fotso v. Republic of Cameroon*, District Court of Oregon (United States), order of 22 February 2013 (6:12CV 1415-TC).

961 In this connection, the provisions of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (art. 50, para. 1) and the Convention on Special Missions (art. 21, para. 1), which refer to the case of collegial bodies acting as Head of State, are of interest. On the other hand, the Commission did not see any need to include a reference to this category in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (*Yearbook … 1972*, vol. II, document A/8710/Rev.1, pp. 312–313, para. (2) of the commentary to draft article 1), and no reference was accordingly made in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

962 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, art. 7, para. 2 (a). The International Court of Justice has made a similar statement on the capacity of the Head of State, Head of Government and Minister for Foreign Affairs to make a commitment on behalf of the State through unilateral acts (*Armed Activities on the Territory of the Congo (New Application: 2002)* (see footnote 956 above), p. 27, para. 46).

963 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 1, para. 1 (a).

964 In this connection, see the Convention on Special Missions, art. 21, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 50.

United Nations Convention on Jurisdictional Immunities of States and Their Property.[965] The inclusion of the Minister for Foreign Affairs in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, is particularly significant, since the Commission, in its own draft articles on the subject, decided not to include government officials in the list of internationally protected persons,[966] but the Minister for Foreign Affairs was nevertheless included in the final Convention adopted by States.

(7) All of the above-mentioned examples have emerged from the work of the Commission, which has on several occasions dealt with the question of whether expressly to include Heads of State, Heads of Government and Ministers for Foreign Affairs in international instruments. In this connection, it was noted that article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property included a specific mention of the Head of State while excluding any express reference to the Head of Government and Minister for Foreign Affairs. However, there is very little reason to conclude that these examples mean that in the present draft articles the Commission must treat Heads of State, Heads of Government and Ministers for Foreign Affairs differently. It is even less reasonable to conclude that the Head of Government and Minister for Foreign Affairs must be excluded from draft article 3. A number of factors must be taken into account here. First, the present draft articles refer solely to the immunity from foreign criminal jurisdiction of State officials, whereas the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character refer to all the immunities that Heads of State, Heads of Government and Ministers for Foreign Affairs may enjoy. Second, the United Nations Convention on Jurisdictional Immunities of States and Their Property refers to the immunities of States; immunity from criminal jurisdiction remains outside its scope.[967] In addition, far from rejecting the immunities that may be enjoyed by the Head of Government and the Minister for Foreign Affairs, the Commission actually recognized them, but simply did not mention these categories specifically in article 3, paragraph 2, "since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons".[968] And third, it must also be borne in mind that all the examples mentioned above preceded the judgment by the International Court of Justice in the *Arrest Warrant* case.

(8) In its judgment in the *Arrest Warrant* case, the International Court of Justice expressly stated that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other

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[965] Article 21 of the Convention on Special Missions, in addition to the Head of State, refers to the Head of Government and Minister for Foreign Affairs, although it does so in separate paragraphs (paragraph 1 refers to the Head of State and paragraph 2 refers to the Head of Government, Minister for Foreign Affairs and other persons of high rank). The same model is followed in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, which also refers to the officials mentioned in separate paragraphs. By contrast, the United Nations Convention on Jurisdictional Immunities of States and Their Property includes only a mention *eo nomine* of the Head of State (art. 3, para. 2), and the other two categories of officials must be considered as included in the concept of "representatives of the State" found in article 2, paragraph 1 (b) (iv). See paragraphs (6) and (7) of the commentary to article 3 of the articles on jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 22.

[966] *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 313, para. (3) of the commentary to article 1. It must be kept in mind that the Commission decided not to make this reference because it could not be based upon any "broadly accepted rule of international law", but it did acknowledge that "[a] cabinet officer would, of course, be entitled to special protection whenever he was in a foreign State in connexion with some official function". (This sentence is included in both the English and French versions of the commentary, but not in the Spanish version.)

[967] The statement that the Convention "does not cover criminal proceedings" was proposed by the Ad Hoc Committee set up on the subject by the General Assembly and was ultimately included in paragraph 2 of General Assembly resolution 59/38 of 2 December 2004, by which the Convention was adopted.

[968] Para. (7) of the commentary to article 3 (*Yearbook ... 1991*, vol. II (Part Two), p. 22).

States, both civil and criminal".[969] This statement was later reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[970] Both of these judgments were discussed extensively by the Commission, particularly with regard to the Minister for Foreign Affairs. Members generally expressed the view that the *Arrest Warrant* case reflects the current state of international law and that it must accordingly be concluded that there is a customary rule under which the immunity from foreign criminal jurisdiction *ratione personae* of the Minister for Foreign Affairs is recognized. In the view of these members, the position of the Minister for Foreign Affairs and the special functions he or she carries out in international relations constitute the basis for the recognition of such immunity from foreign criminal jurisdiction. However, some members of the Commission pointed out that the Court's judgment did not constitute sufficient grounds for concluding that a customary rule existed, as it did not contain a thorough analysis of the practice and several judges expressed opinions that differed from the majority view.[971] One of those members nevertheless said that, in view of the fact that the Court's judgment in that case has not been opposed by States, the absence of a customary rule does not prevent the Commission from including Ministers for Foreign Affairs among the persons enjoying immunity *ratione personae* from foreign criminal jurisdiction, as a matter of progressive development of international law.

(9) As to the practice of national courts, the Commission has also found that, while there are very few rulings on the immunity *ratione personae* from foreign criminal jurisdiction of the Head of Government and almost none in respect of the Minister for Foreign Affairs, the national courts that have had occasion to comment on this subject have nevertheless always recognized that those high-ranking officials do have immunity from foreign criminal jurisdiction during their term of office.[972]

(10) As a result of the discussion, the Commission found that there are sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction. Consequently, it has been decided to include them in draft article 3.

(11) The Commission has also considered whether other State officials could be included in the list of the persons enjoying immunity *ratione personae*. This has been raised as a possibility by some members of the Commission in light of the evolution of international relations, particularly the fact that high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs are becoming increasingly involved in international forums and making frequent trips outside the national territory. Some members of the Commission have supported the view that other high-ranking officials should be included in draft article 3 with a reference to the *Arrest Warrant* case, stating that the use of the words "such as" should be interpreted to extend the regime of immunity *ratione personae* to high-ranking State officials, other than the Head of State, Head of Government and Minister for Foreign Affairs, who have major responsibilities within the State and who are involved in representation of the State in the fields of their activity. In this connection, some

969 *Arrest Warrant of 11 April 2000* (see footnote 899 above), pp. 20–21, para. 51.

970 *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 925 above), pp. 236–237, para. 170.

971 See in particular, in the *Arrest Warrant of 11 April 2000* case (footnote 899 above), the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal; the dissenting opinion of Judge Al-Khasawneh; and the dissenting opinion of Judge *ad hoc* Van den Wyngaert.

972 With regard to recognition of the immunity from foreign criminal jurisdiction of the Head of Government and the Minister for Foreign Affairs, see the following cases, both criminal and civil, in which national courts have made statements on this subject, either as the grounds for decisions on substance or as *obiter dicta*: *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, 28 April 1961 (footnote 953 above) (implicitly recognizes, *a contrario*, the immunity of a Minister for Foreign Affairs); *Chong Boon Kim v. Kim Yong Shik and David Kim*, Circuit Court of the First Circuit, State of Hawaii (United States), Judgment of 9 September 1963, reproduced in *American Journal of International Law*, vol. 58 (1964), pp. 186–187; *Saltany and Others v. Reagan and Others*, United States District Court for the District of Columbia, 23 December 1988 (footnote 939 above); *Tachiona v. Mugabe ("Tachiona I")*, District Court for the Southern District of New York (United States), 30 October 2001 (footnote 960 above); *H.S.A., et al. v. S.A., et al.* (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), 12 February 2003 (footnote 960 above).

members of the Commission have suggested that immunity *ratione personae* is enjoyed by a minister of defence or a minister of international trade. Other members of the Commission, however, see the use of the words "such as" as not widening the circle of the persons who enjoy this category of immunity, since the Court uses the words in the context of a specific dispute, the subject of which is the immunity from foreign criminal jurisdiction of a Minister for Foreign Affairs. Lastly, several members of the Commission have drawn attention to the difficulty inherent in determining which persons should be deemed to be "other high-ranking officials", since this will depend to a large extent on each country's organizational structure and method of conferring powers, which differ from one State to the next.[973]

(12) In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice reverted to the subject of the immunity of high-ranking State officials other than the Head of State, Head of Government and Minister for Foreign Affairs. The Court dealt separately with the immunity of the Head of State of Djibouti and of the two other high-ranking officials, namely the Attorney General (*procureur de la République*) and the Head of National Security. With regard to the Head of State, the Court made a very clear pronouncement that in general, he or she enjoys immunity from criminal jurisdiction *ratione personae*, although that was not applicable in the specific case, since the invitation to testify issued by the French authorities was not a measure of constraint.[974] With regard to the other high-ranking officials, the Court stated that the acts attributed to them were not carried out within the scope of their duties;[975] it considered that Djibouti did not make it sufficiently clear whether it was claiming State immunity, personal immunity or some other type of immunity; and it concluded that "[t]he Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case".[976]

(13) In national judicial practice, a number of decisions deal with the immunity *ratione personae* from foreign criminal jurisdiction of other high-ranking officials. However, the decisions in question are not conclusive. While some of the decisions are in favour of the immunity *ratione personae* of high-ranking officials such as the minister of defence or minister of international trade,[977] in others, the national courts found that the person on trial

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[973] This problem has already been raised by the Commission itself, in paragraph (7) of its commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), p. 22. The Commission drew attention to the same problems in paragraph (3) of the commentary to article 1 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons (*Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 313) and in paragraph (3) of the commentary to article 21 of the draft articles on special missions (*Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359).

[974] See *Certain Questions of Mutual Assistance in Criminal Matters* (footnote 925 above), pp. 236–240, paras. 170–180.

[975] *Ibid.*, p. 243, para. 191.

[976] *Ibid.*, pp. 243–244, para. 194. See, in general, paragraphs 181–197, *ibid.*, pp. 240–244.

[977] In this connection, see the case Re *General Shaul Mofaz* (Minister of Defence of Israel), Bow Street Magistrates' Court (United Kingdom), Judgment of 12 February 2004, reproduced in International and Comparative Law Quarterly, vol. 53, Issue 3 (2004), p. 771; and the case Re *Bo Xilai* (Minister for Commerce and International Trade of China), Bow Street Magistrates' Court, Judgment of 8 November 2005 (reproduced in *International Law Reports*, vol. 128, p. 713), in which the immunity of Mr. Bo Xilai is acknowledged, not just because he was considered to be a high-ranking official, but particularly because he was on special mission in the United Kingdom. A year later, in a civil case, the United States executive branch recognized Mr. Bo Xilai's immunity because he was on special mission in the United States: *Suggestion of Immunity and Statement of Interest of the United States*, District Court for the District of Columbia, 24 July 2006 (Civ. No. 04-0649): see United States, District Court for the District of Columbia, *Weixum* et al. v. *Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008) (deferring to the executive branch's position). In the *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola* case, Court of Cassation, Criminal Chamber (France), 19 January 2010 (see footnote 925 above), the Court acknowledged in general terms that an incumbent minister of defence enjoys immunity *ratione personae* from foreign criminal jurisdiction, but in the specific case recognized only immunity *ratione materiae*, since the

did not enjoy immunity, either because he or she was not a Head of State, Head of Government or Minister for Foreign Affairs or because he or she did not belong to the narrow circle of officials who deserve such treatment,[978] which illustrates the major difficulty involved in identifying the high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs who can indisputably be deemed to enjoy immunity *ratione personae*. It should also be pointed out, however, that in some of these decisions, the immunity from foreign criminal jurisdiction of a high-ranking official is analysed from various perspectives (immunity *ratione personae*, immunity *ratione materiae*, State immunity, immunity deriving from a special mission), reflecting the uncertainty in determining precisely what immunity from foreign criminal jurisdiction might be enjoyed by

person on trial no longer held that office. In the *A. c. Ministère public de la Confédération* case, Federal Criminal Court, Switzerland, 25 July 2012 (see footnote 925 above), the Tribunal stated in general that an incumbent minister of defence enjoyed immunity *ratione personae* from foreign criminal jurisdiction, but in the case in question, it did not recognize immunity because Mr. Nezzar had completed his term of office, and the acts carried out constitute international crimes, depriving him also of immunity *ratione materiae.*

[978] An example of this is the case of *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), Judgment of 29 July 2011 (see footnote 925 above), in which the Court admitted, based on the International Court of Justice judgment in the *Arrest Warrant* case (see footnote 909 above), that "in customary international law certain holders of high-ranking office are entitled to immunity *ratione personae* during their term of office" (para. 55) as long as they belong to a narrow circle of specific individuals because "it must be possible to attach to the individual in question a similar status" (para. 59) to that of the Head of State, Head of Government and Minister for Foreign Affairs referred to in the above-mentioned judgment. After analysing the functions carried out by Mr. Khurts Bat, the Court concluded that he "falls outwith that narrow circle" (para. 61). Earlier, the Paris Court of Appeal also failed to recognize the immunity of Mr. Ali Ali Reza because, although he was Minister of State of Saudi Arabia, he was not the Minister for Foreign Affairs (see *Ali Ali Reza v. Grimpel*, Court of Appeal of Paris, 28 April 1961 (footnote 953 above)). In the *United States of America v. Noriega* case (see footnote 925 above), the Court of Appeals for the Eleventh Circuit, in its judgment of 7 July 1997 (appeals Nos. 92-4687 and 96-4471), stated that Mr. Noriega, former Commander in Chief of the Armed Forces of Panama, could not be included in the category of persons who enjoy immunity *ratione personae*, dismissing Mr. Noriega's allegation that at the time of the events, he had been Head of State, or *de facto* leader, of Panama. Another court, in the *Republic of the Philippines v. Marcos* case, District Court for the Northern District of California, Judgment of 11 February 1987 (665 F. Supp. 793), indicated that the Attorney General of the Philippines did not enjoy immunity *ratione personae*. In the *Fotso v. Republic of Cameroon* case (see footnote 960 above), the executive branch informed the Court that the President of Cameroon enjoyed immunity as a sitting Head of State, and the case was dismissed. United States, District Court, District of Oregon, *Fotso* v. *Republic of Cameroon*, 25 January 2013, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 25424, at *2–6 (D. Ore. Jan. 25, 2013). The executive branch did not address the immunity of the Minister of Defence and the Secretary of State for Defence, but the court later found that those officials enjoyed immunity, given that they "acted in their official capacities." United States, District Court, District of Oregon, *Fotso* v. *Republic of Cameroon*, 16 May 2013, No. 6:12-cv-1415-TC, 2013 U.S. Dist. LEXIS 83948, at*3, *16–21 (D. Ore. May 16, 2013). It should be kept in mind that the two cases previously cited involved the exercise of civil jurisdiction. It must also be noted that on some occasions, national courts have not recognized the immunity from jurisdiction of persons holding high-ranking posts in constituent units within a federal State. In this connection, see the following cases: *R. (on the application of Diepreye Solomon Peter Alamieyeseigha) v. The Crown Prosecution Service*, Queen's Bench Division (Divisional Court) (United Kingdom), Judgment of 25 November 2005 ([2005] EWHC 2704 (Admin)), in which the Court did not recognize the immunity of the Governor and Chief Executive of Bayelsa State in the Federal Republic of Nigeria; and *Public Prosecutor (Tribunal of Naples) v. Milo Djukanovic*, Court of Cassation, Third Criminal Section (Italy), Judgment of 28 December 2004 (Rivista di diritto internazionale, vol. 89 (2006), p. 568), in which the Court denied immunity to the President of Montenegro before it became an independent State. Finally, in *Evgeny Adamov v. Office fédéral de la justice*, Federal Tribunal of Switzerland, 22 December 2005 (see footnote 953 above), the Tribunal denied immunity to a former Minister of Atomic Energy of the Russian Federation in an extradition case; however, it acknowledged in an *obiter dictum* that it was possible that unspecified high-ranking officials could enjoy immunity.

high-ranking officials other than the Head of State, Head of Government and Minister for Foreign Affairs.[979]

(14) On another level, it must be recalled that the Commission has already referred to the immunity of other high-ranking officials in its draft articles on special missions and its draft articles on the representation of States in their relations with international organizations.[980] It must be recalled that these instruments only establish a regime under which such persons continue to enjoy the immunities accorded to them under international law beyond the framework of those instruments. However, neither in the text of the draft articles nor in the Commission's commentaries thereto is it clearly indicated what these immunities are and whether they do or do not include immunity from foreign criminal jurisdiction *ratione personae*. It must also be emphasized that although these high-ranking officials may be deemed to be included in the category of "representatives of the State" mentioned in article 2, paragraph 1 (b) (iv), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, that instrument – as previously mentioned – does not apply to "criminal proceedings". Nevertheless, some members of the Commission stated that high-ranking officials do benefit from the immunity regime of special missions, including immunity from foreign criminal jurisdiction, when they are on an official visit to a third State as part of their fulfilment of the functions of representing the State in the framework of their substantive duties. It was said that this offers a means of ensuring the proper fulfilment of the sectoral functions of this category of high-ranking officials at the international level.

(15) In view of the foregoing, the Commission considers that "other high-ranking officials" do not enjoy immunity *ratione personae* for the purposes of the present draft articles, but that this is without prejudice to the rules pertaining to immunity *ratione materiae*, and on the understanding that when they are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.

(16) The phrase "from the exercise of" has been used in the draft article with reference both to immunity *ratione personae* and to foreign criminal jurisdiction. The Commission decided not to use the same phrase in draft article 1 (Scope of the present draft articles) so as not to prejudge the substantive aspects of immunity, in particular its scope, that will be taken up in other draft articles.[981] In the present draft article, the Commission has decided to retain the phrase "from the exercise of," since it illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the

[979] The decision in the *Khurts Bat v. Investigating Judge of the German Federal Court* case (see footnote 925 above) is a good example of this. In the *Association Fédération nationale des victimes d'accidents collectifs*; *Association des familles des victimes du Joola* case, Court of Cassation, Criminal Chamber (France), 19 January 2010 (see footnote 925 above), the Court ruled simultaneously, and without sufficiently differentiating its ruling, on immunity *ratione personae* and immunity *ratione materiae*. In the *A. c. Ministère public de la Confédération* case, Federal Criminal Court (Switzerland), 25 July 2012 (see footnote 925 above), after making a general statement about immunity *ratione personae*, the Court also considered whether immunity *ratione materiae* or the diplomatic immunity claimed by the person concerned could be applied. The arguments used by national courts in other cases are even more imprecise, as in the case of *Kilroy v. Windsor*, District Court for the Northern District of Ohio, Eastern Division, which, in its judgment of 7 December 1978 in a civil case (Civ. No. C-78-291), recognized the immunity *ratione personae* of the Prince of Wales because he was a member of the British royal family and was heir apparent to the throne, but also because he was on official mission to the United States. Noteworthy in the *Bo Xilai* cases was the fact that, while both the British and United States courts recognized the immunity from jurisdiction of the Chinese Minister for Commerce, they did so because he was on an official visit and enjoyed the immunity derived from special missions.

[980] Draft articles on the representation of States in their relations with international organizations, adopted by the Commission at its twenty-third session, *Yearbook ... 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284. On other occasions the Commission has used the expressions "*personnalité officielle*" ("official") (draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, art. 1, *Yearbook ... 1972*, vol. II, document A/8710/Rev.1) and "other persons of high rank" (draft articles on special missions, art. 21, *Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 359).

[981] See above, paragraph (2) of the commentary to draft article 1.

immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[982]

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Commentary

(1) Draft article 4 deals with the scope of immunity *ratione personae* from both the temporal and material standpoints. The scope of immunity *ratione personae* must be understood by looking at the temporal aspect (para. 1) in conjunction with the material aspect (para. 2). Although each of these aspects is conceptually distinct, the Commission has chosen to cover them in a single article, since this offers a more comprehensive view of the meaning and scope of the immunity enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs. The Commission has decided to cover the temporal aspect first, since this gives a better understanding of the scope of immunity *ratione personae*, which is limited to a specific period of time.

(2) With regard to the temporal scope of immunity *ratione personae*, the Commission has thought it necessary to include the adverb "only" so as to emphasize the point that this type of immunity applies to Heads of State, Heads of Government and Ministers for Foreign Affairs exclusively during the period when they hold office. This is consistent with the very reason for according such immunity, which is the special position held by such officials within the State's organizational structure and which, under international law, places them in a special situation of having a dual representational and functional link to the State in the ambit of international relations. Consequently, immunity *ratione personae* loses its significance when the person enjoying it ceases to hold one of those posts.

(3) This position has been upheld by the International Court of Justice, which stated in the *Arrest Warrant* case that "after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity".[983] Although the Court was referring to the Minister for Foreign Affairs, the same reasoning applies, *a fortiori*, to the Head of State and the Head of Government. Moreover, the limitation of immunity *ratione personae* to the period of time in which the persons enjoying such immunity hold office is also recognized in the conventions establishing special regimes of immunity *ratione personae*, particularly the Vienna Convention on Diplomatic Relations and the Convention on Special Missions.[984] The Commission itself, in its commentaries to the draft articles on jurisdictional immunities of States and their property, stated that "[t]he immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated".[985] The strict

[982] See *Arrest Warrant of 11 April 2000* (footnote 899 above), p. 25, para. 60; and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 910 above), p. 124, para. 58.

[983] *Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 25, para. 61.

[984] Vienna Convention on Diplomatic Relations, art. 39, para. 2; and Convention on Special Missions, art. 43, para. 2.

[985] It added: "All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have

temporal scope of immunity *ratione personae* is also confirmed by various national court decisions.[986]

(4) Consequently, the Commission considers that after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. The Commission has not thought it necessary to indicate the specific criteria to be taken into account in order to determine when the term of office of the persons enjoying such immunity begins and ends, since this depends on each State's legal order, and practice in this area varies.

(5) During – and only during – the term of office, immunity *ratione personae* extends to all the acts carried out by the Head of State, Head of Government and Minister for Foreign Affairs, both those carried out in a private capacity and those performed in an official capacity. In this way, immunity *ratione personae* is configured as "full immunity"[987] with reference to any act carried out by any of the individuals just mentioned. This configuration reflects State practice.[988]

(6) As the International Court of Justice stated in the *Arrest Warrant* case, with particular reference to a Minister for Foreign Affairs, extension of immunity to acts performed in both a private and an official capacity is necessary to ensure that the persons enjoying immunity

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relinquished their posts" (*Yearbook ... 1991*, vol. II (Part Two), p. 18, paragraph (19) of the commentary to draft article 2, para. 1 (b) (v).

986 Such decisions have often arisen in the context of civil cases, where the same principle of a temporal limitation for the immunity applies. See, for example, *Mellerio c. Isabel de Bourbon*, Court of Appeal of Paris, 3 June 1872 (footnote 953 above); *Seyyid Ali Ben Hamond, prince Raschid, c. Wiercinski*, Seine Civil Court, 25 July 1916 (footnote 953 above); *Ex-roi d'Egypte Farouk c. S.A.R.L. Christian Dior*, Court of Appeal of Paris, 11 April 1957 (footnote 953 above); *Société Jean Dessès c. prince Farouk et dame Sadek,* Tribunal de Grande Instance de la Seine, 12 June 1963, reproduced in *Revue critique de droit international privé* (1964), p. 689 (English version reproduced in *International Law Reports*, vol. 65, pp. 37–38); In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others v. Estate of Marcos*, United States Court of Appeals, 16 June 1994 (footnote 935 above). A British court recently found that the former King of Spain, Juan Carlos de Borbón y Borbón, has no longer enjoyed immunity *ratione personae* since his abdication. See *Corinna Zu Sayn-Wittgenstein-Sayn v. HM Juan Carlos Alfonso Víctor María de Borbón y Borbón*, High Court of Justice, Queen's Bench Division (United Kingdom), Judgment of 24 March 2022, [2022] EWHC 668 (QB), para. 58. In the context of criminal cases, see *Pinochet*, National High Court, Central Investigation Court No. 5 (Spain), request for extradition of 3 November 1998 (footnote 960 above).

987 The International Court of Justice refers to the material scope of immunity *ratione personae* as "full immunity" (*Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 22, para. 54). The Commission itself, for its part, has stated with reference to the immunity *ratione personae* of diplomatic agents that "[t]he immunity from criminal jurisdiction is complete" (*Yearbook ... 1958*, vol. II, document A/3859, p. 98, paragraph (4) of the commentary to article 29 of the draft articles on diplomatic intercourse and immunities).

988 See, for example, *Arafat e Salah*, Court of Cassation (Italy), 28 June 1985 (footnote 947 above); *Ferdinand et Imelda Marcos c. Office fédéral de la police*, Federal Tribunal (Switzerland), 2 November 1989 (footnote 960 above); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others – Ex Parte Pinochet*, House of Lords (United Kingdom), 24 March 1999 (footnote 925 above), at p. 592; *Gaddafi*, Court of Appeal of Paris, 20 October 2000 (footnote 947 above) (English version in *International Law Reports*, vol. 125, p. 490, at p. 509); *H.S.A., et al. v. S.A., et al*. (indictment of Ariel Sharon, Amos Yaron and others), Court of Cassation (Belgium), Judgment of 12 February 2003 (footnote 960 above), at p. 599; *Issa Hassan Sesay a.k.a. Issa Sesay, Allieu Kondewa, Moinina Fofana v. President of the Special Court, Registrar of the Special Court, Prosecutor of the Special Court, Attorney-General and Minister of Justice*, Supreme Court of Sierra Leone, Judgment of 14 October 2005 (S.C. No. 1/2003); and *Case against Paul Kagame*, National High Court, Central Investigation Court No. 4 (Spain), indictment of 6 February 2008 (footnote 960 above), pp. 156–157. Among more recent cases, see *Association Fédération nationale des victimes d'accidents collectifs; Association des familles des victimes du Joola*, Court of Appeal of Paris, Investigating Chamber, Judgment of 16 June 2009, confirmed by the Court of Cassation, Judgment of 19 January 2010 (footnote 925 above); *Khurts Bat v. Investigating Judge of the German Federal Court*, Administrative Court, High Court of Justice (United Kingdom), 29 July 2011 (footnote 925 above), para. 55; and *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (footnote 925 above), legal ground No. 5.3.1. See also *Teodoro Nguema Obiang Mangue et autres*, Court of Appeal of Paris, 13 June 2013 (footnote 925 above).

ratione personae are not prevented from exercising their specific official functions, since "[t]he consequences of such impediment to the exercise of those official functions are equally serious … regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity".[989] Thus, "no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity'".[990] The same reasoning must apply, *a fortiori*, to the Head of State and Head of Government.

(7) The fullness of immunity *ratione personae* is also reflected in the present draft articles, which do not establish any limitation or exception applicable to this type of immunity, in contrast to the case of immunity *ratione materiae* by virtue of draft article 7.

(8) As regards the terminology used to refer to acts covered by immunity *ratione personae*, it must be borne in mind that no single, uniform wording is actually in use. For example, the Vienna Convention on Diplomatic Relations makes no express distinction between acts carried out in a private or official capacity in referring to acts to which the immunity from criminal jurisdiction of diplomatic agents extends, although it is understood to apply to both categories.[991] Moreover, the terminology in other instruments, documents and judicial decisions, as well as in the literature, also lacks consistency, with the use, among others, of the expressions "official acts and private acts", "acts performed in the exercise of their functions", "acts linked to official functions" and "acts carried out in an official or private capacity". In the present draft article, the Commission has found it preferable to use the phrase "acts performed, whether in a private or official capacity", following the wording used by the International Court of Justice in the *Arrest Warrant* case.

(9) The definition of an "act performed in an official capacity" is set out in draft article 2, subparagraph (b). The Commission has not considered it necessary to define what is meant by "act performed in a private capacity", as this notion is residual in nature. As a result, it must be understood by default that any act not performed in an official capacity has been performed in a private capacity.

(10) The Commission has used the term "act" in the same sense and for the same reasons explained in the commentary to draft article 2, subparagraph (b), which contains the definition of "act performed in an official capacity".

(11) The acts to which immunity *ratione personae* extends are those that a Head of State, Head of Government or Minister for Foreign Affairs has carried out during or prior to his or her term of office. The reason for this relates to the purpose of immunity *ratione personae*, which is both to protect the sovereign equality of States and to guarantees that the persons enjoying this type of immunity can perform their functions of representation of the State unimpeded throughout their term of office. In this sense, there is no need for further clarification regarding the applicability of immunity *ratione personae* to the acts performed by such persons throughout their term of office. As regards acts performed prior to the term of office, it must be noted that immunity *ratione personae* applies only if the criminal jurisdiction of a foreign State is to be exercised during the term of office of the Head of State, Head of Government or Minister for Foreign Affairs. This is because, as the International Court of Justice stated in the *Arrest Warrant* case, "no distinction can be drawn … between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether … the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office."[992]

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989 *Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 22, para. 55.

990 *Ibid*.

991 This is the conclusion to be drawn from reading article 31, paragraph 1, in conjunction with article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations. Articles 31, paragraph 1, and 43, paragraph 2, of the Convention on Special Missions must be construed in the same way.

992 *Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 22, para. 55.

(12) In any event, it must be noted that, as the Court also stated in the same case, immunity *ratione personae* is procedural in nature and must be interpreted, not as exonerating a Head of State, Head of Government or Minister for Foreign Affairs from criminal responsibility for acts committed during or prior to his or her term of office, but solely as suspending the exercise of foreign criminal jurisdiction during the term of office of those high-ranking officials.[993] Consequently, when the term of office ends, the acts carried out during or prior to the term of office cease to be covered by immunity *ratione personae* and may, in certain cases, be subject to the criminal jurisdiction that cannot be exercised during the term of office.

(13) Lastly, it should be noted also that immunity *ratione personae* does not in any circumstances apply to acts carried out by a Head of State, Head of Government or Minister for Foreign Affairs after his or her term of office. Since they are now considered a "former" Head of State, Head of Government or Minister for Foreign Affairs, such immunity would have ceased when the term of office ends.

(14) Paragraph 3 addresses what happens with respect to acts carried out in an official capacity while in office by the Head of State, Head of Government or Minister for Foreign Affairs after his or her term of office ends. Paragraph 3 proceeds from the principle that immunity *ratione personae* ceases after the term of office ends. Consequently, immunity *ratione personae* no longer exists after the term of office ends. Nevertheless, it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her term of office, have carried out acts in an official capacity which do not lose that quality merely because the term of office has ended and may accordingly be covered by immunity *ratione materiae*. This matter has not been disputed in substantive terms, although it has been expressed variously in State practice, treaty practice and judicial practice.[994]

(15) In order to address these problems, paragraph 3 sets forth a "without prejudice" clause on the potential applicability of immunity *ratione materiae* to such acts. This does not mean that immunity *ratione personae* is prolonged past the end of the term of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* which applies automatically by virtue of paragraph 3. The Commission considers that the "without prejudice" clause simply acknowledges the application of the rules concerning immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs. Paragraph 3 does not prejudge the content of the immunity *ratione materiae* regime, which is developed in Part Three of the draft articles.

Part Three
Immunity *ratione materiae*

Commentary

(1) Part Three of the present draft articles concerns immunity *ratione materiae* from foreign criminal jurisdiction. Immunity from jurisdiction *ratione materiae* is applicable to all State officials, current or former, including those who previously enjoyed immunity *ratione personae* as a Head of State, Head of Government or Minister for Foreign Affairs but are no longer in office.

(2) Part Three consists of three draft articles that define the normative elements of the legal regime applicable to immunity from jurisdiction *ratione materiae*. Draft article 5

[993] "Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility" (*ibid.*, p. 25, para. 60).

[994] Thus, for example, with reference to the immunity of members of diplomatic missions, the Vienna Convention on Diplomatic Relations expressly states that "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist" (art. 39, para. 2); the formulation is repeated in the Convention on Special Missions (art. 43, para. 1). In the judicial practice of States, this has been expressed in a wide variety of ways: reference is sometimes made to "residual immunity", the "continuation of immunity in respect of official acts" or similar wording. On this aspect, see the analysis by the Secretariat in its 2008 memorandum (A/CN.4/596 and Corr.1, available from the Commission's website, documents of the sixtieth session, paras. 137 *et seq.*).

identifies the subjective element of immunity (State officials enjoying immunity). Draft article 6 is focused on the material element (acts covered by immunity) and the temporal element (duration of immunity). Draft article 7 defines a limitation or exception to immunity linked to the alleged commission of crimes under international law. Finally, the draft articles contain an annex that lists a number of treaties as references for identifying the crimes under international law enumerated in draft article 7. The annex must therefore be read in conjunction with the present Part Three.

(3) Additionally, paragraph 3 of draft article 6 defines the relationship between immunity *ratione personae* and the immunity *ratione materiae* that applies to Heads of State, Heads of Government and Ministers for Foreign Affairs after their term of office has ended.

Article 5
Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Commentary

(1) Draft article 5 is the first of the draft articles on immunity *ratione materiae* and is intended to define the subjective scope of this category of immunity from foreign criminal jurisdiction. Consequently, this draft article parallels draft article 3, on persons enjoying immunity *ratione personae*. It has the same structure, and it uses, *mutatis mutandis*, the same wording and the terminology already agreed on by the Commission concerning the latter draft article. There is no list of actual persons who enjoy immunity; instead, in the case of immunity *ratione materiae*, they have been referred to as "State officials acting as such".

(2) The expression "State officials", as used in this draft article, is to be understood in the sense given to it in draft article 2, subparagraph (a), namely: "any individual who represents the State or who exercises State functions". In contrast to the situation with persons enjoying immunity *ratione personae*, the Commission did not consider it possible, in the present draft articles, to draw up a list of persons enjoying immunity *ratione materiae*. Rather, the persons in this category must be identified on a case-by-case basis, by applying the criteria set out in draft article 2, subparagraph (a), which highlight the existence of a link between the official and the State. The commentary to draft article 2, subparagraph (a), must be duly kept in mind for the purposes of the present draft article.[995]

(3) The phrase "acting as such" refers to the official nature of the acts of the officials, emphasizing the functional nature of immunity *ratione materiae* and establishing a distinction from immunity *ratione personae*. In view of the functional nature of immunity *ratione materiae*, some members of the Commission have expressed doubts about the need to define the persons who enjoy it, since in their view the essence of immunity *ratione materiae* is the nature of the acts performed and not the individual who performs them. Nevertheless, the majority of members of the Commission thought it would be useful to identify the persons in this category of immunity, since immunity from foreign criminal jurisdiction applies to these individuals. The reference to the fact that the "State officials" must have acted "as such" in order to enjoy immunity *ratione materiae* says nothing about the acts that might be covered by such immunity, which are addressed in draft article 6. For the same reason, the expression "acting in an official capacity" has not been used, to avoid potential confusion with the concept of an "act performed in an official capacity".

(4) In conformity with draft article 4, paragraph 3,[996] immunity *ratione materiae* also applies to former Heads of State, Heads of Government and Ministers for Foreign Affairs "acting as [State officials]". Nevertheless, the Commission does not consider it necessary to refer explicitly to those officials in the present draft article, since immunity *ratione materiae* applies to them, not because of their special status within the State, but in view of the fact

[995] See, above, paragraphs (3)–(20) of the commentary to draft article 2.

[996] This provision reads: "The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae.*" Concerning the scope of this "without prejudice" clause, see above, paragraph (15) of the commentary to draft article 4.

that they are State officials who have acted as such during their term of office. Even though the Commission considers that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione materiae stricto sensu* only after they have left office, there is no need to mention this in draft article 5. The matter is covered more fully in draft article 6 on the substantive and temporal scope of immunity *ratione materiae*, which is modelled on draft article 4.

(5) Draft article 5 is without prejudice to exceptions to immunity *ratione materiae*, referred to in draft article 7.

(6) Lastly, attention must be drawn to the fact that draft article 5 uses the expression "from the exercise of foreign criminal jurisdiction", as does draft article 3 to refer to persons enjoying immunity *ratione personae*. This expression illustrates the relationship between immunity and foreign criminal jurisdiction and emphasizes the essentially procedural nature of the immunity that comes into play in relation to the exercise of criminal jurisdiction with respect to a specific act.[997]

Article 6
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Commentary

(1) Draft article 6 is intended to define the scope of immunity *ratione materiae*, which covers the material and temporal elements of this category of immunity of State officials from foreign criminal jurisdiction. Draft article 6 complements draft article 5, which refers to the persons enjoying immunity *ratione materiae*. Both draft articles determine the general regime applicable to this category of immunity.

(2) Draft article 6 has content parallel to that used by the Commission in draft article 4 on the scope of immunity *ratione personae*. In draft article 6, the order of the first two paragraphs has been changed, with the reference to the material element (acts covered by immunity) appearing first and the reference to the temporal element (duration of immunity) afterwards. The intent is to place emphasis on the material element and on the functional dimension of immunity *ratione materiae*, thus reflecting the fact that acts performed in an official capacity are central to this category of immunity. Even so, it should be borne in mind that the scope of such immunity must be understood by looking at the material aspect (para. 1) in conjunction with the temporal aspect (para. 2). Furthermore, draft article 6 contains a paragraph on the relationship between immunity *ratione materiae* and immunity *ratione personae*, in similar fashion to draft article 4, paragraph 3, which it complements.

(3) The purpose of paragraph 1 is to indicate that immunity *ratione materiae* applies exclusively to acts performed in an official capacity, as the concept was defined in draft article 2 (b).[998] Consequently, acts performed in a private capacity are excluded from this category of immunity, unlike immunity *ratione personae*, which applies to both categories of acts.

(4) Although the purpose of paragraph 1 is to emphasize the material element of immunity *ratione materiae*, the Commission decided to include a reference to State officials to highlight the fact that only such officials may perform one of the acts covered by immunity under the draft articles. This makes clear the need for the two elements (subjective and material) to be

[997] See, above, paragraph (16) of the commentary to draft article 3.
[998] See, above, draft article 2 (b) and paragraphs (21)–(35) of the commentary thereto.

present in order for immunity to be applied. It was not considered necessary, however, to make reference to the requirement that the officials be "acting as such", since the status of the official does not affect the nature of the act, but rather the subjective element of immunity, and is already provided for in draft article 5.[999]

(5) The material scope of immunity *ratione materiae* as set out in draft article 6, paragraph 1, does not prejudge the question of limitations or exceptions to immunity, which is addressed in draft article 7.

(6) Paragraph 2 refers to the temporal element of immunity *ratione materiae* by placing emphasis on the permanent character of such immunity, which continues to produce effects even when the official who has performed an act in an official capacity has ceased to be an official. Such characterization of immunity *ratione materiae* as permanent derives from the fact that its recognition is based on the nature of the act performed by the official, which remains unchanged regardless of the position held by the author of the act. Thus, although it is necessary for the act to be performed by a State official acting as such, its official nature does not subsequently disappear. Consequently, for the purposes of immunity *ratione materiae* it is irrelevant whether the official who invokes immunity holds such a position when immunity is claimed, or, conversely, has ceased to be a State official. In both cases, the act performed in an official capacity will continue to be such an act and the State official who performed the act may equally enjoy immunity whether or not he or she continues to be an official. The permanent character of immunity *ratione materiae* has already been recognized by the Commission in its work on diplomatic relations,[1000] has not been challenged in practice and is generally accepted in the literature.[1001]

(7) The Commission chose to define the temporal element of immunity *ratione materiae* by stating that such immunity "continues to subsist after the individuals concerned have ceased to be State officials", following the model used in the 1961 Vienna Convention on Diplomatic Relations[1002] and the 1946 Convention on the Privileges and Immunities of the United Nations.[1003] The expressions "continues to subsist" and "have ceased to be State

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999 See, above, paragraph (3) of the commentary to draft article 5.

1000 See, *a contrario sensu*, paragraph (19) of the commentary to draft article 2, paragraph 1 (b) (v), of the draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session: "The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated" (*Yearbook … 1991*, vol. II (Part Two), p. 18).

1001 See Institute of International Law, resolution on "Immunities from jurisdiction and execution of Heads of State and of Government in international law", which sets out – *a contrario sensu* – the same position in its article 13, paragraphs 1 and 2 (*Yearbook of the Institute of International Law*, vol. 69 (Session of Vancouver, 2001), p. 743, at p. 753); and "Resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", art. III, paras. 1–2 (*ibid*., vol. 73 (Session of Naples, 2009), p. 226, at p. 227). The resolutions are available from the website of the Institute: www.idi-iil.org, under "Resolutions".

1002 Article 39, paragraph 2, of the Convention provides: "When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

1003 Article IV, section 12, of the Convention provides: "In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members." The 1947 Convention on the Privileges and Immunities of the Specialized Agencies follows the same model; in article V, section 14, it provides: "In order to secure for the representatives of members of the specialized agencies at meetings convened by them complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties."

officials" are based on those treaties. Furthermore, the Commission used the term "individuals" to reflect the definition of "State official" in draft article 2, subparagraph (a).[1004]

(8) Lastly, it should be noted that although paragraph 2 deals with the temporal element of immunity, the Commission considered it appropriate to include an explicit reference to acts performed in an official capacity, bearing in mind that such acts are central to the issue of immunity *ratione materiae* and in order to avoid a broad interpretation of the permanent character of this category of immunity which could be argued to apply to other acts.

(9) The purpose of paragraph 3 is to define the model of the relationship that exists between immunity *ratione materiae* and immunity *ratione personae*, on the basis that they are two distinct categories. As a result, draft article 6, paragraph 3, is closely related to draft article 4, paragraph 3, which also deals with that relationship, albeit in the form of a "without prejudice" clause.

(10) Pursuant to draft article 4, paragraph 1, immunity *ratione personae* has a temporal aspect, since the Commission considered that after the term of office of the Head of State, Head of Government or Minister for Foreign Affairs has ended, immunity *ratione personae* ceases. However, such "cessation … is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*" (draft article 4, paragraph 3). As the Commission stated in the commentary to that draft article, "it must be kept in mind that a Head of State, Head of Government or Minister for Foreign Affairs may, during his or her term of office, have carried out acts in an official capacity which do not lose that quality merely because the term of office has ended and may accordingly be covered by immunity *ratione materiae*". The Commission also stated: "This does not mean that immunity *ratione personae* is prolonged past the end of the term of office of persons enjoying such immunity, since that is not in line with paragraph 1 of the draft article. Nor does it mean that immunity *ratione personae* is transformed into a new form of immunity *ratione materiae* which applies automatically by virtue of paragraph 3. The Commission considers that the 'without prejudice' clause simply acknowledges the application of the rules concerning immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs".[1005]

(11) This is precisely the situation referred to in paragraph 3 of draft article 6. The paragraph proceeds on the basis that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy broad immunity known as immunity *ratione personae*, which, in practical terms, includes the same effects as immunity *ratione materiae*. This does not prevent these State officials, after their term in office has ended, from enjoying immunity *ratione materiae*, *stricto sensu*.

(12) To this end, the requirements for immunity *ratione materiae* will need to be fulfilled, namely: that the act was performed by a State official acting as such (Head of State, Head of Government or Minister for Foreign Affairs in this specific case), in an official capacity and during his or her term of office. The purpose of draft article 6, paragraph 3, is precisely to state that immunity *ratione materiae* is applicable in such situations. The paragraph therefore complements draft article 4, paragraph 3, which the Commission said "does not prejudge the content of the immunity *ratione materiae* regime".[1006]

(13) However, regarding the situation described in draft article 6, paragraph 3, some members of the Commission considered that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy both immunity *ratione personae* and immunity *ratione materiae*. Other members of the Commission emphasized that, for the purposes of these draft articles, immunity *ratione personae* is general and broader in scope and encompasses immunity *ratione materiae*, since it applies to both private and official acts. For these members, such officials enjoy only immunity *ratione personae* during their term of office, and only after their term of office has come to an end will they enjoy immunity *ratione materiae*, *stricto sensu*, as provided for in draft article 4 and reflected in

[1004] For the meaning of the term "individual", see, above, paragraph (6) of the commentary to draft article 2.

[1005] Paragraphs (14) and (15) of the commentary to draft article 4 above.

[1006] Paragraph (15) of the commentary to draft article 4 above.

the commentaries to draft articles 4 and 5. While favouring one or the other option might have consequences before the national courts of certain States (in particular with regard to the conditions for invoking immunity), such consequences would not extend to all national legal systems. During the debate, some members of the Commission expressed the view that it was not necessary to include paragraph 3 in draft article 6, and that it was sufficient to refer to the matter in the commentaries thereto.

(14) The Commission ultimately decided to retain draft article 6, paragraph 3, particularly in view of the practical importance of the paragraph, whose purpose is to clarify, in operational terms, the regime applicable, after their term of office has ended, to individuals who previously enjoyed immunity *ratione personae* (the Head of State, Head of Government and Minister for Foreign Affairs).

(15) The wording of paragraph 3 is modelled on the Vienna Convention on Diplomatic Relations (art. 39, para. 2) and the Convention on the Privileges and Immunities of the United Nations (art. IV, sect. 12), which govern situations similar to those covered in the paragraph in question, namely the situation of persons who enjoyed immunity *ratione personae*, after the end of their term of office, with respect to acts performed in an official capacity during such term of office. The Commission has used the expression "continue to enjoy immunity" in order to reflect the link between the moment when the act occurred and the moment when immunity is invoked. Like the treaties on which it is based, draft article 6, paragraph 3, does not qualify immunity, but confines itself to the use of the generic term. Yet although the term "immunity" is used without any qualification whatsoever, the Commission understands that the term is used to refer to immunity *ratione materiae*, since it is only in this context that it is possible to take into consideration the acts of State officials performed in an official capacity after their term of office has ended.

Article 7
Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of apartheid;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Commentary

(1) The consideration of draft article 7 has given rise to a long debate since 2016. This debate reflected the different positions held by the members of the Commission on an issue of great relevance, namely the existence or non-existence of limitations and exceptions to immunity *ratione materiae,* to which reference is made in paragraphs (9)–(12) of this commentary.

(2) During the debate on draft article 7, there also arose the issue of the need to include procedural provisions and safeguards in the draft articles, including with regard to draft article 7.[1007] That issue was linked by some members to the issue of the adoption of draft

[1007] In order to reflect the great importance attached by the Commission to procedural provisions and safeguards in the context of the present topic, in 2017 it was agreed to include a footnote, which was later deleted when the text of the draft articles was adopted on first reading. The footnote reads as

article 7. The Commission completed its work on procedural provisions and safeguards in the seventy-third session.

(3) While the Commission provisionally adopted draft article 7 and the related annex by recorded vote during its sixty-ninth session (2017),[1008] in its seventy-third session (2022)draft article 7 and the related annex were adopted without a vote. However, some members recalled that they had voted against draft article 7 in 2017, setting out their reasons in explanations of vote, and stated that the fact that no vote had taken place in 2022 did not mean that either the law or their legal positions had in any way changed.

(4) This commentary reproduces, with minor updates, the commentary adopted in 2017. Following the well-established practice of the Commission when adopting draft articles on first reading, it seeks to capture the different positions held by the members of the Commission when draft article 7 and the related annex were provisionally adopted.

(5) Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles. The draft article contains two paragraphs, one that lists the crimes (para. 1) and one that identifies the definition of those crimes (para. 2).

(6) As draft article 7 refers solely to immunity from jurisdiction *ratione materiae*, it is included in Part Three of the draft articles and does not apply in respect of immunity from jurisdiction *ratione personae*, which is regulated in Part Two of the draft articles.

(7) This does not mean, however, that the State officials listed in draft article 3 (Heads of State, Heads of Government and Ministers for Foreign Affairs) will always be exempt from the application of draft article 7. On the contrary, it should be borne in mind that, as the Commission has indicated, Heads of State, Heads of Government and Ministers for Foreign Affairs "enjoy immunity *ratione personae* only during their term of office"[1009] and the cessation of such immunity "is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*".[1010] In addition, draft article 6, on immunity *ratione materiae*, provides that "[i]ndividuals who enjoyed immunity *ratione personae* ..., whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office".[1011] Accordingly, as this residual immunity is immunity *ratione materiae*, draft article 7 will be applicable to the immunity from jurisdiction enjoyed by a former Head of State, a former Head of Government or a former Minister for Foreign Affairs for acts performed in an official capacity during their term of office. Therefore, such immunity *ratione materiae* will not apply to these former officials in connection with the crimes under international law listed in paragraph 1 of draft article 7.

(8) Paragraph 1 of draft article 7 lists the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity during his or her term of office. Thus, draft article 7 complements the normative elements of immunity from foreign criminal jurisdiction *ratione materiae* as defined in draft articles 5 and 6.

(9) The Commission has included this draft article for the following reasons. First, it considers that there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law. This trend is reflected in judicial decisions taken

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follows: "The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session." The footnote marker was inserted after the headings of Part Two and Part Three of the draft articles, since procedural provisions and safeguards may refer to both categories of immunity, and should also be considered in relation to the draft articles as a whole. See *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 140.

[1008] See *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), paras. 74–75.

[1009] Draft article 4, para. 1. See, above, paragraphs (2) and (3) of the commentary to draft article 4.

[1010] Draft article 4, para. 3. See, above, paragraphs (14) and (15) of the commentary to draft article 4.

[1011] Draft article 6, para. 3. See, above, paragraphs (9) to (15) of the commentary to draft article 6.

by national courts which, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction *ratione materiae* in relation to certain international crimes.[1012] In rare cases, this trend has also been reflected in the adoption of

[1012] See the following cases, which are presented in support of such a trend: *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999 (footnote 954 above); *Pinochet*, Belgium, Court of First Instance of Brussels, 6 November 1998 (footnote 955 above), p. 349; *Hussein*, Germany, Higher Regional Court of Cologne, Judgment of 16 May 2000, 2 Zs 1330/99, para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office); *Bouterse*, Netherlands, Amsterdam Court of Appeal, 20 November 2000 (footnote 947 above) (although the Supreme Court subsequently quashed the verdict, it did not do so in relation to immunity but because of the violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001, International Law in Domestic Courts [ILDC 80 (NL 2001)]); *Sharon and Yaron*, Belgium, Court of Appeal of Brussels, 26 June 2002 (footnote 947 above), p. 123 (although the Court granted immunity *ratione personae* to Ariel Sharon, it tried Amos Yaron, who, at the time the acts were committed, was head of the Israeli armed forces that took part in the Sabra and Shatila massacres) (see also *H.S.A., et al. v. S.A., et al.* (footnote 960 above)); *H. v. Public Prosecutor*, Netherlands, Supreme Court, Judgment of 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; *Lozano v. Italy*, Italy, Court of Cassation, 24 July 2008 (footnote 939 above), para. 6; *A. c. Ministère public de la Confédération*, Federal Criminal Court (Switzerland), 25 July 2012 (footnote 925 above); *FF v. Director of Public Prosecutions*, High Court of Justice, Queen's Bench Division, Divisional Court, 7 October 2014 (footnote 954 above) (the significance of this ruling lies in the fact that it was issued as a "consent order", that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter agrees that the charges of torture against Prince Nasser are not covered by immunity *ratione materiae*). In a civil proceeding, the Italian Supreme Court has also asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction (*Ferrini v. Federal Republic of Germany*, Italy, Court of Cassation, Judgment of 11 March 2004, *International Law Reports*, vol. 128, p. 658, at p. 674). In *Jones*, although the House of Lords recognized immunity from civil jurisdiction, it reiterated that immunity from criminal jurisdiction is not applicable in the case of torture (*Jones v. Saudi Arabia*, 14 June 2006 (see footnote 925 above). Lastly, it should be noted that the Federal High Court of Ethiopia, albeit in the context of a case pursued against an Ethiopian national, affirmed the existence of a rule of international law preventing the application of immunity to a former Head of State accused of international crimes (*Special Prosecutor v. Hailemariam*, Federal High Court, Judgment of 9 October 1995, ILDC 555 (ET 1995)). National courts have in some cases tried officials of another State for international crimes without expressly ruling on immunity. This occurred, for example, in the *Barbie* case before the French courts: *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, France, Court of Cassation, Judgments of 6 October 1983, 26 January 1984 and 20 December 1985, *International Law Reports*, vol. 78, p. 125; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Rhone Court of Assizes, Judgment of 4 July 1987, *ibid.*, p. 148; and Court of Cassation, Judgment of 3 June 1988, *ibid.*, vol. 100, p. 330. Meanwhile, the National High Court of Spain has addressed the situations of various foreign officials for alleged international crimes without deeming it necessary to rule on immunity, in the *Pinochet*, *Scilingo*, *Cavallo*, *Guatemala*, *Rwanda* and *Tibet* cases. In the *Rwanda* case, however, the National High Court ruled against the prosecution of President Kagame on the grounds that he enjoyed immunity. Similarly, in the *Tibet* case, the National High Court ruled against the prosecution of the then President of China; however, following the end of the latter's term as President of China, the Central Court of Investigation No. 2 of the National High Court allowed his prosecution by order of 9 October 2013, claiming that he no longer enjoyed "diplomatic immunity". Nevertheless, after the modification of the *Ley Orgánica del Poder Judicial* (Act for the Judiciary), the case was ultimately set aside. A last relevant example is the judgment of the German Federal Court of Justice on 28 January 2021 (case No. 3 StR 564/19) (see footnote 925 above) condemning a former lieutenant of the Afghan Army for torture as a war crime committed in that country against Taliban members in 2013 and 2014. This judgment expressly ruled that immunity *ratione materiae* from foreign criminal jurisdiction does not apply with regard to war crimes under customary international law, when committed by subordinate State officials (para. 18); see also paragraphs 11, 13, 23 and 35. The Court held that there is international custom supporting this finding, and analysed the relevant practice in paragraphs 19 to 43. This judgment largely follows the legal opinion issued by the German Federal Public Prosecutor General about the applicability of immunity to crimes under international law, in which the Federal Public Prosecutor General, after analysing both national and international case law, concluded that immunity *ratione materiae* does not apply to an official of another State accused of crimes under international law. Like the judgment of the Federal Court of

national legislation that provides for exceptions to immunity *ratione materiae* in relation to the commission of international crimes.[1013] This trend has also been highlighted in the

Justice, the legal opinion of the Federal Public Prosecutor General also examines the work of the Commission on the present topic. It has an added value, given that, under German law, the Federal Public Prosecutor General has exclusive competence to introduce criminal proceedings under the German Code of Crimes against International Law. The legal opinion is available in English in C. Kreß, P. Frank and C. Barthe, "Functional immunity of foreign State officials before national courts: a legal opinion by Germany's Federal Public Prosecutor General", *Journal of International Criminal Justice*, vol. 19, No. 3 (July 2021), pp. 697–716.

[1013] In support of this position, attention has been drawn to Organic Act No. 16/2015 of 27 October, on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, which establishes a separate regime of immunity for Heads of State, Heads of Government and Ministers for Foreign Affairs, according to which, in respect of "acts performed in the exercise of official functions [by the officials in question] during a term in office, genocide, forced disappearance, war crimes and crimes against humanity shall be excluded from immunity" (art. 23, para. 1, *in fine*). Also of interest is Act No. 24488 of Argentina, on foreign State immunity, article 3 of which was excluded by Decree No. 849/95 promulgating the Act, with the result that the Argentine courts may not decline to hear a claim against a State for violation of international human rights law. Meanwhile, from a far more limited perspective, the United States Foreign Sovereign Immunities Act, as amended by the Torture Victim Protection Act, establishes a "[t]errorism exception to the jurisdictional immunity of a foreign state" (sect. 1605A), which makes it possible to exclude the application of immunity for certain types of acts such as torture or extrajudicial executions, provided that they were carried out by officials of a State previously designated by the competent authorities of the United States as a "state sponsor of terrorism". A similar exception is contained in the State Immunity Act of Canada. Lastly, it should be borne in mind that some limitations or exceptions to immunity in relation to international crimes are contained in national legislation concerning such crimes, either in separate laws (see the Repression of Serious Violations of International Humanitarian Law Act of Belgium, as amended in 2003; the 2003 International Crimes Act of the Netherlands; and the Criminal Code of the Republic of the Niger, as amended in 2003) or in legislation implementing the Rome Statute of the International Criminal Court. For implementing legislation that establishes a general exception to immunity, see Burkina Faso, Act No. 50 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the courts of Burkina Faso, arts. 7 and 15.1 (according to which the Burkina Faso courts may exercise jurisdiction with respect to persons who have committed a crime that falls within the competence of the Court, even in cases where it was committed abroad, provided that the suspect is in their territory. Moreover, official status shall not be grounds for exception or reduction of responsibility); Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute, art. 7.2 ("the immunities or special rules of procedure accompanying the official status of a person by virtue of the law or of international law shall not prevent national courts from exercising their competence with regard to that person in relation to the offences specified in this Act"); Ireland, International Criminal Court Act 2006, art. 61.1 ("In accordance with Article 27, any diplomatic immunity or state immunity attaching to a person by reason of a connection with a state party to the Statute is not a bar to proceedings under this Act in relation to the person"); Mauritius, International Criminal Court Act 2001, art. 4; South Africa, Implementation of the Rome Statute of the International Criminal Court Act (No. 27 of 18 July 2002), arts. 4 (2) (a) (i) and 4 (3) (c) (stating that South African courts are competent to prosecute crimes of genocide, crimes against humanity and war crimes when the alleged perpetrator is in South Africa and that any official status claimed by the accused is irrelevant). For implementing legislation that establishes procedures for consultation or limitations only in relation to the duty to cooperate with the International Criminal Court, see: Argentina, Act No. 26200 implementing the Rome Statute of the International Criminal Court, adopted by Act No. 25390 and ratified on 16 January 2001, arts. 40 and 41; Australia, International Criminal Court Act 2002 (No. 41 of 2002), art. 12.4; Austria, Federal Act No. 135 of 13 August 2002 on cooperation with the International Criminal Court, arts. 9.1 and 9.3; Canada, 1999 Extradition Act, art. 18; France, Code of Criminal Procedure (under Act No. 2002-268 of 26 February 2002), art. 627.8; Germany, Courts Constitution Act, arts. 20.1 and 21; Iceland, 2003 International Criminal Court Act, art. 20.1; Ireland, International Criminal Court Act 2006 (No. 30), art. 6.1; Kenya, International Crimes Act, 2008 (No. 16 of 2008), art. 27; Liechtenstein, Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals, art. 10.1 (b) and (c); Malta, Extradition Act, art. 26S.1; Norway, Act No. 65 of 15 June 2001 concerning implementation of the Rome Statute of the International Criminal Court of 17 July 1998 in Norwegian law, art. 2; New Zealand, International Crimes and International Criminal Court Act 2000, art. 31.1; Samoa, International Criminal Court Act 2007 (No. 26 of 2007), arts. 32.1 and 41;

literature, and has been reflected to some extent in proceedings before international tribunals.[1014]

(10) Second, the Commission also took into account the fact that the draft articles on immunity of State officials from foreign criminal jurisdiction are intended to apply within an international legal order whose unity and systemic nature cannot be ignored. Therefore, the Commission should not overlook other existing standards or clash with the legal principles enshrined in such important sectors of contemporary international law as international humanitarian law, international human rights law and international criminal law. In this context, the consideration of crimes to which immunity from foreign criminal jurisdiction does not apply must be careful and balanced, taking into account the need to preserve respect for the principle of the sovereign equality of States, to ensure the implementation of the principles of accountability and individual criminal responsibility and to end impunity for the most serious international crimes, which is one of the primary objectives of the international community. Striking this balance will ensure that immunity fulfils the purpose for which it was established (to protect the sovereign equality and legitimate interests of States) and that it is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law.

(11) In light of the above two reasons, the Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method. It is on this premise that the Commission has included in draft article 7 a list of crimes to which immunity *ratione materiae* shall not apply for the following reasons: (a) they are crimes which in practice tend to be considered as crimes not covered by immunity *ratione materiae* from foreign criminal jurisdiction; and (b) they are crimes under international law that have been identified as the most serious crimes of concern to the international community, and there are international, treaty-based and customary norms relating to their prohibition, including an obligation to take steps to prevent and punish them.

(12) However, some members disagreed with this analysis. First, they opposed draft article 7, which had been adopted by vote, stating that: (a) the Commission should not portray its work as possibly codifying customary international law when, for reasons indicated in the

Switzerland, Act on Cooperation with the International Criminal Court, art. 6; Uganda, International Criminal Court Act 2006 (No. 18 of 2006), art. 25.1 (a) and (b); and United Kingdom, International Criminal Court Act 2001, art. 23.1. Denmark is a special case: its International Criminal Court Act of 16 May 2001, art. 2, attributes the settlement of questions on immunity to the executive branch without defining a specific system for consultations.

[1014] The existence of a trend towards limiting immunity for international crimes was noted by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in *Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 88, para. 85. For its part, the European Court of Human Rights, in *Jones and Others*, expressly recognized that there appeared to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture", and that, "in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States" (*Jones and Others v. the United Kingdom* (see footnote 925 above), paras. 213 and 215).

footnotes below, it is clear that national case law,[1015] national statutes,[1016] and treaty law[1017] do not support the exceptions asserted in draft article 7; (b) the relevant practice shows no

[1015] Those members noted that only ten cases are cited (see footnote 1012 above) that purportedly expressly address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law, and that most of those cases actually provide no support for the proposition that such immunity is to be denied. For example, in the United Kingdom case of *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* (see footnote 954 above), immunity was denied only with respect to acts falling within the scope of a treaty in force that was interpreted as waiving immunity (the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). The German case of *Hussein* (see footnote 1012 above) did not concern any of the crimes listed in draft article 7, and the judgment did not assert, in relation to the hypothesis that the then President Hussein had ceased to hold office, that immunity *ratione materiae* from jurisdiction was not or should not be recognized in that instance. The *Bouterse* case (see footnote 947 above) was not upheld by the Netherlands Supreme Court and the reasoning of the lower court on immunity remained an untested *obiter dictum*. The Belgian decision in *Sharon and Yaron* (see footnote 947 above) was controversial and led the Parliament thereafter to alter Belgian law, resulting in a ruling by the Court of Cassation (*H.S.A., et al. v. S.A., et al.*, 12 February 2003 (see footnote 960 above)) affirming a lack of jurisdiction over the case. The same law was at issue in *Pinochet* before the Court of First Instance of Brussels (see footnote 955 above). In the case of *Lozano v. Italy* (see footnote 939 above), the foreign State official was accorded, not denied, immunity *ratione materiae.* The case *Special Prosecutor v. Hailemariam* (see footnote 1012 above) concerned prosecution by Ethiopia of one of its own nationals, not of a foreign State official. Other cases cited concern situations where immunity has not been invoked, or has been waived; they provide no support for the proposition that a State official does not enjoy immunity *ratione materiae* from foreign criminal jurisdiction under customary international law if such immunity is invoked. For example, with respect to the judgment of the German Federal Court of Justice on 28 January 2021, neither Afghanistan nor the individuals concerned invoked immunity in that case, war crimes were the sole crime at issue, and the court only went so far as to identify a rule of customary international law that applied to prosecution of "foreign low-ranking officials," such as a soldier. Further, those members noted that the relevance for the topic of *civil* cases in national courts must be carefully considered; to the extent they are relevant, they tend not to support the exceptions asserted in draft article 7. For example, the case *Ferrini v. Federal Republic of Germany* (see footnote 1012 above) was found by the International Court of Justice to be inconsistent with the obligations of Italy under international law. See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 910 above). In the case of *Jones v. Saudi Arabia* (see footnote 925 above), the House of Lords recognized the immunity of the State official. By contrast, in addition to those cases indicated above, those members pointed to several cases where immunity *ratione materiae* has been invoked and accepted by national courts in criminal proceedings. See, for example, *Hissène Habré*, Senegal, Court of Appeal of Dakar, 4 July 2000, and Court of Cassation, 20 March 2001 (footnote 947 above) (immunity accorded to former Head of State); and *Jiang Zemin*, decision of the Federal Prosecutor General of Germany, 24 June 2005, 3 ARP 654/03-2.

[1016] These members noted that very few national laws address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law. As acknowledged in the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), para. 42: "Immunity of the State or of its officials from jurisdiction is not explicitly regulated in most States. On the contrary, the response to immunity has been left to the courts". Of the few national laws that purportedly address such immunity (Burkina Faso, Comoros, Ireland, Mauritius, Niger, South Africa, Spain), none support draft article 7 as it is written. For example, the Spanish Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, art. 23, para. 1, only addresses the immunity *ratione materiae* of former Heads of State, Heads of Government and Ministers for Foreign Affairs. Statutes such as the Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003, of Belgium or the 2003 International Crimes Act of the Netherlands only provide that immunity shall be denied as recognized under international law, without any further specification. Further, those members observed that national laws implementing an obligation to surrender a State official to the International Criminal Court, arising under the Rome Statute or a decision by the Security Council, are not relevant to the issue of immunity of a State official under customary international law from foreign criminal jurisdiction. Also irrelevant are national laws focused on the immunity of States, such as Act No. 24488 of Argentina, the Foreign Sovereign Immunities Act of the United States, and the State Immunity Act of Canada (further, it was noted that the Foreign Sovereign Immunities Act was not amended by the Torture Victim Protection Act, which has nothing to do with terrorism).

"trend", temporal or otherwise, in favour of exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; (c) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; (ii) immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by a peremptory norm of international law; (iii) the issue of immunity must be considered at an early stage of the exercise of jurisdiction, before the case is considered on the merits;[1018] (d) the lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts; and (e) the establishment of a new system of exceptions to immunity, if not agreed upon by treaty, will likely harm inter-State relations and risks undermining the international community's objective of ending impunity for the most serious international crimes. Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a "normative policy" exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for "new law" that cannot be considered as either *lex lata* or desirable progressive development of international law. Second, those members of the Commission also stressed the difference between procedural immunity from foreign jurisdiction, on the one hand, and substantive criminal responsibility, on the other, and maintained that the recognition of exceptions to immunity was neither required nor necessarily appropriate for achieving the required balance. Rather, in the view of those members, impunity can be avoided in situations where a State official is prosecuted in his or her own State; is prosecuted in an international court; or is prosecuted in a foreign court after waiver of the immunity. Asserting exceptions to immunity that States have not accepted by treaty or through their widespread practice risks creating severe tensions, if not outright conflict, among States whenever one State exercises criminal jurisdiction over the officials of another based solely on an allegation that a heinous crime has been committed.

Paragraph 1

(13) Paragraph 1 (a)–(f) of draft article 7 lists the crimes under international law which, if allegedly committed, would prevent the application of immunity from criminal jurisdiction to a foreign official, even if the official committed those crimes while acting in an official capacity during his or her term of office. The crimes are as follows: the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance.

(14) The chapeau of the draft article uses the phrase "shall not apply" in order to reflect the fact that in both practice and doctrine two different interpretations have been followed with regard to whether or not such crimes are to be considered "acts performed in an official capacity". One view is that the commission of such crimes can never be considered a function of the State and they therefore cannot be regarded as "acts performed in an official capacity". The contrary view holds that crimes under international law either require the presence of a State element (torture, enforced disappearance) or else must have been committed with the backing, express or implied, of the State machinery, so that there is a connection with the State, and such crimes can therefore be considered in certain cases as "acts performed in an

[1017] These members noted that none of the global treaties addressing specific types of crimes (e.g., genocide, war crimes, apartheid, torture, enforced disappearance) contain any provision precluding immunity *ratione materiae* of State officials from foreign criminal jurisdiction, nor do any of the global treaties addressing specific types of State officials (e.g., diplomats, consular officials, officials on special mission).

[1018] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 910 above), p. 137, para. 84 ("customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated"); and *Arrest Warrant of 11 April 2000* (footnote 899 above), p. 25, para. 60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law").

official capacity".[1019] Although the Commission did not find it necessary to come down in favour of one or the other of these interpretations, it noted that some national courts have not applied immunity *ratione materiae* in the exercise of their criminal jurisdiction in respect of these crimes under international law, either because they do not regard them as an act performed in an official capacity or a characteristic function of the State,[1020] or because they take the view that, although crimes under international law may constitute such an act or function, such crimes (by virtue of their gravity or because they contravene peremptory norms) may not give rise to recognition of the perpetrator's immunity from criminal jurisdiction.[1021]

(15) Therefore, bearing in mind that, in practice, the same crime under international law has sometimes been interpreted as a limitation (absence of immunity) or as an exception (exclusion of existing immunity), the Commission considered it preferable to address the topic in terms of the effects resulting from each of these approaches, namely, the non-applicability to such crimes of immunity *ratione materiae* from foreign criminal jurisdiction that otherwise might be enjoyed by a State official. The Commission opted for this formulation for reasons of clarity and certainty, in order to provide a list of crimes which, even if committed by a State official, would preclude the possibility of immunity from foreign criminal jurisdiction.

(16) To that end, the Commission used the phrase "immunity ... shall not apply", following, *mutatis mutandis*, the technique once used by the Commission in relation to jurisdictional immunity of the State, when it used the phrase "proceedings in which State immunity cannot be invoked" in a similar context.[1022] However, in draft article 7, the Commission decided not to use the phrase "cannot be invoked" in order to avoid the procedural component of that phrase, preferring instead to use the neutral phrase "shall not apply".

(17) The expression "from the exercise of foreign criminal jurisdiction" is included in the chapeau for consistency with the formulation used in draft articles 3 and 5.

(18) The expression "crimes under international law" refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national

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[1019] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 910 above), p. 125, para. 60 (discussing *acta jure imperii* in the context of State immunity).

[1020] See, for example, the following cases: *Pinochet*, Court of First Instance of Brussels, 6 November 1998 (footnote 955 above), p. 349; and *Hussein*, Germany, Higher Regional Court of Cologne, 16 May 2000 (footnote 1012 above), para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office). A similar argument has also been used in some cases when the question of immunity has been raised before the civil courts. See, for example, *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Livadeia, 30 October 1997 (footnote 955 above).

[1021] As happened, for example, in the case of *Attorney General of the Government of Israel v. Adolf Eichmann*, Israel, Supreme Court, 29 May 1962 (see footnote 947 above), pp. 309–310. In the *Ferrini* case, the Italian courts based their ruling on both the gravity of the crimes committed and the fact that the conduct in question was contrary to *jus cogens* norms (*Ferrini v. Federal Republic of Germany*, Court of Cassation, 11 March 2004 (see footnote 1012 above), p. 674). In the *Lozano* case, the Italian Court of Cassation based its denial of immunity on the violation of fundamental rights, which have the status of *jus cogens* norms and must therefore take precedence over the rules governing immunity (*Lozano v. Italy*, 24 July 2008 (see footnote 939 above), para. 6). In *A. c. Ministère public de la Confédération*, the Federal Criminal Court of Switzerland based its decision on the existence of a customary prohibition of international crimes that the Swiss legislature considers to be *jus cogens*; it also pointed out the contradiction between prohibiting such conduct and continuing to recognize immunity *ratione materiae* that would prevent the launch of an investigation (*A. c. Ministère public de la Confédération*, 25 July 2012 (see footnote 925 above)).

[1022] Draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session, *Yearbook ... 1991*, vol. II (Part Two), p. 33. The Commission used the phrase cited above as the title of part III of those draft articles and reiterated a variant in articles 10 to 17 in the same part. For an explanation of the reasons that led the Commission to use this phrase, see, in particular, paragraph (1) of the commentary to part III (p. 33) and paragraphs (1) to (5) of the commentary to article 10 (pp. 33–34). The United Nations Convention on Jurisdictional Immunities of States and Their Property likewise uses the phrase "[p]roceedings in which State immunity cannot be invoked" in the title of part III and similar wording in articles 10 to 17.

law. The crimes listed in draft article 7 are the crimes of greatest concern to the international community as a whole; there is a broad international consensus on their definition as well as on the existence of an obligation to prevent and punish them. These crimes have been addressed in treaties and are also prohibited by customary international law.

(19) The expression "crimes under international law" was used previously by the Commission in the Nürnberg Principles[1023] and in the 1954 draft Code of Offences against the Peace and Security of Mankind.[1024] In this context, the Commission took the view that the use of the expression "crimes under international law" means that "international law provides the basis for the criminal characterization" of such crimes and that "the prohibition of such types of behaviour and their punishability are a direct consequence of international law".[1025] What follows from this is "the autonomy of international law in the criminal characterization" of such crimes[1026] and the fact that "the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law".[1027] Accordingly, the use of the expression "crimes under international law" directly links the list of crimes contained in paragraph 1 of draft article 7 to international law and ensures that the definition of such crimes is understood in accordance with international standards, and any definition established under domestic law to identify cases in which immunity does not apply is irrelevant.

(20) The category of crimes under international law includes (a) the crime of genocide, (b) crimes against humanity and (c) war crimes. The Commission included these crimes among the crimes in respect of which immunity does not apply for two basic reasons. First, these are crimes about which the international community has expressed particular concern, resulting in the adoption of treaties that are at the heart of international criminal law, international human rights law and international humanitarian law, and the international courts have emphasized not only the gravity of these crimes, but also the fact that their prohibition is customary in nature and that committing them may constitute a violation of peremptory norms of general international law (*jus cogens*).[1028] Second, these crimes arise, directly or indirectly, in the judicial practice of States in relation to cases in which the issue of immunity *ratione materiae* has been raised. Lastly, it should be noted that these three crimes are included in article 5 of the Rome Statute, where they are described as "the most serious crimes of concern to the international community as a whole".[1029] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

[1023] See principle I of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment" (*Yearbook … 1950*, vol. II, document A/1316, p. 374).

[1024] See article 1 of the draft Code of Offences against the Peace and Security of Mankind adopted in 1954: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished" (*Yearbook … 1954*, vol. II, document A/2693, p. 150). For its part, article 1, paragraph 2, of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996 states that "[c]rimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law" (*Yearbook … 1996*, vol. II (Part Two), p. 17).

[1025] See paragraph (6) of the commentary to article 1 of the 1996 draft Code of Crimes against the Peace and Security of Mankind, *Yearbook… 1996*, vol. II (Part Two), p. 17.

[1026] *Ibid.*, para. (9), p. 18.

[1027] *Ibid.*, para. (10). It should be borne in mind that the Commission, in commenting on principle I of the Nürnberg Principles, had stated that "[t]he general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law" (*Yearbook … 1950*, vol. II, document A/1316, p. 374).

[1028] The Commission itself has declared that the prohibition of genocide, the prohibition of crimes against humanity, the basic rules of international humanitarian law, the prohibition of apartheid and the prohibition of torture are *jus cogens* norms. See the annex to the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), in chapter IV of the present report.

[1029] Rome Statute, art. 5, para. 1, and preamble, fourth paragraph.

(21) The Commission decided not to include the crime of aggression at this time, even though it too is included in article 5 of the Rome Statute and is characterized as a crime under the amendments adopted at the Review Conference of the Rome Statute held in Kampala in 2010.[1030] The Commission took this decision in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of crime,[1031] given that it constitutes a "crime of leaders". However, some members stated that the crime of aggression should have been included in paragraph 1 of draft article 7, as it is the most serious of the crimes under international law, it was previously included by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind[1032] and it is one of the crimes covered by the Rome Statute. Furthermore, a substantial number of States have included the crime of aggression within their national criminal law.[1033] Accordingly, they expressed their opposition to the majority decision of the Commission and reserved their position on the matter.

(22) On the other hand, the Commission considered it necessary to include in paragraph 1 of draft article 7 the crimes of apartheid, torture and enforced disappearance as separate categories of crimes under international law in respect of which immunity does not apply. Although these crimes are included in article 7 of the Rome Statute under the category of

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[1030] See the definition of aggression in article 8 *bis*, *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010*, publication of the International Criminal Court, RC/9/11, resolution 6, "The crime of aggression" (RC/Res.6).

[1031] In this regard, it should be borne in mind that in the commentaries to the 1996 draft Code of Crimes against the Peace and Security of Mankind, the Commission stated the following: "The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security" (*Yearbook … 1996*, vol. II (Part Two), p. 30, paragraph (14) of the commentary to article 8).

[1032] *Ibid.*, pp. 42–43 (art. 16).

[1033] The following are examples of national legislation that includes the crime of aggression: Austria, Criminal Code No. 60/1974 of 23 January 1974, as amended by BGBl. I No. 112/2015 of 13 August 2015, sect. 321k; Azerbaijan, Criminal Code of 2000, arts. 100–101; Bangladesh, International Crimes (Tribunals) Act, art. 3, International Crimes (Tribunals) Act No. XIX of 1973, as amended by the International Crimes (Tribunals) (Amendment) Act No. LV of 2009 and Act No. XXI of 2012; Belarus, Criminal Code, arts. 122–123, Law No. 275-Z of 9 July 1999 (as amended on 28 April 2015); Bulgaria, Criminal Code, arts. 408–409, *State Gazette*, No. 26 of 2 April 1968, as amended by *State Gazette*, No. 32 of 27 April 2010; Croatia, Criminal Code, arts. 89 and 157, *Official Gazette of the Republic of Croatia "Narodne novine"*, No. 125/11; Cuba, Criminal Code, arts. 114–115, Act No. 62 of 29 December 1987, as amended by Act No. 87 of 16 February 1999; Ecuador, Criminal Code, art. 88; Estonia, Criminal Code, sects. 91–92; Finland, Criminal Code, Act No. 39/1889, as amended by Act No. 1718/2015, sects. 4 (a), 4 (b) and 14 (a); Germany, Criminal Code of 13 November 1998 (BGBl); Luxembourg, Criminal Code, art. 136; Macedonia, Criminal Code, art. 415; Malta, Criminal Code, sect. 82(C), Criminal Code of the Republic of Malta (1854, as amended in 2004); Mongolia, Criminal Code (2002), art. 297; Montenegro, Criminal Code, art. 442, *Official Gazette of the Republic of Montenegro*, No. 70/2003, Correction, No. 13/2004; Paraguay, Criminal Code of the Republic of Paraguay, art. 271, Act No. 1160/97; Poland, Criminal Code, art. 17, Law of 6 June 1997; Republic of Moldova, Criminal Code of the Republic of Moldova, arts. 139–140, adopted by Law No. 985-XV on 18 April 2002 (as amended in 2009); Russia, Criminal Code, Criminal Code of the Russian Federation, arts. 353–354, Federal Law No. 64-FZ of 13 June 1996 (as amended); Samoa, International Criminal Court Act 2007, as amended by the International Criminal Court Amendment Act 2014, No. 23, sect. 7A; Slovenia, Criminal Code of 2005, arts. 103 and 105; Tajikistan, Criminal Code of the Republic of Tajikistan, arts. 395–396; Timor-Leste, Criminal Code of the Democratic Republic of Timor-Leste, Decree Law No. 19/2009, art. 134. See, for discussion, A. Reisinger Coracini, "National legislation on individual responsibility for conduct amounting to aggression", in R. Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review*, London and New York, Routledge, 2016.

crimes against humanity,[1034] the Commission took into account the following elements to consider them as separate crimes. First, the crimes of apartheid, torture and enforced disappearance have been the subject of treaties that establish a special legal regime for each crime for the purposes of prevention, suppression and punishment,[1035] which imposes specific obligations on States to take certain measures in their domestic legislation, including the obligation to define such crimes in their national criminal legislation and to take the necessary measures to ensure that their courts are competent to try such crimes.[1036] It should be added that the treaties in question establish systems of horizontal international cooperation and judicial assistance between States.[1037] Second, the Commission also noted that the crimes of apartheid, torture and enforced disappearance are subject under the Rome Statute to a specific threshold that is defined as the commission of such crimes "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack",[1038] which, however, does not exist in the instruments specifically related to these crimes. Third, the Commission observed that the conventions against torture and enforced disappearance expressly establish that such acts can only be committed by State officials or at their instigation or with their support or acquiescence.[1039] In addition, the Commission took into account the fact that, in many cases, when national courts have dealt with these crimes in relation to immunity, they have done so by treating them as separate crimes. The treatment of torture is a good example of this.[1040] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(23) While some members of the Commission suggested that the list should include other crimes such as slavery, terrorism, human trafficking, child prostitution and child pornography, and piracy, which are also the subject of treaties that establish special legal regimes for each crime for the purposes of prevention, suppression and punishment, the Commission decided not to include them. In doing so, it took into account the fact that these crimes either are already covered by the category of crimes against humanity or do not fully correspond to the definition of crimes under international law *stricto sensu*, being more correctly described in most cases as transnational crimes. In addition, such crimes are usually committed by non-State actors and are not reflected in national judicial practice relating to immunity from jurisdiction. In any event, the non-inclusion of other international crimes in

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1034 Rome Statute, art. 7, para. 1, subparas. (j), (f) and (i), respectively.

1035 See International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

1036 International Convention on the Suppression and Punishment of the Crime of Apartheid, art. IV; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 4–6; and International Convention for the Protection of All Persons from Enforced Disappearance, arts. 4, 6 and 9.

1037 International Convention on the Suppression and Punishment of the Crime of Apartheid, art. XI; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 6–9; and International Convention for the Protection of All Persons from Enforced Disappearance, arts. 10–11 and 13–14.

1038 Rome Statute of the International Criminal Court, art. 7, para. 1. The definition of the threshold is contained in article 7, paragraph 2 (a).

1039 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 1; and International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

1040 As, for example, in the United Kingdom, where cases relating to immunity from jurisdiction *ratione materiae* which raised the question of the non-applicability of such immunity to acts of torture have been based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999 (footnote 954 above); and *FF v. Director of Public Prosecutions*, High Court of Justice, Queen's Bench Division, Divisional Court, 7 October 2014 (footnote 954 above). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also served as the basis of a matter related to immunity from civil jurisdiction: *Jones v. Saudi Arabia*, House of Lords, 14 June 2006 (see footnote 925 above).

draft article 7 should not be taken to mean that the Commission underestimates the seriousness of such crimes.

(24) Lastly, it should be noted that the Commission did not include in draft article 7, paragraph 1, the crimes of corruption or crimes affected by the so-called "territorial tort exception" proposed by the Special Rapporteur.[1041] This does not mean, however, that the Commission considers that immunity from foreign criminal jurisdiction *ratione materiae* should apply to these two categories of crimes.

(25) With regard to corruption (understood as "grand corruption"), several members of the Commission pointed out that crimes of corruption are especially serious as they directly affect the interests and stability of the State, the well-being of its population and even its international relations. Consequently, those members were in favour of including an exception to immunity *ratione materiae*. However, other members of the Commission argued that, while the seriousness of the crime of corruption cannot be called into question, its inclusion in draft article 7 posed a problem, related essentially to the general nature of the term "corruption" and the wide range of acts that can be included in this category, as well as the fact that, in their view, treaty practice and case law do not provide sufficient grounds for including such crimes among the limitations and exceptions to immunity. Other members questioned whether corruption met the test of gravity of the other crimes listed in draft article 7. Lastly, several members of the Commission pointed out that corruption cannot under any circumstances be regarded as an act performed in an official capacity and therefore need not be included among the crimes for which immunity does not apply.

(26) Especially in view of that last argument, the Commission decided not to include crimes of corruption in draft article 7, on the grounds that they do not constitute "acts performed in an official capacity", but are acts carried out by a State official solely for his or her own benefit.[1042] Although some members of the Commission pointed out that the involvement of State officials in such acts cannot be ignored, because it is precisely their official status that facilitates and makes possible the crime of corruption, some members of the Commission took the view that the fact that the crime is committed by an official does not change the nature of the act, which remains an act performed for the official's own benefit even if the official uses State facilities that might give the act a semblance of official status. Accordingly, since the normative element contained in draft article 6, paragraph 1, does not apply to the crime of corruption, several members of the Commission took the view that immunity from jurisdiction *ratione materiae* does not exist in relation to the crime of corruption and therefore the latter does not need to be included in the list of crimes for which immunity does not apply.

(27) The Commission also considered the case of other crimes committed by a foreign official in the territory of the forum State without that State's consent to both the official's presence in its territory and the activity carried out by the official that gave rise to the commission of the crime (territorial exception). This scenario differs in many respects from the crimes under international law included in paragraph 1 of draft article 7 or the crime of corruption. Although the view was expressed that immunity could exist in these circumstances and the exception should not be included in draft article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes, such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply. This is without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, as set forth in draft article 1, paragraph 2.

[1041] See the fifth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), paras. 225–234.

[1042] In the same vein, see, above, paragraphs (23), (25) and (33) of the commentary to draft article 2, dealing with the definition of an "act performed in an official capacity".

Paragraph 2

(28) Paragraph 2 of draft article 7 establishes a link between paragraph 1 of the article and the annex to the draft articles, entitled "List of treaties referred to in draft article 7, paragraph 2". While the concept of "crimes under international law" and the concepts of "crime of genocide", "crimes against humanity", "war crimes", "crime of apartheid", "torture" and "enforced disappearance" belong to well-established categories in contemporary international law, the Commission is mindful that the fact that draft article 7 refers to "crimes" means that the principle of legal certainty characteristic of criminal law must be preserved and tools must be provided to avoid subjectivity in identifying what is meant by each of the aforementioned crimes.

(29) However, the Commission did not consider it necessary to define the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance, as this is not part of its mandate within the framework of the present draft articles. On the contrary, the Commission found it preferable to simply identify the treaty instruments that define the aforementioned categories, for inclusion in a list that will enable the competent authorities of the forum State to act with greater certainty in applying draft article 7. The outcome of this exercise is the list contained in the annex to the draft articles.

(30) As indicated in paragraph 2 of draft article 7, the linkage of each crime with the treaties listed in the annex is only for the purposes of draft article 7 on the immunity of State officials from foreign criminal jurisdiction, in order to identify the definitions of the crimes listed in paragraph 1 of the article without assuming or requiring that States must be parties to those instruments.

(31) On the other hand, it should be borne in mind that the listing of certain treaties has no effect on the customary nature of these crimes, as recognized under international law, or on the specific obligations that may arise from those treaties for States parties. Similarly, the inclusion of only some of the treaties that define the crimes in question has no effect on other treaties that define or regulate the same crimes, whose definitions and legal regimes remain intact for States parties in their application of those treaties. In conclusion, the reference to a specific treaty for the definition of each of the crimes listed in paragraph 1 of draft article 7 is included for reasons of convenience and appropriateness and solely for the purposes of draft article 7, and in no way affects the other rules of customary or treaty-based international law that refer to such crimes and that contain legal regimes of general scope for each of them.

(32) The criteria used by the Commission to select the treaties included in the annex, as well as the explanations relating to each of them, have been included in the commentary to the annex, to which the reader is referred. The commentaries to paragraph 2 of draft article 7 and to the annex should be read together.

Part Four
Procedural provisions and safeguards

Commentary

(1) Part Four of the draft articles concerns the procedural provisions and safeguards to be applied in connection with the immunity of State officials from foreign criminal jurisdiction.

(2) International instruments that refer to the immunity of State officials from foreign criminal jurisdiction have generally been confined to stating that immunity exists, identifying those who enjoy immunity, defining its scope and, in certain cases, establishing rules on the waiver of immunity, without including provisions of a procedural nature.

(3) Nevertheless, the Commission has considered that the present draft articles should include procedural provisions and safeguards supplementing the substantive provisions included in Parts One, Two and Three. This is explained, first, by the need to maintain a balance between the rights and interests of the State of the official and the rights and interests of the forum State, as in both cases such rights and interests are directly linked to the principle of the sovereign equality of States. Second, the inclusion of procedural provisions and safeguards is conceived as a means of offering the States involved some useful instruments to facilitate reciprocal communication and cooperation regarding a particularly sensitive issue. In this context, the procedural provisions and safeguards are intended to promote

mutual trust and the stability of international relations. Last but not least, the procedural provisions and safeguards are meant to ensure that the exercise of criminal jurisdiction with regard to an official of another State is not abusive or politically motivated. For all these reasons, the Commission takes the view that the inclusion of procedural provisions and safeguards gives an added value to the draft articles and helps to strike a balance among the different provisions contained therein.

(4) The procedural provisions and safeguards apply generally to all cases where the question of immunity of State officials from foreign criminal jurisdiction arises, but they are especially important in cases where immunity from foreign criminal jurisdiction may be affected by the provisions of draft article 7, which refers to limitations or exceptions to the application of immunity *ratione materiae* in relation to the crimes under international law listed in that draft article. The Commission has duly taken this circumstance into account, which is adequately reflected in the text of the draft articles contained in Part Four.

(5) Part Four consists of 11 draft articles dealing, respectively, with the scope of Part Four and its relationship to the rest of the draft articles (draft article 8), the procedural provisions and safeguards that apply in the direct relations between the forum State and the State of the official (draft articles 9–15), the application of the rules pertaining to the right to a fair trial and the procedural safeguards applicable to the official of another State in respect of whom the question of immunity arises (draft article 16), and the establishment of mechanisms for facilitating consultations and the settlement of any dispute that may arise between the forum State and the State of the official with regard to the immunity from foreign criminal jurisdiction of an official of the latter State (draft articles 17 and 18).

Article 8
Application of Part Four

The procedural provisions and safeguards in the present Part shall be applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the present draft articles.

Commentary

(1) Draft article 8 is the first of the draft articles in Part Four. Its purpose is to define the scope of application of Part Four in connection with Part Two and Part Three, which deal respectively with immunity *ratione personae* and immunity *ratione materiae* of State officials, current or former, from foreign criminal jurisdiction. By referring to the links between Part Four, on the one hand, and Part Two and Part Three, on the other, draft article 8 takes into account the notion of balance between the substantive provisions of the present draft articles and the procedural provisions and safeguards contained therein.

(2) As Part Four is an integral part of the draft articles, its provisions are intended to be generally applicable to the other provisions of the draft articles. There was nonetheless a divergence of views among the members of the Commission with regard to the scope of Part Four, in particular its relationship to draft article 7.

(3) In the view of some members, the procedural guarantees and safeguards contained in Part Four apply only when immunity might exist, which seemingly was not the case with respect to the crimes listed in draft article 7, as it was couched in absolute terms, stating that immunity *ratione materiae* "shall not apply in respect of the following crimes under international law" (referring to the crimes listed in paragraph 1 (a)–(f) of that draft article). On the contrary, several members supported a broader interpretation of the draft articles proposed by the Special Rapporteur and envisioned a role for procedural safeguards and guarantees even with respect to situations where draft article 7 was engaged.

(4) In light of this divergence of views, the Commission adopted draft article 8, which expressly states that all the procedural provisions and safeguards in Part Four of the draft articles "shall be applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, current or former, that concerns any of the draft articles

contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the present draft articles". Draft article 8 does not prejudge and is without prejudice to any additional procedural guarantees and safeguards, including whether specific safeguards apply to draft article 7.

(5) With the phrase "including to the determination of whether immunity applies or does not apply under any of the present draft articles", the Commission has confirmed that Part Four, in its entirety, also applies to draft article 7. This is made especially clear by the reference to the determination of immunity, understood as the process for deciding whether immunity applies or does not apply, which is the subject of draft article 14. In determining the applicability of immunity *ratione materiae*, account should be taken both of the normative elements listed in draft articles 4, 5 and 6 and of the limitations and exceptions set out in draft article 7. In addition, under draft article 8, all the procedural provisions and safeguards set out in Part Four must be respected in the process of determining whether exceptions are applicable.

(6) Although the Commission discussed a proposal to include an express reference to draft article 7 in draft article 8, in order to ensure that the provisions and safeguards in Part Four would be understood to apply to it, the proposal was rejected in favour of a more general and neutral formulation referring to "the determination of whether immunity applies or does not apply under any of the present draft articles".

(7) Part Four is applicable "in relation to any exercise of criminal jurisdiction by the forum State over an official of another State". The term "exercise of criminal jurisdiction" is used in draft article 8 to refer broadly to different steps that may be taken by the forum State to determine, where appropriate, the criminal responsibility of an individual. In view of the differences in practice between States' various legal systems and traditions, it was not considered necessary to refer specifically to the nature of these steps, which may include both acts of the executive and acts performed by judges and prosecutors.

(8) Draft article 8 uses the phrase "over an official of another State, current or former". This reflects the need for there to be a connection between the foreign State official and the exercise of criminal jurisdiction by the forum State in respect of which immunity might be applicable. The express mention of the temporal situation in which the official may be in his or her relationship with the foreign State (current or former) follows draft article 2 (a), which establishes that the concept of "State official" refers to "both current and former State officials".[1043] Nevertheless, this reference is not intended to alter the temporal scope of immunity from criminal jurisdiction, since, as the Commission points out in the commentary to draft article 2, "[t]he temporal scope of immunity *ratione personae* and of immunity *ratione materiae* is the subject of other draft articles".[1044] The words "current or former" should therefore be understood in light of the provisions of draft article 4, for immunity *ratione personae*, and of draft article 6, for immunity *ratione materiae*.

Article 9
Examination of immunity by the forum State

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.

2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:

(a) before initiating criminal proceedings;

(b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

[1043] See, above, paragraphs (19)–(20) of the commentary to draft article 2.
[1044] Paragraph (14) of the commentary to draft article 2, above.

Commentary

(1) Draft article 9 concerns the obligation to examine the question of immunity from criminal jurisdiction when the authorities of the forum State seek to exercise or do exercise criminal jurisdiction over an official of another State. "Examination of immunity" refers to the measures necessary to assess whether or not an act of the authorities of the forum State involving the exercise of its criminal jurisdiction may affect the immunity from criminal jurisdiction of an official of another State. Thus, "examination" of immunity is a preparatory act that marks the beginning of a process that will end with a determination of whether or not immunity applies. Although closely related, "examination" and "determination" of immunity are distinct categories. The "determination of immunity" is addressed in draft article 14.

(2) Draft article 9 contains two paragraphs that define, respectively, a general rule (para. 1) and a special rule that is applicable to specific situations (para. 2). In both cases the obligation to examine the question of immunity is attributed to the "competent authorities" of the forum State. The Commission decided not to specify which State organs fall into this category, since the identification of such organs will depend on the time when the question of immunity arises and on the legal system of the forum State. Since such organs may differ from one domestic legal system to another, it was considered preferable to use a term that encompasses organs of different types, including administrative bodies, executive organs, prosecutors and courts. Determining which State organs fall within the category of "competent authorities" for the purposes of the present draft article is a matter to be considered on a case-by-case basis.

(3) The general rule contained in paragraph 1 defines the obligation of the competent authorities of the forum State to "examine the question of immunity without delay" when they "become aware that an official of another State may be affected by the exercise of its criminal jurisdiction".

(4) The term "official of another State" is used as an equivalent of "State official", which is used in the title of the topic (in the plural) and whose definition is contained in draft article 2 (a). This term thus covers any State official, regardless of rank, whether he or she is covered by immunity *ratione personae* or immunity *ratione materiae*, and whether he or she is still an official at the time when the question of immunity is to be examined. The term "official of another State" therefore includes any official who could enjoy immunity from foreign criminal jurisdiction in accordance with the provisions of Part Two and Part Three of the draft articles.

(5) The obligation to examine the question of immunity will arise only when an official of another State may be affected by the exercise of the criminal jurisdiction of the forum State. For the general rule, the Commission has used the expression "exercise of ... criminal jurisdiction", which it considered preferable to "criminal proceeding", an expression that was considered too narrow. The term "exercise of … criminal jurisdiction" is also used in draft articles 3, 5, 7, 8, 10, 14 and 16. For the purposes of draft article 9, "exercise of … criminal jurisdiction" should be understood to mean such acts carried out by the competent authorities of the forum State as may be necessary to establish the criminal responsibility, if any, of one or several individuals. These acts may be of different types and are not limited to judicial acts, and may include governmental, police, investigative and prosecutorial acts.

(6) However, not all acts that may fall within the generic category "exercise of criminal jurisdiction" will give rise to an obligation to examine the question of immunity. Rather, such an obligation arises only when the official of another State may be "affected" by any of the acts in this category. As follows from the judgments of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*[1045] and in *Certain Questions of Mutual Assistance in Criminal Matters*,[1046] a particular criminal procedure measure may affect the immunity of a foreign official only if it hinders or prevents the exercise of the functions of that person by imposing obligations upon him or her. For example, the commencement of a preliminary investigation or institution of criminal proceedings, not only

[1045] *Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 22, paras. 54–55.

[1046] *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 925 above), pp. 236–237, paras. 170–171.

in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national law being applied. The forum State is also able to carry out at least the initial collection of evidence for the case (to collect witness testimonies, documents, material evidence, etc.), using measures which are not binding or constraining on the foreign official.

(7) The general rule set out in paragraph 1 attaches particular importance to the time at which the competent authorities of the forum State should examine the question of immunity, emphasizing that it should be done at an early stage, since otherwise the effectiveness of the institution of immunity could be undermined. Although treaties addressing various forms of immunity of State officials from foreign criminal jurisdiction have not included specific rules in this regard, the International Court of Justice has expressly stated that the question of immunity should be examined at an early stage and considered *in limine litis*.[1047] With this in mind, the Commission decided to indicate explicitly the point at which examination of the question of immunity should begin, defining it as follows: "[w]hen the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction". The phrase "[w]hen [they] become aware" follows, to some extent, the wording used by the Institute of International Law in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law,[1048] and is intended to emphasize that the question of immunity should be examined as soon as possible, without the need to wait until formal judicial proceedings have begun. To reinforce this idea, the phrase "without delay" has been used, contained in articles 36 and 37 of the Vienna Convention on Consular Relations.

(8) Paragraph 2 of draft article 9 sets out a special rule covering two particular cases in which the competent authorities of the forum State should examine the question of immunity. The special regime set out in this paragraph is framed as a "without prejudice" clause, in order to preserve the applicability of the general rule contained in paragraph 1. In this context, the words "without prejudice" are used to emphasize that the general rule applies in all circumstances and cannot be affected or prejudiced by the special rule contained in paragraph 2. The special rule in paragraph 2 is intended to draw the attention of the competent authorities of the forum State to their obligation to examine the question of immunity before taking any of the special measures set forth in this paragraph, if they have not done so earlier under the general rule. The use of the adverb "always" is intended to reinforce this idea.

(9) Under the special rule contained in paragraph 2, the competent authorities must always examine the question of immunity "before initiating criminal proceedings" (subparagraph (a)) and "before taking coercive measures that may affect an official of another State" (subparagraph (b)). The Commission selected these two cases as examples of acts that would always affect the official of another State and that, if they were to occur, could violate any immunity from foreign criminal jurisdiction that the official might enjoy. The use of the

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[1047] This question was addressed by the International Court of Justice in the proceedings concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court elucidated the applicability of the privileges and immunities set out in the Convention on the Privileges and Immunities of the United Nations in connection with the prosecution in Malaysia of the Special Rapporteur on the independence of judges and lawyers, who had been prosecuted for statements made in an interview. In this context, the Court – at the request of the United Nations Economic and Social Council – issued an advisory opinion in which it stated that "questions of immunity are ... preliminary issues which must be expeditiously decided *in limine litis*", and that this affirmation "is a generally recognized principle of procedural law", the purpose of which is to avoid "nullifying the essence of the immunity rule". Accordingly, the Court concluded by 14 votes to 1 "[t]hat the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*" (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 88, para. 63, and p. 90, para. 67 (2) (b)).

[1048] Article 6 of the resolution of the Institute of International Law states that "[t]he authorities of the State shall afford to a foreign Head of State the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them" (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 1001 above), p. 747.

adverb "before" is intended to reinforce the principle that immunity must always be examined as a preliminary issue *in limine litis*.

(10) The term "criminal proceedings" refers to the commencement of judicial proceedings brought for the purpose of determining the possible criminal responsibility of an individual, in this case an official of another State. This term is to be distinguished from the term "exercise of criminal jurisdiction", which, as noted above, has a broader meaning. The Commission preferred to use the expression "initiati[on] [of] criminal proceedings" rather than the terms "prosecution", "indictment" or "accusation", or the expressions "commencement of the trial phase" or "commencement of the oral proceedings", as these terms may have different meanings in different domestic legal systems. For this reason, it decided to use more general terminology encompassing any of the specific acts representing the initiation of criminal proceedings under the domestic law of the forum State. The identification of the time of "initiati[on] [of] criminal proceedings" as the moment at which, in any event, the question of immunity must be examined is consistent with international practice and jurisprudence. This does not mean, however, that the question of immunity cannot also be examined at a later stage if necessary, including at the appeal stage.

(11) The phrase "coercive measures that may affect an official of another State" refers to acts of the competent authorities of the forum State that are directed at the official and that may be carried out at any time as part of the exercise of criminal jurisdiction, regardless of whether or not criminal proceedings have been initiated. These are essentially *in personam* measures that may affect, *inter alia*, the official's freedom of movement, his or her appearance in court as a witness or his or her extradition to a third State. These measures do not necessarily imply that "criminal proceedings against the official" are taking place, but they may fall under the category "exercise of criminal jurisdiction". Since such measures may differ from one domestic legal system to another, it was considered preferable to use the general wording "coercive measures" to refer to "act of authority", which was used by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, and is inspired by the reasoning of the Court in *Certain Questions of Mutual Assistance in Criminal Matters*.[1049]

(12) In practice, one of the most common coercive measures is the detention of the official. The need to examine the question of immunity before detention is ordered was asserted by the Special Court for Sierra Leone in the *Charles Taylor* case. In its decision of 31 May 2004, the Appeals Chamber stated: "[t]o insist that an incumbent Head of State must first submit himself to incarceration before he can raise the question of his immunity not only runs counter, in a substantial manner, to the whole purpose of the concept of sovereign immunity, but would also assume, without considering the merits, issues of exceptions to the concept that properly fall to be determined after delving into the merits of the claim to immunity".[1050] The Commission therefore considered it necessary to address this issue in connection with the examination of immunity.

(13) With regard to this question, it should be noted that the scope of the draft articles is limited to immunity from foreign criminal jurisdiction and thus does not include the question of inviolability. However, while immunity from jurisdiction and inviolability are two distinct categories that are not interchangeable, it is nevertheless true that both are dealt with at the same time in various treaties, such as the Vienna Convention on Diplomatic Relations, which provides that "[t]he person of a diplomatic agent shall be inviolable [and] shall not be liable to any form of arrest or detention" (art. 29)[1051] and that "[n]o measures of execution may be

[1049] *Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 22, para. 54; *Certain Questions of Mutual Assistance in Criminal Matters* (see footnote 925 above), pp. 236–237, para. 170.

[1050] *Prosecutor v. Charles Ghankay Taylor*, Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2003-01-I, decision on immunity from jurisdiction, 31 May 2004, para. 30. For the text of the decision, see the website of the Special Court: www.scsldocs.org, under "Documents", "Charles Taylor".

[1051] Similar provisions can be found in the Convention on Special Missions, art. 29, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, arts. 28 and 58. A more nuanced reference to this idea can be found in the Vienna Convention on Consular Relations, art. 41, paras. 1–2.

taken in respect of a diplomatic agent" (art. 31, para. 3).[1052] In a similar vein, reference may be made to the resolution of the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law (arts. 1 and 4).[1053]

(14) The Commission also took account of the fact that the detention of an official of another State may, in certain circumstances, affect immunity from jurisdiction. This is the reason for the last phrase of paragraph 2 (b) of the draft article, which "includes" among coercive measures "those that may affect any inviolability that the official may enjoy under international law". The phrase "that the official may enjoy under international law" is intended to draw attention to the fact that not every official of another State, by the mere fact of being an official, enjoys inviolability.

Article 10
Notification to the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.

2. The notification shall include, *inter alia*, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.

3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

Commentary

(1) Draft article 10 concerns the notification that the forum State must provide to another State to inform it that the forum State intends to exercise criminal jurisdiction over one of that State's officials.

(2) Since it is generally accepted that immunity from foreign criminal jurisdiction is granted to State officials for the benefit of the State, it is for the State, not the official, to decide on the invocation and waiver of immunity, and it is also for the State of the official to decide on the means by which to claim immunity for its official. However, in order for it to be able to exercise those powers, it must be aware that the authorities of another State intend to exercise their own criminal jurisdiction over one of its officials.

(3) The Commission has found that treaty instruments providing for some form of immunity of State officials from foreign criminal jurisdiction do not contain any rule imposing on the forum State an obligation to notify the State of the official of its intention to exercise criminal jurisdiction over the official, with the sole exception of article 42 of the Vienna Convention on Consular Relations.[1054] The Commission also took account of the fact that the United Nations Convention on Jurisdictional Immunities of States and Their Property assumes that the forum State must give notice of its intention to exercise jurisdiction over another State. To this end, article 22 of the Convention specifies the means by which "[s]ervice of process by writ or other document instituting a proceeding against a State" must be effected. Although this provision corresponds to a model that differs from that of

[1052] Similar provisions can also be found in the Convention on Special Missions, art. 31, and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 30 and art. 60, para. 2.

[1053] *Yearbook of the Institute of International Law*, vol. 69 (see footnote 1001 above), pp. 745 and 747.

[1054] Article 42 of the Convention reads as follows: "In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel." The Vienna Convention on Diplomatic Relations, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the Convention on Special Missions do not contain any similar provisions.

immunity from foreign criminal jurisdiction, service of process is undeniably indispensable for enabling the State to invoke its immunity. The provision can thus be taken into consideration, *mutatis mutandis*, for the purposes of the present draft article. With this in mind, the Commission decided to include notification among the procedural safeguards set out in Part Four of the draft articles.

(4) Notification is an essential requirement for ensuring that the State of the official receives reliable information on the forum State's intention to exercise criminal jurisdiction over one of its officials and, consequently, for enabling it to decide whether to invoke or waive immunity. At the same time, notification facilitates the opening of a dialogue between the forum State and the State of the official and thus becomes an equally basic requirement for ensuring the proper determination and application of the immunity of State officials from foreign criminal jurisdiction. The Commission therefore regards notification as one of the procedural safeguards set out in Part Four of the draft articles. The concepts of "notification" and "consultation" should not be conflated, since consultations take place at a later stage and are dealt with in draft article 17.

(5) Draft article 10 is divided into three paragraphs dealing, respectively, with the timing of the notification, the content of the notification and the means by which notification may be provided by the forum State.

(6) Paragraph 1 refers to the point in time at which notification should be provided. In view of the purpose of notification, it must be provided at an early stage, since otherwise it will not produce its full effects. However, the fact that notification may have unintended effects on the forum State's exercise of criminal jurisdiction, particularly at the earliest stages, cannot be overlooked. It was therefore considered necessary to strike a balance between the duty to notify the State of the official and the right of the forum State to carry out activities in the context of criminal jurisdiction that may affect multiple subjects and facts but will not necessarily affect the official of another State. To address this concern, the draft article identifies the following points in time as being critical for the provision of notification: (a) the initiation of criminal proceedings; and (b) the taking of coercive measures that may affect an official of another State. Notification must be provided prior to the occurrence of either of these two circumstances. Paragraph 1 of the present draft article has thus been aligned with draft article 9, paragraph 2 (a) and (b), so that the timing of the notification to the State of the official coincides with the special cases in which the competent authorities of the forum State must examine the question of immunity if they have not done so earlier. The expressions "criminal proceedings" and "coercive measures that may affect an official of another State" should therefore be understood in the sense already described in the commentary to draft article 9.

(7) As used in the present draft article, the term "official of another State" is equivalent to "State official" and should therefore be understood in accordance with the definition contained in draft article 2 (a). As noted in the commentary to that draft article, the use of the term "State official" does not affect the temporal scope of immunity, which is subject to the special rules applicable to immunity *ratione personae* and immunity *ratione materiae*. The commentary is equally relevant to the present draft article and, accordingly, the category "official of another State" includes any official of another State who may enjoy immunity in accordance with the provisions of Part Two and Part Three of the draft articles. The term "official of another State" may refer both to an official in active service at the time when the forum State seeks to exercise criminal jurisdiction and to a former official, provided that both may enjoy some form of immunity.

(8) The second sentence of paragraph 1 is based on the understanding that some domestic systems may not have procedures in place to allow for communication between executive, judicial or prosecutorial authorities.[1055] In such cases, compliance with the obligation to notify the State of the official of the initiation of criminal proceedings or the taking of coercive measures against one of its officials may be significantly hampered, especially since, in practice, communications relating to the question of immunity of an official of another State

[1055] See the analysis of this issue in the seventh report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), paras. 121–126.

from foreign criminal jurisdiction often take place through diplomatic channels. The Commission therefore considered it necessary to draw the attention of States to this issue by including this final sentence in paragraph 1. However, bearing in mind as well the diversity of domestic legal systems and practices, the Commission opted for non-prescriptive wording that allows States to assess whether or not the above-mentioned procedures exist in their respective legal systems and, if not, to decide on their adoption. The verb "shall consider" has been used for this purpose.

(9) Paragraph 2 refers to the content of the notification. Given the purpose of the notification, while its content may vary from one case to another, it should always include sufficient information to enable the State of the official to form a judgment as to whether the immunity that might be enjoyed by one of its officials should be invoked or waived. Although the Commission debated whether to include this paragraph, it ultimately opted to retain it as a useful means of ensuring that the forum State provides the State of the official with at least a minimum amount of relevant information. At the same time, a margin of discretion is left to the forum State, considering that different State legal systems and practices may have different rules on the permissibility of disclosing certain elements of information that may sometimes be available only to prosecutors or judges. Accordingly, paragraph 2 is intended to strike a balance between giving the forum State sufficient discretion in the exercise of its criminal jurisdiction and ensuring that it provides the State of the official with sufficient information. This is the reason for the use of the Latin adverb "*inter alia*" before the list of elements that must be included, in all cases, in the notification referred to in draft article 10.

(10) The information that must be included in the notification is of three types: (a) the identity of the official, (b) the grounds for the exercise of criminal jurisdiction, and (c) the competent authority to exercise jurisdiction. The identity of the official is a basic element for enabling the State of the official to assess whether the individual in question is indeed one of its officials and to decide on the invocation or waiver of immunity. With regard to the substantive information to be included in the notification to the State of the official, the Commission took the view that limiting such information to "acts of the official that may be subject to the exercise of criminal jurisdiction" was not sufficient. The phrase "grounds for the exercise of criminal jurisdiction" has therefore been used. This more general wording allows for the inclusion in the notification of not only factual elements relating to the official's conduct, but also information on the law of the forum State on which the exercise of jurisdiction would be based. Finally, the Commission deemed it appropriate to include, in the list of basic items of information, an indication of the authority competent to exercise jurisdiction in the specific case referred to in the notification. This reflects the fact that the State of the official may have an interest in identifying the organs responsible for deciding on the initiation of criminal proceedings or the adoption of coercive measures so that, as the case may be, it can contact them and make such arguments on immunity as it deems appropriate. Since the organs with competence to carry out this type of action and to examine the question of immunity may differ from one domestic legal system to another, the generic term "competent authority" has been used, which may include judges, prosecutors, police or other governmental authorities of the forum State. The use of "competent authority" in the singular is explained by the fact that such an authority will already have been identified in the case to which the notification relates, but this does not mean that competence may not lie with more than one authority.

(11) Paragraph 3 deals with the means of communication that the forum State may use to transmit the notification to the State of the official. This issue has not been addressed in any of the treaties dealing with one form or another of immunity of State officials from foreign criminal jurisdiction. However, the United Nations Convention on Jurisdictional Immunities of States and Their Property specifies the means by which service of process by writ or other document instituting a proceeding against a State must be effected. Under article 22, paragraph 1, it "shall be effected: (a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or (b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or (c) in the absence of such a convention or special arrangement: (i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum".

(12) The Commission considered it useful to indicate, in the present draft article, the means of communication that the forum State may use to effect service. To this end, paragraph 3 sets out a model that includes "diplomatic channels" and "any other means of communication accepted for that purpose by the States concerned".

(13) Communication through diplomatic channels is the means most frequently used in cases where the question of immunity of State officials from foreign criminal jurisdiction arises. This is largely because the question of whether or not immunity from foreign criminal jurisdiction applies to a particular official of another State, which is a sensitive issue, constitutes a case of "official business" and would therefore fall under article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations.[1056] For this reason, "diplomatic channels" have been mentioned first in order to highlight their more frequent use in practice. The expression "through diplomatic channels" reproduces the formulation contained in article 22, paragraph 1 (c) (i), of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which was used previously by the Commission in the draft articles on prevention and punishment of crimes against humanity.[1057] Since that expression is not identical in all official versions of the Convention, the original terms used in the Convention have been retained in the different language versions of the present draft article.

(14) In addition to "diplomatic channels", the text reflects the possibility that States may use other means of communication to provide notifications concerning immunity, some of which are mentioned in article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. This is the reason for the inclusion, in paragraph 3, of the phrase "any other means of communication accepted for that purpose by the States concerned". This wording thus provides for an alternative, the use of which will have to be decided upon by the States concerned on a case-by-case basis; such alternatives may be reflected in either treaties that are general in scope or any other agreements reached by the States concerned. Since the means of communication between States may be addressed in instruments dealing with a wide variety of issues, the phrase "for that purpose" has been included to emphasize that the agreements concerned should in any event be relevant to and applicable in cases where the question of immunity of State officials from foreign criminal jurisdiction arises. This does not mean, however, that such agreements must specifically address immunity or include express rules on notification in connection with immunity. Finally, it should be noted that the phrase "accepted ... by the States concerned" refers to the requirement that such other means of communication must have been accepted by both the forum State and the State of the official.

(15) The last phrase of paragraph 3 provides that the other means of communication accepted "for that purpose" by the States concerned "may include those provided for in applicable international cooperation and mutual legal assistance treaties". The use of such means of communication generated an intense debate in which a number of questions were raised, such as the very concept of "international cooperation and mutual legal assistance treaties", the fact that such treaties are not intended to address the question of immunity, and the possibility that, depending on the type of State authorities competent to issue and receive notification under such treaties, Ministries for Foreign Affairs and other organs responsible for international relations could be excluded from the notification process dealt with in draft article 10. However, the Commission decided to retain a reference to such means of communication between States on the understanding that they have, on occasion, been used by States and can be a useful tool for facilitating notification.

(16) For the purposes of the present draft article, "international cooperation and mutual legal assistance treaties" means multilateral or bilateral instruments concluded for the purpose of facilitating cooperation and mutual legal assistance in criminal matters between States. Multilateral treaties of this type include, but are not limited to, the European

[1056] Under that article, "[a]ll official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed".

[1057] For the text of the draft articles adopted by the Commission and commentaries thereto, see *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 44–45.

Convention on Mutual Assistance in Criminal Matters[1058] and its two additional protocols;[1059] the European Convention on the Transfer of Proceedings in Criminal Matters;[1060] the European Convention on Extradition[1061] and its four additional protocols;[1062] the Inter-American Convention on Mutual Assistance in Criminal Matters;[1063] the Inter-American Convention on Extradition;[1064] the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union;[1065] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings;[1066] the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries;[1067] the Convention on Extradition among the States Members of the Community of Portuguese-speaking Countries;[1068] the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters;[1069] and the Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters.[1070] Bilateral treaties of this type are so numerous that it would be impossible to list them all in this commentary, but reference may be made, at least, to the model treaties that have been developed by various international organizations and that form the basis for many bilateral agreements, including the following instruments adopted within the United Nations framework: the Model Treaty on Mutual Assistance in Criminal Matters,[1071] the Model Treaty on the Transfer of Proceedings in Criminal Matters[1072] and the Model Treaty on Extradition.[1073] They all contain provisions relating to means of communication between States that could be used in connection with the notification dealt with in draft article 10.

1058 European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959), United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185.

1059 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 17 March 1978), *ibid.*, vol. 1496, No. 6841, p. 350; and Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 8 November 2001), *ibid.*, vol. 2297, No. 6841, p. 22.

1060 European Convention on the Transfer of Proceedings in Criminal Matters (Strasbourg, 15 May 1972), *ibid.*, vol. 1137, No. 17825, p. 29.

1061 European Convention on Extradition (Paris, 13 December 1957), *ibid.*, vol. 359, No. 5146, p. 273.

1062 Additional Protocol to the European Convention on Extradition (Strasbourg, 15 October 1975), *ibid.*, vol. 1161, No. 5146, p. 450; Second Additional Protocol to the European Convention on Extradition (Strasbourg, 17 March 1978), *ibid.*, vol. 1496, No. 5146, p. 328; Third Additional Protocol to the European Convention on Extradition (Strasbourg, 10 November 2010), *ibid.*, vol. 2838, No. 5146, p. 181; and Fourth Additional Protocol to the European Convention on Extradition (Vienna, 20 September 2012), Council of Europe, *Council of Europe Treaty Series*, No. 212.

1063 Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), Organization of American States, *Treaty Series*, No. 75.

1064 Inter-American Convention on Extradition (Caracas, 25 February 1981), United Nations, *Treaty Series*, vol. 1752, No. 30597, p. 177.

1065 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29 May 2000), *Official Journal of the European Communities*, C 197, 12 July 2000, p. 3.

1066 *Official Journal of the European Union*, L 328, 15 December 2009, p. 42.

1067 Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries (Praia, 23 November 2005), *Diário da República I*, No. 177, 12 September 2008, p. 6635.

1068 Convention on Extradition among the States Members of the Community of Portuguese-speaking Countries (Praia, 23 November 2005), *ibid.*, No. 178, 15 September 2008, p. 6664.

1069 Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 22 January 1993), *The Informational Reporter of the CIS Council of Heads of State and Council of Heads of Government "Sodruzhestvo"*, No. 1 (1993).

1070 Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau, 7 October 2002), *ibid.*, No. 2 (41) (2002).

1071 Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, annex (subsequently amended by General Assembly resolution 53/112 of 9 December 1998, annex I).

1072 Model Treaty on the Transfer of Proceedings in Criminal Matters, General Assembly resolution 45/118 of 14 December 1990, annex.

1073 Model Treaty on Extradition, General Assembly resolution 45/116 of 14 December 1990, annex (subsequently amended by General Assembly resolution 52/88 of 12 December 1997, annex).

(17) The means of communication provided for in international cooperation and mutual legal assistance treaties are defined in draft article 10 as a subcategory of "other means of communication" and may be used only if the treaties in question are "applicable". This means that both the forum State and the State of the official must be parties to the treaties and that the system established therein must be capable of producing effects in cases where issues relating to the immunity of State officials from foreign criminal jurisdiction may arise.

(18) In any event, it should be emphasized that draft article 10, paragraph 3, does not impose on States any new requirements concerning means of communication other than those already established in the applicable treaties.

(19) Finally, with respect to the form of the notification, the Commission members expressed different views as to whether notification should have to be in writing, as they appreciated both the need to avoid abuse in the notification process and the flexibility that the act of notification itself sometimes requires. It was ultimately considered unnecessary to provide expressly that notification must be made in writing. Thus, although the general view is that notification should preferably be in written form, other possibilities have not been excluded, particularly since notification – especially through diplomatic channels – is often given orally at first and later in writing, regardless of the form of such written notification (*note verbale*, letter or the like).

Article 11
Invocation of immunity

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.

2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.

3. Immunity may be invoked through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

Commentary

(1) Draft article 11 addresses the issue of invocation of immunity from a twofold perspective: recognition of the right of the State of the official to invoke immunity, on the one hand; and the procedural aspects relating to the timing, content and means of communication of the invocation of immunity, on the other. Draft article 11 also refers to the need to inform the competent authorities of the forum State that immunity has been invoked. This draft article does not deal with the effects of invocation.

(2) Paragraph 1 of draft article 11 is based on the recognition that the State of the official is entitled to invoke the immunity of its officials when another State seeks to exercise criminal jurisdiction over them. Although treaties addressing one form or another of immunity of State officials from foreign criminal jurisdiction do not expressly refer to the invocation of immunity or the corresponding right of the State of the official, invocation of the immunity of State officials is a common practice that is understood to be covered by customary international law. The invocation of immunity has a dual purpose: on the one hand, it serves as an instrument with which the State of the official may claim immunity for its official; on the other, it makes the State seeking to exercise jurisdiction aware of this circumstance and enables it to take account of the information provided by the State of the official for the purpose of determining immunity.

(3) The right to invoke immunity rests with the State of the official. This is easily justified by the fact that the purpose of immunity is to preserve the sovereignty of the State of the official, meaning that immunity is recognized in the interest of the State and not in the interest

of the individual.[1074] It is thus for the State itself, and not for its officials, to invoke immunity and to take all decisions relating to its possible invocation. In any event, it is a right of a discretionary nature, which is why the phrase "[a] State may invoke the immunity of its official" has been used.

(4) The power to invoke immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the invocation or the authorities competent to invoke immunity. Determination of those authorities depends on the domestic law, it being understood that this category includes those with responsibility for international relations under international law. However, this does not mean that immunity cannot be invoked by a person specifically mandated to do so by the State, especially in the context of criminal proceedings.

(5) The invocation of immunity must therefore be understood as an official act whereby the State of the official informs the State seeking to exercise criminal jurisdiction that the individual in question is its official and that, in its view, he or she enjoys immunity, with the consequences that follow from that circumstance. Therefore, the earlier immunity is invoked, the more useful it will be. This is reflected by the indication that the State of the official may invoke immunity "when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official". The term "another State" was considered preferable to "forum State" as being broader and more comprehensive, especially since immunity may be invoked prior to the initiation of criminal proceedings *stricto sensu*. The phrase "when it becomes aware" reproduces the expression used in draft article 9. With regard to the way in which the State of the official may become aware of the situation, the Commission took into account, first, the relationship between "notification" and "invocation". One of the purposes of notification is to inform the State of the official that the competent authorities of the forum State intend to exercise criminal jurisdiction. It is therefore a primary means by which the State of the official may become aware of the situation. However, the Commission did not wish to exclude the possibility that the State of the official might become aware of the situation by another means, either through information received from its official or from any other source of information. Therefore, no reference is made to the notification dealt with in draft article 10 as being the relevant act for determining the point in time at which immunity may be invoked.

(6) Paragraph 1 provides for the possibility that the State of the official may invoke immunity when it becomes aware that "the criminal jurisdiction of another State could be or is being exercised over the official". This alternative wording is intended to reflect the fact that in some cases the State of the official may not become aware of actions taken in respect of its official until a later stage. However, this cannot deprive the State of the official of its right to invoke immunity, especially when acts of jurisdiction that may affect the official have already been carried out.

[1074] This is an uncontroversial matter that has even been reflected in various treaties, including, by way of example, the Vienna Convention on Diplomatic Relations, the preamble of which states that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States" (fourth paragraph). Virtually identical wording can be found in the preambles of the Vienna Convention on Consular Relations (fifth paragraph), the Convention on Special Missions (seventh paragraph) and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (sixth paragraph). The Institute of International Law expressed the same view in the preamble of its resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, in which it states that special treatment is to be given to a Head of State or a Head of Government as a representative of that State, "not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole" (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 1001 above), p. 743, third paragraph). The two Special Rapporteurs who have dealt with this topic in the Commission have also expressed this view (see *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631, p. 395, at p. 402, para. 19; *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646, p. 223, at p. 228, para. 15; and *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, p. 35, at p. 44, para. 49).

(7) The last sentence of paragraph 1 provides that "[i]mmunity should be invoked as soon as possible". The expression "as soon as possible" has been used in light of the fact that the State of the official will have to consider various relevant elements (legal and political) in order to decide whether immunity should be invoked and, if so, what the scope of such invocation should be. Since the State of the official will need a period of time in which to do so, which may vary from one case to another, this phrase has been preferred over "as promptly as possible" or "within a reasonable time", the interpretation of which may be ambiguous. Moreover, the phrase "as soon as possible" draws attention to the importance of invoking immunity at an early stage.

(8) In any event, it should be borne in mind that, while the invocation of immunity constitutes a safeguard for the State of the official, which thus has an interest in invoking it "as soon as possible", this does not preclude the State from invoking immunity at any other time. The use of the verb "may" is to be understood in this permissive sense. Such invocation of immunity will be lawful, regardless of the moment when it is made, which does not mean its effect may not vary depending on this temporal element.

(9) Paragraph 2 concerns the form in which immunity is to be invoked and the content of the invocation. The Commission took account of the fact that the invocation of immunity by the State of the official is intended to influence the process of determining immunity and the possible blocking of the forum State's exercise of jurisdiction. For this reason, it was considered that immunity must be invoked in writing, regardless of the form that such writing may take. The invocation should explicitly state the identity of the official and the position held by him or her, as well as the grounds on which immunity is invoked.

(10) The words "the position held" refer to the title, rank or level of the official (such as Head of State, Minister for Foreign Affairs or legal adviser). In any event, the reference to the position held by the official should in no way be interpreted as implying that lower-level officials are not covered by immunity from foreign criminal jurisdiction, since, as the Commission itself has stated, "[g]iven that the concept of 'State official' rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the individual is irrelevant for the sole purposes of the definition".[1075]

(11) The Commission took the view that the State of the official should not be required to identify the type of immunity being invoked (*ratione personae* or *ratione materiae*), since that might constitute an excessive technical requirement. The reference to the position held by the official and the grounds for invoking immunity should provide a basis on which the forum State can assess whether the rules contained in Part Two (*ratione personae*) or Part Three (*ratione materiae*) of the present draft articles apply.

(12) Paragraph 3 identifies the means by which immunity may be invoked. This paragraph is modelled on paragraph 3 of draft article 10, the commentary to which may be referred to for clarification of its general meaning. It should be noted, however, that the Commission made some drafting changes to paragraph 3 of the present draft article in order to adapt it to the specific features of invocation. In particular, the wording "[i]mmunity may be invoked" has been used instead of "shall be provided" in order not to exclude the possibility that the official's immunity from criminal jurisdiction may be invoked by other means, especially in criminal proceedings through judicial acts permitted by the law of the forum State.

(13) Paragraph 4 is intended to ensure that the invocation of immunity by the State of the official will be made known to the authorities of the other State that are competent to deal with the question of immunity and with the examination or determination of its application. The purpose of this paragraph is to prevent a situation where an invocation of immunity is ineffective simply because it has not been made before the authorities responsible for examining or deciding on immunity. The paragraph reflects the principle that the obligation to examine and determine the question of immunity rests with the State, which must take the necessary measures to comply with this obligation. It is thus defined as a procedural safeguard benefiting both the State of the official and the State seeking to exercise criminal jurisdiction. However, in view of the diversity of States' legal systems and practices, as well

[1075] Paragraph (16) of the commentary to draft article 2, above.

as the need to respect the principle of self-organization, it was not considered necessary to identify which authorities are obliged to report and which authorities should receive notice of the invocation. This is logically predicated on the understanding that, in both cases, the authorities referred to are those of the State that intends to exercise or has exercised its criminal jurisdiction over an official of another State, and that the words "any other authorities" refer to those authorities that are competent to participate in the processes of examining or determining immunity. In both cases, it is irrelevant whether they are administrative bodies, authorities of the executive, the judiciary or the prosecution service, or even police authorities.

Article 12
Waiver of immunity

1. The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official.

2. Waiver of immunity must always be express and in writing.

3. Waiver of immunity may be communicated through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.

5. Waiver of immunity is irrevocable.

Commentary

(1) Draft article 12 deals with the waiver of immunity from a twofold perspective: the recognition of the right of the State of the official to waive immunity, on the one hand, and the procedural aspects relating to the form that the waiver should take and the means by which it is communicated, on the other. Draft article 12 also refers to the need to inform the competent authorities of the forum State that immunity has been waived. Although the structure of draft article 12 is modelled on that of draft article 11, the content of the two is not identical, since invocation and waiver are distinct institutions that should not be confused.

(2) In contrast to invocation, the waiver of immunity from jurisdiction has been discussed in detail by the Commission in several of its previous sets of draft articles[1076] and has been reflected in the treaties based on those draft articles, which cover certain forms of immunity from foreign criminal jurisdiction in the case of certain State officials. These include, in particular, the Vienna Convention on Diplomatic Relations (art. 32), the Vienna Convention on Consular Relations (art. 45), the Convention on Special Missions (art. 41) and the Vienna Convention on the Representation of States in Their Relations with International

[1076] The Commission addressed the waiver of immunity of certain State officials in the course of its work on diplomatic relations, consular relations, special missions and the representation of States in their relations with international organizations. Article 30 of the draft articles on diplomatic intercourse and immunities is worded as follows: "*Waiver of immunity.* 1. The immunity of its diplomatic agents from jurisdiction may be waived by the sending State. 2. In criminal proceedings, waiver must always be express" (*Yearbook ... 1958*, vol. II, document A/3859, p. 99). Article 45 of the draft articles on consular relations provides as follows: "*Waiver of immunities*. 1. The sending State may waive, with regard to a member of the consulate, the immunities provided for in articles 41, 43 and 44. 2. The waiver shall in all cases be express" (*Yearbook ... 1961*, vol. II, document A/4843, p. 118). Article 41 of the draft articles on special missions is worded as follows: "*Waiver of immunity*. 1. The sending State may waive the immunity from jurisdiction of its representatives in the special mission, of the members of its diplomatic staff, and of other persons enjoying immunity under articles 36 to 40. 2. Waiver must always be express" (*Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 365). Lastly, article 31 of the draft articles on the representation of States in their relations with international organizations reads as follows: "*Waiver of immunity*. 1. The immunity from jurisdiction of the head of mission and members of the diplomatic staff of the mission and of persons enjoying immunity under article 36 may be waived by the sending State. 2. Waiver must always be express" (*Yearbook ... 1971*, vol. II (Part One), document A/8410/Rev.1, p. 304).

Organizations of a Universal Character (art. 31). It should be added that the question of the waiver of immunity has also been dealt with in private codification projects on this topic, in particular the 2001 and 2009 resolutions of the Institute of International Law.[1077] The same is true of the waiver of State immunity, which is addressed both in the United Nations Convention on Jurisdictional Immunities of States and Their Property[1078] and in national laws on State immunity.[1079]

(3) The waiver of immunity by the State of the official is a formal act whereby that State waives its right to claim immunity, thus removing this obstacle to the exercise of jurisdiction by the courts of the forum State. The waiver of immunity therefore invalidates any debate on the application of immunity or on limits and exceptions to immunity. This effect of a waiver was confirmed by the judgment of the International Court of Justice in the case of the *Arrest Warrant of 11 April 2000*, in which the Court stated that officials "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity".[1080]

(4) Paragraph 1 recognizes the right of the State of the official to waive immunity. This paragraph reproduces, with minor adjustments, the wording of article 32, paragraph 1, of the Vienna Convention on Diplomatic Relations. Draft article 12, paragraph 1, indicates that "[t]he immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official". The emphasis is thus placed on the holder of the right to waive immunity, which is the State of the official rather than the official himself or herself. This is a logical consequence of the fact that the immunity of State officials from foreign criminal jurisdiction is recognized for the benefit of the rights and interests of the State of the official. Therefore,

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[1077] Article 7 of the Institute of International Law resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law is worded as follows: "1. The Head of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her State. Such waiver may be explicit or implied, provided it is certain. The domestic law of the State concerned determines which organ is competent to effect such a waiver. 2. Such a waiver should be made when the Head of State is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum may be called upon to take" (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 1001 above), p. 749). Article 8 of the resolution states: "1. States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State. 2. In the absence of an express derogation, there is a presumption that no derogation has been made to the inviolability and immunities referred to in the preceding paragraph; the existence and extent of such a derogation shall be unambiguously established by any legal means" (*ibid*.). This approach remained the same in the Institute's 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, although the resolution incorporates a new element by stipulating, in article II, paragraph 3, that "States should consider waiving immunity where international crimes are allegedly committed by their agents". This recommendation mirrors the provisions of paragraph 2 of the same article II, according to which, "[p]ursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled" (*Yearbook of the Institute of International Law*, vol. 73-I-II (see footnote 1001 above), p. 227.

[1078] Nonetheless, it should be borne in mind that the 2004 Convention addresses the waiver of immunity only indirectly, through the enumeration of a number of cases in which the foreign State is automatically deemed to have consented to the exercise of jurisdiction by the courts of the forum State. See, for example, articles 7 and 8 of the Convention.

[1079] See United States, Foreign Sovereign Immunities Act 1976, sects. 1605 (a) (1), 1610 (a) (1), (b) (1) and (d) (1), and 1611 (b) (1); United Kingdom of Great Britain and Northern Ireland, State Immunity Act 1978, sect. 2; Singapore, State Immunity Act 1979, sect. 4; Pakistan, State Immunity Ordinance 1981, sect. 4; South Africa, Foreign States Immunities Act 1981, sect. 3; Australia, Foreign States Immunities Act 1985, sects. 10, 3 and 6; Canada, State Immunity Act 1985, sect. 4.2; Israel, Foreign States Immunity Law 2008, sects. 9 and 10; Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, art. 6; and Spain, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, arts. 5, 6 and 8.

[1080] *Arrest Warrant of 11 April 2000* (see footnote 899 above), p. 25, para. 61.

only that State can waive immunity and thus consent to the exercise by another State of criminal jurisdiction over one of its officials. The verb "may" is used to indicate that the waiver of immunity is a right, not an obligation, of the State of the official. This is in line with the previous practice of the Commission, which, in the various draft articles in which it has dealt with the immunity of State officials from foreign criminal jurisdiction, has reflected the view that there is no obligation to waive immunity.

(5) The power to waive immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the waiver or the authorities competent to communicate the waiver. Neither the conventions nor the national laws referred to above deal with this issue in a specific manner, instead referring to the State in abstract terms.[1081] The Commission itself, in its previous work, has already considered it preferable not to refer expressly to the State organs that are competent to waive immunity.[1082] Moreover, State practice is scant and inconclusive.[1083] Which authorities are competent to waive immunity depends on the domestic law, it being understood that this category includes those with responsibility for international relations under international law. However, this does not mean that the waiver of immunity cannot be communicated by any other person specifically mandated to do so by the State, especially in the context of court proceedings.

(6) In contrast to draft article 11 on the invocation of immunity, this draft article does not include any temporal element, as the Commission found it unnecessary, given that immunity may be waived at any time.

(7) Paragraph 2 refers to the form of the waiver, stating that it "must always be express and in writing". This wording is modelled on article 32, paragraph 2, of the Vienna Convention on Diplomatic Relations, according to which "[w]aiver must always be express", and article 45, paragraph 2, of the Vienna Convention on Consular Relations, which provides that "[t]he waiver shall in all cases be express, except as provided in paragraph 3 of this Article [counterclaim], and shall be communicated to the receiving State in writing". The

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[1081] Exceptionally, some national laws refer to waivers communicated by a head of mission. See United Kingdom, State Immunity Act 1978, sect. 2.7; Singapore, State Immunity Act 1979, sect. 4.7; Pakistan, State Immunity Ordinance 1981, sect. 4.6; South Africa, Foreign States Immunities Act 1981, sect. 3.6; and Israel, Foreign States Immunity Law 2008, sect. 9 (c).

[1082] In the draft articles on diplomatic intercourse and immunities, the Commission already considered it preferable to leave open the question of the organs competent to waive the immunity of diplomatic agents. Thus, in the text of draft article 30 adopted on second reading, it decided to amend the wording of paragraph 2 by deleting the last phrase of the paragraph adopted on first reading, which read "by the Government of the sending State". The Commission explains this decision as follows: "The Commission decided to delete the phrase 'by the Government of the sending State', because it was open to the misinterpretation that the communication of the waiver should actually emanate from the Government of the sending State. As was pointed out, however, the head of the mission is the representative of his Government, and when he communicates a waiver of immunity the courts of the receiving State must accept it as a declaration of the Government of the sending State. In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending State and to the head of the mission" (*Yearbook ... 1958*, vol. II, document A/3859, p. 99, paragraph (2) of the commentary to article 30). In a similar vein, the Commission stated the following in relation to draft article 45 of the draft articles on consular relations: "The text of the article does not state through what channel the waiver of immunity should be communicated. If the head of the consular post is the object of the measure in question, the waiver should presumably be made in a statement communicated through the diplomatic channel. If the waiver relates to another member of the consulate, the statement may be made by the head of the consular post concerned" (*Yearbook ... 1961*, vol. II, document A/4843, p. 118, paragraph (2) of the commentary to article 45).

[1083] For example, in the United States, the waiver was formulated by the Minister of Justice of Haiti in *Paul v. Avril* (United States District Court for the Southern District of Florida, Judgment of 14 January 1993, 812 F. Supp. 207), and, in Belgium, by the Minister of Justice of Chad in the *Hissène Habré* case (see footnote 947 above). In Switzerland, in the case of *Ferdinand et Imelda Marcos c. Office fédéral de la police* (Federal Court, 2 November 1989 (see footnote 960 above)), the courts did not analyse which ministries were competent, but merely noted that it was sufficient that they were government bodies and therefore accepted a communication sent by the diplomatic mission of the Philippines.

statement that the waiver must be "express and in writing" reinforces the principle of legal certainty.

(8) The requirement that the waiver be express has been consistently reaffirmed by the Commission in its previous work,[1084] and is reflected in both relevant treaties[1085] and national laws.[1086] For this reason, the Commission did not retain paragraph 4 of the draft article originally proposed by the Special Rapporteur in her seventh report, which was worded as follows: "A waiver that can be deduced clearly and unequivocally from an international treaty to which the forum State and the State of the official are parties shall be deemed an express waiver".[1087] While members of the Commission generally considered that the waiver of immunity may be expressly provided for in a treaty,[1088] there was some criticism of the use of the phrase "can be deduced", which was understood by some members as recognizing a form of implicit waiver.

(9) The possibility that a waiver of immunity may be based on obligations imposed on States by treaty provisions arose, in particular, in the *Pinochet (No. 3)* case,[1089] although this was not the basis of the decision taken by the House of Lords. It has also arisen, albeit from a different perspective, in relation to the interpretation of articles 27 and 98 of the Rome Statute of the International Criminal Court and the duty of States parties to cooperate with the Court. However, the Commission's view was that there are insufficient grounds for concluding that the existence of such treaty obligations can automatically and generally be understood to waive the immunity of State officials, especially since the International Court of Justice concluded as follows in its judgment in *Arrest Warrant of 11 April 2000*: "Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions."[1090]

(10) In addition to being express, the waiver of immunity must be formulated in writing. This does not, however, affect the precise form that such writing should take, which will depend not only on the will of the State of the official, but also on the means used to communicate the waiver and even on the framework in which it is formulated. Thus, nothing prevents the waiver from being formulated by means of a *note verbale*, letter or other non-diplomatic written communication addressed to the authorities of the forum State, by means of a procedural act or document, or even by means of any other document that expressly, clearly and reliably affirms the State's willingness to waive the immunity of its official from foreign criminal jurisdiction.

(11) Finally, attention is drawn to the fact that, in contrast to draft article 11, paragraph 2, this draft article contains no express reference to the content of the waiver, as the Commission

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1084 See footnote 1076 above.

1085 See Vienna Convention on Diplomatic Relations, art. 32, para. 2; Vienna Convention on Consular Relations, art. 45, para. 2; Convention on Special Missions, art. 41, para. 2; and Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, art. 31, para. 2.

1086 For example, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain provides for such express waiver of immunity in article 27 in relation to the immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs.

1087 A/CN.4/729, para. 103.

1088 The Institute of International Law expressed a similar view in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, stating, in article 8, paragraph 1, that "States may, by agreement, derogate to the extent they see fit, from the inviolability, immunity from jurisdiction and immunity from measures of execution accorded to their own Heads of State" (*Yearbook of the Institute of International Law*, vol. 69 (see footnote 1001 above), p. 749).

1089 *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)*, United Kingdom, House of Lords, 24 March 1999 (see footnote 954 above).

1090 *Arrest Warrant of 11 April 2000* (see footnote 899 above), pp. 24–25, para. 59.

did not find it necessary. Although the members' views were divided as to whether a reference to content should be included, in the end it was considered preferable to leave a margin of discretion to the State of the official. Accordingly, the words "and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains", which had appeared in the Special Rapporteur's original proposal, were deleted. In any event, the Commission wishes to note that the content of the waiver should be clear enough to enable the State before whose authorities it is submitted to identify the scope of the waiver without ambiguity.[1091] For this purpose, it is understood that the State of the official should expressly mention the name of the official whose immunity is waived, as well as, where appropriate, the substantive scope it intends to give to the waiver, especially when the State does not wish to waive immunity absolutely, but to limit it to certain acts or to exclude certain acts alleged to have been performed by the official. If the waiver of immunity is limited in scope, the State of the official may invoke immunity in respect of acts not covered by the waiver, that is, when the authorities of the other State seek to exercise or do exercise their criminal jurisdiction over the same official for acts other than those which gave rise to the waiver or which became known after the waiver was issued.

(12) Paragraph 3 concerns the means by which the State of the official may communicate the waiver of immunity of its official. As this paragraph is thus the counterpart to draft article 11, paragraph 3, it substantially reproduces the wording of that paragraph, with the sole exception of the use of the verb "communicated" in order to align draft article 12, paragraph 3, with article 45 of the Vienna Convention on Consular Relations. In view of the parallels between this paragraph 3 and paragraph 3 of draft article 11, reference is made to the commentary to draft article 11 with regard to the question of which authorities of the State of the official are competent to decide on and to communicate the waiver of immunity. In particular, it should be noted that the use of the verb "may", referring to means of communication, is intended to leave open the possibility that the waiver of immunity may be communicated directly to the courts of the forum State.

(13) Paragraph 4 provides that "[t]he authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived". This paragraph is the equivalent of draft article 11, paragraph 4, with some drafting changes only. Since both paragraphs follow the same logic and serve the same

[1091] Three examples of clear statements of waiver, which appear in the memorandum by the Secretariat on immunity of State officials from foreign criminal jurisdiction (A/CN.4/596 and Corr.1, available from the Commission's website, documents of the sixtieth session, paras. 252 and 253), are reproduced below. In *Paul v. Avril*, the Minister of Justice of Haiti stated that "Prosper Avril, ex-Lieutenant-General of the Armed Forces of Haiti and former President of the Military Government of the Republic of Haiti, enjoys absolutely no form of immunity, whether it be of a sovereign, a chief of state, a former chief of state; whether it be diplomatic, consular, or testimonial immunity, or all other immunity, including immunity against judgment, or process, immunity against enforcement of judgments and immunity against appearing before court before and after judgment" (*Paul v. Avril* (see footnote 1083 above), p. 211). In the *Ferdinand et Imelda Marcos* case, the waiver submitted by the Philippines was worded as follows: "The Government of the Philippines hereby waives all (1) State, (2) head of State or (3) diplomatic immunity that the former President of the Philippines, Ferdinand Marcos, and his wife, Imelda Marcos, might enjoy or might have enjoyed on the basis of American law or international law. ... This waiver extends to the prosecution of Ferdinand and Imelda Marcos in the above-mentioned case (the investigation conducted in the southern district of New York) and to any criminal acts or any other related matters in connection with which these persons might attempt to refer to their immunity" (*Ferdinand et Imelda Marcos c. Office fédéral de la police* (see footnote 960 above), pp. 501–502). In the proceedings conducted in Brussels against Hissène Habré, the Ministry of Justice of Chad expressly waived immunity in the following terms: "The National Sovereign Conference, held in N'djaména from 15 January to 7 April 1993, officially waived any immunity from jurisdiction with respect to Mr. Hissène Habré. This position was confirmed by Act No. 010/PR/95 of 9 June 1995, which granted amnesty to political prisoners and exiles and to persons in armed opposition, with the exception of 'the former President of the Republic, Hissène Habré, his accomplices and/or accessories'. It is therefore clear that Mr. Hissène Habré cannot claim any immunity whatsoever from the Chadian authorities since the end of the National Sovereign Conference" (letter from the Minister of Justice of Chad to the examining magistrate of the Brussels district, 7 October 2002).

purpose, the commentary to draft article 11 in this regard also applies to paragraph 4 of the present draft article.

(14) Paragraph 5 provides that "[w]aiver of immunity is irrevocable". This provision is based on the premise that once immunity has been waived, its effect is projected into the future and the question of immunity ceases to act as a barrier to the exercise of criminal jurisdiction by the authorities of the forum State. Therefore, in light of the effects and the very nature of the waiver of immunity, the conclusion that it cannot be revoked seems obvious, since otherwise the institution would lose all meaning. Paragraph 5 of the present draft article nonetheless gave rise to some debate among the members of the Commission.

(15) This debate relates not to the basis for concluding that the waiver of immunity is irrevocable, but to possible exceptions to irrevocability. First, it should be noted that the members of the Commission generally agree that paragraph 5, as currently drafted, reflects a general rule that manifests the principle of good faith and addresses the need to respect legal certainty. However, some members also expressed the view that exceptions to this general rule might be warranted in some situations, such as when new facts not previously known to the State of the official come to light after immunity has been waived; when it is found in a particular case that the basic rules of due process have not been observed during the exercise of jurisdiction by the forum State; or when exceptional circumstances of a general nature arise, such as either a change of government or a change in the legal system, that could result in a situation where the right to a fair trial is no longer guaranteed in the State seeking to exercise its criminal jurisdiction.

(16) These considerations gave rise to a debate on the usefulness and desirability of including this paragraph in draft article 12. Some members expressed support for its deletion, particularly since neither the relevant treaties nor the domestic laws of States have expressly referred to the irrevocability of waivers of immunity, and the practice on this issue is limited.[1092] Conversely, other members considered it useful to retain paragraph 5 for reasons of legal certainty and because the Commission itself, referring to the waiver of immunity contemplated in its draft articles on diplomatic intercourse and immunities, stated that "[i]t goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance".[1093] However, other members pointed out that the irrevocable nature of waivers of immunity cannot be inferred from that statement.

(17) To address the issue of possible exceptions to the irrevocability of waivers of immunity, some members of the Commission suggested that the wording of paragraph 5 should be modified to introduce attenuating language such as "save in exceptional circumstances" or "in principle". In their view, this would acknowledge that a waiver may be revoked in special circumstances such as those referred to above. Other members, on the contrary, took the view that the introduction of such language would further complicate the interpretation of paragraph 5 and that the wording should therefore remain unchanged if the paragraph was ultimately retained in draft article 12. In this connection, a view was expressed

[1092] On waiver of immunity and submission of the foreign State to the jurisdiction of the forum State, see: United States, Foreign Sovereign Immunities Act 1976, sect. 1605 (a); United Kingdom, State Immunity Act 1978, sect. 2; Singapore, State Immunity Act 1979, sect. 4; Pakistan, State Immunity Ordinance 1981, sect. 4; South Africa, Foreign States Immunities Act 1981, sect. 3; Australia, Foreign States Immunities Act 1985, sect. 10; Canada, State Immunity Act 1985, sect. 4; Israel, Foreign States Immunity Law 2008, sects. 9 and 10; Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State 2009, arts. 5 and 6; and Spain, Organic Act No. 16/2015 of 27 October on privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, arts. 5–8. Only the laws of Australia and Spain provide for the irrevocability of the waiver of immunity. Under the Foreign States Immunities Act 1985 of Australia, "[a]n agreement by a foreign State to waive its immunity under this Part has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement" (sect. 10.5). For its part, Organic Act No. 16/2015 of Spain establishes that "[t]he consent of the foreign State referred to in articles 5 and 6 may not be revoked once the proceedings have been initiated before a Spanish court" (art. 8 (Revocation of consent)).

[1093] *Yearbook ... 1958*, vol. II, document A/3859, p. 99, paragraph (5) of the commentary to article 30.

that, in the final analysis, a waiver of immunity is a unilateral act of the State, the scope of which should be defined in light of the Commission's 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, in particular principle 10.[1094] Finally, the difficulty of identifying exceptional circumstances that could justify the revocation of a waiver of immunity was highlighted, although it was reiterated that a change of government or a change of legal system that could be prejudicial to the respect for the official's human rights and right to a fair trial could fall into this category. On the other hand, doubts were expressed as to whether the emergence of new facts that were not known at the time of the waiver, or the exercise of jurisdiction by the forum State in respect of facts not covered by the waiver, could be categorized as exceptional circumstances, since they were not exceptions, but matters in respect of which the State of the official had not waived immunity, with the result that immunity could be applied under the general rules contained in the draft articles.

(18) In view of the discussion summarized in the preceding paragraphs and the practice generally followed in similar cases where there is a divergence of views among the members during the first reading of a draft text, the Commission decided to retain paragraph 5 in draft article 12, thus enabling States to become duly aware of the debate and to provide comments.

Article 13
Requests for information

1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.

2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.

3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

4. The requested State shall consider any request for information in good faith.

Commentary

(1) Draft article 13 provides that both the forum State and the State of the official may request information from each other. It is the last of the procedural provisions under Part Four of the draft articles before reference is made to the determination of whether immunity applies or not. This is the subject of draft article 14. Draft article 13 consists of four paragraphs referring to the right of the States concerned to request information (paras. 1 and 2), the procedure for requesting information (para. 3) and the manner in which the requested State is to consider the request (para. 4).

(2) Paragraphs 1 and 2 indicate that both the forum State and the State of the official may request information. Although the Commission takes the view that requests for information follow the same logic regardless of whether they come from one State or the other, for the sake of clarity it preferred to address the two situations in separate paragraphs. The two paragraphs use similar wording, the only difference being the ultimate objective pursued by the requesting State, which is, for the forum State, "to decide whether immunity applies or not" and, for the State of the official, "to decide on the invocation or the waiver of immunity".

(3) The request for information referred to in paragraphs 1 and 2 is made with such an ultimate purpose in mind and should be understood as part of the process that a State must follow in order to decide on immunity in a specific case, from the perspective of either the forum State (examination and determination of immunity) or the State of the official

[1094] Principle 10 reads as follows: "A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: (*a*) any specific terms of the declaration relating to revocation; (*b*) the extent to which those to whom the obligations are owed have relied on such obligations; (*c*) the extent to which there has been a fundamental change in the circumstances" (*Yearbook ... 2006*, vol. II (Part Two), p. 161, para. 176).

(invocation or waiver of immunity). This is why the expression "in order to decide" is used in both paragraphs, to show that in both cases the final decision will be the outcome of a process that may involve different phases and acts.

(4) When it adopted draft article 13, the Commission took account of the fact that, in order to determine whether or not immunity applies, the forum State will need information on the official in question (name, position within the State, scope of authority, etc.) and on the connection between the State of the official and the acts of the official that may give rise to the exercise of criminal jurisdiction. This information is important for enabling the forum State to take a decision on immunity, especially in the case of immunity *ratione materiae*, but it may be known only to the State of the official. The same is true in cases where the State of the official must decide whether to invoke or waive immunity, since that State may need to obtain information on the law or the competent organs of the forum State or on the stage reached in the activity undertaken by the forum State. Draft article 13 is intended to facilitate access to such information.

(5) The information referred to in the preceding paragraph may already be in the possession of the forum State or the State of the official, especially if the provisions of draft articles 10 (on notification), 11 (on invocation) or 12 (on waiver) have been applied prior to the request for information. In acting under those provisions, the forum State and the State of the official undoubtedly will have provided information to each other. However, it is still possible that the information received by those means may in some cases be insufficient for the purposes of the aforementioned objectives. In these circumstances, in particular, requests for information become a necessary and useful tool for ensuring the proper functioning of immunity, while also strengthening cooperation between the States concerned and building trust between them. The system for requesting information provided for in draft article 13 therefore serves as a procedural safeguard for both States.

(6) The request may relate to any item of information that the requesting State considers useful for the purpose of taking a decision concerning immunity. Given the variety of items of information that may be taken into account by States for the purpose of deciding on the application, invocation or waiver of immunity, it is not possible to draw up an exhaustive list of such items. The Commission opted to use the expression "any information that it considers relevant", in preference to "the necessary information", as the adjective "necessary" could be understood in a narrow, literal sense, especially in English. Conversely, the use of the word "relevant" acknowledges that the requesting State (be it the forum State or the State of the official) has the right to decide on the information that it wishes to request in each case, as provided in a number of international instruments.[1095]

(7) Paragraph 3 refers to the channels through which information may be requested. This paragraph is modelled on paragraph 3 of draft articles 10, 11 and 12, the wording of which it reproduces *mutatis mutandis.* The commentaries to those draft articles are thus applicable to this paragraph.

(8) The Commission nonetheless wishes to draw attention to its decision not to include in draft article 13 a paragraph on internal communication between authorities of the forum State or the State of the official, similar to paragraph 4 of draft articles 11 and 12. This is because the request for information should be understood to refer essentially to information that, in many cases, will be complementary or additional to the information already in the possession of the forum State or the State of the official, and that therefore will usually be sought at a more advanced stage of the process. Thus, it is likely that the competent decision-making authority in each State will already be known to the other and that it is therefore not necessary to introduce this element, which operates as a safeguard clause. In any event, if the request for information is made at a time when the authorities are only beginning to deal with the

[1095] See, for example, European Convention on Mutual Assistance in Criminal Matters, art. 3; Inter-American Convention on Mutual Assistance in Criminal Matters, art. 7; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 1, paras. 1 and 2; and Model Treaty on Mutual Assistance in Criminal Matters, art. 1, para. 2.

question of immunity, there is no reason not to apply the principle that the competent authorities of the same State have an obligation to communicate with each other.

(9) Paragraph 4 replaces paragraphs 4 and 5 originally proposed by the Special Rapporteur, which listed the possible grounds for refusal of the request and the conditions to which both the request for information and the information provided could be subject, including confidentiality.[1096] The Commission considered it preferable to include in draft article 13 a simpler paragraph merely setting out the principle that any request for information must be considered in good faith by the requested State, be it the forum State or the State of the official. There are several reasons for this. First, the original proposal listing the permitted grounds for refusal could be interpreted *a contrario* as recognizing an obligation to provide the requested information. Such an obligation, however, does not exist in international law, except in respect of specific obligations that may be laid down in international cooperation and mutual legal assistance agreements or other treaties. Second, the original proposal could conflict with any systems for requesting and exchanging information that may be established in international cooperation and mutual legal assistance treaties, which would in any case apply between the States parties. Third, the establishment of a confidentiality rule could conflict with State rules governing confidentiality. Fourth, the purpose of draft article 13 is to promote cooperation and the exchange of information between the forum State and the State of the official, but this purpose could be undermined or called into question if the draft article expressly listed grounds for refusal and rules of conditionality.

(10) In the Commission's view, however, the above considerations do not give grounds for ignoring the question of the criteria that States should follow in assessing requests for information. It therefore opted for wording that sets out, in a simple manner, the obligation of the requested State to consider in good faith any request that may be addressed to it. The term "requested State" reflects the terminology commonly used in international cooperation and mutual legal assistance treaties, which is familiar to States.

(11) The expression "shall consider ... in good faith" in paragraph 4 refers to the general obligation of States to act in good faith in their relations with third parties. The scope of this obligation, by its very nature, cannot be analysed in the abstract and must be determined on a case-by-case basis. Its inclusion in draft article 13 should be understood in the context defined by the draft article itself: as a procedural tool for promoting cooperation between the forum State and the State of the official to enable each of them to form a sound judgment to serve as a basis for the decisions referred to in paragraphs 1 and 2. Accordingly, the expression "shall consider ... in good faith" should be interpreted in light of two elements operating together: first, the obligation to examine the request; and second, the requirement to do so with the intention of helping the other State to take an informed and well-founded decision on whether or not immunity applies, or on the invocation or waiver of immunity. The expression "shall consider ... in good faith" thus reflects an obligation of conduct and not an obligation of result.

(12) The requested State should take these elements into account as a starting point for the examination of any request for information, but nothing prevents it from also considering other elements or circumstances in reaching a decision on the request, such as, *inter alia*, concerns of sovereignty, public order, security and essential public interest. In any event, the Commission did not consider it necessary to refer expressly to these elements in draft article 13, recognizing that it is for the requested State to identify the reasons justifying its decision.

(13) The Commission did not consider it necessary to refer expressly, in paragraph 4, to the possibility of attaching conditions to the provision of the requested information. However, nothing would prevent the requested State from assessing whether to formulate conditions as part of the process of "considering in good faith" a request for information, especially if this would facilitate or encourage the provision of the requested information.

[1096] See the seventh report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), annex II.

Article 14
Determination of immunity

1. A determination of the immunity of a State official from foreign criminal jurisdiction shall be made by the competent authorities of the forum State according to its law and procedures and in conformity with the applicable rules of international law.

2. In making a determination about immunity, such competent authorities shall take into account in particular:

(a) whether the forum State has made the notification provided for in draft article 10;

(b) whether the State of the official has invoked or waived immunity;

(c) any other relevant information provided by the authorities of the State of the official;

(d) any other relevant information provided by other authorities of the forum State; and

(e) any other relevant information from other sources.

3. When the forum State is considering the application of draft article 7 in making the determination of immunity:

(a) the authorities making the determination shall be at an appropriately high level;

(b) in addition to what is provided in paragraph 2, the competent authorities shall:

(i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7;

(ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.

4. The competent authorities of the forum State shall always determine immunity:

(a) before initiating criminal proceedings;

(b) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law. This subparagraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

5. Any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State.

Commentary

(1) Draft article 14 concerns the determination of immunity. As "determination" means the decision on whether or not immunity applies in a particular case, this is a key provision of Part Four of the present draft articles. Draft article 14 is one of the most fundamental procedural safeguards contained in this part.

(2) "Determination" is the final stage of a process in which the competent authorities of the forum State make an assessment of the various elements and circumstances of a particular case. It is to be distinguished from the "examination" of immunity covered in draft article 9, which refers only to the initial consideration of this question. In any case, as determination is the final stage of the process, draft article 14 should be read in conjunction with other provisions of Part Four of the draft articles, in particular draft articles 8 to 13, which deal

with institutions that are relevant to the determination of immunity. In this connection, attention is drawn to the special relevance of draft article 8, which defines the scope of application of Part Four and its relationship to the other parts of the draft articles. Under that draft article, a determination about immunity must be made whenever the question of immunity from the forum State's exercise of criminal jurisdiction arises, including in cases where draft article 7 may be applicable.

(3) Draft article 14 consists of five paragraphs concerning, respectively, the identification of who is to make the determination of immunity and what legal rules must be followed in that process (para. 1); what general criteria must be taken into account by the forum State in determining immunity (para. 2); what special criteria must be taken into account by the forum State in determining immunity in connection with draft article 7 (para. 3); when immunity must be determined (para. 4); and judicial challenges to the determination of immunity (para. 5).

Paragraph 1

(4) Paragraph 1 begins with the words "A determination". The use of the article "a" is intended to show that the determination is always made with respect to a specific case, the elements and circumstances of which may differ from those of any other case. In each language version of the draft article, the most appropriate word for achieving this purpose has been used.

(5) The determination of immunity is to be made by "the competent authorities of the forum State". The reference to "the competent authorities of the forum State" introduces an element of flexibility that allows two factors to be taken into account: first, that the determination of immunity may be made at different times and is not limited to a judicial procedure *stricto sensu*, and second, that the authorities competent to determine immunity may vary from one State to another, depending on the applicable national rules. Authorities with competence to determine immunity may include administrative and executive bodies, prosecutors, judges or other organs to which the national law of the forum State grants such competence. Moreover, it should be borne in mind that several organs of the forum State may be considered successively as competent authorities in cases where the determination of immunity can or must be made at different stages, in particular when the exercise of the criminal jurisdiction of the forum State requires the intervention of judicial authorities. In such cases, the criteria set forth in paragraphs 2, 3 and 4 of draft article 14 must be applied by each of the competent authorities in making a determination of immunity.

(6) The determination of immunity is to be made in accordance with the national law of the forum State. Paragraph 1 uses the phrase "according to its law and procedures" to indicate that the competent authorities must take into account both the substantive rules and the procedural rules applicable to the case. However, while the domestic law of the forum State will be the primary basis for determining immunity, an express reference to the determination to be made "in conformity with the applicable rules of international law" has also been included, given that immunity is part of international law and that States are also bound by both customary and treaty rules that may have a bearing on immunity and its determination. Therefore, both categories of law – national and international – must be applied in tandem.

Paragraph 2

(7) Paragraph 2 sets out the criteria to be taken into account by the competent authorities of the forum State in determining immunity in a particular case. The criteria in this paragraph shall be taken into account in all cases of the determination of immunity, including those in which the application of draft article 7 may be considered. In any event, while these are the basic criteria that shall always be taken into account, they are not the only ones which the competent authorities of the forum State may consider in determining immunity. This is reflected by the words "in particular" at the end of the introductory phrase of the paragraph.

(8) The list of criteria to be taken into account by the competent authorities of the forum State includes some essential elements forming part of the procedural path that begins with the examination of immunity and ends with the determination of immunity, in particular the notification provided for in draft article 10 (referred to in subparagraph (a)), the invocation

or waiver of immunity by the State of the official (subparagraph (b)) and the information made available to the forum State (subparagraphs (c), (d) and (e)).

(9) These criteria have been included because of their direct connection to the procedural safeguards referred to in draft articles 10, 11, 12 and 13. However, while all the criteria included in draft article 14, paragraph 2, are related to these other draft articles, the Commission did not consider it necessary to include cross references to them in all cases. Only an express reference to draft article 10 has been included, given that this is the only draft article that imposes an obligation on the forum State, while the other draft articles refer to powers of the State of the official (invocation and waiver) or to optional instruments available to the forum State and the State of the official (requests for information).

(10) It should be borne in mind that the criteria listed in paragraph 2 are not prerequisites for the determination of immunity, but elements of guidance which are offered to the competent authorities and which they must take into consideration for the purpose of determining immunity. This is particularly relevant with regard to the invocation of immunity, which has not been considered by the Commission as a prerequisite for the application of either immunity *ratione personae* or immunity *ratione materiae*. The competent authorities of the forum State must therefore determine immunity in any case, whether or not it has been invoked, and irrespective of the different weight that the invocation or non-invocation of immunity may have in light of the circumstances of each particular case.

(11) With regard to the information available to the competent authorities of the forum State, the Commission considered it useful to refer separately to information from each of the sources from which it may originate. Information provided by the State of the official (subparagraph (c)) is directly related to the system of requests for information provided for in draft article 13, but nothing prevents such information from being provided *proprio motu* outside that system. The reference to information "provided by other authorities of the forum State" (subparagraph (d)) reflects the fact that the authorities with competence to determine immunity may receive, and often do receive, information from other authorities of the State that may be useful or necessary for the determination of immunity, including information provided by the police, the Ministry for Foreign Affairs, the Ministry of Justice or others. Finally, the Commission has noted that the competent authorities of the forum State often receive or have access to information from other sources, including third States, international organizations (such as the International Criminal Police Organization (INTERPOL)), international investigative mechanisms, courts, the International Committee of the Red Cross and non-governmental organizations. The Commission considered that this information may be useful for the determination of immunity in a particular case and has therefore referred to it in subparagraph (e). However, it did not expressly refer to the various sources mentioned above, preferring instead to use the expression "other sources" so as to refer generally to any source of information that may be useful for the determination of immunity in a particular case.

(12) Lastly, it should be noted that the Commission decided not to establish in paragraph 2 any hierarchy among the sources from which the available information has originated. Therefore, subparagraphs (c), (d) and (e) begin with the words "any other relevant information". This phrase also means that the information to be taken into consideration in determining immunity must always be "relevant", and it is for the competent authorities of the forum State to assess such relevance.

Paragraph 3

(13) Paragraph 3 applies only in cases where the determination of immunity is related to draft article 7. In other words, it applies only in cases where the forum State considers that the official of another State may have committed one of the crimes under international law listed in that draft article, which may lead the forum State to determine that the official does not enjoy immunity *ratione materiae* even if the acts in question were performed in an official capacity. The Commission has thus taken the view that special criteria for determining immunity must be established for cases of this type to ensure a proper balance between the interests of the forum State and those of the State of the official. These special criteria serve two complementary purposes: first, to reduce the risk of politicization and misuse of draft

article 7, and second, to ensure that effect can be given to draft article 7 and that its use in good faith is not prevented.

(14) The special criteria listed in paragraph 3 are complementary to those set out in paragraph 2, which also apply in cases of determination of immunity that may be affected by draft article 7. The special criteria set out in paragraph 3 relate to two distinct questions: which authorities should determine immunity in these circumstances (subparagraph (a)) and what additional elements should be assessed by the competent authorities for the purpose of determining immunity (subparagraph (b)).

(15) Subparagraph (a) requires that the authorities of the forum State that are to determine immunity "be at an appropriately high level". The Commission included this criterion taking into account, in the first place, the seriousness of the crimes alleged to have been committed by the official in such cases, which, owing to their characteristics and specific nature, require assessment by specially qualified State authorities with a special level of competence. The Commission also considered that, in relation to this category of crimes, the exercise of criminal jurisdiction over a foreign official may have a significant impact on the relations between the forum State and the State of the official. This is another reason that the authorities making the determination of immunity should have sufficiently high-level decision-making power.

(16) The Commission understands "appropriately high level" to be the necessary criterion for defining the concept of a "competent authority" for the purpose of this type of determination, and has therefore, in subparagraph (a), used only the term "authorities" rather than "competent authorities", which, however, is used in subparagraph (b). In any event, it should be recalled that, as noted above, the term "authorities" is used to refer to a broad range of State organs, including administrative, executive, prosecutorial and judicial authorities. It should moreover be borne in mind that the determination of which "authorities [are] at an appropriately high level" will depend on each State's legal system. Therefore, "appropriately high level" does not necessarily mean "hierarchically superior", since the existence or not of a hierarchical relationship in each category of organs will depend on the internal system of the forum State.

(17) Paragraph 3, subparagraph (b), sets out two criteria that serve as additional elements to be assessed when determining immunity in cases that may be covered by draft article 7. Because they are different in nature, they use different wording to express the obligation imposed on the competent authorities: "assure themselves" with respect to the first criterion and "give consideration" with respect to the second.

(18) Under the first of these criteria, set forth in subparagraph (b) (i), "the competent authorities [must] assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7"; that is, a crime of genocide, a crime against humanity, a war crime, or a crime of apartheid, torture or enforced disappearance. The expression "[must] assure themselves" refers to the competent authorities' obligation to form a reasoned judgment on this point. This should not, however, be confused with the standard of being convinced beyond reasonable doubt, which would be necessary for a court to conclude that the official in question is criminally responsible for the commission of any of these crimes. This distinction is very important, especially since, as will be noted below, the determination of immunity may be made at different times and need not necessarily take the form of a judicial determination.

(19) To prevent the politically motivated or improper use of exceptions to immunity, the criterion contained in subparagraph (b) (i) is intended to ensure that the determination of immunity is not based solely on news reports, complaints or other types of unsubstantiated information. It is therefore essential to define the standard of proof applicable to the information which the competent authorities use as the basis for forming their judgment. After weighing different possibilities,[1097] it was decided that an internationally established standard of proof should be used. The Commission thus decided that the standards defined

[1097] The Commission considered, among others, the following formulations: "*prima facie* evidence", "clear and convincing evidence" and "the highest standard of proof for the prosecution of crimes in the domestic legal system" of the forum State.

in the Rome Statute of the International Criminal Court would serve as a useful model, especially as these standards were considered and agreed upon by States at an international conference with broad participation.

(20) In line with this approach, the Commission assessed the different formulations used in the Rome Statute to identify a sufficient basis for the exercise of jurisdiction, namely: (a) a "reasonable basis to believe that a crime ... has been or is being committed", as a sufficient standard of proof for the Prosecutor to decide to initiate an investigation,[1098] and, conversely, "substantial reasons to believe that an investigation would not serve the interests of justice";[1099] (b) "reasonable grounds to believe that [an individual] has committed a crime", as the applicable standard for the Pre-Trial Chamber to issue a warrant of arrest;[1100] and (c) "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged", for the Pre-Trial Chamber to confirm the charges.[1101]

(21) After analysing each of these ways of describing the standard of proof, the Commission decided to use the expression "substantial grounds to believe", which in its view is precise enough to achieve the objectives pursued by this criterion. This expression is taken from the English version of article 61, paragraph 7, of the Rome Statute, which is the same in the Arabic, Chinese, French and Russian versions. Although the wording of that paragraph is different in the Spanish version ("*motivos fundados para creer*"), the Commission preferred not to use different wording in each of the official languages, in order to avoid possible misinterpretations on an issue of such importance as the standard of proof required for the application of the exception to immunity *ratione materiae*. However, the Commission decided not to retain the words immediately preceding that phrase in article 61, paragraph 7 ("whether there is sufficient evidence to establish"), to avoid creating the erroneous impression that the authorities competent to determine immunity must examine the evidence as thoroughly as the Pre-Trial Chamber of the International Criminal Court is required to do, through a judicial procedure in which the right of the accused or his or her counsel to participate is recognized.

(22) In connection with the above-mentioned considerations, it should be noted that the use of the phrase "substantial grounds to believe" in the present draft article should not be conflated with the use of the same phrase in the English version of article 53, paragraph 1 (c), of the Rome Statute[1102] as a basis on which the Prosecutor of the Court may decide that, despite the existence of sufficient information indicating that crimes within the jurisdiction of the Court have been committed, an investigation need not be initiated because it "would not serve the interests of justice". Although the Commission considered this issue, it decided not to include a reference to the interests of justice as part of this criterion because doing so could potentially politicize the determination of immunity.

(23) The standard of proof just discussed refers to the conduct of the official of another State, using the wording "committed any of the crimes under international law listed in draft article 7". The verb "committed" follows the wording of the above-mentioned provisions of the Rome Statute and should be understood in relation to the process of determining immunity, which, as noted above, cannot be confused with the determination of any criminal responsibility that the official may have incurred. Therefore, the use of the verb "committed" does not prejudice the presumption of innocence of the official, respect for which is provided for in draft article 16, entitled "Fair treatment of the State official".

(24) Under the criterion set forth in paragraph 3 (b) (ii) of this draft article, the competent authorities must "give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official". The obligation imposed on the competent authorities is less stringent than that

[1098] Rome Statute, art. 53, para. 1 (a).
[1099] *Ibid*., art. 53, para. 1 (c).
[1100] *Ibid*., art. 58, para. 1 (a).
[1101] *Ibid*., art. 61, para. 7.
[1102] The same wording is used in the Chinese and Spanish versions of this article. The wording of Arabic, French and Russian versions is different.

referred to in subparagraph (b) (i), since those authorities need only "give consideration to" any such request or notification.

(25) This criterion allows for the fact that proceedings in respect of the crimes under international law listed in draft article 7 may be instituted by a plurality of jurisdictions, both national and international. Such crimes may be submitted to the criminal courts of the official's own State, to the criminal courts of third States by virtue of the jurisdictional powers provided for in their legal systems or in applicable treaties, and to the competent international and hybrid courts. Criminal jurisdiction may be exercised concurrently or consecutively before more than one of the courts indicated, as well as before the courts of the forum State.

(26) The Commission therefore decided to include this special criterion for the determination of immunity in connection with draft article 7, given that it allows for the operation of the applicable systems of cooperation and mutual legal assistance and, by this means, for the establishment of objective conditions for the exercise of jurisdiction by the forum State, the State of the official, a third State or an international court. The Commission also noted that the official's immunity from criminal jurisdiction will play a different role in each of the jurisdictions mentioned above, being inapplicable before the courts of the official's State and before international criminal tribunals. Consequently, assessing whether a court other than those of the forum State is exercising or intends to exercise jurisdiction may be a useful tool for avoiding a conflict between respect for immunity and establishment of criminal responsibility for the commission of crimes under international law. This amounts to an enhanced procedural safeguard for the purposes of Part Four of the present draft articles.

(27) The use, in paragraph 3 (b) (ii), of the alternative expressions "request or notification", "another authority, court or tribunal" and "its exercise of or intention to exercise" is meant to ensure that the wording is flexible enough to cover the different situations that may arise in practice.

(28) This criterion is clearly related to the transfer of criminal proceedings referred to in draft article 15. However, as its scope is broader, the Commission preferred not to include an express reference to that draft article in this paragraph of draft article 14.

Paragraph 4

(29) Paragraph 4 refers to the moment at which immunity must be determined and applies to any determination made under draft article 14.

(30) Although paragraph 4 was not initially included in draft article 14 as originally proposed, the Commission decided to include it in light of a general discussion on a proposal, made by one of its members, that the exercise of criminal jurisdiction over a foreign official should not be possible if the official is not present in the territory of the forum State. The Commission decided against that proposal on the grounds that it would excessively limit the forum State's jurisdiction and is not in line with international practice, given that the legal systems of a number of States allow for trials *in absentia*. It should be added that, in general, there is nothing to prevent certain acts characterized as an exercise of jurisdiction, in particular investigations, from being carried out even if the person concerned is not in the territory of the forum State.

(31) The Commission nevertheless considered that this proposal, despite its exclusion from the draft article, had raised the point that the draft article on the determination of immunity should make some provision for protecting the State official until the determination is actually made. The result is paragraph 4 of draft article 14, which constitutes a safeguard for the State of the official and for the official himself or herself by requiring that the determination of immunity always be made before measures that will necessarily affect the official are taken.

(32) Like the examination of immunity, the determination of immunity should take place as early as possible, to avoid a situation where the late determination of immunity prevents it from producing its full effects.[1103] However, the Commission did not consider it necessary to indicate, in a general way, when the determination should take place, since this will depend

[1103] See, in particular, paragraph (7) of the commentary to draft article 9 above.

on different circumstances that cannot be listed in an exhaustive manner. Rather, paragraph 4 of this draft article indicates when immunity must necessarily be determined if it has not been determined earlier. This is reflected in the use of the word "always" with reference to the obligation to determine immunity that is incumbent on the competent authorities of the forum State.

(33) In indicating when immunity must necessarily be determined, draft article 14, paragraph 4, largely follows the wording of draft article 9, paragraph 2. Accordingly, the authorities must determine immunity "before initiating criminal proceedings" and "before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law". The meaning and scope of these phrases have been previously analysed in the commentary to draft article 9, paragraph 2, to which reference is made.[1104]

(34) However, paragraph 4 (b) of draft article 14 adds a new sentence stating that the fact that immunity must always be determined before coercive measures can be taken against a foreign official "does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official". This clause strikes a balance between the interests of the State of the official, represented by the determination of immunity at a procedurally appropriate time, and the interests of the forum State, represented by the retention of the power to take such coercive measures as are necessary to ensure that, should the forum State subsequently be able to exercise criminal jurisdiction over the foreign official, this will not be impossible in practice. The coercive measures that could be adopted or continued will therefore be measures of a precautionary nature, including, for example, any administrative measures aimed at preventing the official's departure from the territory of the forum State, such as a requirement to surrender his or her passport or an order prohibiting the official from leaving the territory and requiring him or her to report periodically to the national authorities. The retention of the power to adopt and continue such coercive measures even after immunity has been determined is justified, in particular, by the fact that the determination may be made at an early stage of the exercise of jurisdiction and then be reversed at a later stage, especially in the judicial phase.

Paragraph 5

(35) As noted above, the determination of immunity may be made at different times and may be decided upon by administrative, executive, prosecutorial or judicial authorities. This means that the determination of immunity need not necessarily be a judicial determination.

(36) However, because immunity is determined for the purpose of the exercise of criminal jurisdiction by the forum State, there is in practice a strong likelihood that the determination of immunity will lead to a judicial phase, especially in relation to a decision to initiate criminal proceedings against the foreign official or the adoption of certain coercive measures that must be approved by the courts or may be subject to challenge. In addition, the decisions adopted by administrative, executive or prosecutorial authorities on the determination of immunity may be subject to judicial oversight in many cases. With this in mind, the Commission has included in draft article 14 a paragraph 5 on the possibility of challenging a determination regarding immunity by means of judicial proceedings.

(37) Although the Special Rapporteur's initial proposal was broader, the Commission decided to approach the issue of challenging the determination of immunity in terms of the safeguards provided to the State of the official and to the official himself or herself. Consequently, priority has been given to challenges to a "determination that an official of another State does not enjoy immunity", which "shall be open to challenge through judicial proceedings". An obligation is thus imposed on the forum State to ensure that such a challenge is possible. The Commission has used the phrase "challenge through judicial proceedings", which, although the subject of much debate, was considered to be the most appropriate means, owing to its generality, of covering the different legal avenues and remedies established for this purpose in national judicial systems. Paragraph 5 likewise does

[1104] See, in particular, paragraphs (8)–(14) of the commentary to draft article 9 above.

not address the issue of standing to challenge the determination or other issues of a procedural nature that will depend on each country's national law.

(38) The emphasis placed on cases where the determination concludes that immunity does not apply is also due to other considerations. For example, it has been argued that in some judicial systems a decision by the prosecutor not to exercise jurisdiction, including where the decision is based on a finding that immunity applies, is not subject to legal challenge. However, the priority treatment given to challenges to determinations denying immunity in no way implies that the Commission's intent is to exclude challenges to determinations upholding immunity. On the contrary, paragraph 5 contains a "without prejudice" clause stating that it is "without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State".

(39) Through this "without prejudice" clause, the Commission recognizes that a determination in favour of immunity may also be challenged in court, thus reflecting the existing practice in a number of States and the need to strike a balance between the rights of the foreign official, on the one hand, and those of the victims of the crimes he or she is alleged to have committed, on the other. In this context, the Commission has taken into account, in particular, the right of access to justice, which is a basic component of the right to effective judicial protection and, as such, is recognized in various international human rights instruments[1105] and has been systematically referred to in the case law of regional courts such as the European Court of Human Rights[1106] and the Inter-American Court of Human Rights,[1107] as well as in the doctrine of the Human Rights Committee.[1108] All these elements must be duly taken into account in order to determine whether a challenge "may be brought under the applicable law of the forum State", since the Commission understands that the expression "applicable law" refers both to State law and to the rules of international law that are enforceable against that State.

Article 15
Transfer of the criminal proceedings

1. The competent authorities of the forum State may, acting *proprio motu* or at the request of the State of the official, offer to transfer the criminal proceedings to the State of the official.

2. The forum State shall consider in good faith a request for transfer of the criminal proceedings. Such transfer shall only take place if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution.

3. Once a transfer has been agreed, the forum State shall suspend its criminal proceedings, without prejudice to the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.

[1105] See, in this connection, the following instruments: International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, and vol. 1057, p. 407, art. 14; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), *ibid.*, vol. 213, No. 2889, p. 221, arts. 6 and 13; Charter of Fundamental Rights of the European Union (Nice, 7 December 2000), *Official Journal of the European Communities*, C 364, 18 December 2000, p. 1, art. 47; American Convention on Human Rights: "Pact of San José, Costa Rica" (San Jose, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, art. 8; African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), *ibid*., vol. 1520, No. 26363, p. 217, art. 7; and Arab Charter on Human Rights (adopted at the Summit of the League of Arab States at its sixteenth ordinary session, held in Tunis in May 2004, CHR/NONE/2004/40/Rev.1, or *Boston University International Law Journal*, vol. 24, No. 2 (2006), p. 147), art. 12.

[1106] See, e.g., *Airey v. Ireland*, 9 October 1979, European Court of Human Rights, Series A, No. 32; and *Stanev v. Bulgaria* [GC], No. 36760/06, European Court of Human Rights, ECHR 2012.

[1107] See, in particular, *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 October 1987, Inter-American Court of Human Rights, Series A, No. 9.

[1108] See, in particular, Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial.

4. The forum State may resume its criminal proceedings if, after the transfer, the State of the official does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution.

5. The present draft article is without prejudice to any other obligations of the forum State or the State of the official under international law.

Commentary

(1) Draft article 15 provides for the possibility of transferring criminal proceedings to the State of the official and regulates the conditions under which this may occur, as well as its effects.

(2) The transfer of criminal proceedings is one of the mechanisms for cooperation and mutual legal assistance in criminal matters. Although not very widespread, it has been provided for in some multilateral international instruments.[1109] Its importance is illustrated by the General Assembly's adoption of the Model Treaty on the Transfer of Proceedings in Criminal Matters. This mechanism allows a State that is exercising jurisdiction over an individual to transfer the criminal proceedings to another State that also has jurisdiction and that, for various reasons, would be in a better position to exercise jurisdiction. The transfer of proceedings is intended to ensure that jurisdiction is effectively exercised and that, where appropriate, the individual's criminal responsibility can be established.[1110]

(3) Although the international instruments governing the transfer of proceedings do not refer to the immunity of State officials from foreign criminal jurisdiction, there is nothing to prevent this mechanism from also being used in a context where the question of immunity arises. Draft article 15 serves this purpose by permitting the transfer, to the State of the official, of proceedings instituted against him or her in the forum State. Recourse to this instrument of cooperation ensures a balance between the rights and interests of the State of the official and those of the forum State, helping to preserve immunity while also ensuring that immunity does not prevent the effective exercise of criminal jurisdiction over the official. This formula is fully compatible with the position taken by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, in which it stated that immunity does not affect the international criminal responsibility of a State official, which may be established through the exercise of jurisdiction by the courts of the State of the official, by other courts or by an international criminal tribunal.[1111]

(4) Draft article 15 refers only to the transfer of criminal proceedings from the forum State to the State of the official, since it is intended as a procedural safeguard operating between the States directly concerned by the present draft articles. This does not mean that the proceedings cannot be transferred to a third State under applicable rules on cooperation and mutual legal assistance in criminal matters, nor does it mean that the proceedings cannot be transferred to a competent international criminal court. However, the transfer of criminal proceedings to a third State or to an international criminal court must be carried out in accordance with the international rules applicable in each case and not in accordance with draft article 15, which establishes special rules for the transfer of criminal proceedings between the forum State and the State of the official in the context of the present draft articles.

[1109] The Council of Europe adopted the 1972 European Convention on the Transfer of Proceedings in Criminal Matters. The European Convention on Mutual Assistance in Criminal Matters refers to the transfer of proceedings in article 21. Of particular importance is the treatment given to the transfer of criminal proceedings in article 21 of the United Nations Convention against Transnational Organized Crime ((New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209), which, moreover, has been the subject of continued discussion within the Conference of the Parties to the Convention. In this regard, see Working Group on International Cooperation of the Conference of the Parties to the Convention, Practical considerations, good practices and challenges encountered in the area of transfer of criminal proceedings as a separate form of international cooperation in criminal matters (CTOC/COP/WG.3/2017/2).

[1110] See Council of Europe, Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters, *European Treaty Series*, No. 73.

[1111] *Arrest Warrant of 11 April 2000* (see footnote 899 above), pp. 25–26, para. 61.

(5) Draft article 15 consists of five paragraphs, which set out the procedural steps to be followed in transferring criminal proceedings and the effects of such transfer (paras. 1–3) and establish two safeguards concerning the exercise of jurisdiction by the forum State (paras. 4 and 5).

Paragraph 1

(6) Paragraph 1 concerns the first phase of the transfer process, providing that "[t]he competent authorities of the forum State may ... offer to transfer the criminal proceedings to the State of the official". The transfer is therefore understood as a prerogative of the forum State and not as an obligation. Moreover, this prerogative of the forum State is embodied in the offer to transfer and not in the transfer itself, which will take place only if the requirement set forth in the second sentence of paragraph 2 of the draft article is met. Although some Commission members took the view that the use of the verb "offer" was unnecessary and that its deletion would not alter the meaning of the paragraph, the Commission decided to retain it in order to strengthen the connection between paragraph 1 and the condition established in paragraph 2 for the transfer to take place and, therefore, to make clear the consensual nature of the transfer procedure as a whole.

(7) In accordance with paragraph 1, the offer may be made "*proprio motu* or at the request of the State of the official". Although the transfer procedure is likely to be initiated at the request of the State of the official, the Commission did not wish to rule out the possibility that it may be initiated by an authority of the forum State in exercise of its own powers. In any event, the ultimate decision to "offer to transfer" is within the unilateral competence of the authorities of the forum State, subject to the clause contained in the first sentence of paragraph 2. As in other draft articles, the term "competent authorities" includes any authority of the forum State, whether administrative, executive, prosecutorial or judicial.

(8) Paragraph 1 does not mention the rules that should govern the adoption of a decision to offer to transfer the proceedings, but this should not be taken to mean that such a decision is discretionary in absolute terms. Rather, the competent authorities referred to in this paragraph, like all State authorities, will be bound by the law applicable in the State, which includes both the rules of national law and the rules of international law that are enforceable against the forum State. This is particularly relevant in cases where the proceedings to be transferred relate to the commission of crimes under international law in respect of which the State has an obligation to exercise jurisdiction under international law. This circumstance has been particularly taken into account by the Commission, which included paragraph 5 to address this specific problem.

(9) Lastly, it should be noted that the offer to transfer the criminal proceedings is an autonomous act that does not require the authorities of the forum State to first decline to exercise their jurisdiction. The Commission noted that, in a recent case that it examined for the purpose of preparing this draft article, the competent authorities of the forum State took the view that they were delegating, rather than relinquishing, the exercise of their own jurisdiction.[1112] For this reason, the Commission decided to retain only the reference to the offer to transfer, on the understanding that this implies that the competent authorities of the forum State will not be obliged to take a prior decision on the exercise of their own jurisdiction. This reflects the diversity of existing models in national legal systems and is consistent with the safeguard clause contained in paragraph 4, which provides for the resumption of criminal proceedings by the forum State.

[1112] The decision in question is the judgment of 10 May 2018 of the Lisbon Court of Appeal, handed down in criminal proceedings for corruption involving a former Vice-President of Angola. See Case No. 333/14.9TELSB-U.L1-9, available at http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/88e2a666e33779ce802582b8003567f3?OpenDocument. The Court's interpretation was probably based on the fact that the transfer of the criminal proceedings to the Angolan courts was based exclusively on Portuguese law (the Code of Criminal Procedure).

Paragraph 2

(10) Although the forum State is not obliged to offer to transfer the proceedings, paragraph 2 imposes an obligation on the forum State to consider any request for transfer in good faith. It is understood that such a request for transfer will have to come from the State of the official, in view of the relationship between paragraph 1 and paragraph 2 referred to above. This obligation makes good faith the essential principle that will govern the relations between the State of the official and the forum State with regard to the transfer of criminal proceedings, being equally applicable to both States.

(11) The reference to good faith in the first sentence of paragraph 2 is of special significance when read in conjunction with the second sentence of that paragraph, according to which the transfer will only take place "if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution". This wording reproduces what is known as the "Hague formula", which appeared for the first time in article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft,[1113] and which has subsequently been reproduced in many conventions. This "formula" was examined by the Commission in its work on the obligation to extradite or prosecute (*aut dedere aut judicare*)[1114] and on the prevention and punishment of crimes against humanity.[1115] The wording of this phrase in draft article 15 is identical to that of draft article 10 of the draft articles on prevention and punishment of crimes against humanity, although the latter draft article deals with the obligation to extradite or prosecute.

(12) As indicated by the Commission in its work on the aforementioned two topics, the submission of the case to the competent authorities should be understood as a substantive and not merely formalistic measure. This means that the State of the official has an obligation to transmit all available evidentiary and other information to its competent authorities, so that they may evaluate it and conduct an investigation that will enable them to form a judgment on whether to initiate proceedings against the official. However, the submission of the case for prosecution does not amount to an obligation to initiate such proceedings, as the decision on whether to do so will depend on the evaluation of the evidence submitted and other available information, as well as the evidence obtained in the investigation to be carried out by the competent authorities. In any event, the submission of the case to the competent authorities must, at the very least, be done in good faith and not for the purpose of blocking prosecution or preventing the establishment of the official's responsibility; as the International Court of Justice stated in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the exercise of jurisdiction by the State concerned (in this case the State of the official) must be carried out for the purpose of ensuring that the individual (in this case the official) will not go unpunished.[1116] In this regard, it should be recalled that draft article 10 of the draft articles on prevention and punishment of crimes against humanity expressly provides that the competent authorities to whom the matter is referred "shall take their decision [whether or not to initiate criminal proceedings] in the same manner as in the case of any other offence of a grave nature under the law of that State".[1117] The phrase "submit the case ... for the purpose of prosecution" has similarly to be interpreted in a substantive manner and with the ultimate purpose in mind.

[1113] Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105.

[1114] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. VI, in particular paras. (10)–(21) of the final report on the topic, which is reproduced in paragraph 65 of the Commission's report.

[1115] *Ibid., Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 44–45, draft articles on prevention and punishment of crimes against humanity, draft article 10 (*Aut dedere aut judicare*) and commentary thereto.

[1116] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 902 above), at pp. 460 and 461, paras. 115 and 120.

[1117] This expression is also found in the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 902 above), pp. 454–455, para. 90.

(13) The interpretation of the obligation of the official's State to act in good faith in submitting the case to its national authorities is of particular importance in relation to draft article 15, paragraph 4, to which the above comments apply.

Paragraph 3

(14) Paragraph 3 provides for the suspension of criminal proceedings in the forum State as a consequence of the transfer. Such suspension will only occur when the transfer has been agreed and, in any case, will be limited in scope by the "without prejudice" clause included at the end of the paragraph. The wording of the "without prejudice" clause is identical to that of paragraph 4 (b) of draft article 14 and serves the same purpose. Therefore, reference is made to the commentary to that provision as to the clause's meaning and scope.[1118]

Paragraph 4

(15) Paragraph 4 is intended as a safeguard clause in favour of the forum State, which, despite having transferred the criminal proceedings to the State of the official and suspended its own criminal proceedings, may resume them if the State of the official does not adequately fulfil the obligation to submit the case to its competent authorities for the purpose of prosecution.

(16) Although the Commission considered different formulations drawn essentially from article 17, paragraphs 1 and 2, of the Rome Statute of the International Criminal Court,[1119] it finally decided to draft the safeguard clause in a simple way that avoids subjective components and allows a direct link to be established with paragraph 2 of this draft article. This ensures that if the State of the official fails to fulfil the obligation it has undertaken to submit the case to its competent authorities for the purpose of prosecution, the forum State will be able to reactivate its criminal proceedings. The expression "may resume" emphasizes the optional nature of this power of the forum State. The aim is to reflect the different situations in which the forum State may find itself depending on the nature of the crime committed by the official and the circumstances of the crime, in particular its gravity and, especially, its possible classification as a crime under international law, a category of crimes that cannot be allowed to go unpunished.

(17) Paragraph 4 expressly mentions, as a factor indicating a breach of the obligation, failure to "promptly and in good faith submit the case" to the competent authorities of the State of the official for the purpose of prosecution. This wording is meant to draw attention to the requirement to avoid any delaying tactics or merely formalistic submissions that would be contrary to the purpose of the transfer of proceedings.

Paragraph 5

(18) Paragraph 5 contains a "without prejudice" clause stating that draft article 15 is "without prejudice to any other obligations of the forum State or the State of the official under international law".

[1118] See, in particular, paragraphs (32)–(34) of the commentary to draft article 14 above.

[1119] Article 17, paragraph 1 (a), of the Rome Statute provides that the Court must find a case inadmissible unless the "State which has jurisdiction over it ... is unwilling or unable genuinely to carry out the investigation or prosecution". Paragraph 2 identifies the circumstances to be taken into account in determining "unwillingness in a particular case", namely: "(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." The final proposal considered by the Commission was worded as follows: "4. The competent authorities of the forum State can resume the exercise of their criminal jurisdiction when the competent authorities of the official's State, after having accepted the transfer, conduct themselves in a manner indicating that: (a) they have no intention to bring the official concerned to justice; (b) they aim at shielding the official concerned from criminal responsibility".

(19) This paragraph is meant to address the concern expressed, during the debate on draft article 15, that the provision on the transfer of criminal proceedings might not be fully compatible or might even be in contradiction with various rules of international law that impose a primary obligation on States to exercise jurisdiction over individuals who have committed certain crimes under international law. The discussion focused, in particular, on the obligation to extradite or prosecute established in article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the interpretation given to it by the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. Since the Court has defined the obligation to prosecute as a treaty obligation, and extradition as an option,[1120] a question arose as to whether the system for the transfer of criminal proceedings established in draft article 15, which does not make the transfer contingent on an inability of the forum State to exercise its jurisdiction, is in conformity with the obligations voluntarily accepted by the States parties to the Convention against Torture.

(20) In view of this special problem, the Commission has included a "without prejudice" clause to be applied in connection with the transfer of criminal proceedings. This clause applies both to obligations owed by the forum State and to those owed by the State of the official and is not subject to limitations. It therefore applies in respect of any obligation arising under international law, irrespective of its source or the subject matter to which it relates.

Article 16
Fair treatment of the State official

1. An official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law.

2. Any such official who is in prison, custody or detention in the forum State shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State of the official;

(b) to be visited by a representative of that State; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the forum State, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended.

[1120] In its judgment of 20 July 2012, the Court stated as follows: "94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect. 95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State". See *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 902 above), p. 456, paras. 94–95.

Commentary

(1) Draft article 16 recognizes the right of an official of another State to be treated fairly by the authorities of the forum State that are exercising or have exercised jurisdiction over that official. The Commission has opted for an approach centred on the official, whose rights are recognized, rather than the mere enumeration of obligations owed by the forum State. This more adequately reflects the eminently personal nature of the rights and guarantees set forth in the draft article. This approach is reflected both in the title of the draft article (Fair treatment of the State official) and in its paragraphs 1 and 2, which begin, respectively, with the words "[a]n official ... shall be guaranteed" and "[a]ny such official ... shall be entitled". The rights enjoyed by the State official are encompassed under the general heading of "fair treatment", on the understanding that this expression necessarily includes the requirements of impartiality and independence.

(2) The recognition of the official's right to fair treatment is an additional safeguard supplementing those already listed in draft articles 9 to 15. This safeguard applies to the official, insofar as the rights listed in draft article 16 are of an individual nature. It should nonetheless be recalled that these safeguards apply to the official in his or her capacity as such and are therefore also safeguards for the official's State. This draft article thus responds to the concerns expressed by some States regarding the possibility that one of their officials might be subjected to the jurisdiction of a State whose legal system does not provide sufficient guarantees of respect for human rights, especially the rights and guarantees inherent in the notion of a fair trial.

(3) Draft article 16 draws upon and echoes the wording of draft article 11 of the draft articles on prevention and punishment of crimes against humanity.[1121] Like that draft article, draft article 16 consists of three paragraphs concerning, respectively, the recognition of the general procedural rights and guarantees that any individual may enjoy (para. 1); special recognition of a set of rights enjoyed by a State official who is in prison, custody or detention in the forum State (para. 2); and the rules applicable to the exercise of the special rights set forth in paragraph 2 (para. 3). However, while draft article 16 follows the structure of the aforementioned draft article 11, there are drafting and conceptual differences corresponding to elements that are specific to the present draft articles.

(4) Paragraph 1 provides that "[a]n official of another State ... shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees". This generic statement includes all the rights and guarantees enjoyed by any individual in relation to any measure taken against him or her by the authorities of the forum State. These include rights relating to personal liberty or deprivation thereof and the various components of the right of access to the courts and the right to a fair trial, including the right of a person accused of a crime to be informed of the charges against him or her, to be assisted by counsel of his or her own choosing and to communicate with the authorities of the forum State in a language he or she understands.[1122] The category of rights and procedural guarantees also includes the various components of the right to consular assistance recognized in article 36 of the Vienna Convention on Consular Relations. This right is enjoyed by any national of a State whether or not he or she has the status of an official within the meaning of the present draft articles.

(5) The rights and procedural guarantees referred to in draft article 16, paragraph 1, and the conditions in which their exercise must be ensured and protected are those set forth in the national law of the forum State and international law. In particular, human rights law and international humanitarian law define the applicable international standard, the meaning of which has already been established by the Commission in relation to draft article 11 of the

[1121] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 44 and 45, draft articles on prevention and punishment of crimes against humanity, draft article 11 (Fair treatment of the alleged offender) and commentary thereto.

[1122] For a list of the rights included in this category, see the seventh report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), paras. 159–168.

draft articles on prevention and punishment of crimes against humanity.[1123] Although the relevant international standards usually refer to "rights" or "rights and guarantees", the term "rights and procedural guarantees" has been used in paragraph 1 to accommodate the variety of circumstances in which these must be ensured in respect of a foreign official, which are not limited to judicial proceedings.

(6) With regard to this last issue, the Commission did not consider it necessary to include in the draft article an express reference to the different stages or points in time at which the authorities of the forum State must ensure respect for the official's rights and procedural guarantees. These rights and guarantees must be safeguarded and protected whenever those authorities take any action with respect to the official of another State, both in the period prior to the determination of immunity and during and after the process of determining immunity, including the prosecution of the official and the enforcement of any sentence imposed on him or her.

(7) Paragraph 2 establishes a new right that is accorded to an official of another State who is under any form of imprisonment, custody or detention in the forum State. Its wording is modelled on draft article 11, paragraph 2, of the draft articles on prevention and punishment of crimes against humanity, but some significant changes have been introduced, in particular the deletion of any reference to ties of nationality or residence between the official and the official's State. This is because the special rights articulated in paragraph 2 of draft article 16 are distinct from the right to consular assistance, which is understood to be included among the rights and procedural guarantees referred to in paragraph 1 and will apply in all circumstances.[1124]

(8) Although the right to consular assistance applies to any State official who is a national of that State, the Commission has borne in mind that, under the definition of "State official" contained in draft article 2, subparagraph (a), the official need not necessarily be a national of the State, in which case he or she would not be covered by the right to consular assistance by the State of the official. It has also taken account of the fact that an official's immunity from foreign criminal jurisdiction is recognized for the benefit of the State and by virtue of the special relationship between the official and the official's State, which should have a special bearing on the rights and procedural guarantees to which the official is entitled. For this reason, the Commission considered it useful to include, in the draft article on fair treatment of the State official, a special provision creating certain rights that operate solely by virtue of the relationship between the State and its official. These additional rights are linked to cases in which the official is in prison, custody or detention in the forum State, as this is the most extreme scenario in which the forum State's exercise of jurisdiction over a foreign official can have an adverse impact on the performance of his or her State functions or representation of the State and, therefore, on immunity.

(9) Paragraph 2 of the draft article begins with the words "[a]ny such official" to reinforce the link with paragraph 1. The two paragraphs must be read together for a proper understanding of the scope of the concept of "fair treatment of the State official". In defining the content of the special rights accorded to an official of another State, draft article 11 of the draft articles on prevention and punishment of crimes against humanity was used as a model. As noted in the preceding paragraph, the Commission considered that ensuring that the foreign official can communicate with and be visited by the nearest appropriate representative of his or her State, and be informed of these rights, constitutes a safeguard both for the official and for the official's State.

(10) Paragraph 3 reproduces almost verbatim the corresponding paragraph of the above-mentioned draft article 11, which in turn is based on article 36, paragraph 2, of the Vienna Convention on Consular Relations. It must be noted that, for the sake of consistency with the terminology used in the present draft articles, paragraph 3 refers to applicable law as the laws

[1123] See A/74/10, pp. 98–101, commentary to draft article 11, in particular para. (7). See also seventh report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction, A/CN.4/729, chap. IV, sect. A, paras. 159–168.

[1124] Consular assistance has been considered as one of the components of the "fair treatment". See draft articles on prevention and punishment of crimes against humanity, A//74/10, pp. 98–101, commentary to draft article 11, in particular paras. (8) and (9).

and regulations "of the forum State".[1125] Pursuant to this paragraph, national law is identified as the applicable law for the exercise of the special rights set forth in paragraph 2, given that the precise manner in which individuals are arrested, detained or imprisoned is, to a large extent, governed by national rules. Therefore, the manner in which such an individual may exercise the rights to receive information and to communicate with or be visited by the appropriate representatives of another State may vary from one State to another. However, the recognition of this diversity and the resulting margin of discretion of the forum State are limited by the last phrase of paragraph 3, which states that the application of national law is "subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended". This criterion of interpretation in accordance with the intended purpose is designed to ensure that the forum State will not apply its laws and regulations in an arbitrary manner that would, in practice, impair the rights to which the official of another State is entitled under paragraph 2 of the draft article.

Article 17
Consultations

The forum State and the State of the official shall consult, as appropriate, at the request of either of them, on matters relating to the immunity of an official covered by the present draft articles.

Commentary

(1) Draft article 17 concerns consultations between the forum State and the State of the official. Consultations are a mechanism that is commonly used for different purposes in inter-State relations. Consultations are held in particular, though not exclusively, to obtain information on matters of common interest, to seek the views of another State on such matters, to identify ways of avoiding a dispute between two States or to facilitate a solution to a dispute that has already arisen. The obligation for the States concerned to hold consultations has been included in numerous international treaties and in treaties on international cooperation and legal assistance in criminal matters.[1126]

(2) The consultations referred to in draft article 17 are not limited to a specific area and may concern all "matters relating to the immunity of an official covered by the present draft articles". Consultations may therefore relate both to the process of determining immunity and to any other issue related to immunity, including the normative elements that define immunity *ratione personae* (Part Two) and immunity *ratione materiae* (Part Three), as well as procedural provisions and safeguards (Part Four). Consultations should thus be distinguished from the "requests for information" provided for in draft article 13, which are limited to the information necessary for the determination of immunity by the forum State and the decision on the invocation or waiver of immunity by the State of the official.

(3) Consultations are a procedural safeguard for both the State of the official and the forum State and may therefore be held at the request of either State. Given that consultations are considered a procedural safeguard, the Commission decided to use the word "shall" to denote the obligatory nature of the consultations. However, the phrase "as appropriate" was also included to introduce an element of flexibility that allows the forum State and the State of the official to adapt to the circumstances of each specific case, including the situation of their diplomatic relations. The use of this flexibility formula does not change the obligatory nature of the consultations, nor does it mean that recourse to such consultations is merely recommended.

[1125] These terms are, consequently, different to the terms used in the Vienna Convention on Consular Relations ("the laws and regulations of the receiving State") and in draft article 11, paragraph 3, of the draft articles on prevention and punishment of crimes against humanity ("State in the territory under whose jurisdiction the person is present"). See A/74/10, chap. IV, para. 44.

[1126] See Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 18; and Model Treaty on Mutual Assistance in Criminal Matters, art. 21.

(4) The Commission did not consider it necessary to establish any procedure for consultations, preferring instead to preserve the extremely flexible nature of this mechanism.

(5) Lastly, it should be emphasized that consultations do not in themselves constitute a dispute settlement system, nor is their function exclusively related to dispute settlement. However, there is nothing to prevent consultations from being held in the context of an ongoing or emerging dispute between the forum State and the State of the official. For this reason, the draft article on consultations has been placed at the end of Part Four of the draft articles, immediately before the draft article on the settlement of disputes.

Article 18
Settlement of disputes

1. In the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice.

2. If a mutually acceptable solution cannot be reached within a reasonable time, the dispute shall, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice, unless both States have agreed to submit the dispute to arbitration or to any other means of settlement entailing a binding decision.

Commentary

(1) Draft article 18 is the last of the provisions in Part Four of the draft articles and concerns the settlement of any disputes that may arise between the forum State and the State of the official.

(2) The practice generally followed by the Commission to date has been not to include dispute settlement provisions in its draft articles, leaving the matter to be decided by States at a later stage. However, the recent draft articles on prevention and punishment of crimes against humanity include draft article 15 on the settlement of disputes, which was justified by the fact that the draft articles were conceived by the Commission as a draft treaty.

(3) Since the Commission has not yet decided whether to recommend to the General Assembly that the present draft articles be used as a basis for the negotiation of a treaty, different views have been expressed on the advisability of including draft article 18. The Commission nevertheless considered it preferable to include a draft article on dispute settlement, for several reasons. Among them is a wish to encourage States to express their views in this regard by commenting on the draft article, which would not have been possible if it had not been included until the draft articles' adoption on second reading.

(4) A further consideration is that draft article 18 follows the logic underpinning the content and structure of Part Four of the draft articles. The procedural provisions and safeguards contained in Part Four are intended, *inter alia*, to help create conditions of trust between the forum State and the State of the official that will eliminate or reduce the possibility that a dispute may arise in connection with the immunity of a particular official from foreign criminal jurisdiction. If such a dispute were nonetheless to arise, it could only be resolved through the means of peaceful settlement accepted in contemporary international law. The Commission has therefore considered it useful to include draft article 18 as the final step in the *iter* or logical sequence that serves as the common thread running through Part Four of the draft articles.

(5) In order to ensure consistency in its work, the Commission has taken into account the text of draft article 15 of the above-mentioned draft articles on prevention and punishment of crimes against humanity, the basic elements of which are reflected in draft article 18 of the present draft articles. However, the wording adopted by the Commission differs in some respects from that earlier text, in order to reflect certain features specific to the dispute settlement system applicable in relation to the immunity of State officials from foreign criminal jurisdiction.

(6) Paragraph 1 of the draft article establishes the obligation to settle by peaceful means any dispute arising between the forum State and the State of the official. The dispute has been

defined by reference to "the interpretation or application of the present draft articles". This terminology is generally accepted and is found in various dispute settlement clauses contained in treaties, as well as in the jurisprudence of the International Court of Justice and other international tribunals.

(7) Paragraph 1 broadly follows the wording of Article 33 of the Charter of the United Nations, using the expression "shall seek a solution" to refer to an obligation of conduct required of the forum State and the State of the official. The phrase "by negotiation or other peaceful means of their own choice" is intended to emphasize the principle of free choice of means. The specific mention of negotiation follows the generally accepted model in various dispute settlement clauses found in treaties, without implying that other peaceful means of dispute settlement are excluded. On the contrary, the reference to "other peaceful means" is to be understood as including all the means spelled out in Article 33 of the Charter: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. In any event, it should be borne in mind that the negotiation referred to in this paragraph should not be confused with the consultations referred to in draft article 17, which are autonomous in nature and are not required to be held as a precondition for the implementation of draft article 18.

(8) Paragraph 2 establishes a dispute settlement system which, following the traditional model, will be triggered only if the States have been unable to resolve their dispute by a means of their own choice, as provided in paragraph 1 of the draft article. This system is compulsory, as shown by the expression "the dispute shall ... be submitted". It may be activated unilaterally by either the forum State or the State of the official, on the sole condition that they have been unable to reach "a mutually acceptable solution ... within a reasonable time". The Commission did not consider it appropriate to set a specific time limit for this purpose, preferring instead to use the term "reasonable time", the scope of which will need to be determined on a case-by-case basis by the International Court of Justice or other dispute settlement body.

(9) Jurisdiction to settle the dispute in a binding manner is attributed to the International Court of Justice, unless the forum State and the State of the official "have agreed to submit the dispute" to another means of judicial settlement, which must, in any case, lead to "a binding decision". This recognizes the character of the International Court of Justice as a reference jurisdiction for international law, which has also played a significant role in relation to the immunity of State officials from foreign criminal jurisdiction.

(10) Among the alternative means of binding settlement of disputes relating to immunity, the Commission has included arbitration in the first place, since it is a well-established means that is frequently used by States and is included as an alternative legal means in many treaties. Paragraph 2 of draft article 18 also provides, as an alternative, for any "other means of settlement entailing a binding decision". This wording, taken from article 282 of the United Nations Convention on the Law of the Sea,[1127] accommodates the possibility that disputes concerning immunity of State officials from foreign criminal jurisdiction may or must be submitted to other international tribunals, especially those established pursuant to treaties or within regional organizations.

(11) It should be emphasized that if the International Court of Justice is replaced with another means of settlement agreed upon by the States concerned, the alternative body chosen must in any case have jurisdiction to settle the dispute by means of a decision that is binding on the parties, be it an arbitral award or a judgment of an international or internationalized court.

(12) To conclude the commentary on the dispute settlement system, attention is drawn to the fact that draft article 18 does not contain an opt-out clause allowing for unilateral derogation from the system of binding settlement of disputes set out in paragraph 2, thus departing from the model of draft article 15 of the draft articles on prevention and punishment of crimes against humanity. Although some members of the Commission supported the inclusion of such a clause, others preferred not to include one, given that this matter is closely

[1127] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 3.

related to the final form of the draft articles and the recommendation to be addressed to the General Assembly in due course. Finally, other members pointed out that the debate on whether or not to include such a clause has no real effect, since unilateral derogation from the binding settlement of disputes could occur under any circumstances. Given this divergence of views, the Commission considered it preferable not to include a unilateral derogation clause in the draft articles adopted on first reading, although it may return to this issue at a later stage in light of comments from States and the recommendation to be addressed to the General Assembly on the future of the draft articles.

(13) Finally, it should be noted that draft article 18 as adopted by the Commission on first reading does not include the final paragraph originally proposed by the Special Rapporteur, under which, "[i]f the dispute is referred to arbitration or to the International Court of Justice, the forum State shall suspend the exercise of its jurisdiction until the competent organ issues a final ruling".[1128] While some members of the Commission took the view that an obligation to suspend criminal proceedings after submitting the dispute to a binding means of settlement could constitute a useful procedural safeguard, reference to such an obligation was excluded because it was not possible to find precedents, either in existing treaties or in international jurisprudence, to support this provision. Moreover, the suspension of criminal proceedings in these circumstances could encounter serious difficulties in some State legal systems. Therefore, draft article 18 does not cover this issue, and the possible suspension of domestic proceedings will depend on any relevant agreement between the parties or, where applicable, any provisional measures ordered by the International Court of Justice or other organ having jurisdiction under paragraph 2.

Annex
List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

Rome Statute of the International Criminal Court, 17 July 1998, article 6;

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of apartheid

International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article II.

Torture

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, article 1, paragraph 1.

Enforced disappearance

International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

Commentary

(1) As established in paragraph 2 of draft article 7, "the crimes under international law mentioned [in paragraph 1] are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles". As indicated in the commentary to paragraph 2, the sole purpose of the list included in the annex is to identify the definitions of

[1128] Eighth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/739), para. 54, draft article 17, para. 3.

the crimes under international law in respect of which immunity *ratione materiae* does not apply. The list has no effect whatsoever on the customary nature of these crimes or on any specific obligations that the treaties included in the list may impose on the States parties thereto.

(2) The choice of treaties whose articles are included in the annex to provide a definition of the various crimes under international law was based on three fundamental criteria: (a) the desire to avoid possible confusion when several treaties use different language to define the same crime; (b) the selection of treaties that are universal in scope; and (c) the selection of treaties providing the most up-to-date definitions available.

(3) Genocide was defined for the first time in the Convention on the Prevention and Punishment of the Crime of Genocide[1129] and its definition has remained constant in contemporary international criminal law, notably in the statute of the International Criminal Tribunal for the Former Yugoslavia (art. 4),[1130] the statute of the International Criminal Tribunal for Rwanda (art. 2)[1131] and, in particular, the Rome Statute of the International Criminal Court, article 6 of which reproduces the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide. For its part, the Commission defined genocide in article 17 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.[1132] For the purposes of the present draft articles, the Commission has included in the annex both the Rome Statute (art. 6) and the Convention on the Prevention and Punishment of the Crime of Genocide (art. II), given that the wording used in the two instruments is practically identical and has the same meaning.

(4) With regard to crimes against humanity, it should be recalled that some treaties have identified certain behaviours as "crimes against humanity"[1133] and that international courts have ruled on the customary nature of this category of crimes. The statute of the International Criminal Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Criminal Tribunal for Rwanda (art. 3) have also defined this crime. The Commission itself defined this category of crimes in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 18).[1134] However, the Rome Statute was the first instrument to define this category of crimes separately and comprehensively. For this reason, the Commission considered that article 7 of the Rome Statute should be taken as the definition of crimes against humanity for the purposes of the present draft article. This is consistent with the decision taken earlier by the Commission on the draft articles on prevention and punishment of crimes against humanity, draft article 2 of which reproduces the definition of this category of crimes contained in article 7 of the Rome Statute.[1135]

(5) The concept of war crimes has a long tradition that was originally associated with treaties on international humanitarian law. The Geneva Conventions of 12 August 1949 for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), define that category of crimes as "grave breaches".[1136] War crimes were defined

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1129 Convention on the Prevention and Punishment of the Crime of Genocide, art. II.

1130 See footnote 930 above.

1131 See footnote 931 above.

1132 *Yearbook … 1996*, vol. II (Part Two), p. 44.

1133 International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I; and International Convention for the Protection of All Persons from Enforced Disappearance, preamble, fifth paragraph.

1134 *Yearbook… 1996*, vol. II (Part Two), p. 47.

1135 See *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), pp. 27–47.

1136 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (First Geneva Convention), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31, art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (Second Geneva Convention), *ibid.*, No. 971, p. 85, art. 51; Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), *ibid.*, No. 972, p. 135, art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention),

in the statute of the International Criminal Tribunal for the Former Yugoslavia (arts. 2 and 3) and the statute of the International Criminal Tribunal for Rwanda (art. 4), as well as by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 20).[1137] The latest definition of war crimes is contained in article 8, paragraph 2, of the Rome Statute, which draws on previous precedents and refers comprehensively to war crimes committed in both international and non-international armed conflicts, as well as to crimes recognized on the basis of treaties and customary international law. For the purposes of the present draft article, the Commission decided to use the definition contained in article 8, paragraph 2, of the Rome Statute, as being the most up-to-date version of the definition of this category of crimes. This does not imply, however, that the importance of the Geneva Conventions of 1949 and Protocol I thereto in relation to the definition of war crimes should be overlooked.

(6) The crime of apartheid was defined for the first time in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, which, although it describes apartheid as a crime against humanity and a crime under international law (art. I), contains a detailed and separate definition of the crime of apartheid (art. II). For this reason, the Commission decided to use the definition in the 1973 Convention for the purposes of the present draft article.

(7) Torture is defined as a violation of human rights in all the relevant international instruments. Its characterization as prohibited conduct liable to criminal prosecution is found for the first time in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which defines it as a separate crime in article 1, paragraph 1. This definition includes, moreover, the significant requirement that an act cannot be characterized as torture unless it is carried out by, at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. A similar definition is contained in the Inter-American Convention to Prevent and Punish Torture (arts. 2 and 3).[1138] The Commission considers that, for the purposes of the present draft article, torture is to be understood in accordance with the definition in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(8) The enforced disappearance of persons was defined for the first time in the Inter-American Convention on the Forced Disappearance of Persons of 9 June 1994 (art. II).[1139] The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006 also defines this crime (art. 2). As in the case of torture, this definition requires that the act be carried out by, at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. The Commission therefore considers that, for the purposes of the present draft article, the definition of enforced disappearance should be understood in accordance with article 2 of the 2006 Convention.

(9) Taking into account its relationship to draft article 7, the commentary to the annex are to be read together with the commentary to that draft article.

ibid., No. 973, p. 287, art. 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), *ibid.*, vol. 1125, No. 17512, p. 3, art. 85.

[1137] *Yearbook … 1996*, vol. II (Part Two), pp. 53–54.

[1138] Inter-American Convention to Prevent and Punish Torture (Cartagena, Colombia, 9 December 1985), Organization of American States, *Treaty Series*, No. 67.

[1139] Inter-American Convention on the Forced Disappearance of Persons (Belem do Pará, Brazil, 9 June 1994), Organization of American States, *Official Records*, OEA/Ser.A/55.

Chapter VII
Succession of States in respect of State responsibility

A. Introduction

70. At its sixty-ninth session (2017), the Commission decided to include the topic "Succession of States in respect of State responsibility" in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.[1140] The General Assembly, in its resolution 72/116 of 7 December 2017, took note of the decision of the Commission to include the topic in its programme of work.

71. The Special Rapporteur submitted four reports from 2017 to 2021.[1141] The Commission also had before it, at the seventy-first session (2019), a memorandum prepared by the Secretariat providing information on treaties which may be of relevance to its future work on the topic.[1142] Following the debate on each report, the Commission decided to refer the proposals for draft articles made by the Special Rapporteur to the Drafting Committee. The Commission heard interim reports from the successive Chairs of the Drafting Committee on succession of States in respect of State responsibility, containing the draft articles provisionally adopted by the Drafting Committee, at the seventieth to seventy-second sessions (2018, 2019 and 2021).

B. Consideration of the topic at the present session

72. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/751).

73. In his fifth report, composed of four parts, the Special Rapporteur provided an updated overview of the work on the topic undertaken thus far, which included a summary of the debate in the Sixth Committee held at the seventy-sixth session of the General Assembly, together with an explanation of the methodology of the report (Part One). The Special Rapporteur then examined the question of a plurality of injured successor States and a plurality of responsible successor States (Part Two) and also proposed a new scheme for the consolidation and restructuring of the draft articles referred to the Drafting Committee at previous sessions on the basis of proposals contained in his reports (Part Three). Lastly, the Special Rapporteur addressed the future programme of work on the topic (Part Four). No new draft articles were proposed.

74. The Commission considered the fifth report at its 3579th to 3583rd meetings, from 11 to 17 May 2022.

75. At its 3583rd meeting, on 17 May 2022, the Commission decided, on the recommendation of the Special Rapporteur, to instruct the Drafting Committee to proceed with the preparation of draft guidelines on the basis of the provisions previously referred to the Drafting Committee (including those provisions provisionally adopted by the Commission at previous sessions), taking into account the debate held in the plenary on the Special Rapporteur's fifth report.

76. At its 3593rd meeting, on 14 July 2022, the Commission considered the report of the Drafting Committee on the topic (A/CN.4/L.970),[1143] and provisionally adopted draft

[1140] At its 3354th meeting, on 9 May 2017. The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10)).

[1141] A/CN.4/708, A/CN.4/719, A/CN.4/731 and A/CN.4/743 and Corr.1, respectively.

[1142] A/CN.4/730.

[1143] The report and the corresponding statement of the Chair of the Drafting Committee, containing an annex reflecting a consolidated text of all the titles and texts of the draft guidelines on succession of States in respect of State responsibility worked out by the Drafting Committee thus far, are available in the online analytical guide to the work of the International Law Commission.

guidelines 6, 10, 10 *bis* and 11, which had been provisionally adopted by the Drafting Committee in 2018 and 2021, respectively, as well as draft guidelines 7 *bis*, 12, 13, 13 *bis*, 14, 15 and 15 *bis*, which were provisionally adopted by the Drafting Committee at the present session (see section D.1 below). As a result of the change of form of the outcome, the Commission also took note of draft articles 1, 2, 5, 7, 8 and 9, as revised by the Drafting Committee to be draft guidelines.[1144] It also took note that the Special Rapporteur had

[1144] For the ease of reference, the previously adopted draft articles revised to the form of draft guidelines are reproduced below. The numbering reflects the omission of draft articles 3 and 4, proposed by the Special Rapporteur in his first report (2017) and pending in the Drafting Committee until 2022:

Guideline 1

Scope

1. The present draft guidelines concern the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.

2. The present draft guidelines apply in the absence of any different solution agreed upon by the States concerned.

Guideline 2

Use of terms

For the purposes of the present draft guidelines:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

Guideline 5

Cases of succession of States covered by the present draft guidelines

The present draft guidelines concern only the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Guideline 7

Acts having a continuing character

When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.

Guideline 8

Attribution of conduct of an insurrectional or other movement

1. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration is considered an act of the new State under international law.

2. Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts.

Guideline 9

Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

(b) when a part or parts of the territory of the predecessor State separate to form one or more States; or

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

2. In particular circumstances, the injured State and the successor State should endeavour to reach an agreement for addressing the injury.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.

provided revised commentaries on an informal basis for draft guidelines 1, 2, 5, 7, 8 and 9 to assist the Commission in its future work on this topic.

77. At its 3605th to 3611th meetings, from 29 July to 4 August 2022, the Commission adopted the commentaries to draft guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12, 13, 13 *bis*, 14, 15 and 15 *bis* (see sect. D.2 below).

78. At its 3611th meeting, on 4 August 2022, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Pavel Šturma, whose mastery of the subject, guidance, and cooperation greatly facilitated the work of the Commission.

Brief summary of the debate on selected issues raised in the fifth report of the Special Rapporteur

(a) Plurality of States

79. The Special Rapporteur explained that in his fifth report he had focused primarily on the problems associated with a plurality of injured successor States or with a plurality of responsible successor States. In doing so, the Special Rapporteur had also taken into account the concept of "shared responsibility", referred to in the Guiding Principles on Shared Responsibility in International Law, developed through a project undertaken at the University of Amsterdam.[1145] However, in his view, in light of their scope of application, the Guiding Principles were of limited use to the topic at hand.

80. As regards the plurality of injured successor States, the Special Rapporteur was of the view that not all categories of succession of States were equally relevant. Typical examples that occurred in practice were the dissolution of a State and the separation of a part or parts of a State. The Special Rapporteur concluded that State practice supported the priority of specific agreements. In the absence of such an agreement and where there were no special connections between one or more successor States and the injury, the solution was to be found in application of equitable apportionment. At the same time, he noted that the responsible State could not refuse a claim by one successor State because of a plurality of injured States, since that would contravene article 46 of the articles on responsibility of States for internationally wrongful acts.[1146]

81. Concerning the plurality of responsible successor States, the Special Rapporteur observed that in all cases where a predecessor State continued to exist, an injured State would be entitled to invoke its responsibility. In cases of uniting States (merger) and incorporation, the issue of plurality did not *per se* arise. In situations of the dissolution of a State, agreement between the injured State and the relevant successor State or States was key. At the same time, as a matter of invocation, the injured State was able to rely on the rule codified in article 47 of the articles on responsibility of States for internationally wrongful acts. The Special Rapporteur noted further that, in practice, owing to the application of relevant agreements or national legislation, only one successor typically bore responsibility in cases of the plurality of responsible successor States.

82. The Special Rapporteur further recalled that he had already addressed particular aspects of plurality of States in cases of continuing or composite acts in his earlier proposals, including those made in the Drafting Committee, for draft articles 7 and 7 *bis*. Accordingly, he had not proposed a draft article on plurality of States or on shared responsibility in the context of succession, since the examples of relevant State practice involved situations of either the responsibility of a predecessor State that continued to exist or the responsibility of a successor State for its own acts or the acts of a predecessor State to which it had a special link. A further option was to include a clause indicating that the text being developed by the Commission was without prejudice to the application of articles 46 and 47 of the articles on responsibility of States for internationally wrongful acts.

[1145] A. Nollkaemper *et al*., "Guiding Principles on Shared Responsibility in International Law", *European Journal of International Law*, vol. 31 (2020), pp. 15–72.

[1146] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

83. During the ensuing debate in the plenary, several members agreed that there was no need to introduce a provision on plurality of States. It was emphasized that particular aspects of the existence of a plurality of States in cases of continuing or composite acts could be resolved on the basis of the general rules of State responsibility. According to another view, it was advisable to include such a provision, along the lines of article 7, "Plurality of successor States", of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility,[1147] or to include a reference thereto. Some members were also of the view that it was unnecessary to include a "without prejudice" clause in relation to articles 46 and 47 of the articles on responsibility of States for internationally wrongful acts.

84. Several members agreed that there was no need to examine separately the concept of "shared responsibility", since, in their view, the concept was not directly relevant to the present topic. On the other hand, it was suggested that examination of the concept could provide clarity to the Commission's work, and that it could also be referred to in the commentary.

(b) Final form

85. As regards the work of the Drafting Committee on the draft provisions referred to it at previous sessions, the Special Rapporteur confirmed his intention to withdraw draft articles 3 and 4, proposed in his first report, submitted in 2017. His fifth report contained several proposals, of a technical and stylistic nature, for modification of draft provisions being considered by the Drafting Committee. He also expressed the hope that the topic could be completed on first reading at the current session.

86. Several members questioned whether the development of draft articles was the most appropriate outcome, particularly in light of concerns expressed by some States in the Sixth Committee, throughout the course of the Commission's work on the topic, as to the relative paucity of State practice available to justify the adoption of draft articles. It was suggested that the Commission consider changing the format of its work on the topic to, *inter alia*, draft guidelines or draft conclusions, which would be designed to serve as general guidance for States (as opposed to developing a set of binding rules). Some members expressed doubts as to whether the adoption of the entire set of draft articles on first reading, at the present session, was feasible. While several members expressed support for continuing the work of the Drafting Committee, a proposal was made to discontinue the Committee's work on an instrument, and, instead, to convene a Working Group, chaired by the Special Rapporteur, with the aim of producing a report on the topic that would be annexed to the Commission's report, as had been done with previous topics, including that on the "obligation to extradite or prosecute (*aut dedere aut judicare*)".[1148]

C. Text of the draft articles on succession of States in respect of State responsibility provisionally adopted by the Commission at its seventy-first and seventy-second sessions

87. The text of draft articles 1, 2, 5, 7, 8 and 9 provisionally adopted by the Commission at its seventy-first and seventy-second sessions is reproduced below.

Article 1[1149]
Scope

1. The present draft articles apply to the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.

[1147] *Yearbook of Institute of International Law, Tallinn Session*, vol. 76 (2015), p. 711, at p. 715.

[1148] *Yearbook of the International Law Commission, 2014*, vol. II (Part Two), para. 65. Informal consultations on the final form of the work on the present topic were held on 19 May 2022.

[1149] For the commentary to this draft article, see A/74/10, para. 118. The commentary should be read in light of the changes of draft articles to draft guidelines, where appropriate.

2. The present draft articles apply in the absence of any different solution agreed upon by the States concerned.

Article 2[1150]
Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

…

Article 5[1151]
Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article 7[1152]
Acts having a continuing character

When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.

Article 8[1153]
Attribution of conduct of an insurrectional or other movement

1. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.

2. Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts.

[1150] For the commentary to this draft article, see *ibid*. The commentary should be read in light of the changes of draft articles to draft guidelines, where appropriate.

[1151] For the commentary to this draft article, see *ibid*. The commentary should be read in light of the change of draft articles to draft guidelines, where appropriate.

[1152] For the commentary to this draft article, see A/76/10, para. 165. The commentary should be read in light of the changes of draft articles to draft guidelines, where appropriate.

[1153] For the commentary to this draft article, see *ibid*. The commentary should be read in light of the changes of draft articles to draft guidelines, where appropriate.

Article 9[1154]
Cases of succession of States when the predecessor State continues to exist

Succession of States in respect of State responsibility

1. When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

(b) when a part or parts of the territory of the predecessor State separate to form one or more States; or

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

2. In particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.

D. Text of the draft guidelines on succession of States in respect of State responsibility provisionally adopted by the Commission at its seventy-third session

1. Text of the draft guidelines

88. The text of draft guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12, 13, 13 *bis*, 14, 15 and 15 *bis* provisionally adopted by the Commission at its seventy-third session is reproduced below.

Guideline 6
No effect upon attribution

A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession.

Guideline 7 *bis*
Composite acts

1. When a predecessor State continues to exist, the breach of an international obligation by that State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the predecessor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful act.

2. The breach of an international obligation by a successor State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the successor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful act.

3. The provisions of paragraphs 1 and 2 are without prejudice to whether the breach of an international obligation by a successor State may occur through a series

[1154] For the commentary to this draft article, see *ibid*. The commentary should be read in light of the change of draft articles to draft guidelines, where appropriate.

of actions or omissions defined in aggregate as wrongful that commences with the predecessor State and continues with the successor State.

Guideline 10
Uniting of States

When two or more States unite and so form one successor State, and an internationally wrongful act has been committed by any of the predecessor States, the injured State and the successor State should agree on how to address the injury.

Guideline 10 *bis*
Incorporation of a State into another State

1. When an internationally wrongful act has been committed by a State prior to its incorporation into another State, the injured State and the incorporating State should agree on how to address the injury.

2. When an internationally wrongful act has been committed by a State prior to incorporating another State, the responsibility of the State that committed the wrongful act is not affected by such incorporation.

Guideline 11
Dissolution of a State

When a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, the injured State and the relevant successor State or States should agree on how to address the injury arising from the internationally wrongful act. They should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.

Guideline 12
Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed against a predecessor State by another State before the date of succession of States, and the predecessor State continues to exist, the predecessor State continues to be entitled to invoke the responsibility of the other State even after the date of succession, if the injury to it has not been made good.

2. In addition to paragraph 1, a successor State may, in particular circumstances, be entitled to invoke the responsibility of the State that committed the internationally wrongful act.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State.

Guideline 13
Uniting of States

When two or more States unite and so form one successor State, and any of the predecessor States was injured by an internationally wrongful act of another State, the successor State may invoke the responsibility of that other State.

Guideline 13 *bis*
Incorporation of a State into another State

1. When an internationally wrongful act has been committed against a State prior to its incorporation into another State, the incorporating State may invoke the responsibility of the wrongdoing State.

2. When an internationally wrongful act has been committed against a State prior to incorporating another State, the injured State continues to be entitled to invoke the responsibility of the wrongdoing State.

Guideline 14
Dissolution of a State

1. When a State that has been injured by an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, one or more of the successor States may, in particular circumstances, be entitled to invoke the responsibility of the wrongdoing State.

2. The wrongdoing State and the relevant successor State or States should endeavour to reach agreement for addressing the injury. They should take into account any territorial link, any loss or benefit derived for nationals of the successor State, any equitable proportion and all other relevant circumstances.

Guideline 15
Diplomatic protection

The present draft guidelines do not address the application of the rules of diplomatic protection in situations of the succession of States.

Guideline 15 *bis*
Cessation and non-repetition

1. A predecessor State that is responsible for an internationally wrongful act that occurred before the date of succession of States, and that continues to exist after the date of succession, remains under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

2. A State that is responsible for an internationally wrongful act in accordance with draft guideline 7 or with draft guideline 7 *bis*, paragraph 1 or paragraph 2, is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its seventy-third session

89. The text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its seventy-third session is reproduced below.

Guideline 6
No effect upon attribution

A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession.

Commentary

(1) The purpose of draft guideline 6 is to clarify that an internationally wrongful act occurring before the date of succession remains attributable to the State that committed it. This provision expresses the basic principle which is codified in article 1 of the articles on responsibility of States for internationally wrongful acts.[1155]

(2) The Commission considered whether such a draft guideline was needed in the context of this topic. There was a view that the draft guideline was unrelated to the present topic and

[1155] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76, p. 26 ("Every internationally wrongful act of a State entails the international responsibility of that State."). See also General Assembly resolution 56/83 of 12 December 2001, annex.

unnecessarily reiterated a rule that was obvious or self-evident. However, the Commission considered that such a provision was important, because it constituted the logical premise of a number of subsequent draft guidelines concerning aspects of State responsibility, which were relevant in the context of State succession. Such provisions, for example, concern the responsibility for breaches of international law having a continuing character (draft guideline 7), composite acts (draft guideline 7 *bis*) and the question of the attribution of conduct of an insurrectional or other movement (draft guideline 8).

(3) While the term "attribution" in this draft guideline comes from the concept of attribution of conduct addressed in article 2, subparagraph (a), and in chapter II of the articles on responsibility of States for internationally wrongful acts,[1156] it does not refer to the term "attribution of conduct" as such. Instead, the Commission opted for the formulation "attribution … of an internationally wrongful act" to emphasize that, in the context of succession of States, an internationally wrongful act as a whole remains attributable to the State that committed that act before the date of succession.

Guideline 7 *bis*
Composite acts

1. When a predecessor State continues to exist, the breach of an international obligation by that State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the predecessor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful act.

2. The breach of an international obligation by a successor State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the successor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful act.

3. The provisions of paragraphs 1 and 2 are without prejudice to whether the breach of an international obligation by a successor State may occur through a series of actions or omissions defined in aggregate as wrongful that commences with the predecessor State and continues with the successor State.

Commentary

(1) Following the structure of articles 14 and 15 of the articles on responsibility of States for internationally wrongful acts,[1157] draft guidelines 7 and 7 *bis* appear consecutively in the present draft guidelines. In light of the complexity of the subject matter and the need to maintain consistency with its previous work, the Commission emphasized the importance in the present draft guideline of tracking the text of article 15 of the articles on responsibility of States for internationally wrongful acts as closely as possible.[1158]

(2) The draft guideline has three paragraphs. The wording of each paragraph follows that of article 15 of the articles on responsibility of States for internationally wrongful acts, focusing on the question of when the breach by a composite act occurs in various succession contexts. The first two paragraphs relate, respectively, to composite acts performed entirely by a predecessor State and by a successor State. The third relates to a composite act begun by a predecessor State and completed by its successor State after the date of succession. All three paragraphs focus on composite acts that begin before the date of succession of States and end after such date.

(3) Paragraph 1 relates to composite acts that straddle the date of succession and are performed entirely by a predecessor State that continues to exist after the date of succession. The paragraph makes clear that a predecessor State is responsible for an internationally wrongful composite act comprising actions or omissions attributable to the predecessor State

[1156] *Ibid*.

[1157] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[1158] See article 15 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76, p. 27.

that were performed both before and after the date of succession. In other words, the incidence of a State succession has no impact on the responsibility of a predecessor State for a composite act whose components are entirely attributable to it. Furthermore, the paragraph does not address a composite act of the predecessor State that occurs entirely before or entirely after the date of succession.

(4) The Commission also considered whether a specific reference to attribution was necessary in the text, to make clear that the actions or omissions constituting the composite act must all be attributable to the predecessor State. To address this point, the word "its" was included before "other actions and omissions" and should be understood to refer to the element of attribution.

(5) Paragraph 2 mirrors paragraph 1 with respect to a successor State. The paragraph makes clear that a successor State is responsible for an internationally wrongful composite act comprising actions or omissions attributable to the successor State that were performed both before and after the date of succession. It is recalled that a State that incorporates all or part of the territory of another State is the successor State with respect to that territory, even though the State existed before the date of succession. A composite act performed by a successor State entirely after the date of succession is also within the scope of this paragraph.

(6) Paragraph 3 concerns the scenario where the composite act is started by the predecessor State before the date of succession of States and is completed by the successor State afterwards. One potential example is that of a creeping expropriation begun by the predecessor State and completed by the successor State. However, the obligation of the successor State to compensate for such an expropriation could be explained on other bases. For example, it could be considered that the continued application by the successor State of the relevant measures adopted by the predecessor State is an act attributable directly to the successor State. In several cases concerning the successors to the former Yugoslavia, for example *Zaklan v. Croatia*, the European Court of Human Rights determined, in a context relating to succession, that the successor State was responsible based on its own actions after the date of succession.[1159]

(7) In the *Gabčíkovo-Nagymaros* case, the International Court of Justice considered that a successor State could be responsible for the conduct of the predecessor State when, by its conduct, the successor assumed the actions of the predecessor as its own.[1160] Other examples concern the possibility that a predecessor State might begin a series of actions that amounts to genocide or a crime against humanity[1161] only when continued by its successor State after the date of succession. Reference could also be made to the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* case brought by Croatia against Serbia before the International Court of Justice, even though the Court ultimately did not need to resolve whether succession to responsibility had occurred because it did not find that the allegations of genocide were substantiated.[1162]

(8) The inconsistency of the available State practice did not allow a firm conclusion to be drawn as to the content of the law. The Commission therefore decided to draft paragraph 3 in the form of a without prejudice clause. Paragraph 3 leaves open the question of whether the responsibility of a successor State for such a composite act exists under international law.

[1159] *Zaklan v. Croatia*, No. 57239/13, European Court of Human Rights, 16 December 2021, paras. 85–86.

[1160] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 81, paras. 151–152.

[1161] See paras. (3) and (5) of commentary to article 15, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at pp. 62–63.

[1162] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at pp. 58 and 129, paras. 117 and 442.

Guideline 10
Uniting of States

When two or more States unite and so form one successor State, and an internationally wrongful act has been committed by any of the predecessor States, the injured State and the successor State should agree on how to address the injury.

Commentary

(1) Draft guideline 10 addresses the situation where two or more States merge to form one successor State. By forming a new State, the predecessor States cease to exist.

(2) In some of its earlier work, the Commission understood the term "uniting of States" to cover both merger and incorporation.[1163] However, following the most recent approach in article 21 of the articles on nationality of natural persons in relation to the succession of States, of 1999,[1164] the Commission decided to draw an explicit distinction by having separate draft guidelines to cover the two situations. Draft guideline 10 addresses merger, while draft guideline 11 addresses incorporation.

(3) The provision is not to be interpreted as a rule of automatic succession, as rights and obligations do not automatically transfer from a predecessor State to a successor State. At the same time, the provision should not be viewed as an expression of the "clean slate" principle either, as that would risk leaving the injured State without a remedy.

(4) The Commission sought to balance such positions by recommending that the injured State and the successor State endeavour to reach an agreement on how to address the injury, an outcome inspired by draft guideline 9, paragraph 2. It is intended to encourage States to seek a solution to questions of international responsibility in situations of a merger between States. The wording is sufficiently flexible to give States the freedom to choose the modalities of the agreement.

(5) The provision should be understood as meaning that the States concerned should negotiate in good faith with a view to concluding an agreement. As the Permanent Court of International Justice stated in 1931 in the case concerning *Railway Traffic between Lithuania and Poland*, the obligation to negotiate is "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements".[1165] The International Court of Justice summarized and confirmed the relevant case law in its 2011 judgment in *Application of the Interim Accord of 13 September 1995*.[1166] In the same vein, in 1972 the Arbitral Tribunal for the Agreement on German External Debts in the case of *Greece v. the Federal Republic of Germany* explained very aptly the nature of the obligation to negotiate.[1167]

Guideline 10 *bis*
Incorporation of a State into another State

1. When an internationally wrongful act has been committed by a State prior to its incorporation into another State, the injured State and the incorporating State should agree on how to address the injury.

[1163] See art. 31 of the Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

[1164] *Yearbook ... 1999*, vol. II (Part Two), para. 48, at pp. 41–42.

[1165] *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116.

[1166] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, *Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, at p. 685, para. 132.

[1167] *Greece v. the Federal Republic of Germany*, Arbitral Award of 26 January 1972, paras. 62–65: "However, a *pactum de negotiando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken."

2. When an internationally wrongful act has been committed by a State prior to incorporating another State, the responsibility of the State that committed the wrongful act is not affected by such incorporation.

Commentary

(1) A situation of incorporation involves one or more States being incorporated into another State that continues to exist.

(2) Paragraph 1 reflects the scope of the provision. It deals with the situation where the internationally wrongful act was committed by a State that no longer exists, owing to its incorporation into another State. Therefore, the incorporating State continues to exist while the State that committed the internationally wrongful act ceases to exist.

(3) Under the formulation "should agree on how to address the injury", it is incumbent on "the injured State and the incorporating State" to pursue an agreement. However, the obligations arising from the internationally wrongful act do not pass automatically to the incorporating State. Additionally, the obligation to negotiate in good faith is also relevant here (see para. (5) of the commentary to draft guideline 10 above), as well as the consideration of claims made by private individuals.

(4) Paragraph 2 applies to situations where the incorporating State commits the wrongful act. It clarifies that the incorporation does not affect the responsibility of the State that committed the wrongful act.

Guideline 11
Dissolution of a State

When a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, the injured State and the relevant successor State or States should agree on how to address the injury arising from the internationally wrongful act. They should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.

Commentary

(1) Draft guideline 11 addresses the situation where a predecessor State that has committed an internationally wrongful act has ceased to exist as a result of a dissolution.

(2) The phrase "a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States" is inspired by articles 18, 31 and 41 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.[1168]

(3) The Commission sought to draw a balance between the "clean slate" doctrine and the "automatic succession" position.

(4) The draft guideline recognizes the existence of an obligation among the concerned States to seek to agree on how to address the injury. The draft guideline only applies to the relations between the injured State and the successor State or States. However, the need for agreement on how to address the injury may not be relevant to all successor States to an equal extent. Some successor States might have a closer connection with the wrongful act or the injury than others.

(5) The use of the word "relevant" in relation to "successor State or States" reflects the possibility that there may be successor States that do not have an interest in addressing the injury and therefore should not necessarily be involved in negotiations on the question.

[1168] Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983, not yet in force), United Nations, *Juridical Yearbook 1983* (United Nations publication, Sales No. E.90.V.1), p. 139.

(6) The phrase "should agree on how to address the injury" is to be understood in the same manner as in draft guidelines 10 and 10 *bis*, including the obligation to negotiate in good faith.

(7) The second sentence, "[t]hey should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances" provides factors that relevant States may take into account in determining how best to address the injury arising from the internationally wrongful act committed by the predecessor State. In doing so, the factors listed therein also serve as a guide for the determination of which successor State or States are to be considered "relevant" for purposes of draft guideline 11.

(8) The express reference to "any territorial link, any benefit derived, any equitable apportionment" is not intended as providing an exhaustive list of factors. This is confirmed by the concluding phrase "and all other relevant circumstances" which is based on article 31, paragraph 2, of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. Relevant circumstances include those that establish a link between the successor State or States and the internationally wrongful act or the injury, such as the continuity of organs (i.e., a personal link), or unjust enrichment.

(9) The pronoun "they" refers to "the injured State and the relevant successor State or States".

Guideline 12
Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed against a predecessor State by another State before the date of succession of States, and the predecessor State continues to exist, the predecessor State continues to be entitled to invoke the responsibility of the other State even after the date of succession, if the injury to it has not been made good.

2. In addition to paragraph 1, a successor State may, in particular circumstances, be entitled to invoke the responsibility of the State that committed the internationally wrongful act.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State.

Commentary

(1) Draft guideline 12 concerns cases of succession when the predecessor State which has been injured prior to the date of succession continues to exist. These comprise cases where a part of a State secedes to form a new State, including cases of newly independent States, and cases where a part of the territory of a State is ceded to another, pre-existing State. In this respect, it is analogous to draft guideline 9, which covers the comparable scenarios of succession with respect to the responsibility for internationally wrongful acts performed by a predecessor State prior to the date of succession.

(2) The provision has three paragraphs. The first concerns the situation of an injured predecessor State that continues to exist after the date of the succession. The second concerns the situation of a successor State to such a predecessor State. The third is a without prejudice clause with respect to apportionments or other agreements between the predecessor and successor States.

(3) The phrase "continues to be entitled to invoke", in paragraph 1, mirrors draft guideline 9 and confirms that the position of the predecessor State is not affected by the succession of States. The Commission considered whether to refer specifically to requesting reparation from the responsible State, but decided that a reference to the "entitle[ment] to invoke" responsibility was preferable because it is broader, encompassing not only reparation but also other obligations arising from the commission of an internationally wrongful act. Such reference also avoids the question of apportionment between the predecessor State and any relevant successor States, which is dealt with in paragraph 3.

(4) The phrase at the end of paragraph 1, "if the injury to it has not been made good" results from the Commission's consideration of how the injury in question relates to the continued entitlement of the predecessor State to invoke responsibility. The Commission chose this phrase rather than a reference to either the predecessor State being an "injured State" or the continued existence of the injury after the date of succession. Paragraph 1 relates only to the position of an injured predecessor State and is not concerned with the possibility of the invocation of responsibility by a State other than an injured State in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts.[1169] The phrase "the injury to it" captures the idea of the injured predecessor State. Drawing on the articles on responsibility of States for internationally wrongful acts, the phrase "has not been made good" reflects the idea that the predecessor State is not entitled to invoke responsibility in relation to an injury for which full reparation has already been made.

(5) Paragraph 2 concerns the position of a successor State of the injured predecessor State. The paragraph seeks to address the circumstances where a successor State is able to invoke the responsibility of a third State for an internationally wrongful act that it committed, against the predecessor State before the date of succession. The paragraph begins with the phrase "In addition to paragraph 1" in order to clarify its relationship with the previous paragraph. The entitlement of both the predecessor State and the successor State to invoke the responsibility of the wrongdoing State does not entail an obligation of the wrongdoing State to make more than full reparation.

(6) The phrase "in particular circumstances", which tracks the formulation of draft guideline 9, paragraph 2, refers to the connection between the injury to the predecessor State before the date of succession and either the territory or the nationals that became those of the successor State as a consequence of the succession. The paragraph is thus intended, *inter alia*, to satisfy the interests of newly independent States. It would be odd if a newly independent State would not be entitled to invoke the responsibility of a wrongdoing State for injury affecting its territory or population before it became independent.[1170]

(7) The Commission decided to use the phrase "entitled to invoke" to track the formulation of paragraph 1, and the word "may" to reflect the conditionality of the entitlement on the existence of the particular circumstances.

(8) Paragraph 3 is a without prejudice clause. It seeks to accommodate the scenario implied in paragraphs 1 and 2 in which both the predecessor and successor States are entitled to invoke responsibility. It is analogous to paragraph 3 of draft guideline 9 and gives priority to agreements between the States concerned. Such agreements could involve, *inter alia*, the apportionment of compensation already paid to the predecessor State before the date of succession or a decision that the successor State should pursue the entire claim.

Guideline 13
Uniting of States

When two or more States unite and so form one successor State, and any of the predecessor States was injured by an internationally wrongful act of another State, the successor State may invoke the responsibility of that other State.

[1169] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76, pp. 29–30.

[1170] This was, for example, the case with the secession of Pakistan from India in 1947. The British Dominion of India had been party to the 1946 Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, the purpose of which was the equitable distribution of the total assets available as reparation from Germany among several injured States. See Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, done at Paris on 14 January 1946 (United Nations, *Treaty Series*, vol. 555, No. 8105, p. 69). The Governments of India and Pakistan agreed in January 1948 on how to divide the share of reparations allocated to India under the 1946 Agreement. This bilateral agreement led to the conclusion of an additional Protocol to the 1946 Agreement. See Protocol attached to the Paris Agreement of 14 January 1946 on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, signed at Brussels on 15 March 1948 (*ibid*., p. 104).

Commentary

(1) Contrary to draft guideline 10, draft guideline 13 deals with the situation where a predecessor State is an injured State by an internationally wrongful act of another State.

(2) As explained in the commentaries to draft guidelines 10 and 10 *bis*, the Commission decided to treat uniting of States separately from the incorporation of a State. The Commission decided to take the same approach with respect to draft guideline 13, treating uniting of States separately from the incorporation of a State for issues relating to the reparation of injury for internationally wrongful acts committed against a predecessor State. Accordingly, draft guideline 13 covers the unification scenario, while draft guideline 13 *bis* covers the incorporation of a State into another State.

(3) The Commission considered whether to make explicit that the provision referred to an internationally wrongful act that occurred before the date of succession of States. This was found to be unnecessary because, in a situation of unification, the predecessor States cease to exist on the date of succession. Therefore, an injury to a predecessor State could only refer to an injury caused by an internationally wrongful act that occurred before the date of succession.

(4) The Commission used the phrase "may invoke" in draft guideline 13 rather than the formulation in draft guideline 12, paragraph 2, "may, in particular circumstances, be entitled to invoke", since, in the context of a uniting of States, where there is only one successor State, the challenge of determining which State might be entitled to invoke responsibility does not arise. Furthermore, in draft guideline 12, the notion of "entitled to invoke" is linked to the notion of continuation in paragraph 1 and to the idea of "particular circumstances" in paragraph 2, neither of which are relevant to draft guideline 13.

Guideline 13 *bis*
Incorporation of a State into another State

1. When an internationally wrongful act has been committed against a State prior to its incorporation into another State, the incorporating State may invoke the responsibility of the wrongdoing State.

2. When an internationally wrongful act has been committed against a State prior to incorporating another State, the injured State continues to be entitled to invoke the responsibility of the wrongdoing State.

Commentary

(1) Draft guideline 13 *bis* concerns the scenario in which an injured predecessor State becomes part of another State. In line with the terminology used in the present draft guidelines, as set out in the definitions in draft guideline 2, the incorporated State is the predecessor State and the incorporating State is the successor State with respect to the territory incorporated. However, it was considered clearer to use phrasing such as "injured State" and "incorporated State" in the present context.

(2) In paragraph 1, where the ability of the incorporating State to invoke the responsibility of the wrongdoing State only begins on the date of succession, the wording "may invoke" is used. As in draft guideline 13, this reflects the fact that there is no confusion as to which of the States might invoke responsibility after the date of succession because the predecessor State has ceased to exist.

(3) In paragraph 2, the word "continues" is used to indicate that the entitlement of the incorporating State to invoke responsibility begins when it is injured, prior to the date of succession. This reflects the notion that the pre-existing entitlement is not affected by the occurrence of succession.

(4) The term "wrongdoing State", used at the end of both paragraphs, as well as in draft guideline 14, is drawn from the commentary to the articles on responsibility of States for

internationally wrongful acts.[1171] The Commission considered that the phrase was a concise way of indicating the State that was responsible for the internationally wrongful act.

Guideline 14
Dissolution of a State

1. When a State that has been injured by an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, one or more of the successor States may, in particular circumstances, be entitled to invoke the responsibility of the wrongdoing State.

2. The wrongdoing State and the relevant successor State or States should endeavour to reach agreement for addressing the injury. They should take into account any territorial link, any loss or benefit derived for nationals of the successor State, any equitable proportion and all other relevant circumstances.

Commentary

(1) Draft guideline 14 concerns the dissolution of a State in circumstances where the predecessor State was injured prior to the date of succession, but does not continue to exist after that date. Like its analogue draft guideline 11, the provision defines the dissolution of a State in the terms used in article 18, paragraph 1, of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts: that is, "[w]hen a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States". The same definition was also used in the Commission's work on nationality in relation to the succession of States[1172] and the work of the Institute of International Law.[1173] The only change from the 1983 Vienna Convention formulation is the addition of the phrase "that has been injured by an internationally wrongful act". This does not change the definition of a dissolution, but rather serves to indicate the scenario in which the draft guideline applies.

(2) The draft guideline comprises two paragraphs. Paragraph 1 concerns whether one or more of the successor States is entitled to invoke the responsibility of the wrongdoing State for an act against the predecessor State, while paragraph 2 emphasizes the importance of pursuing an agreement between the wrongdoing State and the relevant successor State or States in the context of a dissolution.

(3) In paragraph 1, the use of the phrase "may, in particular circumstances, be entitled to invoke", is inspired by that in draft guideline 12, paragraph 2. The Commission chose such formulation, instead of "may invoke", so as to reflect the idea that, while not all successor States will necessarily be entitled to invoke responsibility, one or more will. The phrase "in particular circumstances" reflects the fact that the identification of the successor State or States that are entitled to invoke responsibility in respect of the injury to the predecessor may depend on a number of factors and that it will not necessarily be all successor States who are so entitled.

(4) The phrase "particular circumstances" refers to a territorial or personal link between an internationally wrongful act or its consequences and one or more of the successor States. The most obvious link seems to be in situations where the injurious consequences of an internationally wrongful act affect only the territory of one successor State. For example, in the *Gabčíkovo-Nagymaros* case, the object of the bilateral treaty between Czechoslovakia and Hungary was situated on the territory of Slovakia, which was solely entitled to invoke

[1171] See, for example, para. (5) of the commentary to article 1, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 33.

[1172] Art. 22: General Assembly resolution 55/153 of 12 December 2000, annex. The articles and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), paras. 47–48.

[1173] See art. 15, para. 1, of the Institute of International Law resolution on State succession in matters of international responsibility: Institute of International Law, Yearbook, vol. 76, Session of Tallinn (2015), "State succession in matters of international responsibility", Fourteenth Commission, Rapporteur: Marcelo Kohen, p. 509, resolution, p. 711. Available from https://idi-iil.org/app/uploads/2017/06/05-Kohen-succession.pdf.

the responsibility of Hungary for the breach of the treaty, even if the breach occurred before the date of succession.[1174] Another possible link is the personal one, where the injury was suffered by persons who became nationals of one successor State. This seems to be the case in some decisions of the United Nations Compensation Commission.[1175]

(5) Paragraph 2 is inspired by draft guideline 11. The use of the word "relevant" is for the same reason as indicated in paragraph (5) of the commentary to draft guideline 11. As explained in paragraph (4) of the present commentary, it may be that only one or more of the successor States might be affected by the consequences of the internationally wrongful act (*e.g.*, in *Gabčíkovo-Nagymaros*, it was Slovakia and not the Czech Republic that was affected). The last sentence is virtually identical to the last sentence of draft guideline 11; it provides criteria for the determination of which successor States are relevant and have a more justified claim in relation to the injury. The same criteria also point to the meaning of the phrase "particular circumstances" in paragraph 1. The emphasis on agreement is consistent with the overall orientation of the draft guidelines, reflected in draft guideline 1, paragraph 2: that agreements between the States concerned have priority.

Guideline 15
Diplomatic protection

The present draft guidelines do not address the application of the rules of diplomatic protection in situations of the succession of States.

Commentary

(1) The present draft guidelines, as set out in draft guideline 1, paragraph 1, concern the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts. Therefore, they do not address the application of the rules of diplomatic protection, as diplomatic protection is just one type of invocation of the responsibility of a State.

(2) The relationship between the rules of responsibility of States for internationally wrongful acts and rules of diplomatic protection was reflected, *inter alia*, in article 44, subparagraph (a), of the articles on responsibility of States for internationally wrongful acts.[1176]

(3) However, the omission of specific rules on diplomatic protection in the present draft guidelines does not mean that the rule relating to the nationality of claims[1177] and other rules of diplomatic protection cannot apply in situations of the succession of States. On the contrary, the occurrence of a succession of States usually involves a change of nationality of persons who reside in the territory or parts of the territory of a predecessor State that becomes the territory of a successor State.

[1174] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at pp. 71–72 and 81, paras. 123 and 151.

[1175] United Nations Compensation Commission, Decision concerning the first instalment of claims for serious personal injury or death (category "B" claims) taken by the Governing Council of the United Nations Compensation Commission at its 43rd meeting, held on 26 May 1994 in Geneva (Decision 20) and Decision concerning the first instalment of claims for departure from Iraq or Kuwait (category "A" claims) taken by the Governing Council of the United Nations Compensation Commission at its 46th meeting, held on 20 October 1994 in Geneva (Decision 22): see documents S/AC.26/Dec.20 (1994), para. 3, footnote 2 ("The claims were initially submitted by the Czech and Slovak Federal Republic. The award of compensation is to be paid to the Government of the Slovak Republic.") and S/AC.26/Dec.22 (1994), para. 2, footnote 2 ("These claims were submitted before the Czech and Slovak Federal Republic ceased to exist. Awards of compensation are to be paid to the Governments of the Czech Republic and the Slovak Republic, respectively."). Decisions of the Governing Council are available at https://uncc.ch/decisions-governing-council.

[1176] Article 44: "The responsibility of a State may not be invoked if: (*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims".

[1177] As expressed in the Permanent Court of International Justice, *Mavrommatis Palestine Concessions*, *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12.

(4) The previous work of the Commission addressed this issue in the articles on diplomatic protection, adopted in 2006.[1178] In particular, this issue was reflected in the text of, and the commentary to, article 5. While the Commission considered that it was necessary to retain the continuous nationality rule, it agreed that there were exceptions to this rule.[1179] Paragraph 2 of article 5 accordingly provides that a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not its national at the date of injury, provided that certain conditions are met. Those conditions, according to paragraph 2 of article 5 and the commentary thereto are: "first, the person seeking diplomatic protection had the nationality of a predecessor State or has lost his or her previous nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law."[1180]

(5) Such conditions are usually met in the case of succession of States, when the change of nationality is involuntary. The second condition in article 5 of the articles on diplomatic protection limits exceptions to the continuous nationality rule mainly to cases involving compulsory imposition of nationality, by which the person has acquired a new nationality as a necessary consequence of factors such as the succession of States.[1181] In situations of succession of States, the acquisition of the new nationality should be considered consistent with international law even if the person had a right of option to choose between two or more nationalities granted by the predecessor and successor States.[1182]

Guideline 15 *bis*
Cessation and non-repetition

1. A predecessor State that is responsible for an internationally wrongful act that occurred before the date of succession of States, and that continues to exist after the date of succession, remains under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

2. A State that is responsible for an internationally wrongful act in accordance with draft guideline 7 or with draft guideline 7 *bis*, paragraph 1 or paragraph 2, is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) Draft guideline 15 *bis* mirrors the formulation of article 30 of the articles on responsibility of States for internationally wrongful acts and applies the rule embodied in that article to the context of State succession.[1183] Accordingly, it deals with two separate issues raised by the breach of an international obligation: (a) the cessation of the wrongful act, and (b) the offer of assurances and guarantees of non-repetition by the responsible State.

(2) On the one hand, cessation is thus linked to the more general rule expressed in article 29 of the articles on responsibility of States for internationally wrongful acts.[1184] Article 29

[1178] See General Assembly resolution 62/67, annex, of 6 December 2007. The articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50.
[1179] *Yearbook … 2006*, vol. II (Part Two), para. 50, at pp. 31–33.
[1180] Para. (7) of the commentary to article 5, *ibid.*, p. 32.
[1181] Para. (10) of the commentary to article 5, *ibid*.
[1182] See also articles 23 and 26 of the articles on nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), pp. 43–47.
[1183] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 88.
[1184] *Ibid*.

states the general principle that the legal consequences of an internationally wrongful act, in particular reparation, do not affect the continued duty of the State to perform the obligation breached. The Commission discussed this issue but decided not to include another draft guideline that would reproduce this principle. The continued duty to perform is a matter of primary rules (rather than secondary rules) and depends on whether the underlying obligation is still in force. On the other hand, assurances and guarantees of non-repetition serve a preventive function.

(3) The general condition that the underlying primary obligations remain in force fully applies. This is a necessary assumption of both the obligation of cessation and the obligation of assurances, in particular in situations of the succession of States. Regarding the obligation of cessation, as the tribunal in *Rainbow Warrior* arbitration stressed, there are "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[1185]

(4) Subparagraphs (a) and (b) of each paragraph are identical to their counterparts in article 30 of the articles on responsibility of States for internationally wrongful acts. The subparagraphs provide, respectively, for the obligation of a State to cease an internationally wrongful act, if the act has a continuing character, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, in the situations described in the *chapeaux* of paragraphs 1 and 2. The Commission also considered that the term "act" should be understood to refer to both actions and omissions.

(5) Paragraph 1 concerns a predecessor State which continues to exist after the date of succession of States. The word "remains" indicates that the succession of States has no impact on such a State's responsibility to cease any wrongful act of a continuing character, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

(6) Paragraph 2 applies to acts by successor States having a continuing character and to composite acts. Acts having a continuing character for which a predecessor State that continues to exist is responsible are covered in paragraph 1. Thus, paragraph 2 addresses acts having a continuing character to the extent that a successor State is responsible. As addressed in draft guideline 7, a successor State is responsible for the consequences of its own acts after the date of the succession of States, and for the acts of its predecessor State, if and to the extent that the successor State accepts such acts as its own. The successor State is obligated to cease any wrongful act for which it is responsible under draft guideline 7 and offer appropriate assurances and guarantees of non-repetition, if circumstances require. With respect to composite acts, addressed in draft guideline 7 *bis*, paragraphs 1 and 2, predecessor States which continue to exist and successor States, respectively, are obligated to cease acts defined in aggregate as wrongful, provided that the acts are continuing in nature. In addition, these States have to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

[1185] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair*, Decision, 30 April 1990, *Reports of International Arbitral Awards* (UNRIAA), vol. XX (1990), pp. 215–264, at p. 270, para. 114.

Chapter VIII
General principles of law

A. Introduction

90. The Commission, at its seventieth session (2018), decided to include the topic "General principles of law" in its programme of work and appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur. The General Assembly, in paragraph 7 of its resolution 73/265 of 22 December 2018, subsequently took note of the decision of the Commission to include the topic in its programme of work.

91. At its seventy-first session (2019), the Commission considered the Special Rapporteur's first report (A/CN.4/732), which set out his approach to the topic's scope and outcome, as well as the main issues to be addressed in the course of the Commission's work. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 3, as contained in the Special Rapporteur's first report, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee regarding draft conclusion 1, provisionally adopted by the Committee in English only, which was presented to the Commission for information.[1186]

92. Also at its seventy-first session, the Commission requested the Secretariat to prepare a memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties, which would be particularly relevant for its future work on the topic.

93. At its seventy-second session (2021), the Commission considered the Special Rapporteur's second report (A/CN.4/741 and Corr.1), in which the Special Rapporteur addressed the identification of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. The Commission also had before it the memorandum it had requested from the Secretariat (A/CN.4/742) at its seventy-first session. Following the debate in plenary, the Commission decided to refer draft conclusions 4 to 9, as presented in the second report, to the Drafting Committee. The Commission provisionally adopted draft conclusions 1, 2 and 4, together with commentaries, and took note of draft conclusion 5, as contained in the report of the Drafting Committee.[1187]

B. Consideration of the topic at the present session

94. At the present session, the Commission considered the Special Rapporteur's third report (A/CN.4/753), in which the Special Rapporteur discussed the issue of transposition (Part One), general principles of law formed within the international legal system (Part Two), and the functions of general principles of law and their relationship with other sources of international law (Part Three). The Special Rapporteur proposed five draft conclusions. He also made suggestions for the future programme of work on the topic (Part Four).

95. At its 3585th meeting, on 1 June 2022, the Commission provisionally adopted draft conclusion 5, which had been provisionally adopted by the Drafting Committee at the seventy-second session (see sect C.1 below).

96. The Commission considered the Special Rapporteur's third report at its 3587th to 3592nd meetings, from 4 to 12 July 2022. At its 3592nd meeting, on 12 July 2022, the Commission decided to refer draft conclusions 10 to 14, as contained in the third report, to the Drafting Committee, taking into account the views expressed in the plenary debate.[1188]

[1186] The interim report of the Chair of the Drafting Committee is available under the analytical guide to the work of the International Law Commission: http://legal.un.org/ilc/guide/1_15.shtml.

[1187] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 169–172 and 238–239. See also A/CN.4/L.955 and Add.1.

[1188] The draft conclusions proposed by the Special Rapporteur in his third report read as follows:

97. At its 3605th meeting, on 29 July 2022, the Commission considered the report of the Drafting Committee (A/CN.4/L.971) on the consolidated text of draft conclusions 1 to 11, provisionally adopted by the Committee.[1189] At the present session, the Committee

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Draft conclusion 10
Absence of hierarchy between the sources of international law

General principles of law are not in a hierarchical relationship with treaties and customary international law.

Draft conclusion 11
Parallel existence

General principles of law may exist in parallel with treaty and customary rules with identical or analogous content.

Draft conclusion 12
Lex specialis *principle*

The relationship of general principles of law with rules of the other sources of international law addressing the same subject matter is governed by the *lex specialis* principle.

Draft conclusion 13
Gap-filling

The essential function of general principles of law is to fill gaps that may exist in treaties and customary international law.

Draft conclusion 14
Specific functions of general principles of law

General principles of law may serve, *inter alia*:

(a) as an independent basis for rights and obligations;

(b) to interpret and complement other rules of international law;

(c) to ensure the coherence of the international legal system.

1189 **Draft conclusion 1**

Scope

The present draft conclusions concern general principles of law as a source of international law.

Draft conclusion 2

Recognition

For a general principle of law to exist, it must be recognized by the community of nations.

Draft conclusion 3

Categories of general principles of law

General principles of law comprise those:

(a) that are derived from national legal systems;

(b) that may be formed within the international legal system.

Draft conclusion 4

Identification of general principles of law derived from national legal systems

To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:

(a) the existence of a principle common to the various legal systems of the world; and

(b) its transposition to the international legal system.

Draft conclusion 5

Determination of the existence of a principle common to the various legal systems of the world

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including the different regions of the world.

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

Draft conclusion 6

Determination of transposition to the international legal system

A principle common to the various legal systems of the world may be transposed to the international legal system in so far as it is compatible with that system.

provisionally adopted draft conclusions 3, 6, 7, 8, 9, 10 and 11. At its 3605th meeting, on 29 July 2022, the Commission provisionally adopted draft conclusions 3 and 7 (see sect. C.1 below), and took note of draft conclusions 6, 8, 9, 10 and 11. At its 3605th to 3612th meetings, from 29 July to 5 August 2022, the Commission adopted the commentaries to draft conclusions 3, 5 and 7, provisionally adopted at the present session (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the third report

98. The Special Rapporteur stated that the third report addressed the functions of general principles of law in the sense of Article 38 paragraph 1 (*c*), of the Statute of the International Court of Justice and the relationship between general principles of law and the other sources of international law contained in Article 38, namely, treaties and customary international law. He also explained that the third report re-examined certain aspects related to the identification of general principles in light of the debate held in the Commission at its seventy-second session and in the Sixth Committee at its seventy-sixth session (2021).

99. The Special Rapporteur explained that Part One of the third report further analysed the issue of transposition of general principles of law derived from national legal systems to the international legal system. The purpose of Part One was to address questions that had been raised by members of the Commission and States in the Sixth Committee, in particular regarding draft conclusion 6 proposed in the Special Rapporteur's second report. The Special Rapporteur first agreed with those who had suggested that draft conclusion 6 could be simplified to avoid being overly prescriptive. Moreover, he emphasized that for recognition

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Draft conclusion 7

Identification of general principles of law formed within the international legal system

1. To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognised the principle as intrinsic to the international legal system.

2. Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.

Draft conclusion 8

Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of general principles of law are a subsidiary means for the determination of such principles.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of general principles of law, as a subsidiary means for the determination of such principles.

Draft conclusion 9

Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law.

Draft conclusion 10

Functions of general principles of law

1. General principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part.

2. General principles of law contribute to the coherence of the international legal system. They may serve, *inter alia*:

(a) to interpret and complement other rules of international law;

(b) as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules.

Draft conclusion 11

Relationship between general principles of law and treaties and customary international law

1. General principles of law, as a source of international law, are not in a hierarchical relationship with treaties and customary international law.

2. A general principle of law may exist in parallel with a rule of the same or similar content in a treaty or customary international law.

3. Any conflict between a general principle of law and a rule in a treaty or customary international law is to be resolved by applying the generally accepted techniques of interpretation and conflict resolution in international law.

to occur, in the sense of Article 38 paragraph 1 (*c*), of the Statute of the International Court of Justice, it was not sufficient for a principle to be recognized *in foro domestico*; rather, recognition of its applicability in the international legal system was also necessary due to differences between national legal systems and the international legal system. He further explained that a formal act of recognition was not required and that recognition in the context of transposition essentially occurred implicitly. He noted that determining the compatibility of the principle with the international legal system was necessary.

100. Part Two summarized the differing views expressed in relation to the second category of general principles of law reflected in draft conclusion 7, namely general principles of law formed within the international legal system, and clarified certain matters regarding the methodology for their identification. The Special Rapporteur reiterated that there was sufficient practice and doctrine to substantiate a draft conclusion on the second category, while acknowledging that caution was required, especially in view of concerns raised that this category should not be confused with customary international law. He emphasized that the main challenge consisted in formulating a clear and precise methodology for the identification of general principles of law formed within the international legal system.

101. The Special Rapporteur stated that Part Three addressed the functions of general principles of law and their relationship with other sources of international law, in particular treaties and customary international law. Following the discussion in Part Three, five draft conclusions were proposed in his third report.

102. Section I of Part Three dealt with the essential function of general principles of law of filling gaps that might exist in conventional and customary international law. The Special Rapporteur explained that a general principle of law could only fill a gap to the extent that the existence of said principle could be determined following the methodology for its identification. He highlighted that such function was widely recognized in practice and doctrine and that the report was careful not to suggest that there was a hierarchy between the three sources of international law (treaties, customary international law, and general principles of law), but, rather, that this relationship should be understood in light of the principle of *lex specialis*. On the question of *non liquet*, the Special Rapporteur clarified that it was not necessary for the Commission to delve into the matter as (*a*) the analysis of the gap-filling function of general principles of law already answered the question of *non liquet*, and (*b*) the question of *non liquet* was applicable only in the judicial context and general principles of law, as a source of international law, were not limited to such perspective.

103. Section II of Part Three addressed three key issues regarding the relationship between general principles of law, treaties and customary international law: (a) the absence of hierarchy between the sources of international law; (b) the possibility of parallel existence of general principles of law and other norms of international law with identical or analogous content; and (c) the operation of the *lex specialis* principle within the context of general principles of law. The Special Rapporteur underlined that practice showed that general principles of law could indeed exist in parallel with treaties and customary international law with an identical or analogous content, and that the applicability and specificity of such principles were not affected by such parallel existence. Additionally, he explained that the *lex specialis* principle was analysed in light of the work of the Commission on fragmentation of international law, concluding that general principles of law may normally be considered as the "general law" in relation to other norms of international law owing to the way in which they emerge.

104. Section III of Part Three of the report covered specific functions of general principles of law. The Special Rapporteur noted that said functions were not necessarily exclusive to general principles of law and needed to be understood in light of their essential gap-filling role. The Special Rapporteur concluded by summarizing the specific functions that general principles of law could serve, as identified in the third report: (*a*) as an independent basis for rights and obligations; (*b*) as a means to interpret and complement other rules of international law; and (*c*) as a means to ensure the coherence and consistency of the international legal system.

2. Summary of the debate

(a) General comments

105. Members generally welcomed the third report of the Special Rapporteur. Appreciation for its rigour and legal logic was expressed. Several members noted the importance of the topic. Some members expressed concerns regarding the scope of the topic, the terminology employed in the third report, and the examples of State practice to support certain propositions therein.

106. Several members reiterated that Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice was widely considered as an authoritative statement on the sources of international law, and that the point of departure of the work of the Commission was general principles of law in the sense of Article 38 as a source of international law. In that connection, some members suggested changing the title of the topic to "General principles of law as a source of international law". It was suggested that, even though the point of departure of the work of the Commission was Article 38, paragraph 1 (*c*), the Commission should not be limited to the confines of the Statute in its debate and conclusions. The view was expressed that Article 38, paragraph 1 (*c*), was a provision relating to the applicable law of the International Court of Justice, rather than a specification of the sources of international law. In that regard, it was stated that the analysis of the jurisprudence of arbitral tribunals or international criminal tribunals, each one with its own applicable law, was irrelevant in a report addressing general principles of law within the meaning of Article 38, paragraph 1 (*c*).

107. Differing views were expressed regarding the nature of general principles of law as a primary source of international law. Several members agreed that general principles of law were a primary and independent source, while others expressed doubts. The need to draw a clear distinction between general principles of law and judicial techniques or maxims, as well as between principles with normative scope and principles without normative scope, was emphasized.

108. A concern was raised regarding a perceived overreliance in the third report on judicial decisions and individual commentators rather than on State practice. It was highlighted that the recognition of general principles of law was incumbent upon States. In respect of general principles of law formed within the international legal system, States could manifest such recognition either in the express form of treaty provisions or in the unwritten form of customary international law. A view was expressed that if gap-filling, where no treaty or customary international law rule applied, was an essential function of general principles of law, then finding evidence of State recognition of the general principle of law in question would be challenging.

109. Some members suggested adding to the draft conclusions a non-exhaustive list of general principles of law, similar to draft conclusion 23 of the topic "Peremptory norms of general international law (*jus cogens*)". A view was expressed that the main objective of the work on the topic should be the identification and confirmation of the specific content of general principles of law, even if it was in the form of an indicative list.

110. Several members reiterated their concerns regarding terminology; it was noted that several distinct terms, such as "general international law", "general principles of international law" and "fundamental principles of international law" were often used interchangeably in practice and in teachings, with some members calling for a proper definition and distinction between them.

(b) Draft conclusion 6

111. With respect to draft conclusion 6 (ascertainment of transposition to the international legal system), as proposed in the second report of the Special Rapporteur, some members reiterated their support for the two-step approach (existence in national legal systems and transposition) proposed by the Special Rapporteur, while the notion of transposition itself was questioned by others. Several members supported implicit transposition rather than an express, active or formal act of transposition. It was stated that recognition was fundamentally the "existence" in national legal systems, while transposition was mainly an

issue of applicability of general principles of law on a case-by-case basis. Agreement was expressed with the Special Rapporteur's position that the requirement of recognition was pertinent to both the existence of the principle across national legal systems and its transposition, while it was stated that recognition should not play a role in determining whether a principle is transposable. A concern was raised that the notion of transposability could override the will of States in a key aspect of the process of recognition of general principles of law and be used as an excuse to ascertain the transposition of general principles of law by special arrangements between States or by controversial judicial decisions.

112. Several members expressed their support for the notion of compatibility or suitability as a defining element of transposition to the international legal system. Doubts were expressed on the use of the term "fundamental principles of international law" in draft conclusion 6 and, in that regard, drafting suggestions were made. It was suggested that article 21 of the Rome Statute of the International Criminal Court could constitute good guidance on the issue of transposition. While several members argued that transposition implied compatibility or suitability with essential elements of the international legal system, a view was expressed that compatibility had to extend to all applicable international law. A suggestion to include the notion of *opinio juris* in the process of recognition was also made.

113. A number of members suggested simplifying draft conclusion 6, in order to favour flexibility in the identification of general principles of law derived from national legal systems, while maintaining certain rigour in the process. Some members emphasized that the Commission should aim at ensuring a text that avoided creating the impression that transposition was either automatic or that it required a formal act. While flexibility and a non-formalized process was supported, further guidance on the requirements of transposition was sought. In that connection, drafting suggestions were made to draft conclusion 6.

(c) Draft conclusion 7

114. Draft conclusion 7 (identification of general principles of law formed within the international legal system) was provisionally adopted by the Commission with commentaries at the present session. Accordingly, following the practice of the Commission, the summary of the debate of this draft conclusion is not included in the present report.

(d) Draft conclusions 10 to 12

115. Several members expressed support for draft conclusions 10 (absence of hierarchy between the sources of international law), 11 (parallel existence), and 12 (*lex specialis* principle), while others expressed hesitation, questioning their usefulness or necessity. Some members commended the efforts by the Special Rapporteur to define relevant dimensions of general principles of law. A view was expressed that draft conclusions on the issue of relationship between sources should not be included in the work of the Commission.

116. Regarding draft conclusion 10, while some members agreed with the third report that the absence of a hierarchy between sources of international law was well supported in the practice of States and scholarly writings, others questioned this approach. According to the members who questioned the approach, even if in theory there was no hierarchy between sources, in practice there was an informal hierarchy between the sources listed in Article 38 of the Statute of the International Court of Justice, which were applied *en ordre successif*. In that connection, it was stated that general principles of law did not in practice have the same status as a treaty or a rule of customary international law. Several members suggested that there was a tension between draft conclusion 10 and draft conclusion 13 (gap-filling), in the sense that a gap-filling function placed general principles of law below treaties and customary international law. A view was expressed that general principles of law were a subsidiary source of international law.

117. Concerns were raised that draft conclusion 10 did not address the relationship of general principles of law with peremptory norms of general international law (*jus cogens*), or the relationship between general principles of law and the law of international organizations. Several drafting suggestions were made for draft conclusion 10, including, *inter alia*, simplifying the text, merging draft conclusion 10 with draft conclusions 11 and 12, or omitting the word "hierarchy". Some members also suggested moving draft conclusions

10 to 12 after draft conclusions 13 and 14 (specific functions of general principles of law). A drafting suggestion was made to specify that draft conclusions 10, 11 and 12 only applied to existing general principles of law.

118. Several members expressed support for draft conclusion 11 as correctly reflecting the possibility of the parallel existence of general principles of law and rules of treaty law and/or rules of customary international law. In that regard, the jurisprudence outlined in the third report to support such proposition was emphasized. Other members considered the provision unnecessary or of limited practical applicability. It was suggested that the content of draft conclusion 11 could be dealt with in the commentary and that the discussion on parallel existence was not relevant to the topic since the Commission was not engaged in a general discussion on sources. The view was expressed that general principles of law could not coexist with rules of customary international law of similar or identical content since the processes for the formation and identification of general principles of law and customary international law would often overlap.

119. Several drafting suggestions were made for draft conclusion 11, in addition to the suggestion to merge draft conclusions 10 and 11. A suggestion to reconsider the reference to the sources of international law with which general principles of law may coexist was also made.

120. Draft conclusion 12 was supported by some members, who considered that *lex specialis* was a principle that may be applicable to resolve conflicts between rules derived from general principles of law on the one hand, and rules of treaty law and customary international law on the other hand. Others questioned whether the provision was needed, as it appeared that its content could be discussed in the commentary. Several members expressed doubts regarding the sole focus on the *lex specialis* principle in the third report and, consequently, in the draft conclusion, when other methods for deconflicting sources could also be relevant and applicable, such as the *lex posteriori* principle. Reconsideration of the focus on the *lex specialis* principle was called for. The view was expressed that general principles of law were *lex generalis* in nature. Some members suggested that there was a tension between draft conclusions 12 and 13, from the perspective of *lex specialis* playing no role if the essential function of general principles was that of gap-filling. It was noted that the analysis contained in the third report and draft conclusion 12 relied mainly on the work of the Commission on fragmentation of international law, when it should also rely on State practice and jurisprudence. Drafting suggestions were made to explicitly mention the *lex generalis* nature of general principles of law in the draft conclusion, as well as to reformulate the draft conclusion so it clarified that *lex specialis* applied as a method of deconflicting norms or rules stemming from general principles of law and other sources of international law addressing the same subject matter.

(e) Draft conclusions 13 and 14

121. Some members commended the Special Rapporteur for addressing an essential dimension of general principles of law and recalled that the importance of addressing the functions of general principles of law had been highlighted by several States in the Sixth Committee. Other members raised doubts concerning the relevance or usefulness of drafting conclusions on the functions performed by general principles of law, an undertaking which constituted a novelty in the Commission's work on the sources of international law. It was highlighted that it was not obvious that the functions listed in draft conclusions 13 and 14 were the only functions of general principles of law, or the most important ones.

122. Regarding draft conclusion 13, several members agreed that the essential function of general principles of law was to fill the *lacunae* left in the international legal system where the other sources offered no solution. Some members stated that general principles of law did not have a monopoly on filling gaps, since treaties and customary international law could also play a similar role. In that connection, the view was expressed that not every gap could be filled with general principles of law. It was also stated that gap-filling did not constitute the main role of general principles of law because they performed a major function in the interpretation and application of existing rules and in providing coherence to the international legal system. While some members supported the use of the term "gap-filling", others considered it ambiguous and misleading.

123. It was emphasized that general principles of law only performed a gap-filling role to the extent that they existed and were recognized. The need to carefully consider the gap-filling function in light of the specificities of the international legal system was mentioned. Some members considered that the third report overestimated the role played by general principles of law in filling gaps. Others noted that the gap-filling function was performed in the context of dispute settlement to avoid situations of *non liquet*. In that connection, a drafting suggestion was made to include the context (dispute settlement) and the objective (preventing a situation of *non liquet*) in the text of the draft conclusion. It was suggested that the existence of a gap should not be a prerequisite to the application of general principles of law, since they performed other important functions in the international legal system. Some members expressed their opposition to the distinction between essential and specific functions developed in the third report. A concern was raised that the third report did not explain how the gap-filling role would apply if the Commission came to the conclusion that two different categories of general principles of law (i.e., those derived from national legal systems and those formed within the international legal system) existed.

124. A number of drafting suggestions were made. Several members suggested merging draft conclusions 13 and 14, in order to avoid the distinction between essential and specific functions. Other suggestions consisted in replacing the term "essential function" with the term "general function", or the term "function" with "character".

125. With respect to draft conclusion 14, some members supported it in substantive terms, agreeing that it correctly identified a number of the functions that general principles of law may serve in the international legal system. Other members, however, questioned whether the functions identified in the provision were exhaustive and raised concerns regarding the characterizations employed therein. Some members queried the description of the functions as "specific", since the functions listed in the draft conclusion were not specific to general principles of law, but rather functions common to all sources of international law. Doubts were also expressed whether draft conclusion 14 was necessary and whether the Commission needed to delve into the functions of general principles of law in the context of the topic.

126. Differing views were expressed regarding general principles of law serving as an independent basis for rights and obligations, as provided for in subparagraph (*a*) of draft conclusion 14. Several members expressed support for subparagraph (*a*), arguing that being an independent basis for rights and obligations was the fundamental function of any source of law, and that this function was closely related to the gap-filling function. Other members opposed this proposition, stating, *inter alia*, that it lacked empirical support, it conflicted with the gap-filling function, and it could unduly encourage reliance on abstract general principles of law to claim rights that did not exist under treaties or customary international law. Further elaboration on the requirements for the existence of rights and obligations on the basis of general principles of law was requested.

127. While support was expressed for subparagraph (*b*) of draft conclusion 14 on the interpretative and complementary function of general principles of law to other rules of international law, some members considered that the subparagraph lacked sufficient support in practice.

128. Several members supported subparagraph (*c*) of draft conclusion 14 on the function of general principles of law to ensure the coherence of the international legal system, while others stated that general principles of law did not fulfil such function, since the notion of international law being a systematic and coherent system was not accurate. More corroboration regarding this function was called for. A drafting suggestion was made to merge subparagraphs (*b*) and (*c*).

(f) Future programme of work

129. Some members supported the proposal by the Special Rapporteur for the Commission to conclude first reading on the topic at its seventy-third session, while others highlighted that this might not be possible due to the lack of time during the second part of the session. In that connection, the complexity of the topic and the differing views within the Commission on some key aspects of the topic were mentioned.

3. Concluding remarks of the Special Rapporteur

130. In his summary of the debate, the Special Rapporteur expressed his gratitude to the members of the Commission and welcomed the enriching debate on his third report. He acknowledged that the topic was a complex one. He emphasized that he had carefully analysed the arguments and concerns expressed by members during the debate.

131. Regarding the scope of the topic, the Special Rapporteur reiterated that the work of the Commission referred to general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. He clarified that both categories of general principles of law (namely, those derived from national legal systems and those formed within the international legal system) were dealt with on the understanding that they fell under Article 38, paragraph 1 (*c*). He further clarified that the statement that the point of departure of the topic should be Article 38, paragraph 1 (*c*), meant that the work of the Commission should not be limited to a literal reading of such provision; rather, it should take into account the existing State practice and jurisprudence, as well as writings.

132. On the question of general principles of law as a source of international law, the Special Rapporteur stated that general principles of law were considered, by the wide majority of the existing practice and doctrine, as a formal source of international law, along with treaties and customary international law. He noted that a number of members of the Commission and States in the Sixth Committee explicitly stated that Article 38, paragraph 1 (*c*), established general principles of law as a source of international law capable of generating norms to regulate conduct at the international level. The judgment of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* was recalled.[1190] Moreover, he explained that the position that Article 38 was limited to the applicable law of the Court implied that there were no sources of international law of a general character; this position, in his view, was unsustainable as it would result in an unacceptable fragmentation of international law, as well as in legal uncertainty, making it impossible for the international legal system to operate.

133. Regarding concerns on inconsistent terminology, the Special Rapporteur recalled that this issue had already been dealt with in the first report, emphasizing that the Commission itself had confirmed on several occasions that "general international law" or "general principles of international law" could refer to general principles of law depending on the context. The Special Rapporteur also explained that when international criminal tribunals applied general principles of law, they were essentially the general principles of law in the sense of Article 38, paragraph 1 (*c*). The Special Rapporteur concluded that the jurisprudence and practice relating to international criminal tribunals were relevant for the topic.

134. Concerning the suggestion by some members to add a non-exhaustive list containing examples of general principles of law, the Special Rapporteur reiterated that such list was not necessary since the primary objective of the topic was to clarify different aspects of general principles of law as a source of international law, including their scope, the methodology for their identification, their functions and relationship with other sources of international law. He stated that the commentaries would refer to relevant practice, which would in turn contain such examples.

135. The Special Rapporteur stated that members of the Commission generally agreed with the two-step approach to the identification of general principles law derived from national legal systems, with the suggestion to adopt a more flexible approach regarding transposition, while maintaining a rigorous methodology, with the notion of compatibility with the international legal system, and with the proposition that transposition was implicit and did not require an express or formal act. The Special Rapporteur also noted that several members agreed that the requirement of recognition as per Article 38, paragraph 1 (*c*), was necessary for transposition. In that regard, the Special Rapporteur clarified that a general principle of law *in foro domestico* was not automatically transposed to the international legal system. He highlighted the need to take into account the differences between national legal systems and

[1190] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 38, para. 56.

the international legal system in the analysis. He also stressed that, in light of the existing practice, jurisprudence and doctrine, the issue of transposition was related to the identification of general principles of law, rather than to the application of an existing general principle of law to a specific case.

136. According to the Special Rapporteur, the main issue before the Commission was to establish clear criteria to determine that a principle *in foro domestico* was transposed to the international legal system. In that regard, he observed that it seemed to have transpired in the plenary debate that compatibility was required for a principle to be considered as transposed. In his view, the compatibility test should be in relation to norms that were universally accepted and that could be considered as a reflection of the basic structure of the international legal system. Taking into account the comments and observations made by members in the plenary, as well as further reflection on certain matters, the Special Rapporteur made a revised proposal for draft conclusion 6, to be considered by the Drafting Committee.

137. With regard to the question of general principles of law formed within the international legal system, the Special Rapporteur recalled that, as in previous years, this question continued to generate differing views among members of the Commission: a number of members supported the existence of general principles of law formed within the international legal system; some members were sceptical, but did not rule out the existence of these principles; and some other members considered that general principles of law were limited to those derived from national legal systems. He reiterated his view that there are grounds to support the existence of general principles of law formed within the international legal system based on an analysis of practice, jurisprudence and doctrine.

138. The Special Rapporteur first explained that the issue before the Commission was to clarify to the extent possible the existence of general principles of law derived from the international legal system. He also stressed that principles falling within this second category governed basic and structural issues of the international legal system, such as sovereign equality of States and consent to the jurisdiction of international courts. He reiterated that Article 38, paragraph 1 (*c*), did not indicate that general principles of law were those limited to general principles of law derived from national legal systems. While the Special Rapporteur acknowledged that practice relevant to the existence of the second category was limited, he stated that it was not insufficient for the Commission to address the question. The Special Rapporteur also clarified that the inductive and deductive methodology in the third report was not different from the methodology proposed for the identification of general principles of law derived from national legal systems. He emphasized that, for both categories of general principles of law, an inductive analysis of norms should first be conducted, followed by a deductive analysis; for the first category, the deductive analysis pertained to the test of compatibility with the international legal system, whereas for the second category, the deductive analysis pertained to demonstrating that the general principle of law in question was inherent to the international legal system.

139. The Special Rapporteur referred to an alternative formulation for draft conclusion 7, to be considered by the Drafting Committee, seeking to find a common ground in light of the comments made by members in the plenary debate.

140. Regarding draft conclusion 10, the Special Rapporteur noted that several members stated that there was no hierarchy between the different sources of international law. With respect to the view by some members that there was a tension between draft conclusion 10 and the gap-filling function, the Special Rapporteur stated that any tension between the two draft conclusions was solved because there seemed to be consensus in the Commission on general principles of law fulfilling the same functions of the other sources of international law, and not being necessarily limited to gap-filling.

141. On draft conclusion 11, regarding the possibility of parallel existence between general principles of law and rules of other sources on international law with identical or analogous content, the Special Rapporteur noted that there were not many discrepancies among the members of the Commission. As regards comments made by some members questioning the parallel existence of general principles of law and rules of customary international law, the Special Rapporteur stated that there was no reason a general principle of law could not exist in parallel with a rule of customary international law. For example, there was a possibility

that a rule of customary international law covered only certain aspects of a general principle of law and thus the principle remained useful in interpreting or applying such rule of customary international law.

142. The Special Rapporteur explained that draft conclusion 12 was limited to the principle of *lex specialis* because said principle was usually referred to in practice and in doctrine when discussing the relationship between general principles of law and other sources. Nevertheless, he agreed that other principles could also be pertinent in the context of normative conflict resolution.

143. Regarding comments made by members on the relationship between general principles of law and peremptory norms of general international law (*jus cogens*), the Special Rapporteur noted that the draft conclusions and the commentaries could clarify that the latter could also be important when addressing a normative conflict.

144. The Special Rapporteur considered that draft conclusions 10 to 12 were necessary to provide guidance to States, international courts and tribunals, and practitioners, taking into account the divergent views existing sometimes in practice and in doctrine on the matter. The Special Rapporteur concurred with suggestions to merge draft conclusions 10 to 12, which could be further discussed in the Drafting Committee.

145. Regarding the gap-filling role of general principles of law, the Special Rapporteur noted that members generally agreed to it, while noting that it could not be considered a function as such and that it responded to practical considerations. He explained that the functions of general principles of law were, in principle, the same functions of the other sources of international law contained in Article 38, paragraph 1 (*c*), while acknowledging that, in practice, general principles of law were often resorted to when treaty rules or customary international law did not regulate, or did not fully or clearly regulate, a legal question.

146. In the view of the Special Rapporteur, draft conclusions on the functions of general principles of law were indeed necessary, given the confusion that sometimes existed both in practice and in doctrine. He agreed with the suggestion by some members that draft conclusions 13 and 14 could be merged, which could be further discussed in the Drafting Committee. He indicated that the Drafting Committee could clarify the functions of general principles of law, taking into account the manner in which general principles of law were usually applied in practice.

147. Finally, the Special Rapporteur reiterated his intention to conclude first reading before the end of the current quinquennium.

C. Text of the draft conclusions on general principles of law provisionally adopted by the Commission at its seventy-third session

1. Text of the draft conclusions

148. The text of the draft conclusions provisionally adopted by the Commission at its seventy-third session is reproduced below.

Conclusion 3
Categories of general principles of law

General principles of law comprise those:

(*a*) that are derived from national legal systems;

(*b*) that may be formed within the international legal system.

Conclusion 5
Determination of the existence of a principle common to the various legal systems of the world

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including the different regions of the world.

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

Conclusion 7
Identification of general principles of law formed within the international legal system

1. To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system.

2. Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-third session

149. The text of the draft conclusions, together with commentaries, provisionally adopted by the Commission at its seventy-third session, is reproduced below.

Conclusion 3
Categories of general principles of law

General principles of law comprise those:

(*a*) that are derived from national legal systems;

(*b*) that may be formed within the international legal system.

Commentary

(1) Draft conclusion 3 addresses the two categories of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. The term "categories" is employed to indicate two groups of general principles of law in light of their origins and thus the process through which they may emerge. In contrast with subparagraph (a) of the draft conclusion, which uses the phrase "are derived from", subparagraph (b) uses the phrase "may be formed". The phrase "may be formed" was considered appropriate to introduce a degree of flexibility to the provision, acknowledging that there is a debate as to whether a second category of general principles of law exists.

(2) Subparagraph (a) of the draft conclusion refers to the general principles of law that are derived from national legal systems. That general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice include those derived from national legal systems is established in the jurisprudence of courts and tribunals[1191] and

[1191] See, for example, the *Fabiani* case (1896) (in H. La Fontaine, *Pasicrisie internationale 1794-1900: Histoire documentaire des arbitrages internationaux* (Berlin, Stämpfli, 1902), p. 356); *Affaire de l'indemnité russe (Russie, Turquie),* Award of 11 November 1912, *Reports of International Arbitral Awards* (UNRIAA), vol. XI, pp. 421–447, at p. 445; *Corfu Channel case, Judgment of 9 April 1949: I.C.J. Reports 1949*, p. 4, at p. 18; International Court of Justice, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966,* p. 6*,* para. 88; *Argentine-Chile Frontier Case*, Award of 9 December 1966, UNRIAA, vol. XVI, pp. 109–182, at p. 164; International Court of Justice, *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970,* p. 3, at p. 38, para. 50; Iran–United States Claims Tribunal, *Sea-Land Service, Inc.* v. *Iran*, Award No. 135-33-1, 20 June 1984, *Iran–United States Claims Tribunal Reports* (IUSCTR), vol. 6, pp. 149 *et seq*., at p. 168; Iran–United States Claims Tribunal, *Questech, Inc.* v. *Iran*, Award No. 191-59-1, 25 September 1985, IUSCTR, vol. 9, pp. 107 *et seq*., at p. 122; Inter-American Court of Human Rights, *Aloeboetoe* et al. v. *Suriname*, Judgment (Reparations and Costs), 10 September 1993, Series C, No. 15, para. 50;

teachings,[1192] and is confirmed by the *travaux préparatoires* of the Statute.[1193] Draft conclusions 4 to 6 deal in greater detail with the methodology for the identification of these general principles of law.

(3) Subparagraph (b) of draft conclusion 3 refers to the general principles of law that may be formed within the international legal system. The existence of this category of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, appears to find support in the jurisprudence of courts and tribunals[1194] and teachings.[1195] Some members, however, consider that Article 38, paragraph 1 (*c*), does not

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International Criminal Tribunal for the Former Yugoslavia, *Prosecutor* v. *Duško Tadić*, No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, para. 225; *Prosecutor* v. *Zejnil Delalić* et al., No. IT-96-21-A, Judgment, 20 February 2001, Appeals Chamber, para. 179; World Trade Organization, Appellate Body, *United States – Tax Treatment for "Foreign Sales Corporations"*, Appellate Body Report, 14 January 2002 (WT/DS108/AB/RW), paras. 142-143; Germany, Constitutional Court, Judgment, 4 September 2004 (2 BvR 1475/07), para. 20; Permanent Court of Arbitration, *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Case No. 2008-7, Award, 22 July 2009, UNRIAA, vol. XXX, pp. 145–416, at p. 299, para. 401; International Centre for Settlement of Investment Disputes, *El Paso Energy International Company* v. *The Argentine Republic*, Case No. ARB/03/15, Award, 31 October 2011, para. 622; Philippines, Supreme Court, *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC*, Decision of 8 March 2016 (G.R. No. 221697; G.R. Nos. 221698-700), pp. 19, 21.

[1192] See, for example, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press, 1953/2006), p. 25; G. Abi-Saab, "Cours général de droit international public", in *Collected Courses of the Hague Academy of International Law,* vol. 207 (1987), pp. 188-189; J. A. Barberis, "Los Principios Generales de Derecho como Fuente del Derecho Internacional", *Revista IIDH*, vol. 14 (1991), pp. 11–41, at pp. 30-31; R. Jennings and A. Watts, *Oppenheim's International Law*, vol. I, 9th ed. (Longman, 1996), pp. 36-37; S. Yee, "Article 38 of the ICJ Statute and applicable law: selected issues in recent cases", *Journal of International Dispute Settlement*, vol. 7 (2016), pp. 472–498, at p. 487; P. Palchetti, "The role of general principles in promoting the development of customary international rules", in M. Andenas *et al*. (eds.), *General Principles and the Coherence of International Law* (Leiden, Brill, 2019), pp. 47–59, at p. 48; Pellet and D. Müller, "Article 38", in A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), p. 925.

[1193] Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (The Hague, Van Langenhuysen Bros., 1920), pp. 331–336.

[1194] See, for example, International Court of Justice, *Corfu Channel case* (see previous footnote), p. 22; International Court of Justice, *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 23; International Court of Justice, *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954, I.C.J. Reports 1954,* p. 19, at p. 32; International Court of Justice, *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 565, paras. 20-21; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor* v. *Anto Furundžija*, No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998 (IT-95-17/1-T), para. 183; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor* v. *Zoran Kupreškić* et al., No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, para. 738.

[1195] See, for example, L. Siorat, *Le problème des lacunes en droit International : Contribution à l'étude des sources du droit et de la fonction judiciaire* (Paris, Librairie générale de droit et de jurisprudence, 1958), p. 286 ; J. G. Lammers, "General principles of law recognized by civilized nations", in F. Kalshoven, P.J. Kuyper and J.G. Lammers (eds.), *Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys* (Alphen aa den Rijn, Sijthoff & Noordhoff, 1980), pp. 53–75, at p. 67; O. Schachter, "International law in theory and practice: general course in public international law", in *Collected Courses of the Hague Academy of International Law*, vol. 178 (1982), pp. 9-396, at pp. 75, 79-80; R. Wolfrum, "General international law (principles, rules, and standards)", in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, vol. IV (entry updated in 2010; Oxford, Oxford University Press, 2012), para. 28; A. A. Cançado Trindade, "General principles of law as a source of international law", in United Nations Audiovisual Library of International Law (2010), at 22:00; B. I. Bonafé and P. Palchetti, "Relying on general principles of law", in C. Brölmann and Y. Radi (eds.)*, Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham, Edward Edgar Publishing, 2016), p. 162; A. Yusuf, "Concluding remarks", in M. Andenas *et al*. (eds.), *General Principles and the Coherence of International Law* (footnote 1192 above), p. 450; G. Gaja, "General principles of law", in *Max Planck Encyclopedia of Public International Law* (2020), paras. 17–20.

encompass a second category of general principles of law, or at least remain sceptical of its existence as an autonomous source of international law. Further aspects about general principles of law formed within the international legal system are explained in the commentary to draft conclusion 7.

Conclusion 5
Determination of the existence of a principle common to the various legal systems of the world

1. To determine the existence of a principle common to the various legal systems of the world, a comparative analysis of national legal systems is required.

2. The comparative analysis must be wide and representative, including the different regions of the world.

3. The comparative analysis includes an assessment of national laws and decisions of national courts, and other relevant materials.

Commentary

(1) Draft conclusion 5 addresses the first step of the two-step methodology for the identification of general principles of law derived from national legal systems set out in draft conclusion 4, that is, the determination of the existence of a principle common to the various legal systems of the world. Paragraph 1 of the draft conclusion provides that, to determine the existence of such a principle, a comparative analysis is required. Paragraph 2 describes the comparative analysis by indicating that the latter must be wide and representative, including the different regions of the world. Paragraph 3 explains which materials are relevant for the purposes of this methodology.

(2) Paragraph 1 of draft conclusion 5 states that a "comparative analysis of national legal systems" is required to determine the existence of a principle common to the various legal systems of the world. This formulation is based on a general approach that is found in practice and in the literature, whereby national legal systems are assessed and compared in order to establish that a legal principle is common to them. The "comparative analysis" referred to in the draft conclusion does not require that particular methodologies that exist in the field of comparative law be employed. While such methodologies may, when appropriate, provide some guidance, a degree of flexibility is generally maintained in practice. What is relevant for the purposes of draft conclusion 5 is that a common denominator is found across national legal systems.[1196]

(3) What is meant by a legal principle "common" to the various legal systems of the world is not specified in draft conclusion 5. The Commission considered that, since the content and scope of general principles of law derived from national legal systems may vary, it was appropriate not to be overly prescriptive in this regard, thus allowing for a case-by-case analysis. In many cases, the result of the comparative analysis may be the determination of the existence of a legal principle of a general and abstract character.[1197] In other cases, however, the comparative analysis can lead to the ascertainment of legal principles with a more concrete or specific character.[1198]

[1196] See, for example, International Criminal Tribunal for the Former Yugoslavia, *Furundžija* (footnote 1194 above), para. 178; and *Prosecutor v. Dragoljub Kunarac, Radomir Kunac and Zoran Vuković*, Nos. IT-96-23-T & IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001, para. 439.

[1197] A general principle of law that is often referred to in practice and in the literature, and which may be considered to be of a general and abstract character, is the principle of good faith.

[1198] Examples of general principles of law that have been invoked or applied in practice, and which may be considered to be of a more specific character (because they present, for instance, precise conditions for their application), include the principles of *res judicata* and *lis pendens*, and the right to lawyer-client confidentiality. See, respectively, International Court of Justice, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100, at pp. 125–126, paras. 58–61; Permanent Court of International Justice, *Certain German Interests in Polish Upper Silesia, Judgment,* 15 August 1925, *P.C.I.J. Series A*, No. 6, pp. 5 *et seq*., at

(4) The second paragraph of draft conclusion 5 indicates that the comparative analysis for the determination of the existence of a principle common to the various legal systems of the world must be "wide and representative, including the different regions of the world". This description is aimed at clarifying that, while it is not necessary to assess every single legal system of the world to identify a general principle of law, the comparative analysis must nonetheless be sufficiently comprehensive to take into account the legal systems of States in accordance with the principle of sovereign equality of States. The term "different regions of the world" was included to emphasize that it does not suffice to show that a legal principle exists in legal systems representing certain legal families (such as civil law, common law and Islamic law), but that it is also necessary to show that the principle has been recognized widely in the various regions of the world[1199] or, as the International Court of Justice indicated

p. 20; International Court of Justice, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 147, at pp. 152–153, paras. 24–28.

[1199] Examples of State practice where a wide and representative comparative analysis may be considered to have been conducted include International Court of Justice, *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, Observations and Submissions of Portugal on the Preliminary Objections of India, annex 20, pp. 714–752, and Reply of Portugal, annexes 192, pp. 858–861 (including the legal systems of Argentina, Australia, Austria, Belgium, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Ireland, Italy, Japan, Mexico, Myanmar, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Saudi Arabia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United States of America, Uruguay, Venezuela (Bolivarian Republic of), Yemen and Zambia, and Czechoslovakia and the Soviet Union); International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, Memorial of Nauru, appendix 3 (including the legal systems of Argentina, Australia, Bangladesh, Belgium, Canada, Chile, China, Colombia, Cyprus, Denmark, Ethiopia, Finland, France, Germany, Ghana, Greece, Hungary, India, Ireland, Italy, Japan, Liechtenstein, Mexico, Netherlands, New Zealand, Nigeria, Pakistan, Romania, Senegal, South Africa, Spain, Sri Lanka, Sweden, Switzerland, the United Kingdom and the United States); International Court of Justice, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* (footnote 1198 above), Memorial of Timor-Leste, annexes 22 to 24 (including the legal systems of Australia, Austria, Belgium, Brazil, Bulgaria, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Indonesia, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Singapore, South Africa, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom and the United States, and the European Union, and Hong Kong, China) and Counter-Memorial of Australia, annex 51 (covering the legal systems of Australia, Belgium, Denmark, France, Germany, India, Indonesia, Mexico, Morocco, New Zealand, Russian Federation, Slovakia, Switzerland, Timor-Leste, Uganda, United Kingdom and United States of America). Similar examples are found in the case law. See, for example, International Criminal Tribunal for the Former Yugoslavia, *Delalić* (footnote 1191 above), paras. 584–589 (Australia, Bahamas, Barbados, Croatia, Germany, Italy, Japan, Russian Federation, Singapore, South Africa, Turkey, United States, England, Scotland, and former Yugoslavia, and Hong Kong, China); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Pavle Strugar*, No. IT-01-42-A, Judgment, Appeals Chamber, 17 July 2008, paras. 52–54 (Australia, Austria, Belgium, Bosnia and Herzegovina, Canada, Chile, Croatia, Germany, India, Japan, Malaysia, Montenegro, Netherlands, Republic of Korea, Russian Federation, Serbia, United Kingdom and United States); International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dražen Erdemović*, Judgment, Appeals Chamber, Case No. IT-96-22-A, Judgment, 7 October 1997, para. 19, referring to the Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 59–65 (Australia, Belgium, Canada, Chile, China, Ethiopia, Finland, France, Germany, India, Italy, Japan, Malaysia, Mexico, Morocco, Netherlands, Nicaragua, Nigeria, Norway, Panama, Poland, Somalia, South Africa, Spain, Sweden, Venezuela (Bolivarian Republic of), and England, and former Yugoslavia); *Furundžija* (see footnote 1194 above), para. 180 (Argentina, Austria, Bosnia and Herzegovina, Chile, China, France, Germany, India, Italy, Japan, Netherlands, Pakistan, Uganda, Zambia, and England and Wales, former Yugoslavia, and New South Wales (Australia)); *Kunarac* (see footnote 1196 above), paras. 437–460 (Argentina, Australia, Austria, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Canada, China, Costa Rica, Denmark, Estonia, Finland, France,

in the *Barcelona Traction* case, that a principle has been "generally accepted by municipal legal systems".[1200]

(5) Paragraph 3 of draft conclusion 5 provides additional guidance by listing, in a non-exhaustive manner, the sources that may be relied upon to carry out the comparative analysis of national legal systems. The terms "national laws" and "decisions of national courts" are to be understood in a broad way, covering the whole range of materials in national legal systems that can be potentially relevant for the identification of a general principle of law, such as constitutions, legislation, decrees and regulations, as well as decisions of national courts from different levels and jurisdictions, including constitutional courts or tribunals, supreme courts, courts of cassation, courts of appeal, courts of first instance, and administrative tribunals. The term "and other relevant materials" was included so as not to preclude other sources of national legal systems that may also be relevant, such as customary law or doctrine.

(6) In preparing draft conclusion 5, paragraph 3, the Commission was mindful that national legal systems are not identical and that each legal system must be analysed in its own context, taking into account its own characteristics. In certain legal systems, for example, the decisions of national courts may be more relevant to determine the existence of a legal principle, while in others written codes and doctrine may have prevalence. The Commission was also in agreement that all branches of national law, including both private and public law, are potentially relevant for the identification of a general principle of law derived from national legal systems.[1201]

Germany, India, Italy, Japan, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Sierra Leone, South Africa, Spain, Sweden, Switzerland, Uruguay, United Kingdom, United States and Zambia).

[1200] *Barcelona Traction* (footnote 1191 above), p. 38, para. 50. See also *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (footnote 1191 above), pp. 19, 21; *El Paso Energy International Company v. The Argentine Republic* (footnote 1191 above), para. 622; International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 675, para. 104; *Abyei Area* (footnote 1191 above), p. 299, para. 401; Germany, Constitutional Court, Judgment, 4 September 2004 (footnote 1191 above), para. 20; *Kunarac* (see footnote 1196 above), para. 439; *Delalić* (footnote 1191 above), para. 179; *Tadić* (footnote 1191 above), para. 225; International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, No. ICTR-96-4-T, Judgment, 2 September 1998, para. 46; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić* et al., No. IT-96-21-T, Decision on the motion to allow witnesses K, L and M to give their testimony by means of video-link conference, Trial Chamber, 28 May 1997, paras. 7–8; *Aloeboetoe* et al. *v. Suriname* (footnote 1191 above), para. 62; *Questech* (footnote 1191 above), p. 122; *Sea-Land Service, Inc. v. Iran* (footnote 1191 above), p. 168; *Corfu Channel case* (footnote 1191 above), p. 18; *Fabiani* case (footnote 1191 above), p. 356; and the *Queen* case between Brazil, Norway and Sweden (1871) ((reproduced in La Fontaine, *Pasicrisie internationale 1794–1900*: *Histoire documentaire des arbitrages internationaux* (footnote 1191 above)), p. 155.

[1201] See, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia …* (footnote 1198 above)p. 125, para. 58 (applying the principle of *res judicata*, derived from civil procedure); *Barcelona Traction* (footnote 1191 above), p. 38, para. 50 (applying the principle of separation between companies and shareholders, derived from corporate law); *United States – Tax Treatment for "Foreign Sales Corporations"* (footnote 1191 above), para. 143 (applying a principle relating to taxation of non-residents, derived from tax law); *Questech, Inc. v. Iran* (see previous footnote), p. 122 (applying the principle *rebuc sic stantibus*, derived from contract law); *Sea-Land Service, Inc. v. Iran* (footnote 1191 above), p. 168 (applying the principle of unjust enrichment, derived from civil law or the law of obligations); *Furundžija* (see footnote 1194 above), paras. 178–182, and *Kunarac* (see footnote 1196 above), paras. 439–460 (applying a definition of "rape" derived from criminal law); *Aloeboetoe v. Suriname* (footnote 1191 above), para. 62 (applying a principle relating to succession for purposes of compensation, derived from laws on inheritance or succession); *Mary Grace Natividad S. Poe-Llamanzares v. COMELEC* (footnote 1191 above), p. 21 (applying a principle of nationality of foundlings, derived from laws on nationality). See also *El Paso Energy International Company v. The Argentine Republic* (footnote 1191 above), para. 622 ("'general principles' are rules largely applied *in foro domestico*, in private or public, substantive or procedural matters"); *South West Africa, Second Phase* (footnote 1191 above), Dissenting Opinion of Judge Tanaka, p. 250, at p. 294 ("So far as the 'general principles of law' are not qualified, the 'law' must be understood to embrace all branches of law, including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc.").

(7) It should be highlighted that determining the existence of a principle common to the various legal systems of the world is not sufficient to establish the existence and content of a general principle of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. As noted in draft conclusion 4, the ascertainment of the transposition of that principle to the international legal system is also required. This second step of the methodology is addressed in draft conclusion 6.

Conclusion 7
Identification of general principles of law formed within the international legal system

1. To determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to the international legal system.

2. Paragraph 1 is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system.

Commentary

(1) Draft conclusion 7 addresses the identification of general principles of law formed within the international legal system.[1202]

(2) Paragraph 1 of draft conclusion 7 provides that, to determine the existence and content of a general principle of law that may be formed within the international legal system, it is necessary to ascertain that the community of nations has recognized the principle as intrinsic to that system. The Commission considered that the existence of this type of general principle of law is justified for a number of reasons. First, there are examples in judicial practice which appear to support the existence of these general principles of law. Second, the international legal system, like any other legal system, must be able to generate general principles of law that are intrinsic to it, which may reflect and regulate its basic features, and not have only general principles of law borrowed from other legal systems. Third, nothing in the text of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice limits general principles of law to those derived from national legal systems. Fourth, the *travaux préparatoires* of the Statute do not exclude the existence of such principles.

(3) As regards the methodology for the identification of general principles of law formed within the international legal system, the Commission considered that it is similar to that applicable to general principles of law derived from national legal systems. In both cases, first, an inductive analysis of existing norms is carried out: in the case of the principles of the first category, existing rules in national legal systems are analysed; in the case of the second category, existing rules in the international legal system are analysed. The methodology is also deductive for both categories: in the case of general principles of law derived from national legal systems, their compatibility with the international legal system must be determined; and in the case of principles formed within the international legal system, it must be shown that such principles are intrinsic to the international legal system.

(4) The second paragraph of draft conclusion 7 indicates that the draft conclusion is without prejudice to the question of the possible existence of other general principles of law formed within the international legal system. This paragraph was included to reflect the view of some members of the Commission who supported the existence of general principles of law formed within the international legal system, but considered that paragraph 1 of the draft conclusion would be too narrow and would not encompass other possible principles that,

[1202] Examples that were referred to by members of the Commission during the debates of the Commission include the principle of sovereign equality of States, the principle of territorial integrity, the principle of *uti possidetis juris*, the principle of non-intervention in the internal affairs of another State, the principle of consent to the jurisdiction to international courts and tribunals, elementary considerations of humanity, respect for human dignity, the Nürnberg Principles and principles of international environmental law.

while not intrinsic or inherent in the international legal system, may nonetheless emerge from within the latter system and not from national legal systems.

(5) Draft conclusion 7 was adopted by the Commission despite differing views among its members, in the interest of obtaining further comments by States on the matter before the completion of the first reading.

(6) Several members, while not excluding that a second category of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice might exist, raised the concern that no sufficient State practice, jurisprudence or teachings existed to support fully the existence of the second category, making it difficult to determine in a clear manner the methodology for their identification.

(7) Some other members were of the view that Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice is limited to the general principles of law derived from national legal systems. The view was expressed that, at the time of the drafting of the Statute of the Permanent Court of International Justice, the Advisory Committee of Jurists did not accept general principles of law formed within the international legal system,[1203] and that, during the drafting of the Statute of the International Court of Justice, the proposal for the creation of general principles of law within the international legal system was not accepted.[1204] Some members cautioned that the Commission should be careful and not engage in an exercise of progressive development in a topic concerning one of the sources of international law. The view was also expressed that confusion with the other sources of international law should be avoided. In this regard, some members of the Commission considered that the distinction between customary international law and general principles of law formed within the international legal system, within the meaning given in draft conclusion 7, was not clear, and that the Commission should be cautious not to put forward a methodology for the identification of those general principles of law that could overlap with the conditions for the emergence of rules of customary international law.

(8) It is emphasized that the present commentary, together with the commentary to draft conclusion 3, are provisional and the Commission will revisit them at a later stage.

[1203] *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920* (footnote 1193 above), 15th meeting, p. 335.

[1204] *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. XIII, 5th meeting of Committee IV/1, 10 May 1945, p. 162 (1945), at p. 164.

Chapter IX
Sea-level rise in relation to international law

A. Introduction

150. At its seventieth session (2018), the Commission decided to include the topic "Sea-level rise in relation to international law" in its long-term programme of work.[1205] The General Assembly, in its resolution 73/265 of 22 December 2018, noted the inclusion of the topic in the long-term programme of work of the Commission.

151. At its seventy-first session (2019), the Commission decided to include the topic in its programme of work. The Commission also decided to establish an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria. At its 3480th meeting, on 15 July 2019, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[1206]

152. At its seventy-second session (2021), the Commission reconstituted the Study Group, and considered the first issues paper on the topic,[1207] which had been issued together with a preliminary bibliography.[1208] At its 3550th meeting, on 27th July 2021, the Commission took note of the joint oral report of the Co-Chairs of the Study Group.[1209]

B. Consideration of the topic at the present session

153. At the present session, the Commission reconstituted the Study Group on sea-level rise in relation to international law, chaired by the two Co-Chairs on issues related to statehood and to the protection of persons affected by sea-level rise, namely Ms. Galvão Teles and Mr. Ruda Santolaria.

154. In accordance with the agreed programme of work and methods of work, the Study Group had before it the second issues paper on the topic (A/CN.4/752), prepared by Ms. Galvão Teles and Mr. Ruda Santolaria and issued in April 2022, together with a selected bibliography (A/CN.4/752/Add.1), finalized in consultation with members of the Study Group and issued only in its original language in June 2022.

155. The Study Group held nine meetings, from 20 to 31 May and on 6, 7 and 21 July 2022.[1210]

156. At its 3612th meeting, on 5 August 2022, the Commission considered and adopted the report of the Study Group on its work at the present session, as reproduced below.

157. At the same meeting, the Commission decided to request the Secretariat to prepare a memorandum identifying elements in the Commission's previous work that could be relevant for its future work on the topic, in particular in relation to statehood and the protection of persons affected by sea-level rise, for its consideration at its seventy-fifth session.

[1205] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 369.

[1206] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 265–273.

[1207] A/CN.4/740 and Corr.1.

[1208] A/CN.4/740/Add.1.

[1209] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), paras. 247–296.

[1210] For the membership of the Study Group, see chap. I.

1. Introduction of the second issues paper by the Co-Chairs

(a) Procedure followed by the Study Group

158. At the first meeting of the Study Group, held on 20 May 2022, the Co-Chair (Ms. Galvão Teles) indicated that the purpose of the six meetings scheduled in the first part of the session was to allow for an exchange of views on the second issues paper and any relevant matters that its members might wish to address on the topic, insofar as they related to the two subtopics under consideration, namely statehood and the protection of persons affected by sea-level rise. The Co-Chair also invited members to engage in a structured and interactive debate, drawing upon the contents of the second issues paper, and to provide input on a draft bibliography on the subtopics, to be issued as an addendum to the second issues paper. The outcome of the first part of the session would be an interim report of the Study Group, to be considered and complemented during the second part of the session so as to reflect a further interactive discussion on the future programme of work. It would then be agreed upon in the Study Group and subsequently presented by the Co-Chairs to the Commission, with a view to being included in the annual report of the Commission. That procedure, agreed upon by the Study Group, was based on the 2019 report of the Commission.[1211]

159. The Co-Chair also recalled that, as outlined in Part Four of the second issues paper, section II of which addressed the future programme of work of the Study Group, in the next quinquennium, the Study Group would revert to each of the subtopics – the law of the sea, statehood and the protection of persons affected by sea-level rise – and would then seek to prepare a substantive report on the topic as a whole by consolidating the results of the work undertaken.

(b) Presentation of the second issues paper

(i) Introduction, general comments and working methods

160. In a general introduction, the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) emphasized the preliminary nature of the second issues paper, underlining that it was intended to serve as a basis for the Study Group's discussion and could be complemented by contribution papers prepared by its members.

161. In addition to containing an outline of the purpose and structure of the issues paper (chapter I), the introduction addressed the inclusion of the topic in the Commission's programme of work and the extent to which it had been considered so far (chapter II). It also contained an overview of Member States' expression of support for or interest in the topic, or otherwise, during the debates in the Sixth Committee since 2018, and a summary of the outreach initiatives undertaken by the Co-Chairs (chapter III). Chapter IV of the introduction comprised an update on the scientific findings and prospects of sea-level rise relevant to the subtopics, which was orally complemented to take account of the fact that two new reports of the Intergovernmental Panel on Climate Change had been issued since the submission of the second issues paper, and to share the key findings set out in the report of the panel on the impacts, adaptation and vulnerability with respect to climate change.[1212] Chapter V of the introduction contained an outline of the relevant outcomes of the International Law Association's work. In that regard, the Co-Chairs noted that the Association had since decided to extend the mandate of the Committee on International Law and Sea-level rise until 2024.

[1211] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), , paras. 270–271.

[1212] Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability – Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner *et al.* (eds.)] (Cambridge, Cambridge University Press); and Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change – Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [P.R. Shukla *et al.* (eds.)] (Cambridge and New York, Cambridge University Press).

162. The purpose of Part One (entitled "General") was to recall the scope and outcome of the topic, taking into account the limits set forth in the syllabus prepared in 2018.[1213] In doing so, Part One contained, in chapter I, an examination of the issues to be considered by the Commission to the extent that they related to statehood, the protection of persons affected by sea-level rise, and the final outcome. Chapter II recalled that methodological and organizational matters had been addressed in the 2018 syllabus,[1214] in chapter X of the 2019 annual report of the Commission,[1215] and in chapter IX of its 2021 annual report.[1216] In that connection, the Co-Chairs emphasized that State practice was essential for the work of the Commission and encouraged States, international organizations and other relevant entities to continue engaging with the Study Group and the Commission in order to share their practices and experiences with regard to the topic.

(ii) Statehood and related observations and guiding questions

163. Part Two of the second issues paper, entitled "Reflections on statehood", was introduced by the Co-Chair of the Study Group (Mr. Ruda Santolaria) at the second meeting of the Study Group.

164. The Co-Chair recalled that sea-level rise is a global phenomenon, which is not uniform and poses serious threats to all States. For low-lying and small island developing States, the threat is existential in nature, and in the case of small island developing States, it concerns their very survival. He noted that, while there had been cases within the same State of evacuation of the population from one island to another,[1217] there was no record of situations where the territory of a State had been completely submerged or rendered uninhabitable. In light of the progressive character of the phenomenon, such a situation could not, however, be considered a distant theoretical concern. The Co-Chair also recalled that the preliminary reflections on statehood did not aim to prejudge or formulate conclusions on those sensitive matters, which deserved considerable caution. The paper aimed to explore certain past or present experiences or situations so as to establish a list of relevant international law issues to be analysed from the perspective of both *lex lata* and *lex ferenda*.

165. Turning to chapter II of Part Two of the issues paper, which focused on criteria for the creation of a State, the Co-Chair recalled that there was no generally accepted notion of a "State". He noted, however, that to be considered a "person" or subject of international law, a State had to meet four criteria in accordance with article 1 of the 1933 Convention on the Rights and Duties of States:[1218] (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other States. The Co-Chair pointed out that the latter point also applied to other subjects of international law. A general overview of the criteria was provided in chapter II. As a matter of further reference, chapter II also explored the characteristics of a State contained in provisions of other illustrative texts: the 1936 resolution of the Institut de Droit International concerning the recognition of new States and new Governments;[1219] the 1949 draft Declaration on Rights and Duties of States;[1220] the 1956 draft articles on the law of treaties proposed by the Special Rapporteur;[1221] and the opinions of the Arbitration Commission of the 1991 International Conference on the Former

[1213] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), annex B, paras. 12–14.
[1214] *Ibid.*, para. 18.
[1215] A/74/10, para. 263–273.
[1216] A/76/10, para. 245–246.
[1217] For example, the people of the Carteret Islands, in Papua New Guinea, have been relocated owing to sea-level rise.
[1218] Convention on the Rights and Duties of States (Montevideo, 26 December 1933), League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19.
[1219] Institut de Droit International, "Resolutions concerning the recognition of new States and new Governments" (Brussels, April 1936), *The American Journal of International Law*, vol. 30, No. 4, Supplement: Official Documents (October 1936), pp. 185–187.
[1220] *Yearbook of the International Law Commission 1949*, p. 287.
[1221] *Yearbook of the International Law Commission, 1956*, vol. II, document A/CN.4/101, para. 10, at pp. 107–108.

Yugoslavia,[1222] in which the definition of the characteristics of a State was consistent with the requirements of the Convention on the Rights and Duties of States.

166. Chapter III contained some representative examples of actions taken by States and other subjects of international law, starting with the Holy See and the Sovereign Order of Malta. In that regard, it was noted that those entities, despite having been deprived of their territories at a certain point in history, maintained their legal personality and continued to exercise some of their rights under international law, in particular the right of legation and the treaty-making power (sections A and B). Chapter III (section C) also considered the example of Governments being forced into exile by foreign military occupation or other circumstances. In that connection, it was noted that, despite losing control over all or a large part of their territory, the affected States retained their status as such and their representative organs moved to territories under the jurisdiction of third States that hosted them, which was regarded as constituting evidence of a presumption of continuity of statehood. In a similar vein, the Co-Chair, drawing upon certain international instruments referred to in section D of chapter III, including the Convention on the Rights and Duties of States, noted that once a State was created as such under international law, it had an unalienable right to take measures to remain a State.

167. With respect to chapter IV, on concerns relating to the phenomenon of sea-level rise and measures taken in that regard, the following aspects were listed for consideration relevant to the issue of statehood:

(a) the possibility that the land area of the State could be completely covered by the sea or rendered uninhabitable, and that there would not be sufficient supply of drinking water for the population;

(b) the progressive displacement of persons to the territories of other States, which in turn raised questions related to nationality, diplomatic protection and refugee status;

(c) the legal status of the Government of a State affected by sea-level rise that had taken residence in the territory of another State;

(d) the preservation of the rights of States affected by the phenomenon of sea-level rise in respect of the maritime areas;

(e) the right to self-determination of the populations of affected States.

168. The Co-Chair further stressed the need to examine measures aimed, on the one hand, at mitigating the effects of sea-rise level – such as coastal reinforcement measures and the construction of artificial islands – and, on the other hand, possible alternatives for the future concerning statehood in the event of complete inundation of a State's territory. With respect to the former, the high cost of preservation measures and the need to assess their environmental impact were underlined, including through cooperation in favour of the most affected States. In connection with the latter, the urgent necessity to take into account the perspective of small island developing States was also emphasized.

169. Against the above background, chapter V presented several preliminary alternatives that were neither conclusive nor limitative. The first of the proposed alternatives was to assume a presumption of continuity of statehood. That proposal was in line with the preliminary approach taken by the International Law Association and with the views expressed by some States that the Convention on the Rights and Duties of States applied only to the determination of the birth of a State rather than to its continued existence. At the same time, it was noted that continuity of statehood in the absence of a territory could entail certain practical problems, such as statelessness of its population or difficulties in exercising rights over maritime zones. Another possible alternative that could be explored consisted in maintaining some form of international legal personality without a territory, similar to the examples of the Holy See and the Sovereign Order of Malta, in relation to which the Co-Chair outlined various modalities: (a) ceding or assignment of segments or portions of

[1222] Maurizio Ragazzi, "Conference on Yugoslavia Arbitration Commission: opinions on questions arising from the dissolution of Yugoslavia", *International Legal Materials*, vol. 31, No. 6 (November 1992), pp. 1488–1526, at p. 1495.

territory in other States, with or without transfer of sovereignty; (b) association with other State(s); (c) establishment of confederations or federations; (d) unification with another State, including the possibility of a merger; and (e) possible hybrid schemes combining elements of more than one modality, specific experiences of which may be illustrative or provide ideas for the formulation of alternatives or the design of such schemes.

170. At the third meeting of the Study Group, the Co-Chair introduced the guiding questions related to statehood, contained in paragraph 423 of the paper. He emphasized that these questions were meant to serve as a basis for future discussions within the Study Group.

(iii) Protection of persons affected by sea-level rise and related observations and guiding questions

171. At the fourth meeting of the Study Group, the Co-Chair (Ms. Galvão Teles) recalled some of the preliminary observations based on Parts Three and Four of the second issues paper, concerning the subtopic "Protection of persons affected by sea-level rise".

172. The Co-Chair noted that the existing international legal frameworks potentially applicable to the protection of persons affected by sea-level rise were fragmented and general in nature, suggesting that they could be further developed to address specific needs of affected persons. In particular, the existing framework could be further complemented to reflect the specificities of the long-term or permanent consequences of sea-level rise and to take account of the fact that the affected persons could remain *in situ*, be displaced within their own territory or migrate to another State in order to cope with or avoid the effects of sea-level rise. In that connection, the Commission's prior work, namely the 2016 draft articles on the protection of persons in the event of disasters,[1223] was regarded as a basis for that exercise.

173. The Co-Chair also noted that, while relevant State practice at the global level remained sparse, it was more developed among States already affected by sea-level rise. The Co-Chair observed that some of the practice identified was not specific to sea-level rise, but generally concerned the phenomena of disasters and climate change. Nonetheless, the practice revealed several principles that might prove useful for the Study Group's examination of the topic. It was also observed that international organizations and other entities with relevant mandates were taking a more proactive approach in order to promote practical tools to enable States to be better prepared to address issues related to human rights and human mobility in the face of climate displacement. The Co-Chairs' efforts to facilitate the exchange of information with States, international organizations and other stakeholders, including through expert meetings, were also underlined.

174. The Co-Chair recalled several relevant international instruments examined in Part Three of the second issues paper, including the Guiding Principles on Internal Displacement, [1224] the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),[1225] the New York Declaration for Refugees and Migrants, [1226] the Global Compact for Safe, Orderly and Regular Migration,[1227] the Sendai Framework for Disaster Risk Reduction 2015–2030,[1228] the Nansen Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, [1229] and the International Law Association's Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea-level

[1223] *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), para. 48.
[1224] E/CN.4/1998/53/Add.2, annex.
[1225] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala, 23 October 2009), United Nations, *Treaty Series*, vol. 3014, No. 52375, p. 3.
[1226] General Assembly resolution 71/1 of 19 September 2016.
[1227] General Assembly resolution 73/195 of 19 December 2018, annex. See also A/CONF.231/7.
[1228] General Assembly resolution 69/283 of 3 June 2015, annex II.
[1229] Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, vol. 1 (December 2015).

Rise.[1230] The importance of the recent Views adopted by the Human Rights Committee in *Teitiota v. New Zealand*,[1231] which concerned the applicability of the *non-refoulement* principle in the context of both climate change and sea-level rise, was noted. The Co-Chair further noted that, according to the Human Rights Committee in that case, the effects of climate change, namely sea-level rise, in receiving States could expose individuals to a violation of their rights under articles 6 (right to life) or 7 (prohibition of torture and cruel, inhuman or degrading treatment or punishment) of the International Covenant on Civil and Political Rights,[1232] thereby triggering the *non-refoulement* obligations of sending States.

175. Turning to Part Four of the second issues paper, the Co-Chair then referred to paragraph 435, which contained a list of guiding questions related to the protection of persons affected by sea-level rise. The questions were divided into three subsets, relating to: (a) the principles applicable to the protection of the human rights of the persons affected by sea-level rise; (b) the principles applicable to situations involving evacuation, relocation, displacement, or migration of persons, including vulnerable persons and groups, owing to the consequences of sea-level rise or as a measure of adaptation to sea-level rise; and (c) the applicability and scope of the principle of international cooperation to help States with regard to the protection of persons affected by sea-level rise. The Co-Chair emphasized that the guiding questions had been proposed in order to structure the future work of the Study Group on the topic, and that proposals or contributions from its members on any of the issues raised therein, and on aspects of State practice and the practice of relevant international organizations and other relevant entities with regard to the issues raised therein, would be welcomed.

2. Summary of the debate

(a) General comments

(i) Topic in general

176. Commenting on the topic in general terms, members of the Study Group reiterated the topic's relevance and the crucial importance of the Commission's discussion for States that are directly affected by sea-level rise, including for those whose survival might be threatened. Some members also expressed a sense of urgency given the issues at stake and the gravity of the situation, noting that sea-level rise had consequences that affected many branches of international law. It was also noted that the States that could be at risk of losing their statehood were small island developing States, which contributed the least to pollution emissions in the atmosphere yet were the most affected by climate change through sea-level rise.

177. It was also noted, however, that while the needs of small island developing States as specially affected States should be carefully taken into account, consistent with the position of the Commission in its conclusions on identification of customary international law,[1233] the Commission ought not to overlook the comments and needs of other States, given that the legal consequences of sea-level rise would affect not only small island developing States and coastal States, but all States. It was also noted that a middle path had to be found between the human and legal dimensions of the topic to make sure that the former was wedded with the latter. It was furthermore underlined that some aspects of the topic addressed difficult and sensitive matters in the nature of policy questions, in relation to which the Commission ought to be cautious, and that the Commission should focus on the legal aspects of the topic, in accordance with its mandate to progressively develop and codify international law.

[1230] Final report of the Committee on International Law and Sea-Level Rise, in International Law Association, *Report of the Seventy-eighth Conference, Held in Sydney, 19–24 August 2018*, vol. 78 (2019), pp. 897 *ff.*, and resolution 6/2018, annex, *ibid.*, p. 33.

[1231] CCPR/C/127/D/2728/2016.

[1232] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[1233] A/73/10, chap. V (paras. 53–66).

(ii) Second issues paper

178. Members of the Study Group largely expressed gratitude to the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) for a very well-documented and structured second issues paper, noting that it presented extensive relevant information in a systematized way, that it was of high quality and that it provided an excellent basis for the Study Group to deliberate on the two subtopics under consideration. It was also noted, however, that the relevance of some developments in the paper – such as comments on the issues of nationality and diplomatic protection with regard to statehood – was not obvious. It was also recalled that the content of the issues paper pertained to the Co-Chairs, not to the Commission as a whole.

179. Members further welcomed the Co-Chairs' outreach efforts on the topic, in terms of both gathering evidence of the practice of States, international organizations and other relevant entities and generating greater interest in and contributions on the topic in intergovernmental and academic fields.

(iii) Scope of the work of the Study Group and working methods

180. Regarding the scope of the work of the Study Group, differing views were expressed in relation to both the material scope and the temporal scope of the topic: while some members of the Study Group considered that they were too ambitious and ought to be narrowed, limitations placed upon the topic were viewed by others as preventing the Study Group from reaching conclusions on whether existing international law would be sufficient to address the challenges faced or whether new rules or principles were required to fill potential gaps.

181. The need to focus on the legal dimension of the topic and avoid speculative scenarios, while ascertaining the operational role of the Commission and distinguishing matters of policy from matters of international law, was also emphasized. In the latter regard, it was suggested that the role of the Commission on the topic should be limited to reviewing or outlining the relevant legal problems arising from situations of sea-level rise. It was also suggested, in contrast, that the Commission could examine policy-related issues and allow for the possibility of developing existing law or, at least, of making non-binding policy suggestions.

182. The need to identify the nexus between the subtopic on issues related to the law of the sea – which the Commission had considered during its seventy-second session – and the subtopics being examined at the current session was also underlined. In that regard, the interrelation between the impact of sea-level rise and the law of the sea was underlined, in particular the principle that "the land dominates the sea" and the principle of freedom of the seas.

183. With regard to working methods, it was noted that it would be useful to clarify how the product of the Study Group would reflect its members' contribution papers. It was further suggested that the Commission, in the next quinquennium, could consider turning the topic into a traditional topic, with a designated special rapporteur or rapporteurs and with public debates in a plenary format.

(iv) Scientific findings

184. With regard to scientific findings, while it was suggested that the Commission might need to appraise the scientific findings upon which it relied so as to be in a position to provide a uniform assessment of the risks, members largely recalled that the work of the Study Group was based on the common ground that sea-level rise was a fact, already proved by science, which was significantly affecting a number of States and was a global phenomenon. It was also noted that an excellent outline of the available scientific data was given in paragraphs 45 to 51 of the second issues paper, and that it was wise to lean – as did the first and second issues papers – on the work of highly regarded expert groups such as the Intergovernmental Panel on Climate Change.

185. On whether future meetings with scientists were needed, differing views were expressed. Members of the Study Group nonetheless welcomed the Co-Chairs' proposal to

organize focused meetings to inform and educate them about the aspects most relevant to their study of the legal questions.

(v) State practice

186. Members of the Study Group reiterated that State practice was essential to the work of the Study Group on the topic and that the limited State practice available restricted the mapping exercise with which it had been entrusted. It was also emphasized that, so far, no States were in the process of becoming completely submerged or otherwise uninhabitable.

187. In terms of scale and representativity, while it was noted that regional practice from small island States – specifically in the Pacific – was steadily emerging, a paucity of comments from Latin America and the Caribbean, Asia and Africa was observed, in conjunction with the need for the Commission to pursue governmental outreach initiatives and for members of the Study Group to prepare contribution papers on regional practice.

188. It was suggested that, in the particular circumstances of an extremely complex, existential and unavoidable phenomenon such as sea-level rise, where there was limited State practice since no State had yet been fully submerged, the Commission might instead have recourse to reasoning by analogy and interpretative norms, consistent with its mandate to progressively develop international law. In that sense, it was recalled that international legal practice included use of international law principles and constant interpretation of legal norms in light of events, in order to be able to address new challenges when appropriate. The need for the Commission to reflect on the basis of international law and to generate a dialogue on the possible options and alternatives, as the Co-Chairs had done to identify the most suitable of them, was also underlined.

(vi) Sources of law

189. With regard to sources of law, it was reiterated that the Commission should take account of treaties, custom and general principles of law that could be applicable – including, for example, the principle of equity, the principle of good faith and the principle of international cooperation – as relevant to the topic. The central role of the United Nations Convention on the Law of the Sea and the need to preserve its integrity was also emphasized.[1234]

190. It was suggested by some members of the Study Group that the principle of international cooperation seemed equally relevant to both subtopics under consideration. It was also observed that the principle could play an important role for States to provide for their own preservation, as suggested by the Co-Chairs in the second issues paper. Given the particularly high cost of preservation measures such as the installation or reinforcement of coastal barriers or defences and dykes, the importance of international cooperation through technology transfer and the exchange of best practices was thus underlined. International cooperation was deemed equally important in relation to the construction of artificial islands to house persons affected by the phenomenon of sea-level rise, given the cost of these initiatives and their potential environmental impact, so that other such durable and environmentally sustainable formulas could be found. The need to identify practical ways and means to achieve such international cooperation was underlined.

191. It was also observed that any reflection on statehood and sea-level rise should include the principle of common but differentiated responsibilities, insofar as the cost of addressing such a severe global environmental problem should be distributed among different States according to their historical responsibility and to their capabilities. To that end, the Study Group could build upon the already existing legal frameworks designed to address climate-related global challenges, including, *inter alia*, article 2 of the Vienna Convention for the Protection of the Ozone Layer,[1235] principle 7 of the Rio Declaration on Environment and

[1234] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

[1235] Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985), United Nations, *Treaty Series*, vol. 1513, No. 26164. p. 293.

Development,[1236] article 3 of the United Nations Framework Convention on Climate Change[1237] and the Kyoto Protocol thereto,[1238] article 20 of the Convention on Biological Diversity,[1239] and the Paris Agreement.[1240]

192. Differing views, encompassing support and scepticism, were also expressed in relation to the relevance to statehood of the principle that the land dominated the sea.

(b) Comments on statehood and related observations and guiding questions

(i) Criteria of the Convention on the Rights and Duties of States

193. During the exchanges on statehood, it was noted that statehood was a complex issue deserving of caution, and emphasized, as outlined in the second issues paper, that there was neither a generally accepted definition of a State, nor clearly defined criteria for the extinction of a State. It was noted that the Commission itself had faced difficulties in defining statehood in the context of its work on the 1949 draft Declaration on Rights and Duties of States. In that regard, it was observed that the term "State" had many meanings, that it had to be interpreted in the context of a particular treaty, and that there was controversial international case law on the matter. It was also noted that the issue of statehood was relevant only to those States whose territory could totally disappear or become unsuitable for sustaining human habitation or economic life, suggesting that the effect of sea-level rise could be limited to a very small number of States.

194. Diverse views were expressed regarding the relevance of the four criteria for the establishment of a State as set out in article 1 of the Convention on the Rights and Duties of States, namely that a State have a permanent population, a defined territory, a sovereign Government, and the capacity to enter into relations with other States and other subjects of international law.

195. In that connection, it was noted that each of the criteria was multifaceted, with many exceptions, possibilities and changing definitions. While these criteria were deemed to be a useful anchoring or starting point for the discussion on statehood and sea-level rise, it was noted that they were the product of a different historical context, at a time when the disappearance of a territory due to environmental changes was conceivable as a matter of fiction only. As such, they might unnecessarily limit the statehood options remaining for affected States. It was also observed that the criteria were not indefinite requirements, and that a State could not automatically disappear because it no longer met one of them, especially through the loss of a territory or a population due to inhabitability.

196. Regarding the criterion of territory, it was affirmed that a territory was a prerequisite for the establishment of a State, and that the existence of land territory had been a deeply rooted aspect of statehood. In contrast, it was noted that sovereignty referred to the whole territory under the State's control and not solely to the land territory. Thus, a territory that became fully submerged because of sea-level rise should not be considered a non-existent territory.

197. It was also underlined that the capacity to enter into relations with other States, the fourth criterion, was viewed in some legal traditions as a consequence stemming from statehood, meaning that there were in fact three real constituent elements of a State: a territory, a population and an effective Government.

198. It was further noted that, in their practice, States had developed modern criteria that supplemented those of the Convention on the Rights and Duties of States, hence the need for

[1236] A/CONF.151/26/Rev.l (Vol. l).

[1237] United Nations Framework Convention on Climate Change (New York, 9 May 1992), United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107.

[1238] Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997), United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162.

[1239] Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79.

[1240] Paris Agreement (Paris, 12 December 2015), United Nations, *Treaty Series*, No. 54113 (volume number has yet to be determined), available from https://treaties.un.org.

the Commission to be careful with its conclusions in that regard. A study on the practice of States regarding the interpretation of the criteria of the Convention on the Rights and Duties of States might therefore be helpful, including to take account of the decisions of the Security Council of the United Nations given their importance in certain cases of statehood. The point was also made that, according to State practice, failure to meet any of the criteria of the Convention on the Rights and Duties of States did not necessarily result in the termination of statehood.

(ii) Statehood and self-determination

199. In the course of the discussion, it was observed that, with a view to understanding which statehood options could be made available to States affected by sea-level rise, the interests and needs of the affected population should be an essential consideration. In that regard, the preservation of an affected population as a people for the purposes of exercising the right of self-determination should be one of the main pillars of the work of the Commission on the issue. At the same time, it was noted that the Commission should keep in mind the special historical and legal contexts of the right of self-determination and exercise caution in applying that principle in relation to sea-level rise.

(iii) Statehood and presumption of continuity

200. Turning to comments on the presumption of continuity of submerged or uninhabitable States and the maintenance of their international legal personality, as outlined in the second issues paper, various views were expressed by members of the Study Group.

201. It was indicated that the presumption of continuity of statehood was a relevant solution to address the consequences of sea-level rise, expressing support for the customary presumption to be considered by the Study Group as a starting point, given that, in particular, there was no clear criterion in customary international law for the cessation of a State. In that regard, it was noted that such an approach would also be in line with the preliminary conclusions reached by the International Law Association during its 2018 Sydney Conference. It was further asserted that the right to preservation was a right inherent in statehood.

202. According to another view that was presented, preliminary presumption of continuity of statehood was subject to further consideration by States, some of which had previously supported that option, disfavouring the extinction of States affected by sea-level rise. It was also suggested that it was not an issue on which the Commission could draw a specific conclusion, given that its role should be limited to outlining the relevant legal problems arising from the situation of sea-level rise, rather than taking further steps to provide specific solutions.

203. In that regard, it was recalled that, consistent with the 2018 syllabus, as referred to in paragraph 64 of the second issues paper, the Commission was, *inter alia*, to undertake an "analysis of the possible legal effects on the continuity or loss of statehood in cases where the territory of island States is completely covered by the sea or becomes uninhabitable".[1241] It was accordingly proposed that the Commission might consider: (a) legal issues arising from the continuity of statehood in the absence of territory, such as diplomatic protection for *de facto* stateless persons, which were partly discussed in the issues paper; and (b) legal issues arising from the discontinuity of statehood, namely extinction of statehood, which had not been considered so far.

204. It was also noted that the principle of continuity of statehood was temporary, aimed at allowing a State to be protected in the absence of a normal situation, as, for example, in the event of military occupation of a territory or internal violence, referred to in paragraphs 192 and 193 of the second issues paper. Further, it was observed that the inundation of a territory or complete absence thereof could not be compared to a change in a territory, and that the presumption of continuity could be envisaged only where a territory and population existed. In that regard, while it was recalled that a territory was an indispensable element of

[1241] A/73/10, annex B, para. 16.

a State, it was also stressed that, rather than depending upon its territory and population, the presumption of continuity of a State was attached to its legal personality.

205. The risks associated with the continuation of statehood in the absence of a territory, or where a disembodied State, without a territory, was subject to the sovereignty of another State, were also underlined. The capacity of such a State to uphold its international and domestic obligations, whether, for example, in relation to its maritime zones or in the field of human rights, migration and refugee law, was also questioned. The need for the Study Group to identify means and methods for preserving peoples' cultural and traditional identities, whether by statehood or otherwise, in low-lying coastal land as well as in fully submerged territories, was also stressed.

(iv) Other possible alternatives for the future concerning statehood

206. Against the background of the above exchange, the Study Group also examined the other possible alternatives for the future concerning statehood, as set out in chapter V of Part Two of the issues paper, such as the maintenance of international legal personality without a territory, and the use of various modalities, as listed in paragraph 169 above, to maintain statehood.

207. In doing so, the Study Group generally welcomed the in-depth analysis and the many illustrative examples explored by the Co-Chair, including those of the Holy See between 1870 and 1929, the Sovereign Order of Malta, and Governments in exile. While it was suggested that they might be helpful to the Study Group in further assessing the loss of statehood for submerged or uninhabitable States, they were deemed of historical interest rather than useful analogies in examining options aimed at maintaining the existence of States affected by sea-level rise. In that regard, it was notably emphasized that the context surrounding the examples provided by the Co-Chair, in which the entities in question appeared not to be truly regarded as a State, was fundamentally different to the context of a territory becoming unavailable, as in the case of sea-level rise.

208. Taking into account the various options examined in the second issues paper, it was suggested that a careful and prudent analysis of the possible alternatives be carried out, and that the creation of *sui generis* legal regimes, on the basis of either agreements between States or decisions by the international community, not be ruled out. In that regard, reference was made to certain cases in which various association agreements allowed the free movement of persons from small island States to a larger State, whereas in other cases no such agreement existed, with the example provided of a procedure in place for other small island States whereby only 75 persons selected by ballot were allowed to move to the larger State each year.[1242]

209. In contrast, the view was expressed that it was not the role of the Commission to recommend certain arrangements over others, a task that should be left to the political realm. Also noted was the potential imbalance in power between a disappearing State and the other (potentially receiving) State with which it would be negotiating a solution: in such a context, the maritime entitlements of the disappearing State could largely or entirely be transferred to the other (receiving) State as part of the arrangement.

(v) Statehood and reclamation efforts

210. Given the importance attached to the possession of a territory in practice, even in small amount, it was suggested that a potential solution could lie in preserving some part of a

[1242] See, for example, the Statement of Partnership between New Zealand and Tuvalu (2019-2023), available at https://www.mfat.govt.nz/assets/Countries-and-Regions/Pacific/Tuvalu/Statement-of-Partnership-NZ-Tuvalu-_2019-2023.pdf. See also New Zealand, Operational Manual, available at https://www.immigration.govt.nz/opsmanual/#46618.htm; and the New Zealand Government Immigration website at https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/pacific-access-category-resident-visa; as well as R. Curtain and M. Dornan, "Climate change and migration in Kiribati, Tuvalu and Nauru", DevPolicyBlog, 15 February 2019, available at https://devpolicy.org/climate-change-migration-kiribati-tuvalu-nauru-20190215/.

disappearing State, such as through reclamation efforts. Those efforts would take an already existing feature, in its natural condition – such as an island – and expand the size of that feature so as to increase the land mass.

(vi) Statehood and compensation

211. It was suggested that, rather than analysing various concepts of statehood and trying to find precedents where there were none, it would be useful to give consideration to the classic issue of compensation for the damage caused, keeping in mind that considerations of continuity of sovereignty would not resolve the challenges faced by the most affected States, which had contributed the least to a phenomenon largely caused by uncontrolled human industry. It was alternatively suggested that addressing compensation as part of the topic could be counterproductive and that it was not expressly mentioned in the 2018 syllabus.

212. It was also noted that some States had expressed concerns about the subtopic of statehood and that it might be necessary to ascertain the extent to which global sea-level rise was attributable to changes in coastlines, given that other such human activity could explain the phenomenon.

(vii) Comments on guiding questions

213. Members of the Study Group made the following observations with respect to the guiding questions listed in paragraph 423 of the second issues paper:

(a) It was suggested that it should be possible for a State, in exceptional circumstances, to continue its existence despite no longer meeting some or all of the criteria set out in the Convention on the Rights and Duties of States. Yet, caution was called for, as practical situations would always be open to interpretation. At the same time, it was noted that the criteria of population and territory remained crucial, and that the prolonged or permanent loss of territory would inadvertently have an effect on statehood;

(b) It was noted that the cases of the Holy See and the Sovereign Order of Malta were not helpful to the examination of the subtopic, although it was also observed that while not directly related, they could be considered by analogy. Relatedly, cases of Governments in exile, which were by definition temporary and did not involve the disappearance of a territory, were not considered directly relevant. According to another view, some valuable conclusions could be drawn from cases of Governments being forced in exile for, at least, the immediate aftermath of the disappearance of a State's land territory due to sea-level rise or for when the land territory of a State became uninhabitable despite not being totally covered by the sea;

(c) Hesitation was expressed as to the existence and content of the right of a State to provide for its preservation, and it was proposed that the Study Group avoid addressing preservation measures from the rights and obligations perspective;

(d) and (e) It was observed that maintaining a presumption of continuity of statehood could result in complex practical difficulties. It was deemed uncertain whether the questions in subparagraphs (d) and (e) of paragraph 423 of the second issues paper were practical or necessary for the Study Group to explore. At the same time, it was proposed that the Study Group develop a set of preventive tools for States to use;

(f) It was noted that any practical modalities would depend on agreements between the States concerned. Some members expressed doubt as to the possibility of expanding the right of self-determination in that context;

(g) A view was expressed that there was no presumption of continuity of statehood. It was also noted that the Study Group should not determine the existence of such a presumption, but instead explore whether it was appropriate;

(h) It was noted that, assuming that a State could still maintain its jurisdiction over maritime zones despite losing its land territory, practical difficulties would arise, including in terms of the State fulfilling its obligations within those zones. Nonetheless, that situation was considered as a potential recourse for affected States. The need to differentiate between

cases of complete and partial inundation, and situations where the land territory of a State became uninhabitable despite not being totally covered by the sea, was emphasized;

(i) According to one view, the question in subparagraph (i) of paragraph 423 of the second issues paper was not useful or relevant to the topic. It was also noted that suggesting specific modalities, such as the establishment of a self-governing area within the territory of a third State, was beyond the scope of the topic;

(j) It was observed that the choice of statehood options was a policy issue and would depend on agreements between the States concerned in each particular case.

(c) Comments on the protection of persons affected by sea-level rise and related guiding questions

(i) Existing legal frameworks

214. During discussions on the subtopic at the fourth and fifth meetings of the Study Group, it was noted that there was no legal framework that provided for a distinct legal status of persons affected by sea-level rise and that existing applicable frameworks were highly fragmented. Support was voiced for the proposal to identify and assess the effectiveness of the existing principles applicable to the protection of persons affected by sea-level rise. The need to consider different features of sea-level rise in the course of that exercise was emphasized. According to another view, it was questionable as to whether the fragmented nature of applicable rules caused any practical problems. It was therefore considered unnecessary to develop a highly specific legal framework for the protection of the narrow group of persons affected by sea-level rise.

215. While commenting on the question of the applicability of existing legal frameworks, some members noted that international refugee law, climate change law and international humanitarian law were not equipped to deal with the protection of persons affected by sea-level rise. In contrast, several relevant international legal instruments, such as the Kampala Convention, the New York Declaration for Refugees and Migrants and the Global Compact for Safe, Orderly and Regular Migration, were noted as examples of successful State cooperation. Members also recalled recent relevant case law of the United Nations human rights treaty bodies.[1243]

216. With respect to the question of available State practice, regret was expressed that only a few States had provided the Commission with relevant information on the topic. It was proposed that the request to States, international organizations and other relevant entities for information and practice be reiterated. Examples were provided of administrative policies adopted by States in response to cross-border displacement induced by sea-level rise. The practices of issuing humanitarian visas and of granting subsidiary protection to persons not qualifying as refugees were regarded as requiring further examination.

(ii) Applicability of human rights law

217. It was recognized that climate change and sea-level rise could adversely affect the enjoyment of human rights, and that there was a need to view all human rights – civil, political, economic, social and cultural – as interrelated, interdependent and indivisible. It was also noted that, while not directly addressing the issue of sea-level rise, certain regional instruments, such as the Cartagena Declaration on Refugees[1244] and the Brazil Declaration[1245] in Latin America or the Kampala Convention in Africa,[1246] did take into account climate

[1243] For example, *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016) and *Bakatu-Bia v. Sweden* (CAT/C/46/D/379/2009).

[1244] Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, on 19–22 November 1984. Available at www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf.

[1245] Brazil Declaration: "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", 3 December 2014. Available at: https://www.unhcr.org/brazil-declaration.html.

[1246] See footnote 1225 above.

change and disasters as cause for movement of persons who needed protection. It was further stressed that States must respect their human rights obligations while addressing the phenomenon of sea-level rise. Relatedly, it was recalled that the Human Rights Council had recently recognized the right to a clean, healthy and sustainable environment.[1247]

218. Some members of the Study Group questioned whether the international human rights law framework could be fully relevant to the protection of persons affected by sea-level rise. It was observed that while States had human rights obligations towards individuals, the sea-level rise phenomenon was not directly attributable to any particular State. Accordingly, it was unclear how human rights rules would operate within that context and, specifically, how and against whom claims related to sea-level rise could be brought. Those questions were considered even more pertinent in the case of a State whose territory was completely submerged or rendered uninhabitable. In response, it was also argued that human rights law was an important lens through which to view the sea-level rise phenomenon, and maintained that the human rights of individuals remained inalienable even if their State had ceased to exist owing to sea-level rise. It was considered, however, necessary to examine the extent to which human rights rules were applicable in that context. A proposal was made to assess how better to integrate human rights obligations into the climate change legal framework. An additional examination of the non-refoulement principle in the context of sea-level rise was suggested.

219. An argument was raised that it was difficult to examine the applicability of human rights law in the context of sea-level rise without addressing the issue of causation, because in order to determine how human rights law applied, it was necessary to identify which specific State or States were responsible in any given case for the protection of applicable human rights. It was noted in response that the Study Group had intentionally excluded causation from the scope of the topic,[1248] and that addressing it would not be helpful for the Study Group's work.

(iii) Comments on guiding questions

220. Members of the Study Group made the following observations with respect to the guiding questions listed in paragraph 435 of the second issues paper:

(a) It was suggested that the human rights mentioned therein be addressed by category, namely civil and political rights on the one hand, and economic, social and cultural rights on the other. Furthermore, it was noted that the principles of non-discrimination, equality and equal protection of the law should be included among those applicable to the protection of the human rights of persons affected by sea-level rise;

(b) A concern was raised that the measures referred to therein with regard to displacement and human mobility were too specific to be recommended as a general rule, since the choice in every particular case would depend to a great extent on domestic legal and administrative frameworks. It was also observed that a preferential regime for individuals displaced owing to sea-level rise could be seen as discriminatory towards people escaping other consequences of climate change. The importance of prevention and prohibition of arbitrary displacement in situations involving the evacuation, relocation, displacement or migration of persons owing to the consequences of sea-level rise was emphasized;

(c) The importance of the principle of international cooperation was stressed. According to another view, the principle was a political concept, and it was questionable as to whether any legal consequences could be derived from it. For guidance on the applicability and scope of the principle of international cooperation, it was therefore suggested that the Study Group refer to the Commission's draft articles on the protection of persons in the event of disasters and to principle 4 of the International Law Association's Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea-level Rise.[1249]

[1247] See Human Rights Council resolution 48/13 of 8 October 2021.

[1248] A/73/10, annex B, para. 14.

[1249] Final report of the Committee on International Law and Sea-Level Rise, in International Law Association, *Report of the Seventy-eighth Conference* (see footnote 1230 above), p. 904, and resolution 6/2018, annex, *ibid.*, p, 33.

(d) Future work of the Study Group

221. In connection with the comments made with respect to the Study Group's scope of the work and working methods (paras. 31–34 above), concern was expressed that the scope of the subtopics was too broad, and it was suggested that the number of questions under examination be reduced. A proposal was also made to focus predominantly on areas with sufficiently developed practice. Relatedly, it was suggested that the Study Group should leave issues related to statehood aside and focus its future work on issues related to the law of the sea and to the protection of persons affected by sea-level rise.

222. Regarding the subtopic of statehood, it was noted that further study was required of the question of extinction of statehood, as it had not been sufficiently explored in the second issues paper. Likewise, it was noted that the Study Group should further examine cases of partial land inundation, cases in which the land territory became uninhabitable despite not being totally covered by the sea, and coastal defence measures and the construction of artificial islands. With respect to the subtopic of the protection of persons affected by sea-level rise, it was proposed that matters of protection of persons in situ and in displacement be considered separately. Moreover, three broad subjects for further study were put forward: (a) human rights obligations; (b) issues specific to the movement of persons, including displacement; and (c) the obligation to cooperate.

223. It was noted that the Study Group's work needed to be based on the previous work of the Commission, in particular on the draft articles on the protection of persons in the event of disasters. At the same time, the need to examine specific aspects of sea-level rise, namely its irreversibility and long-term nature, was emphasized. It was also proposed that the Study Group consider establishing a dialogue with human rights expert bodies within the United Nations system on the subtopic of the protection of persons affected by sea-level rise. On that subtopic, it was further suggested to operate on the basis of a combined rights-based and needs-based approach.

224. With regard to the outcome of the Study Group's work, various proposals were made, including that a framework convention be drafted on issues related to sea-level rise, which could be used as a basis for further negotiations within the United Nations system, following the example of the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.[1250] Another proposal was to focus the work of the Study Group on more concrete, limited outcomes, such as a draft treaty on a new form of subsidiary protection for persons affected by sea-level rise, or a detailed analysis, for illustrative proposes, of certain specific human rights to determine how exactly they were affected and should be protected when affected by sea-level rise. Support was voiced for the development of guidelines for bilateral agreements between States and for the preparation of a list of legal questions to be addressed at the political level within the United Nations. It was also noted that the short-term outcome of the Study Group's work would be its final report, on all subtopics, yet the Commission's work could be continued beyond that outcome in a different format. In that regard, a proposal was made to include, in the final report of the Study Group, a draft resolution addressing all outstanding political issues, for the consideration of the General Assembly.

3. Concluding remarks by the Co-Chairs

(a) General concluding remarks

225. At the sixth meeting of the Study Group, the Co-Chairs (Ms. Galvão Teles and Mr. Ruda Santolaria) delivered concluding remarks in light of the comments that had been expressed by its members during the previous meetings.

226. The Co-Chairs expressed their gratitude to the members of the Study Group for their contributions and comments on the second issues paper. While the paper was considered a good basis for future discussions, some additional information was required on the practice

[1250] Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 14 October 1994), United Nations, *Treaty Series*, vol. 1954, No. 33480, p. 3.

of States and international organizations, especially in Africa, Asia and Latin America and the Caribbean. The Co-Chairs indicated that, while scientific findings related to sea-level rise and climate change were not within the Study Group's scope of work, they would endeavour to organize informal meetings with scientists from the Intergovernmental Panel on Climate Change on specific issues of interest.

227. The Co-Chairs further observed that the Study Group's work would continue without prejudice to the outcome of its work, which, according to the syllabus, was a consolidated final report. Any proposals made by members of the Study Group with regard to the future format of its work and outcome would be examined in more detail at a later stage.

(b) Statehood

228. The Co-Chair (Mr. Ruda Santolaria) recalled that sea-level rise was a gradual phenomenon that could result in the partial or total loss of a State's territory. Although there had been no cases of complete inundation of a State's land, the small island developing States were likely to become uninhabitable in the future.

229. The Co-Chair noted that the lack of State practice had rendered it necessary to explore historical examples and relevant general principles of law. With regard to the latter, he recalled the principle of the sovereign equality of States, the principle of self-determination of peoples, the principle of international cooperation, and the principle of good faith. While it was acknowledged that the historical analogies of the Holy See and the Order of Malta were not directly related to sea-level rise, they could nonetheless be useful for further work on the topic with respect to the possibility of maintaining international legal personality despite the loss of territory. Likewise, some valuable conclusions could be drawn from cases of Governments being forced into exile for, at least, the immediate aftermath of the disappearance of a State's land territory due to sea-level rise or for when the land territory of a State became uninhabitable despite not being totally covered by the sea.

230. Turning to the criteria of statehood, the Co-Chair reiterated that, although there was no generally accepted notion of a "State", the criteria of the Convention on the Rights and Duties of States could constitute a starting point for the Study Group's work. He noted the position expressed by members of the Study Group that there was a difference between criteria for the creation of a State and those for its continued existence. Some reflections on the criteria of territory and permanent population were provided.

231. The Co-Chair noted that the presumption of continuity of a State was also a starting point for further work. At the same time, he emphasized the need to consider the practical implications of maintaining that presumption despite serious changes to a State's territory and its population. Relatedly, the right of a State to ensure its preservation required further reflection. The importance of preserving the right of self-determination of the affected populations was also highlighted.

(c) Protection of persons affected by sea-level rise

232. The Co-Chair (Ms. Galvão Teles) recalled that there was no specific legal framework that provided for a distinct legal status of persons affected by sea-level rise. Existing universal and regional legal frameworks, including human rights law, refugee and migration law, and disaster and climate change law, required additional study with a view to evaluating their applicability in the sea-level rise context. The Co-Chair noted the relevant emerging practice of States, international organizations and other relevant entities, both direct and indirect, and of the need to continue examining its development for the purpose of identifying principles applicable to the protection of persons affected by sea-level rise.

233. The Co-Chair observed that, in line with the proposals made by some members, the Study Group should refer in its work to previous outcomes of the Commission's work, in particular, but not limited to, the draft articles on the protection of persons in the event of disasters. The Co-Chair also recalled that members of the Study Group were welcome to provide individual written contributions on any of the guiding questions.

4. Issues for further work on the subtopics of statehood and the protection of persons affected by sea-level rise

234. Based on the discussions in the Study Group during the first part of the session, the Co-Chairs made the following proposals regarding the continuation of its work on the subtopics, without prejudice to the possibility of further examining other issues as appropriate.

(a) Statehood

235. The Co-Chair (Mr. Ruda Santolaria) proposed that the Study Group request the Secretariat to undertake a study of the relevant previous work of the Commission, with a view to assessing its relevance to the subtopic. He emphasized the need for collaboration with entities and institutions from different regions of the world in order to ensure diversity and representativeness, especially regarding the practice in regions for which less information was available, such as Latin America and the Caribbean, Asia and the Pacific and Africa. He proposed the following tasks to complement the second issues paper with respect to the subtopic of statehood, taking into account the exchange of opinions among members of the Study Group, in the context of the analysis of the sea-level rise in relation to statehood:

(a) an evaluation of the way in which the requirements for the configuration of a State as a person or subject of international law had been interpreted, taking the Convention on Rights and Duties of States as a starting point, and including references to the practice of the General Assembly and the Security Council of the United Nations; and an analysis of any differences between the criteria for the creation of a State and those for the continuity of its existence;

(b) an analysis of the territory, including the different spaces under the sovereignty of the State and the maritime zones under its jurisdiction, and the nature of the land surface that could become submerged as a consequence of sea-level rise;

(c) a presentation of the possible legal effects of the maintenance or the eventual loss of statehood, and of the eventual maintenance of some form of international legal personality, in the context of the different scenarios resulting from sea-level rise; and an analysis of the pertinence of the presumption of statehood in the case of States affected by sea-level rise, and of the ways in which self-determination could be exercised by the affected populations and whether certain principles of general international law could be applied in such cases. Given the progressive nature of sea-level rise, it would be important to distinguish between two situations and the potential effects thereof: one, closer in time, in which the land surface of a State was not completely covered by the sea, but could become uninhabitable; and the other, in which the land surface of a State could become completely covered by the sea. Without prejudice to the specificities of each subtopic in the analysis, the interplay between the different assumptions or scenarios in relation to statehood and their eventual implications for the protection of persons and their rights should be reinforced;

(d) a reflection on the right of a State affected by sea-level rise to seek its conservation, the modalities to be used for that purpose and the significance of international cooperation to that effect;

(e) a careful and prudent analysis of the various options set out in the second issues paper, taking into account the possibility of creating *sui generis* legal regimes or proposing practical alternatives based on agreements between States or instruments in relation to the phenomenon of sea-level rise that could be adopted within the framework of international organizations, especially in the context of the United Nations system.

(b) Protection of persons affected by sea-level rise

236. The Co-Chair (Ms. Galvão Teles) proposed that the Study Group request the Secretariat to undertake a study of the relevant previous work of the Commission, with a view to assessing its relevance to the subtopic. She encouraged members of the Study Group to prepare papers on relevant international and regional practice, and on the guiding questions contained in paragraph 435 of the second issues paper. She emphasized the need to establish and maintain contacts with relevant expert bodies and international organizations. Lastly, the Co-Chair listed the following points that she intended to further examine to complement the

second issues paper with respect to the subtopic of protection of persons affected by sea-level rise taking into account the exchange of views among the members of the Study Group:

(a) the protection of human dignity as an overarching principle in the protection of persons affected by sea-level rise;

(b) the combination of the needs-based and rights-based approaches as the basis for the legal analysis of the protection of persons affected by sea-level rise;

(c) implications on human rights – including with regard to civil, political, economic, social and cultural rights – in the context of the protection of persons affected by sea-level rise;

(d) identification of the scope of the obligations of human rights duty bearers in the context of sea-level rise;

(e) the protection of persons in vulnerable situations in the context of sea-level rise;

(f) the relevance of the principle of *non-refoulement* in the context of the protection of persons affected by sea-level rise;

(g) the implications of the Global Compact for Safe, Orderly and Regular Migration and other soft-law instruments in terms of the protection of persons affected by sea-level rise;

(h) the application of subsidiary and temporary protection to persons affected by sea-level rise;

(i) the relevance of humanitarian visas and similar administrative policies for the protection of persons affected by sea-level rise;

(j) tools for the avoidance of statelessness in the context of sea-level rise;

(k) the content of the principle of international cooperation, including institutional paths for inter-State, regional and international cooperation regarding the protection of persons affected by sea-level rise.

C. Future work of the Study Group

237. In the next quinquennium, the Study Group will revert to the subtopic of the law of the sea in 2023 and to the subtopics of statehood and the protection of persons affected by sea-level rise in 2024. In 2025, the Study Group will then seek to finalize a substantive report on the topic as a whole by consolidating the results of the work undertaken.

Chapter X
Other decisions and conclusions of the Commission

A. Inclusion of new topics in the programme of work

238. At its 3582nd meeting, on 17 May 2022, the Commission decided to include the topic "Settlement of international disputes to which international organizations are parties" in its programme of work and to appoint Mr. August Reinisch as Special Rapporteur. At the same meeting, the Chair of the Commission recalled paragraph 3 of the 2016 syllabus on the topic, which stated that "[i]t would be for future decision whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization, might also be covered".[1251] Considering the importance of such disputes for the functioning of international organizations in practice, it was presumed that the Special Rapporteur and the Commission would take such disputes into account.

239. The Commission, at the same meeting, decided to include the topic "Prevention and repression of piracy and armed robbery at sea" in its programme of work and to appoint Mr. Yacouba Cissé as Special Rapporteur.

240. The Commission, also at the same meeting, decided to include the topic "Subsidiary means for the determination of rules of international law" in its programme of work and to appoint Mr. Charles Chernor Jalloh as Special Rapporteur.

B. Requests by the Commission for the Secretariat to prepare studies on topics in the Commission's programme of work

241. At its 3612th meeting, on 5 August 2022, the Commission decided to request the Secretariat to prepare a memorandum providing information on the practice of States and international organizations which may be of relevance to its future work on the topic "Settlement of international disputes to which international organizations are parties", including both international disputes and disputes of a private law character.

242. The Commission also approved the Special Rapporteur's recommendation that the Secretariat contact States and relevant international organizations in order to obtain information and their views for the purposes of the memorandum.

243. At the same meeting, the Commission decided to request the Secretariat to prepare a memorandum concerning the topic "Prevention and repression of piracy and armed robbery at sea", addressing in particular:

(*a*) elements in the previous work of the Commission that could be particularly relevant for its future work on the topic and the views expressed by States;

(*b*) writings relevant to the definitions of piracy and of armed robbery at sea; and

(*c*) resolutions adopted by the Security Council and by the General Assembly relevant to the topic.

244. The Commission also approved the Special Rapporteur's recommendation that the Secretariat contact States and relevant international organizations in order to obtain information and views concerning:

(*a*) the legislation, case law and practice of States relevant to the topic, including in relation to articles 100 to 107 of the United Nations Convention on the Law of the Sea;

(*b*) the agreements entered into by States under which persons accused of piracy or armed robbery at sea are transferred with a view to prosecution; and

(*c*) the role of international, regional and subregional organizations regarding the prevention and repression of acts of piracy and armed robbery at sea.

[1251] *Yearbook of the International Law Commission, 2016*, vol. II (Part Two), annex I, p. 233.

245. The Commission, also at the same meeting, decided to request the Secretariat to prepare a memorandum on the topic "Subsidiary means for the determination of rules of international law":

(*a*) identifying elements in the previous work of the Commission that could be particularly relevant to the topic;

(*b*) surveying the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic for submission at the seventy-fifth session.

246. The Commission, at the same meeting, decided to request the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be relevant for its future work on the topic "Sea-level rise in relation to international law", in particular in relation to statehood and the protection of persons, also for submission at the seventy-fifth session.

C. Programme, procedures and working methods of the Commission and its documentation

247. On 1 June 2022, the Planning Group was constituted for the present session.

248. The Planning Group held three meetings on 1 June and on 21 and 22 July 2022. It had before it the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-sixth session, prepared by the Secretariat (A/CN.4/746); General Assembly resolution 76/111 of 9 December 2021 on the report of the International Law Commission on the work of its seventy-second session; General Assembly resolution 76/117 of 9 December 2021 on the rule of law at the national and international levels; and the proposed programme budget for 2023, Programme 6, Legal affairs, subprogramme 3, concerning the Progressive development and codification of international law.

1. Working Group on the long-term programme of work

249. At its 1st meeting, on 1 June 2022, the Planning Group decided to reconvene the Working Group on the long-term programme of work, with Mr. Mahmoud D. Hmoud as Chair. The Chair of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group, at its 2nd meeting, on 21 July 2022. The Planning Group took note of the oral report.

250. The Commission noted that it had already recommended during the present term the inclusion of the following topics in its long-term programme of work: (*a*) General principles of law (2017),[1252] which is in the current programme of work; (*b*) Evidence before international courts and tribunals (2017);[1253] (*c*) Universal criminal jurisdiction (2018);[1254] (*d*) Sea-level rise in relation to international law (2018),[1255] which is also in the current programme of work; (*e*) Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law (2019);[1256] (*f*) Prevention and repression of piracy and armed robbery at sea (2019),[1257] included in the current programme of work at the present session; and (*g*) Subsidiary means for the determination of rules of international law (2021),[1258] also included in the current programme of work at the present session.

[1252] *Yearbook … 2017*, vol II (Part Two), p. 147, para. 267 and pp. 155 *et seq.*, annex I.
[1253] *Ibid.*, p. 147, para. 267 and pp. 168 *et seq.*, annex II.
[1254] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 369 and annex A.
[1255] *Ibid.*, para. 369 and annex B.
[1256] *Ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 290 and annex B.
[1257] *Ibid.*, para. 290 and annex C.
[1258] *Ibid.*, *Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 302 and annex.

251. At the present session, the Commission, on the recommendation of the Working Group, decided to recommend the inclusion of the topic "Non-legally binding international agreements" in the long-term programme of work of the Commission.

252. In the selection of the topic, the Commission was guided by its recommendation at its fiftieth session (1998) regarding the criteria for the selection of the topics, namely: (*a*) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (*b*) the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and (*c*) the topic should be concrete and feasible for progressive development and codification. The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[1259] The Commission considered that the present topic constituted a useful contribution to the progressive development of international law and its codification. The syllabus of the topic selected appears as annex I to the present report.

253. The Commission recalls that five other topics remain inscribed in the long-term programme of work from previous quinquenniums, namely: (*a*) Ownership and protection of wrecks beyond the limits of national maritime jurisdiction;[1260] (*b*) Jurisdictional immunity of international organizations; [1261] (*c*) Protection of personal data in transborder flow of information;[1262] (*d*) Extraterritorial jurisdiction;[1263] and (*e*) The fair and equitable treatment standard in international investment law.[1264]

2. Working Group on methods of work of the Commission

254. At its 1st meeting, on 1 June 2022, the Planning Group decided to re-establish the Working Group on methods of work of the Commission, with Mr. Hussein A. Hassouna as Chair. The Chair of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group at its 2nd meeting, on 21 July 2022. The Planning Group took note of the oral report.

255. The Commission notes that in the course of the present term, the Working Group considered a series of working papers prepared by members on such issues as the work regarding the Plenary, the Drafting Committee and Special Rapporteurs; reports of Special Rapporteurs and how such reports could be addressed in Plenary; the work of Study Groups and Working Groups; how texts at various stages of development in the Commission's work should be reflected, particularly in the Commission's report; rules of procedure and selection of new topics; the relationship with other bodies, including the Sixth Committee, international and regional organizations and other actors; and the nomenclature relating to the outcomes of the Commission's work. The substance of the working papers and the comments by members on them complemented in particular the work done by the Commission in 1996 and 2011.

256. The Commission further notes that given the constraints of time during the current session and the need not to be underinclusive of the issues addressed, the Working Group needed more time beyond the present Commission's term. To this end, it notes the wish of the Working Group to continue its work into the next quinquennium, building upon the work already accomplished, as well as the previous work on methods of work undertaken in particular in 1996 and 2011. The Commission further notes that the Working Group recalled General Assembly resolution 76/111, as well as comments made by delegations on the report of the International Law Commission on the work of its seventy-second session, as reflected in the topical summary prepared by the Secretariat (A/CN.4/746), and stresses that the

[1259] *Yearbook ... 1998*, vol. II (Part Two), p. 110, para. 553. See also *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238.
[1260] *Yearbook ... 1996*, vol. II (Part Two), pp. 97–98, para. 248 and pp. 139 *et seq.*, annex II, Addendum 2.
[1261] *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257 and pp. 201 *et seq.*, annex II.
[1262] *Ibid.*, pp. 217 *et seq.*, annex IV.
[1263] *Ibid.*, pp. 229 *et seq.*, annex V.
[1264] *Yearbook ... 2011*, vol. II (Part Two), p. 175, para. 365, and pp. 202 *et seq.*, annex IV.

Working Group will continue its work so as to improve and develop further the methods of work of the Commission.

257. The Commission expresses its appreciation for the efforts of the Secretariat in meeting the challenges of organizing hybrid sessions for the Commission in 2021 and 2022. In particular, it welcomes, subject to resource availability, the webcasting of the plenary meetings, as this assured visibility and transparency. It also supports the continued use of the "Google drive" to assure easy accessibility of documents for members. Bearing in mind that greater reliance will continue to be placed on technology, the Commission encourages its members and the Secretariat to continue efforts aimed at using the available tools.

3. Consideration of General Assembly resolution 76/117 of 9 December 2021 on the rule of law at the national and international levels

258. The General Assembly, in its resolution 76/117 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. Since its sixtieth session (2008), the Commission has commented at each of its sessions on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report[1265] remain relevant and reiterates the comments made at its previous sessions. [1266]

259. The Commission recalls that the rule of law is of the essence of its work. The Commission's purpose, as set out in article 1 of its statute, is to promote the progressive development of international law and its codification.

260. Having in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level, and aims to promote respect for the rule of law at the international level.

261. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission will continue to take into account, where appropriate, the rule of law as a principle of governance and the human rights that are fundamental to the rule of law, as reflected in the Preamble and in Article 13 of the Charter of the United Nations and in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels.[1267]

262. In its current work, the Commission is aware of "the interrelationship between the rule of law and the three pillars of the United Nations (peace and security, development, and human rights)",[1268] without emphasizing one at the expense of the other. In this spirit, the Commission particularly welcomes the decision of the General Assembly inviting Member States to focus their comments during the upcoming Sixth Committee debate at the seventy-seventh session of the General Assembly regarding the rule of law on the subtopic "The impacts of the global coronavirus disease (COVID-19) pandemic on the rule of law at the national and international levels".[1269]

[1265] *Yearbook … 2008*, vol. II (Part Two), pp 146–147.

[1266] *Yearbook … 2009*, vol. II (Part Two), p. 150, para. 231; *Yearbook … 2010*, vol. II (Part Two), pp. 202–204, paras. 390–393; Yearbook … 2011, vol. II (Part Two), p. 178, paras. 392–398; *Yearbook … 2012*, vol. II (Part Two), p. 87, paras. 274–279; *Yearbook … 2013*, vol. II (Part Two), p. 79, paras. 171–179; *Yearbook … 2014*, vol. II (Part Two) and Corr.1, p. 165, paras. 273–280; *Yearbook … 2015*, vol. II (Part Two), p. 85, paras. 288–295; *Yearbook … 2016*, vol. II (Part Two), pp. 227–228, paras. 314–322; *Yearbook … 2017*, vol. II (Part Two), pp. 149–150, paras. 269–278; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), paras. 372–380; *ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 293–301; and *ibid.*, Seventy-sixth Session, Supplement No. 10 (A/76/10), paras. 304–312.

[1267] General Assembly resolution 67/1 of 30 November 2012 on the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, para. 41.

[1268] Report of the Secretary-General on measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations (S/2013/341), para. 70.

[1269] General Assembly resolution 76/117, para. 23.

263. In this regard, since its seventy-second session in 2021, the Commission and its members have been following developments closely. The Commission recalls, in this connection, its role of strengthening the current international legal framework. This is consistent with its mandate to assist the General Assembly with the promotion of the progressive development of international law and its codification. The Commission recalls, in particular, the terms of article 17 of its statute, which enables the Commission also to consider proposals and draft multilateral conventions submitted by States Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies or official bodies established by intergovernmental agreement. Any such textual or other proposal on the international legal challenges related to pandemics referred to the Commission would be given all due consideration, and if taken forward, would likely be beneficial to States and the rule of law at both the national and international levels.

264. As with other institutions, within and outside the United Nations, the COVID-19 pandemic impacted the Commission's own work in different ways. In 2020, the Commission faced an unprecedented circumstance as it was unable to convene in Geneva because of the pandemic, and in 2021 it held its session in a hybrid format. The Commission reiterates in this regard its gratitude to both the General Assembly and the Government of Switzerland for the decisions taken that enabled it to continue the performance of its mandate during the pandemic. It should also be mentioned that while the normal methods of the Commission was disrupted significantly, the extraordinary efforts were made to ensure the smooth conduct of the Commission's deliberations during the hybrid session.[1270]

265. In fulfilling its mandate concerning the progressive development and codification of international law, the Commission is conscious of current challenges for the rule of law. Recalling that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law,[1271] the Commission wishes to recall that much of its work consists of collecting and analysing national practices related to the rule of law with a view to assessing their possible contribution to the progressive development and codification of international law.

266. Bearing in mind the role of multilateral treaty processes in advancing the rule of law,[1272] the Commission recalls that the work of the Commission on different topics has led to several multilateral treaty processes and to the adoption of a number of multilateral treaties.[1273] The Commission welcomes General Assembly resolution 76/119 which decided to establish an ad hoc working group of the Sixth Committee to examine the draft articles on the protection of persons in the event of disasters and to consider further the recommendation of the Commission for the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

267. In the course of the present session, under the ongoing constraints of the COVID-19 pandemic, the Commission continues to make its contribution to the promotion of the rule of law, including by working on the topics in its current programme of work: "Peremptory norms of general international law (*jus cogens*)" (adopted on second reading at the current session); "Protection of the environment in relation to armed conflicts" (adopted on second reading at the current session); "Immunity of State officials from foreign criminal jurisdiction" (adopted on first reading at the current session); "Succession of States in respect of State responsibility"; "General principles of law"; and "Sea-level rise in relation to international law".

268. The Commission, in light of the conclusion of its work on five topics in its programme of work between the sixty-ninth session (2017) and the present session, as well as the pending conclusion of additional topics in its current programme of work, decided to add three new topics to the programme of work, namely, "Settlement of international disputes to which

[1270] See, in this regard, *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 315.

[1271] General Assembly resolution 75/141 of 15 December 2020 on the rule of law at the national and international levels, paras. 2 and 19.

[1272] *Ibid.*, para. 8.

[1273] See, more specifically, *Yearbook … 2015*, vol. II (Part Two), p. 86, para. 294.

international organizations are parties", "Prevention and repression of piracy and armed robbery at sea" and "Subsidiary means for the determination of rules of international law".

269. The Commission reiterates its commitment to the promotion of the rule of law in all of its activities.

4. Honoraria

270. The Commission reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which have been expressed in the previous reports of the Commission.[1274] The Commission emphasizes that resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research. This is without prejudice to the proposed establishment of a trust fund (see, below, section E, and annex II and appendix).

5. Documentation and publications

271. The Commission underscored once more the unique nature of its functioning in the progressive development of international law and its codification, in that it attaches particular relevance to State practice and the decisions of national and international courts in its treatment of questions of international law. The Commission reiterated the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the function of the Commission. The reports of its Special Rapporteurs require an adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine, and a thorough analysis of the questions under consideration. The Commission stressed that it and its Special Rapporteurs are fully conscious of the need to achieve economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind. While the Commission is aware of the advantages of being as concise as possible, it reiterates its strong belief that an *a priori* limitation cannot be placed on the length of the documentation and research projects relating to the work of the Commission. It follows that Special Rapporteurs cannot be asked to reduce the length of their reports following submission to the Secretariat, irrespective of any estimates of their length made in advance of submission to the Secretariat. Word limits are not applicable to Commission documentation, as has been consistently reiterated by the General Assembly.[1275] The Commission stresses also the importance of the timely preparation of reports by Special Rapporteurs and their submission to the Secretariat for processing and submission to the Commission sufficiently in advance so that the reports are issued in all official languages, ideally four weeks before the start of the relevant part of the session of the Commission. In this respect, the Commission reiterates the importance of Special Rapporteurs submitting their reports within the time limits specified by the Secretariat. Only on this basis can the Secretariat ensure that official documents of the Commission are published in due time in the six official languages of the United Nations.

[1274] See *Yearbook ... 2002*, vol. II (Part Two), pp. 102–103, paras. 525–531; *Yearbook ... 2003*, vol. II (Part Two), p. 101, para. 447; *Yearbook ... 2004*, vol. II (Part Two), pp. 120–121, para. 369; *Yearbook ... 2005*, vol. II (Part Two), p. 92, para. 501; *Yearbook ... 2006*, vol. II (Part Two), p. 187, para. 269; *Yearbook ... 2007*, vol. II (Part Two), p. 100, para. 379; *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 358; *Yearbook ... 2009*, vol. II (Part Two), p. 151, para. 240; *Yearbook ... 2010*, vol. II (Part Two), p. 203, para. 396; *Yearbook ... 2011*, vol. II (Part Two), p. 178, para. 399; *Yearbook ... 2012*, vol. II (Part Two), p. 87, para. 280; *Yearbook ... 2013*, vol. II (Part Two), p. 79, para. 181; *Yearbook ... 2014*, vol. II (Part Two) and Corr.1, p. 165, para. 281; *Yearbook ... 2015*, vol. II (Part Two), p. 87, para. 299; *Yearbook ... 2016*, vol. II (Part Two), p. 229, para. 333; *Yearbook ... 2017*, vol. II (Part Two), p. 150, para. 282; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 382; *ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 302; and *ibid.*, *Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 317.

[1275] For considerations relating to page limits on the reports of Special Rapporteurs, see, for example, *Yearbook ... 1977*, vol. II (Part Two), p. 132, and *Yearbook ... 1982*, vol. II (Part Two), pp. 123–124. See also General Assembly resolution 32/151 of 9 December 1977, para. 10, and General Assembly resolution 37/111 of 16 December 1982, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

272. The Commission reiterated its firm view that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, cannot be subject to arbitrary length restrictions. The Commission once more noted with satisfaction that the measures introduced at its sixty-fifth session (2013) to streamline the processing of its summary records had resulted in the more expeditious transmission to members of the Commission of the English version for timely correction and prompt release. The Commission once more called on the Secretariat to resume the practice of preparing provisional summary records in both English and French, and to continue its efforts to sustain the measures in question, in order to ensure the expeditious transmission of the provisional records to members of the Commission. The Commission further noted that the more recent practice of submitting the provisional records electronically for corrections to be made in track changes was working smoothly. The Commission also welcomed the fact that those working methods had led to the more rational use of resources and called on the Secretariat to continue its efforts to facilitate the preparation of the definitive records in all official languages, without compromising their integrity.

273. The Commission expressed its gratitude to all Services involved in the processing of documentation, both in Geneva and in New York, for their efforts in seeking to ensure timely and efficient processing of the Commission's documents, often under narrow time constraints. It emphasized that timely and efficient processing of documentation was essential for the smooth conduct of the Commission's work. The work done by all Services was all the more appreciated under the current conditions.

274. The Commission reaffirmed its commitment to multilingualism and recalled the paramount importance to be given in its work to the equality of the six official languages of the United Nations, which had been emphasized in General Assembly resolutions 69/324 of 11 September 2015; 71/328 of 17 September 2017; and 73/346 of 16 September 2019.[1276]

275. The Commission once more expressed its warm appreciation to the United Nations Library at Geneva, which continues to assist members of the Commission with efficiency, competence and dedication. It welcomed the bibliographic package that the Library prepares for the Commission, and expressed its gratitude for the briefing it received on 5 May 2022 on the online bibliography database and other library services. The Commission wished to note that the Library continued to provide valuable services even under the limitations imposed by the COVID-19 pandemic. The Commission further noted that library services are essential to the functioning of the Commission in the progressive development and codification of international law, and it has long valued the assistance it has received from the Library at Geneva over the years. To this end, the Commission emphasized the need to limit the impact of budget restrictions on the mandate of the United Nations Library and Archives at Geneva and to provide adequate funding for the continuation of the Library's ability to function as a research library to assist the Commission in the performance of its mandate in the codification and progressive development of international law. The Commission also expresses the hope that every effort will be made to minimize the effect of the planned refurbishment on the services of the Library.

6. *Yearbook of the International Law Commission*

276. The Commission reiterated that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolution 76/111, expressed its appreciation to Governments that had made voluntary contributions to the Trust Fund on the backlog relating to the *Yearbook of the International Law Commission*, and encouraged further contributions to the Trust Fund.

277. The Commission recommends that the General Assembly, as in its resolution 76/111, *express its satisfaction* with the remarkable progress achieved in the past few years in catching up with the backlog of the *Yearbook of the International Law Commission* in all six languages, and *welcome the efforts* made by the Division of Conference Management of the

[1276] See also General Assembly resolution 76/111.

United Nations Office at Geneva, especially its Editing Section, in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; and *encourage* the Division of Conference Management to continue providing all necessary support to the Editing Section in advancing work on the *Yearbook*.

7. Assistance of the Codification Division

278. The Commission expressed its appreciation for the invaluable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and the ongoing assistance provided to Special Rapporteurs and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission. In particular, the Commission expressed its appreciation to the Secretariat for its continued efforts, which have enabled the Commission to meet even against the backdrop of the COVID-19 pandemic. The Commission also recognized the work of the Codification Division in providing texts in different languages to ensure the quality and representativeness of the work of the Drafting Committee.

8. Websites

279. The Commission expressed its appreciation to the Secretariat for the website on the work of the Commission, and welcomed its continuous updating and improvement.[1277] The Commission reiterated that the website and other websites maintained by the Codification Division[1278] constitute an invaluable resource for the Commission and for researchers of the work of the Commission in the wider community, thereby contributing to the rule of law and to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website on the work of the Commission included information on the current status of the topics on the agenda of the Commission, as well as links to the advance edited versions of the summary records of the Commission and the audio and video recordings of the plenary meetings of the Commission.

9. United Nations Audiovisual Library of International Law

280. The Commission once more noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law[1279] in promoting a better knowledge of international law and the work of the United Nations in the field, including the work of the Commission.

10. Consideration of the possible convening in the next quinquennium of the first part of a session of the Commission in New York

281. The Commission recommends that it hold the first part of a session in New York during the next quinquennium and requests the Secretariat to proceed with the necessary administrative and organizational arrangements to facilitate the holding of such a session in New York. Particular attention was drawn to the need to ensure access to library facilities at Headquarters and electronic access to the resources and research assistance of the Library of the United Nations Office at Geneva. The need to ensure access and sufficient space for assistants to members of the Commission to attend meetings of the Commission was also emphasized.

11. Visas

282. The Commission reiterates its gratitude to the Government of Switzerland, the host State of the Commission, for its support over many years that has enabled the Commission's smooth and effective functioning at the Palais des Nations, Geneva. The Commission is particularly grateful for the exceptional steps taken by the Swiss authorities to enable it to hold its seventy-second session in hybrid format in 2021, and for the continuing assistance

[1277] http://legal.un.org/ilc.
[1278] In general, available from: http://legal.un.org/cod/.
[1279] http://legal.un.org/avl/intro/welcome_avl.html.

of those authorities for the current session as the meetings of the Commission begin to return to a pre-pandemic normal.

283. The Commission draws attention to the importance that its members receive visas in a timely manner for travel to its seat at the United Nations Office at Geneva or to New York, in accordance with the relevant agreements, and requests the Secretariat to liaise, as appropriate, with the relevant authorities in that regard.

D. Date and place of the seventy-fourth session of the Commission

284. The Commission decided that its seventy-fourth session would be held in Geneva from 24 April to 2 June and from 3 July to 4 August 2023.

E. Consideration of operative paragraph 34 of resolution 76/111 of 9 December 2021 on the report of the International Law Commission on the work of its seventy-second session

285. The Commission took note of operative paragraph 34 of resolution 76/111 and provided additional comments and observations on the matter, which, together with the terms of reference for the proposed Trust Fund, appear in annex II and an appendix to the present report.

F. Cooperation with other bodies

286. At the 3585th meeting, on 1 June 2022, Judge Joan E. Donoghue, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.[1280] An exchange of views followed. At that meeting, the Commission also observed a moment of silence in memory of Judge Antônio Augusto Cançado Trindade who passed away in Brazil on 29 May 2022.

287. The Commission was again unable to have an exchange of views with the African Union Commission on International Law, the Asian–African Legal Consultative Organization, the Committee of Legal Advisers on Public International Law of the Council of Europe or the Inter-American Juridical Committee. The Commission continues to value its cooperation with such bodies and expresses the hope that the exchanges of views can be organized at future sessions.

288. On 21 July 2022, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on matters of mutual interest. Welcoming remarks were made by Mr. Nils Melzer, Director, International Law, Policy and Humanitarian Diplomacy, ICRC. Mr. Dire D. Tladi, the Chair of the Commission, gave a brief overview of the Commission's work and spoke of different approaches to the development of international law. Ms. Cordula Droege, Chief Legal Officer, Head of the Legal Division, ICRC gave a brief overview of the work of the ICRC and made remarks on assessing the value of different instruments in the clarification and development of international humanitarian law. A discussion on the development of international law moderated by Mr. Nils Melzer followed.

G. Representation at the seventy-seventh session of the General Assembly

289. The Commission decided that it should be represented at the seventy-seventh session of the General Assembly by its Chair, Mr. Dire D. Tladi.

[1280] The statement is recorded in the summary record of that meeting.

H. International Law Seminar

290. Pursuant to General Assembly resolution 76/111, the fifty-sixth session of the International Law Seminar was held at the Palais des Nations from 4 to 22 July 2022, during the present session of the Commission. The Seminar is intended for young jurists specializing in international law, and young professors or government officials pursuing an academic or diplomatic career in posts in the civil service of their countries.

291. Twenty-eight participants of different nationalities, from all regional groups, took part in the session.[1281] The participants attended plenary meetings of the Commission and specially arranged lectures, and participated in working groups on specific topics.

292. Mr. Dire D. Tladi, Chair of the Commission, opened the Seminar. Mr. Markus Schmidt, Senior Legal Adviser to the United Nations Office at Geneva, was responsible for the administration, organization and conduct of the Seminar and served as its Director. Mr. Vittorio Mainetti, international law expert and consultant, acted as Coordinator, assisted by Mr. Georg Hopfner and Mr. Hongda Sun, legal assistants.

293. The following lectures were given by members of the Commission: "The work of the International Law Commission" by Mr. Ernest Petrič; "Reparations to individuals for gross violations of international human rights law, and serious violations of international humanitarian law" by Mr. Claudio Grossman Guiloff; "Subsidiary means for the determination of rules of international law" by Mr. Charles Chernor Jalloh; "Changes in the methods of work of the International Law Commission: recent trends and its impact (or lack of impact)" by Mr. Shinya Murase; "Peremptory norms of general international law (*jus cogens*)" by Mr. Dire D. Tladi; "General principles of law" by Mr. Marcelo Vázquez-Bermúdez; "Protection of the environment in relation to armed conflicts" by Ms. Marja Lehto; "Immunity of State officials from foreign criminal jurisdiction" by Ms. Concepción Escobar Hernández; "Succession of States in respect of State responsibility" by Mr. Pavel Šturma; and "Provisional application of treaties" by Mr. Juan Manuel Gómez Robledo. In addition, a round table was organized with the five co-Chairs of the Study Group on the topic "Sea-level rise in relation to international law", Mr. Bodgan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

294. A lecture was given by Mr. Marcelo G. Kohen, Professor at the Graduate Institute of International and Development Studies, on "Evidence before the International Court of Justice".

295. Participants visited the exhibition "100 years of Multilateral Cooperation in Geneva" at the United Nations Museum Geneva, led by Mr. Pierre-Etienne Bourneuf, historian and advisor to the United Nations Library and Archives at Geneva. Participants visited also the International Labour Organization (ILO), and attended two presentations given by Mr. Dražen Petrović, Registrar of the ILO Administrative Tribunal, on "International administrative tribunals", and Mr. Georges Politakis, ILO Legal Adviser, on "ILO standard-setting".

[1281] The following persons participated in the Seminar: Mr. Adam Abdou Hassan (Niger); Ms. Rawa Almakky (Saudi Arabia); Mr. Christian Bukor (Slovenia); Mr. Víctor P. Calderón Merino (Ecuador); Mr. Pierrot Chambu Ntizimire (Democratic Republic of the Congo); Ms. Ludovica Di Lullo (Italy); Mr. Fabian Simon Eichberger (Germany); Ms. Malak Elkasrawy (Egypt); Ms. Kaniz Fatima (Pakistan); Ms. María Consuelo Gálvez Reyes (Chile); Ms. Estelle Carine Gassi Matago (Cameroon); Ms. Kristi How (Singapore); Mr. Manzi Karbou (Togo); Ms. Irene Meta (United Republic of Tanzania); Ms. Kefilwe Moshokwa-Seberane (Botswana); Mr. Garo Moughalian (Lebanon); Ms. Shaiesta Nabibaks (Suriname); Mr. Alfredo Uriel Pérez Manriquez (Mexico); Ms. Sasha Raycheva (Bulgaria); Mr. Juan David Saenz Henao (Colombia); Mr. Jamaldeen Seidu (Ghana); Ms. Augustina Siman (Moldova); Ms. Beril Sogut (Türkiye); Mr. Viet Tong Trinh (Viet Nam); Mr. Leandro Daniel Verteramo (Argentina); Ms. Andrea Maria Villavicencio Morales (Peru); Mr. Louino Volcy (Haiti); and Ms. Florentina Xavier (Timor-Leste). The Selection Committee, chaired by Mr. Makane Moïse Mbengue, Professor of International Law at the University of Geneva, met on 28 April 2022 and selected 29 candidates from 202 applications. At the last minute, one selected candidate could not attend the Seminar.

296. Two working groups, on "Reparations to individuals for gross violations of international human rights law, and serious violations of international humanitarian law" and "Subsidiary means for the determination of rules of international law", were organized and participants were assigned to one of them. Two members of the Commission, Mr. Claudio Grossman Guiloff and Mr. Charles C. Jalloh, respectively, supervised and provided guidance to the working groups. Each group prepared a report and presented its findings during the last working session of the Seminar. The reports were compiled and distributed to all participants, as well as to the members of the Commission.

297. Participants also attended a session with the International Law Seminar Alumni Network. Ms. Verity Robson (alumna 2017), President of the Network, Mr. Moritz Rudolf (alumnus 2017), Vice-President of the Network, Ms. Valeria Reyes Menéndez (alumna 2017), Vice-President of the Network, Ms. Ozge Bilge (alumna 2019), Mr. René Figueredo Corrales (alumnus 2019) and Mr. Vittorio Mainetti, Secretary-General of the Network and Coordinator of the International Law Seminar, addressed the participants and presented the work of the Network.

298. The Republic and Canton of Geneva offered its traditional hospitality at the Geneva Hôtel de Ville, where Seminar participants visited the premises of the cantonal authorities, guided by Ms. Irene Renfer, Deputy Secretary-General of the Geneva Parliament, and Mr. Giovanni Magnin, project manager, Service of Protocol of the Republic and Canton of Geneva.

299. The Chair of the Commission, the Director of the International Law Seminar and Mr. Jamaldeen Seidu (Ghana), on behalf of the participants in the Seminar, addressed the Commission during the closing ceremony of the Seminar. Each participant was presented with a diploma.

300. The Commission notes with concern that in recent years, the finances of the International Law Seminar have been adversely affected by the economic and financial crisis which in turn has reduced the number and amounts of voluntary contributions from Member States to the United Nations Trust Fund for the Seminar. The situation this year was much better than it was in 2019, due to two large voluntary contributions in 2021. In 2022, 21 fellowships were granted (17 for travel and subsistence, 3 for travel only and 1 for subsistence only).

301. Since its inception in 1965, 1,284 participants, representing 178 nationalities, have taken part in the Seminar. Some 781 participants have received a fellowship.

302. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations based in Geneva. The Commission recommends that the General Assembly again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2023 with as broad participation as possible, and an adequate geographical distribution.

Annex I

NON-LEGALLY BINDING INTERNATIONAL AGREEMENTS
/
(LES ACCORDS INTERNATIONAUX JURIDIQUEMENT NON-CONTRAIGNANTS)

by Mathias Forteau[1]

1. Introduction

1. The practice of non-legally binding international agreements (also called in the literature "Gentlemen's agreements", "political agreements", "informal agreements" or in French "*instruments (ou actes) concertés non conventionnels*") is an old practice, which has been the subject of multiple doctrinal studies since 1945.[2] These studies, in particular the one conducted by the Institute of International Law in the early 1980's,[3] provide relevant insights on this practice. They have not however clarified all contentious aspects relating to the nature and regime of such agreements.

2. Moreover, the practice of non-legally binding international agreements has considerably grown and has become more complex and diversified in the last decades; it is therefore the subject of increased attention and of significant concern, in the literature and in State practice. Notably, it was the subject of a study and of guidelines from the Inter-American Juridical Committee in 2020, which sought in particular to shed light on the definitions for binding and non-binding agreements and the methods for identifying them, the capacity to conclude them, and their legal effects, while at the same time indicating that "in several places [the Guidelines] note areas where existing international law is unclear or disputed" and that "The Guidelines leave such issues unresolved".[4] This topic is also since 2021 on the agenda of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI), where the "rising importance of non-legally binding agreements in international law" has been stressed.[5] Recent developments in some national legal systems also demonstrate the relevance of this topic today.[6] These different elements show that there is a need for more clarity and increased legal certainty

[1] The author wishes to thank Ms. Jessica Joly Hébert, doctoral candidate at the Université Paris Nanterre and member of the CEDIN, for her help in preparing the present proposal.

[2] On terminology, see *infra,* para. 3.

[3] See, in the selective bibliography attached, references to the work of the Institute of International Law on *International Texts of Legal Import in the Mutual Relations of their Authors and Texts Devoid of Such Import*.

[4] Inter-American Juridical Committee, *Guidelines on Binding and Non-Binding Agreement* (resolution and final report (77 p.) by D. Hollis), August 2020, accessible online (original version of the resolution in Spanish and of the report in English).

[5] Committee of Legal Advisers on Public International Law (CAHDI), Expert Workshop on "Non-Legally Binding Agreements in International Law", 26 March 2021, Chair's Summary, p. 1. See also p. 4: "a significant number of CoE Member States had expressed their support to assemble a more detailed account of their practice on non-legally binding agreements".

[6] In France, for example, it was suggested by the *Conseil d'Etat* that a circular expressly provides that the Ministry of Foreign Affairs ensures a certain control over non-legally binding agreements before their conclusion, to make sure that "*la rédaction ne laisse pas d'ambiguïté sur le caractère juridiquement non contraignant*" ["the drafting does not leave any ambiguity on the non-legally binding nature"] and that these agreements be in principle published (see Conseil d'Etat, *Le droit souple*, Etudes et documents, 2013, pp. 168-170). See also in Spain, Law 25/2014 of 27 November 2014 on treaties and other international agreements, which contains provisions on "non-normative" ("no normativos") international agreements ([https://www.boe.es/buscar/act.php?id=BOE-A-2014-12326]). On the Canadian practice, see for example [https://treaty-accord.gc.ca/procedures.aspx?lang=fra], point 8 and Annex C. On the United Kingdom's practice, see for example "The Scrutiny of International Treaties and other international agreements in the 21st century inquiry", Written evidence from Sir Michael Wood (SIT 03) to the Public Administration and Constitutional Affairs Committee of the House of Commons, accessible online [https://committees.parliament.uk/writtenevidence/36775/pdf/]. See more broadly, on current developments in national practices, C. Bradley, J. Goldsmith, O. Hathaway, "The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis", 2022, accessible online; O. Hathaway, "Non-Binding Agreements and International Law", ASIL, *International Law Behind the Headlines*, Episode 33, 2022, [https://soundcloud.com/americansocietyofinternationallaw/international-law-behind-the-headlines-episode-33].

at the universal level on the topic of non-legally binding agreements,[7] particularly given the "legal risks still associated with the use of non-legally binding instruments".[8]

3. Considering that one of the key points is to determine how these instruments can be distinguished from legally binding agreements, terminology and form play an important role because they may provide significant indications on the intent of those who adopt the act.[9] The term non-legally binding "agreement" ("*accord*" in French) is used in the title of this proposal without prejudice to the meaning that could eventually be appropriate to give it (and bearing in mind that in the practice of some States, the term "agreement" could refer to binding agreements only). Other terms, in case of need, could be preferred (for example, "arrangement" or "understanding" ("*entente*"), or "instrument", providing that the term eventually adopted corresponds to the scope of the topic – on which see *infra,* para. 27). Since the term "non-binding agreement" was used in previous work of the Commission (see *infra,* para. 8) and in the recent work of the Inter-American Juridical Committee and the CAHDI (see *supra,* para. 2), it has been adopted in the present proposal.

4. Consistent with the above, and as explained below at paragraph 27, this topic does not address the law and consequences arising with respect to treaties, with respect to agreements between States (or international organizations) that are governed by national law, or with respect to agreements between private actors. Further, it does not address legally binding international agreements that contain within them provisions that have combination of legally binding and non-legally binding effects.

2. The proposed topic and the criteria for selecting new topics

5. The practice related to non-legally binding international agreements raises an important number of legal issues which are of great and concrete importance in international relations. As such, these issues fulfill the criteria fixed by the International Law Commission for the selection of new topics.[10]

(i) The topic is one that can respond to "the needs of States" by providing them with useful clarifications and, if deemed appropriate, guidelines with regard to the nature and potential legal effects of these agreements.

(ii) The topic is "sufficiently advanced in stage in terms of State practice", given the density of recent practice and the fact that it has been explored in detail in the literature for several decades.

(iii) The topic is also undoubtedly "concrete and feasible", on the one hand because it fully corresponds to the field of expertise of the International Law Commission, which has undisputed experience and authority on the sources of international law, and on the other hand because it is a topic of reasonable scope and is sufficiently focused.

(iv) Finally, while some might consider that the topic does not correspond to "new developments in international law and pressing concerns of the international community as a whole", it remains important for the Commission to continue to deal with classical topics which are of critical importance in the daily practice of States. During the debates of the Sixth Committee in 2021 on the programme of work of the International Law Commission, the Netherlands accordingly stressed its wish that the Commission focus on topics that are "more pertinent for international practice, such as the use of non-binding instruments in the identification and application of international law".[11]

3. Non-legally binding international agreements in the past work of the Commission

6. The Commission has had the occasion in the past to discuss the question of non-legally binding international agreements, but has never conducted a complete study on the topic.

[7] The concern was recently expressed by the OECD in the *Recueil de pratiques d'organisations internationales. Œuvrer à l'élaboration d'instruments internationaux plus efficaces/Compendium of International Organisations' Practices. Working Towards More Effective International Instruments*, 25 February 2022, accessible online.
[8] Statement of the Legal Adviser of the United Nations, as cited by CAHDI Chair's Summary, cited above, p. 1.
[9] See *infra,* paras. 12-20. See also A. Aust, *Modern Treaty Law and Practice,* 3rd ed. (CUP:2013), Chapter 3.
[10] *Yearbook …* 2011, vol. II (2), p. 175, para. 366.
[11] A/C.6/76/SR.18, para. 50.

7. In the context of its work on the *Law of Treaties*, the Commission had to determine which agreements correspond to the notion of treaty, and by contrast, which ones do not come under the law of treaties because of their non-legally binding character. One has to admit that the 1966 draft of the Commission on the law of treaties was not perfectly clear in that regard. It adopted a definition – which was taken up in the 1969 Vienna Convention on the Law of Treaties between States and the 1986 Vienna Convention on treaties concluded by international organizations – of the term "treaty" that was of a very broad nature, "covering all forms of international agreement in writing concluded between States", provided that the agreement must be "governed by international law". But the definition given by the Commission of this latter expression is equivocal:

> "The phrase 'governed by international law' serves to distinguish between international agreements regulated by public international law and those which, although concluded between States, are regulated by the national law of one of the parties (or by some other national law system chosen by the parties). The Commission examined the question whether the element of 'intention to create obligations under international law' should be added to the definition. Some members considered this to be actually undesirable since it might imply that States always had the option to choose between international and municipal law as the law to govern the treaty, whereas this was often not open to them. Others considered that the very nature of the contracting parties necessarily made an inter-State agreement subject to international law, at any rate in the first instance. The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase 'governed by international law', and it decided not to make any mention of the element of intention in the definition."[12]

8. In the conclusions on the *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* adopted in 2018, the Commission considered that non-legally binding agreements are "agreements" that shall be taken into account to interpret treaties for the purpose of Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties. According to conclusion 10, paragraph 1,

> "An agreement under article 31, paragraph 3 (*a*) and (*b*), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account."

The commentary on this draft conclusion specifies, in particular, that "[t]he aim of the second sentence of paragraph 1 is to reaffirm that 'agreement', for the purpose of article 31, paragraph 3, need not, as such, be legally binding, in contrast to other provisions of the 1969 Vienna Convention in which the term 'agreement' is used in the sense of a legally binding instrument."[13]

9. Along the same lines, guideline 4 of the *Guide to Provisional Application of Treaties* of 2021 provides that the provisional application of a treaty "may be agreed […] through […] (b) any other means or arrangements". The commentary on this provision indicates that this formula "broadens the range of possibilities for reaching agreement on provisional application" and "is in accordance with the inherently flexible nature of provisional application".[14]

10. It should also be noted that in the draft adopted at first reading in 2019 on the *Protection of the environment in relation to armed conflicts*, it is indicated in the commentary of draft Principle 17 on the designation by agreement of protected zones that the notion of agreement "should be understood in its broadest sense as including mutual as well as unilateral declarations accepted by the other party, treaties and other types of agreements".[15] Similarly, the commentary of draft Principle 23 on peace processes indicates that it "aims to cover all formal peace agreements, as well as other instruments or agreements concluded or adopted at any point during the peace process […]", which "agreements and instruments may take different forms".[16]

11. The preceding elements demonstrate the potential value of a comprehensive study by the International Law Commission of existing international law on non-legally binding international agreements. Two series of questions would in particular deserve to be studied in the context of this topic: the criteria for identifying non-legally binding international agreements (*infra*, 4) and the potential legal effects of such agreements (*infra*, 5).

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[12] Para. 6 of the commentary on draft Article 2, *Yearbook…* 1966, vol. II, p. 189.

[13] *Official Records of the General Assembly, Seventy-third session Supplement 10* (A/73/10), para. 9 of the commentary on conclusion 10.

[14] *Ibid*., seventy-sixth session (A/76/10), para. 5 of the commentary on Guideline 4.

[15] *Ibid*, seventy-fourth session (A/74/10), para. 1 of the commentary on draft Principle 17.

[16] *Ibid*., para. 6 of the commentary on draft Principle 23; see also about the "documents" considered as "peace agreements" in the United Nations peace agreements database, *ibid.*, footnote 1359.

4. The criteria for identifying non-legally binding international agreements

12. The first series of questions concerns the identification of criteria to distinguish, in international law, non-legally binding agreements from those that are legally binding. This distinction is crucial, as it determines the effect to be attributed to an agreement – in particular the question of whether it is subject to the law of treaties starting with the principle *Pacta sunt servanda*, and whether it has to be registered by the United Nations under Article 102 of the Charter (bearing in mind that it is not because an agreement is not registered that it is not necessarily a treaty), or if it is a simple declaration of intent, or an agreement of an exclusively political nature.[17] In this spirit, Poland declared, during the debate of the Sixth Committee in 2021, that "the Commission had conducted useful work to clarify various provisions of the Vienna Convention and suggested that it consider carrying out similar work on other provisions of the Convention, such as those concerning the definition of the term "treaty" (…)"[18].

13. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the International Court of Justice decided that the 1990 Minutes "are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement."[19]

14. The question of the distinction between treaties and non-legally binding international agreements has arisen more recently in the case law, notably in the case concerning *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)* and in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*.

15. In the first case, the Court had to determine whether what was formally presented as a "Memorandum of Understanding" (MOU) constituted a treaty or not. The Court concluded that it was indeed a treaty, on the basis of a certain number of elements, in particular some elements of form, namely "[t]he inclusion of a provision addressing the entry into force of the MOU [which] is indicative of the instrument's binding character" and that "Kenya considered the MOU to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations, and Somalia did not protest that registration until almost five years thereafter".[20]

16. In the second case, the Court held that the agreements or declarations invoked by the Applicant did not carry legal obligations, even though the declarations in question were "politically significant",[21] based primarily on the search for the "intention" of the Parties to these instruments to be bound by legal obligations. According to the Court, this intention must appear "[i]rrespective of the form that agreements may take",[22] and "in the absence of express terms indicating the existence of a legal commitment, [it] may be established on the basis of an objective examination of all the evidence".[23]

17. For its part, and without being exhaustive, the International Tribunal for the Law of the Sea has held that the term "agreement", within the meaning of Article 15 of the United Nations Convention on the Law of the Sea on the delimitation of the territorial sea between States with opposite or adjacent coasts, means "in light of the object and purpose of article 15 of the Convention, […] a legally binding agreement. In the view of the Tribunal, what is important is not the form or designation of an instrument but its legal nature and content."[24] The question

[17] On the related practice of the Treaty Section of the United Nations, see particularly *Treaty Handbook*, United Nations, section 5.3.
[18] A/C.6/76/SR.19, para. 19.
[19] Judgment of 1 July 1994, *I.C.J. Reports 1994*, p. 121, para. 25.
[20] Judgment of 2 February 2017, preliminary objection, *I.C.J. Reports 2017*, pp. 22-25, paras. 41-50 (para. 42 for the quote).
[21] Judgment of 1 October 2018, *I.C.J. Reports 2018*, p. 543, para. 105.
[22] Judgment of 1 October 2018, *I.C.J. Reports 2018*, p. 540, para. 97.
[23] Judgment of 1 October 2018, *I.C.J. Reports 2018*, p. 539, para. 91. See pp. 543 and ff., paras. 105 and ff., for the examination, one by one, of the agreements invoked by the Applicant in this case.
[24] Judgment of 14 March 2012, in the case concerning the *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Rep. 2012*, p. 35, para. 89.

was equally raised whether the reference to agreements in Article 281 of the UNCLOS covers binding agreements only or also non-binding ones.[25]

18. In many situations nowadays, doubts can arise with regard to the nature of an agreement, which lead to very concrete consequences. The works of the Institute of International Law, in addition to the academic writings, have identified a large number of such agreements, including for example, the agreement of the Yalta Conference and the Helsinki Final Act of 1975.[26] The 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses provides for instance, in its Article 3, for the conclusion of "agreements" of watercourses without specifying whether these agreements must be legally binding.[27] Guidelines on the conclusion of agreements concerning water may have maintained a certain ambiguity in this respect, either because they use equivocal terms such as "arrangement",[28] or because they define these terms in a way that seems to be inclusive of both binding and non-binding agreements.[29] Similarly, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provides, among other examples in other provisions, in its Article 7, paragraph 20, that "The Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article."

19. Of course, the inquiry into the nature of the agreement is in principle facilitated when it contains a clear and unambiguous provision on the question. This is the case, among numerous examples, of Article 16 of the Financial Stability Board Charter.[30] One can also cite the "Non-legally binding authoritative statement of principles" on forests adopted at the 1992 Rio Conference.[31] Conversely, parties to a negotiation may set themselves the explicit objective of concluding a "legally binding" instrument.[32]

20. In the absence of such a clause, or when its meaning or scope is uncertain, it is necessary to be able to rely on general criteria. Available studies tend to show that there is a diversity of possible criteria. Some emphasize the intention of the parties to the agreement, which can also be revealed by the content of the instrument or the practice surrounding it; more objective elements may also be highlighted, such as the form of the instrument, the type of language used, or the modalities related to its registration or publication.[33] The criteria that are currently considered to be favoured in practice, the case-law and academic works, and how those criteria should be applied, must be identified in order to define more clearly what separates treaties from non-legally binding agreements.

5. The potential legal effects of non-legally binding international agreements

[25] See in particular on this point the decision of the Conciliation Commission between Timor-leste and Australia dated 19 September 2016, paras. 55 ff. [https://pcacases.com/web/sendAttach/10052].

[26] See for example the agreements identified by O. Schachter, "The Twilight Existence of Nonbinding International Agreements", *American Journal of International Law*, 1977, pp. 296-304; Ph. Gautier, *Essai sur la définition des traités entre Etats. La pratique de la Belgique aux confins du droit des traités*, Bruylant, Bruxelles, 1993, pp. 312-375 and particularly pp. 323 and ff. for the practice; M. Forteau, A. Miron, A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, LGDJ-lextenso, Paris, 2022, n° 304 and ff. See also the analysis of the Founding Act on NATO/Russia Relations of 1997 by Ph. Gautier *in Annuaire français de droit international*, 1997, pp. 82-92.

[27] The commentary on Article 3 of the corresponding 1994 ILC draft does not contain further details on this point. See *Yearbook…*, 1994, vol. II (2), pp. 92-95.

[28] See the *Guide to reporting under the Water Convention and as contribution to SDG indicator 6.5.2 of the UNECE*, United Nations, Geneva, 2020, Section 2, pp. 13-15.

[29] See for example the *Step-by-step monitoring methodology for SDG indicator 6.5.2 version "2020"*, p. 3 ([https://www.unwater.org/app/uploads/2020/02/SDG_652_Step-by-step_methodology_2020_ENG.pdf]): "Arrangement for water cooperation refers to: a bilateral or multilateral treaty, convention, agreement or other arrangement, such as memorandum of understanding, between riparian States that provides a framework for cooperation on transboundary water management".

[30] Article 16: "This Charter is not intended to create any legal rights or obligations" ([https://www.fsb.org/wp-content/uploads/r_090925d.pdf?page_moved=1]).

[31] Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, 21 April 1992, A/CONF.151/6 ([https://digitallibrary.un.org/record/144461?ln=en]).

[32] See for example United Nations General Assembly Resolution 69/292 of 19 June 2015 which plans for the development of such an instrument on marine biological diversity of areas beyond national jurisdiction.

[33] See in particular A. Aust, "The Theory and Practice of Informal International Instruments", *International and Comparative Law Quarterly*, 1986, pp. 796 and ff.; Ph. Gautier, *Essai sur la définition des traités entre Etats. La pratique de la Belgique aux confins du droit des traités*, Bruylant, Bruxelles, 1993, pp. 353 and ff., especially pp. 352-352 on the doctrinal debates on the relevant criteria.

21. A second series of questions relates to the potential legal effects of non-legally binding agreements – in comparison with those, better identified, of legally binding agreements. International law cannot be reduced today to binding obligations alone. As it has been rightly said, even if it is not for international courts and tribunals "to pronounce on the political or moral duties",[34] "[t]hat an instrument does not constitute a treaty does not mean that it does not have legal effect"[35] and "[t]he conclusion that nonbinding agreements are not governed by international law does not however remove them entirely from having legal implications"[36]. Other "legal effects" may also exist and will need to be identified. Nothing indicates that the study will ultimately lead to the conclusion that such effects exist, or if they exist, that there are many of them. But if they do exist, it is important that the Commission identify and define them, on the basis of existing practice, case-law and literature.

22. Some of these legal effects may be of a *direct nature*. Such is in particular the case of the interpretative role of non-legally binding agreements as identified by the Commission in 2018 in its conclusions on subsequent agreements and practice (see *supra,* para. 8). Some also consider that such agreements would be subject to the legal principle of good faith in their application. Mention may also be made here of the monitoring or control of compliance with non-legally binding agreements that can be instituted by an international organization, and which implies that a certain legal effect is granted to these agreements.[37] At the very least, one can safely assume that the fields covered by these agreements can no longer be considered as falling exclusively within the exclusive domestic jurisdiction of each party concerned.

23. Other effects could be of an *indirect nature*.[38] Non-legally binding agreements could in particular play a role in the formation of other sources of international law, starting with customary international law, or be invoked within the framework of the theory of estoppel, or even as a form of waiver, as a presumption, or as evidence in favour or against a given claim. There is also the question of the relationship between agreements that are not legally binding and those that are. In particular, it is necessary to determine whether or to what extent such agreements could modify or amend a legally binding agreement, considering that the criterion laid down by the ILC and the Vienna Convention with regard to treaty modification is that of the "consent" of the parties to the treaty.[39] The question of the regime applicable to termination of treaties or to withdrawal by "consent of the parties" was the subject of important debates at the time of the codification of the law of treaties.[40] One can also wonder whether an initially non-binding agreement may not subsequently become binding, either by virtue of an acceptance – possibly unilateral – of one or more parties to the agreement, or by virtue of the practice related to it after its conclusion or of an act of an international organization or conference.[41]

24. Likewise, it has to be ascertained whether, or to what extent, a non-legally binding agreement could be given legal effect as a result of a direct or indirect reference thereto in a treaty or another legally binding act. For example, under Article 207 of the UN Convention on the Law of the Sea, "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures".[42] Similarly, it is to be noted that the United Nations have considered

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[34] ICJ, *International Status of South-West Africa*, Advisory Opinion, *I.C.J. Reports 1950*, p. 140.

[35] *Oppenheim's International Law*, Vol. 1, Parts 2 to 4, Longman, 1992, pp. 1209-1210, note 8.

[36] See O. Schachter, "The Twilight Existence of Nonbinding International Agreements", *American Journal of International Law*, 1977, p. 301. See also M. Forteau, A. Miron, A. Pellet, *Droit international public*, cited above, n° 304: non-legally binding agreements *"sont aux traités ce que les recommandations sont aux décisions des organisations internationales"* ["are to treaties what recommendations are to decisions of international organizations"].

[37] See for example United Nations General Assembly Resolution 47/191 of 22 December 1992 putting in place "institutional arrangements to follow up the United Nations Conference on Environment and Development".

[38] See recently on the topic, A. Zimmerman, N. Jauer, "Legal Shades of Grey? Indirect Legal Effects of 'Memoranda of Understanding'", *Archiv. des V.*, 2021, pp. 278-299.

[39] See para. 3 of the commentary on Article 51 of the ILC draft on the law of treaties: *Yearbook ...,* 1966, vol. II, p. 249: "The theory has sometimes been advanced that an agreement terminating a treaty must be cast in the same form as the treaty which is to be terminated or at least constitute a treaty form of equal weight. The Commission, however, concluded that this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the '*acte contraire*'. The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty. In doing so, they will doubtless take into account their own constitutional requirements, but international law requires no more than that they should consent to the treaty's termination."

[40] See in particular *Yearbook ...* 1963, vol. II, pp. 202-203, and 1966, vol. II, pp. 28-31.

[41] See J. Barberis, "Le concept de 'traité international' et ses limites", *Annuaire français de droit international*, 1984, p. 259.

[42] See also, e.g, UNCLOS Art. 60, para. 5.

the Conference on Security and Co-operation in Europe (CSCE) to be a "regional agreement" within the meaning of Chapter VIII of the Charter.[43]

25. In order to better identify the legal effect of non-legally binding international agreements, it will also be necessary to determine the rules, if any, regulating such agreements and ask, in particular, whether – or to what extent – rules pertaining to the law of treaties governing the capacity to conclude treaties, the process of conclusion, the application, suspension, amendment and modification, termination or invalidity of treaties apply to these agreements.[44] For example, it has been argued that States "*ne peuvent conclure un accord qui soit contraire au* jus cogens *sous prétexte qu'il s'agit d'un accord non obligatoire*" [*"cannot enter into an agreement which would be contrary to jus cogens under the pretext that the agreement is a non-binding one"*].[45] It can also be said that a non-legally binding agreement may not defeat provisions of a treaty in force.[46] Also, if there is no doubt that the breach of a non-legally binding agreement may not, as such, engage international responsibility,[47] one may wonder whether in some cases, such an agreement could lead to a certain form of liability if it constitutes aiding or assisting the commission of a wrongful act.[48]

26. The issue relating to the transparency and publication of non-legally binding agreements could also be addressed, possibly in the form of recommendations or best practices. Great care must be taken, however, not to give non-legally binding agreements – which are precisely concluded with the intention of not binding legally their parties – a scope or legal effects that the said parties did not intend or which they did not consent to. On a more general level, it must clear that the purpose of the present topic would not be to impose limitations on the freedom of States to conclude, in a flexible manner, non-binding agreements, which are essential to international cooperation and dialogue between States. Its aim is rather to provide clarification on the nature and possible effects of such agreements under international law.

6. The scope of the topic

27. The scope of the topic would be as follows (see also *supra,* paras. 3 and 4):

(i) The topic should focus only on non-legally binding international *instruments* and leave out the separate question of the effect of non-binding *provisions* that may be found in certain treaties.[49]

(ii) It will be necessary to delimit the types of instruments to be considered by limiting the study to "agreements", which by definition excludes non-consensual acts, such as a unilateral act of a State or of an international organization as such.

(iii) It would be appropriate to limit the study to *written* agreements (excluding tacit or oral agreements, or bilateral customs).

(iv) It would also be appropriate to limit the study to agreements which take the form of a single instrument or a single set of instruments (an exchange of notes that would be non-binding, for example) and to exclude from the scope of the study "agreements" resulting from the combination of two or more unilateral acts, such as optional declarations recognizing the jurisdiction of the International

[43] See the United Nations General Assembly Resolution 47/10 of 28 October 1992.
[44] The Court of Justice of the European Union, for example, ruled that the European Commission had not been given the power under the European Union treaties to sign non-legally binding agreements with a third State without the prior authorization of the Council: see CJUE, *Council v. Commission*, 28 July 2016, C-660/13, para. 38.
[45] J. Barberis, "Le concept de 'traité international' et ses limites", *Annuaire français de droit international*, 1984, p. 258.
[46] See for example, Court of Justice of the European Union, *Commission v. Greece*, 12 February 2009, C-45/07, para. 29.
[47] See O. Schachter, "The Twilight Existence of Nonbinding International Agreements", *American Journal of International Law*, 1977, p. 300: "[…] a nonbinding agreement, however seriously taken by the parties, does not engage their legal responsibility".
[48] See Articles on State Responsibility, Art. 16.
[49] See for example ICJ, *Oil Platforms*, Judgment, 12 December 1996, *I.C.J. Reports 1996*, p. 815, para. 31: "In the light of the foregoing, the Court considers that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of Articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court"; compare with *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France),* Judgment, 4 June 2008, *I.C.J. Reports 2008*, pp. 215-216, para. 101, and p. 216, para. 104. See also J. d'Aspremont, "Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice", *RBDI* 2003, pp. 496-520.

Court of Justice as compulsory under Article 36 of the Statute of the Court, or that manifest "consent" as a circumstance precluding wrongfulness as contemplated in Article 20 of the ILC Articles of 2001.[50]

(v) The question will inevitably arise as to whether the topic should include legal acts of an uncertain or debated nature such as acts adopted by conferences of States parties that are not attributable to an autonomous subject of international law and could be considered to possess a conventional nature, or concluding reports of conferences incorporating "agreed conclusions"[51] or even certain "codes of conduct".[52] Norms or standards elaborated in informal frameworks such as those existing in the field of control of imports and exports of dual-use materials (for example, the Wassenaar Arrangement) or in the field relating to the fight against money laundering or the financing of terrorism, should be included in the study.[53]

(vi) It will also be necessary to specify whether the topic concerns only agreements concluded by States or also those concluded by international organizations. At first glance, there seems to be no particular reason to exclude the latter from the scope of the topic.[54] On the other hand, it is recommended not to include agreements concluded with or by non-State entities, which fall into a genre that would be too different.[55]

(vii) Similarly, inter-State agreements or arrangements which are not covered by international law should be excluded from the topic.[56]

(viii) On the other hand, agreements between sub-States actors – or State authorities not vested with the power to engage the State internationally – of different countries would presumably fall under the scope of the topic to the extent that they are not covered by domestic law only.

(ix) Finally, it will be certainly advisable to limit the study to aspects of public international law and not to address – in any case, not as such – aspects of the topic which come under domestic law, including under "foreign relations law".[57]

7. The possible form of the work of the Commission

28. The work of the Commission should probably take the form of conclusions, or guidelines (or model provisions) if need be. A preliminary examination of the topic could also lead, if necessary, to the use of a study group, provided that its work is fully transparent. It will also be up to the Commission to decide in due time on the final outcome of the project, in accordance with the direction it will decide to give to it and its content.

[50] In the articles adopted on State responsibility at first reading in 1996, the Commission considered that "[t]he case covered by the article therefore comprises, first, the request of a State to be permitted to act in a specific case in a manner not in conformity with the obligation and, secondly, the expression of consent, by the State benefiting from the obligation, to such conduct by the first State. It is the combined effect of these two elements which results in an agreement that, in the case in point, precludes the wrongfulness of the act." (*Yearbook of the ILC*, 1979, vol. II, pp. 109-110, Article 29 on consent, commentary, para. 3). See more broadly on the question J. Salmon, "Les accords non formalisés ou *solo consensu*", *Annuaire français de droit international*, 1999, pp. 1-28.

[51] *Oppenheim's International Law*, vol. 1, Parts 2 to 4, Longman, 1992, p. 1189.

[52] Ibid, p. 1202, note 18.

[53] See especially A. Rodiles, *Coalitions of the Willing and International Law. The Interplay between Formality and Informality*, CUP, 2018.

[54] For example, on the practice of the European Union, see R. Wessel, "Normative Transformations in EU External Relations: The Phenomenon of 'Soft' International Agreements", *West European Politics*, 2021, pp. 72-92.

[55] The Secretariat of the ILC recommended making it a separate topic (see Long-term programme of work, International Law Commission, A/CN.4/679/Add.1 to 3, 31 March 2016, paras. 13 and ff.)

[56] The Inter-American Juridical Committee chose to include them in its study. The question of the international or domestic nature of an inter-State agreement referring to domestic law as the applicable law has been discussed for example in the case *Loan Agreement between Italy and Costa Rica, RIAA*, vol. XXV, p. 61, para. 37 (the Tribunal concluded that it was an international agreement).

[57] On this point, see *supra*, para. 2.

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Annex II

Request of the General Assembly under operative paragraph 34 of its resolution 76/111 of 9 December 2021

1. In paragraph 34 of its resolution 76/111, the General Assembly took note of paragraph 329 of the 2021 report of the Commission (A/76/10) and, *inter alia*, requested that more information about the constraints and shortfalls referred to in paragraph 329 be provided, as well as available options to address them, including information regarding the terms of reference of the proposed trust fund, for consideration by the General Assembly at its seventy-seventh session.

2. The present information is provided in response to the above-mentioned paragraph 34. The first part addresses matters concerning Special Rapporteurs and Chairs of Study Groups, whose work is unremunerated, and the role of the Secretariat in supporting them, while the second part considers related budgetary aspects. It should be noted that the information in the present annex and the terms of reference of the proposed Trust Fund set out in the appendix focus on assistance to Special Rapporteurs and Chairs of Study Groups, and support of their work by the Secretariat.

3. The Commission recalls that it has on numerous occasions reiterated its views concerning the question of honoraria, as well as the extent to which the research of Special Rapporteurs is affected by lack of resources. It stresses the importance of the need for Special Rapporteurs (particularly those from developing regions) to obtain the necessary assistance to undertake the research required for the preparation of their reports.

The role of Special Rapporteurs, Chairs of Study Groups and the Secretariat

4. The proposed consideration of a Trust Fund to support the work of Special Rapporteurs and Chairs of Study Groups and Secretariat assistance to their work should not be understood as detracting from the fact that these matters should be addressed in the relevant programme budget pertaining to the work of the Commission. The proposed Trust Fund is suggested as a "stop-gap" measure.

5. The Commission wishes to underline that its Special Rapporteurs play a central role in its functioning. The practice of the Commission has been to appoint one of its members to serve as Special Rapporteur at an early stage of the consideration of a topic irrespective of whether it is a matter of progressive development of international law or its codification.[1] Special Rapporteurs have different professional backgrounds and responsibilities and are appointed taking into account the different regional groups that are reflected in the composition of the Commission as a whole.

6. The additional functions of a member serving as Special Rapporteur continue until the Commission has completed its work on a topic. It is the responsibility of the Special Rapporteur to offer the intellectual vision for the topic; to mark out its contours; to explain existing practice and the state of the law; to make proposals in reports on the topic to the Commission; to take into account the views expressed by members, Member States and, in some instances, international organizations and other actors; and to manage the overall development of the Commission's work on the topic, from its conception in terms of content and structure to the adoption of a final output with commentaries.

7. The Special Rapporteur performs a variety of tasks ranging from the preparation of reports on the topic, participation in the consideration of the topic in the plenary, elucidation of various aspects of the topic in plenary and in the work of the Drafting Committee, and the

[1] The statute of the Commission only envisages the appointment of a Special Rapporteur in the case of progressive development of international law.

preparation of revised texts, to the elaboration of commentaries, once such texts are adopted by the Commission. The reports of Special Rapporteurs form the very basis of work for the Commission and constitute a critical component of the methods and techniques of work of the Commission established under its statute.[2]

8. The tasks of Special Rapporteurs require extensive independent research and analysis, as well as a serious commitment to stewardship at all stages of the Commission's work on a topic. While the Commission is in session for a determined period of time, the functions of the Special Rapporteurs continue throughout the year.

9. The requirement of independence in the performance of their functions has the consequence for the Special Rapporteurs that they carry out their tasks separately from their other professional responsibilities — in parallel with, but often at the expense of, their professional activities. As the Commission assumes increasing responsibility for topics that are multidisciplinary, coupled in certain instances with the paucity of readily available practice, research work on particular topics has involved travel and contacts with individuals and institutions with particular expertise on the specific topics in question or with access to particular information. The use of research assistance under the direct supervision of a Special Rapporteur has always been an essential component of the work of Special Rapporteurs in preparing reports intersessionally.

10. In some instances, Special Rapporteurs are located in places where accessibility to primary research material and resources is difficult and expensive. Indeed, there have been situations in which individual Special Rapporteurs have used their personal resources for research activities or have foregone travel entitlements to make detours to conduct research elsewhere on their way to or from the Commission's sessions in Geneva. In some regions, access to the Internet may be intermittent and expensive. All these impediments place an additional burden on Special Rapporteurs, particularly when the Commission is out of session, as they are required to prepare reports analysing complex questions of international law in readiness for the following session of the Commission.

11. In short, the scheme under the statute of the Commission relies heavily on the work done by Special Rapporteurs, whose reports, prepared intersessionally, form the basis for the consideration of the various topics by the Commission.

12. Where the Commission has in recent years established a Study Group, the Chairs and members assigned to particular issues work in a similar manner to that of Special Rapporteurs outlined above.

13. As regards the Secretariat, pursuant to article 14 of the statute of the Commission, the Secretary-General of the United Nations provides substantive and technical servicing to the Commission, including providing various forms of assistance to Special Rapporteurs. From the establishment of the Commission, the Codification Division of the Office of Legal Affairs of the United Nations has served as the Secretariat of the Commission.

14. The type of assistance offered by the Secretariat to Special Rapporteurs has two interconnected aspects: assistance provided to the Commission as a whole, from which Special Rapporteurs benefit, and assistance provided to individual Special Rapporteurs in the discharge of their responsibilities.

15. In the context of the former, the Codification Division undertakes considerable independent research, analytical studies and surveys to facilitate the work of the Commission. At its thirty-second session (1980), the Commission noted that the studies and research projects prepared by the Codification Division were part and parcel of the consolidated methods and techniques of work of the Commission and, as such, constituted an indispensable contribution to its work.[3] This remains the case.

[2] See generally, United Nations, *The Work of the International Law Commission*, vol. I (2017) (9th ed.), (United Nations publication, Sales. No. E.17.V.2).

[3] See *Yearbook … 1980*, vol. II (Part Two), pp. 169–170, para. 192. While there is a synergy for the overall work of the Commission, the studies and surveys by the Secretariat are independent of reports of the Special Rapporteurs and, in the nature of the work of the Commission, are not intended to be a replacement thereof.

16. As to the latter, this includes the Codification Division assigning a staff member or members to: work closely with the Special Rapporteur at the various stages of development of the topic; follow and monitor developments on the topic in question; and provide research assistance upon request, such as collecting evidence of State practice, doctrinal material and jurisprudence, or conducting research on a particular issue. These functions are subsumed in the overall activities of the Division. The staff members concerned also perform editorial, research and referencing tasks with respect to the reports prepared by Special Rapporteurs. They may sometimes also assist with the preparation of the commentary to draft outcomes at the request of the Special Rapporteurs, who remain primarily responsible for the commentaries.[4] The presence of such staff members is often crucial during the consideration of a particular topic when the Commission is in session. Based on recent practice, their participation in any related outside activities undertaken by the Special Rapporteur in the development of the topic can also be highly valuable.

Honoraria for Special Rapporteurs

17. The Commission recalls that the unique role of Special Rapporteurs in its work has been recognized by the General Assembly from the outset when, in 1949, it initially authorized on an exceptional basis the payment of research grants to Special Rapporteurs and subsequently decided that special allowances be granted on an exceptional basis to all members of the Commission.[5]

18. It was the specific provision in the statute of the Commission concerning the appointment of members of the Commission as Special Rapporteurs on selected topics that led the Fifth Committee that year to recommend to the General Assembly, as an exception, the payment of research project grants, in the form of honoraria. Payment of such honoraria was conditional upon the submission of a report. In the debates in the Fifth Committee, the Chair of the Advisory Committee on Administrative and Budgetary Questions noted that Special Rapporteurs prepared drafts and working papers to assist the Commission, which not only saved the Commission time during sessions, but also demanded extra work and time on the part of seasoned legal authorities.[6]

19. The payments were designed not so much to compensate adequately the individuals concerned for their services as to acknowledge in a token manner the substantial sacrifice of time or of financial interest on the part of the individuals concerned.

20. After several reviews, the General Assembly, in paragraph 1 of its resolution 35/218, decided, with effect from 1 January 1981, on certain rates of honoraria payable in those cases it had already authorized on an exceptional basis, including the International Law Commission, and its Special Rapporteurs. It was determined that the rates payable would be: Five thousand (5000) United States dollars for the Chairs, 3000 dollars for other members. An additional amount of 2500 dollars was payable to members of International Law Commission when acting as Special Rapporteurs, conditional upon the preparation of specific reports or studies between sessions of the Commission.[7]

21. At its fifty-sixth session (2002), having considered the note by the Secretariat on the comprehensive study of the question of honoraria payable to members of organs and subsidiary organs of the United Nations (A/56/311), the General Assembly, in accordance with its resolution 56/272, decided, with effect from 6 April 2002, to set at a level of one United States dollar per year all honoraria then payable on an exceptional basis, including to the members of the International Law Commission. Consequently, when the honorarium was pegged at $1 per year for all members of the Commission, Special Rapporteurs no longer

[4] See *Yearbook … 1996*, vol. II (Part Two), p. 96, para. 234; see also article 20 of the statute of the International Law Commission.

[5] At its fourth session (1949), the General Assembly authorized the annual payment of honoraria to the Chair and the Special Rapporteurs of the Commission in respect of work performed by them between sessions.

[6] See *Official Records of the General Assembly, Fourth Session, Fifth Committee, Summary Records of Meetings*, 20 September–8 December 1949, 208th Meeting, 26 October 1949.

[7] A/53/643.

receive the additional amount that was payable conditional upon the preparation of specific reports or studies between sessions of the Commission.

22. Since its fifty-fourth session (2002), the Commission has repeatedly drawn the attention of the General Assembly to the impact of resolution 56/272,[8] emphasizing in particular that the resolution affected Special Rapporteurs, especially those from developing countries, as it compromises support for their research work. It has urged the General Assembly to reconsider this matter, with a view to restoring the honoraria for Special Rapporteurs.

Other related budgetary aspects

23. The Commission's budget is covered under subprogramme 3 of the programme "Legal affairs" of the regular budget. It covers the requirements of travel and subsistence allowance of the 34 members of the Commission, attendance by the Chair at the regular session of the General Assembly during consideration of the Commission's report, honoraria for the 34 members of the Commission (payable at the $1 per year rate set by the General Assembly in its resolution 56/272, which the Commission opted not to receive), and travel and subsistence allowance for a limited number of members of the Codification Division to substantively service the sessions of the Commission.

24. The Commission notes that there have been budgetary pressures affecting the United Nations over the years, resulting in budgetary cuts (for example, 2010–2011, 2012–2013 and 2014–2015) or no growth (for example, 2006–2007), from which the Commission has not been immune. In some instances, with a budgetary overrun contemplated in the budget estimates, a programme budget implication (PBI) has been raised to meet the needs of the Commission (2016–2017).

25. The Commission is aware that administrative and budgetary questions are matters considered by the Fifth Committee. It is not its intention to interfere in the processes concerning the negotiation of the regular budget, and any options that may be available in that regard. As will be clear from the above, however, attendance by Special Rapporteurs or by Chairs of Study Groups at workshops or seminars to further their work, and attendance at such workshops or seminars by members of the Secretariat in support of Special Rapporteurs and Chairs of Study Groups, although a valuable and often essential part of the work of the Commission, in the absence of honoraria, fall outside United Nations budgetary provision.

26. In paragraph 34 of its resolution 76/111, the General Assembly also requested information regarding the terms of reference of the proposed trust fund. Should the proposal for the establishment of a trust fund be accorded favourable consideration by the General Assembly, there will be a need for terms of reference. Such terms of reference to be promulgated by the Secretary-General could take the form contained in the appendix to the present annex. The text draws upon other previous terms of reference, including those contained in General Assembly 75/129 on the Trust Fund for the Judicial Fellowship Programme of the International Court of Justice. The Commission is grateful to its Secretariat for the preparation of the terms of reference.

[8] See *Yearbook ... 2002*, vol. II (Part Two), pp. 102–103, paras. 525–531; *Yearbook ... 2003*, vol. II (Part Two), p. 101, para. 447; *Yearbook ... 2004*, vol. II (Part Two), pp. 120–121, para. 369; *Yearbook ... 2005*, vol. II (Part Two), p. 92, para. 501; *Yearbook ... 2006*, vol. II (Part Two), p. 187, para. 269; *Yearbook ... 2007*, vol. II (Part Two), p. 100, para. 379; *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 358; *Yearbook ... 2009*, vol. II (Part Two), p. 151, para. 240; *Yearbook ... 2010*, vol. II (Part Two), p. 203, para. 396; *Yearbook ... 2011*, vol. II (Part Two), p. 178, para. 399; *Yearbook ... 2012*, vol. II (Part Two), p. 87, para. 280; *Yearbook ... 2013*, vol. II (Part Two), p. 79, para. 181; *Yearbook ... 2014*, vol. II (Part Two) and Corr.1, p. 165, para. 281; *Yearbook ... 2015*, vol. II (Part Two), p. 87, para. 299; *Yearbook ... 2016*, vol. II (Part Two), p. 229, para. 333; *Yearbook ... 2017*, vol. II (Part Two), p. 150, para. 282; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 382; *ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 302; and *ibid.*, *Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 317.

Appendix

Proposed Terms of Reference

Trust Fund for Assistance to Special Rapporteurs of the International Law Commission and matters ancillary thereto (ILC Special Rapporteurs Trust Fund)

Terms of Reference

I. Establishment

1. The Trust Fund for Assistance to Special Rapporteurs of the International Law Commission and matters ancillary thereto is hereby established pursuant to resolution 77/….

II. Background

2. At its seventy-second (2021) and seventy-third (2022) sessions, the International Law Commission proposed that consideration be given to the establishment of a Trust Fund to support Special Rapporteurs of the International Law Commission and related matters.

3. Special Rapporteurs of the International Law Commission play a central role in the functioning of the Commission. The practice of the Commission has been to appoint one of its members to serve as a Special Rapporteur at the early stage of the consideration of a topic irrespective of whether it is a matter of progressive development or codification.[1] The Special Rapporteur of the Commission performs a variety of tasks ranging from the preparation of reports on the topic, participation in the consideration of the topic in the plenary, elucidation of various aspects of the topic in plenary and in the work of the Drafting Committee, and the preparation of revised texts, to the elaboration of commentaries once such texts are adopted by the Commission. The reports of Special Rapporteurs form the very basis of work for the Commission and constitute a critical component of the methods and techniques of work of the Commission established under its statute.[2]

4. The tasks of Special Rapporteurs require extensive independent research and analysis, as well as a serious commitment to provide stewardship at all stages of the Commission's work on a topic. The functions of Special Rapporteurs continue throughout the year. The scheme under the statute of the Commission relies heavily on the work done by Special Rapporteurs, whose reports, prepared intersessionally, form the basis for the consideration of the various topics by the Commission. Special Rapporteurs bear responsibility for the authorship of their reports.

5. The practical needs of the Special Rapporteurs are necessarily determined by the requirements of the statute of the Commission. The statutory responsibilities of the Commission and its character as an expert body of persons of recognized competence in international law with the object of promoting the progressive development of international law and its codification make it imperative to retain the distinct role of the Commission, as an expert deliberative body of the General Assembly.

6. The work of Special Rapporteurs is resource intensive. Special Rapporteurs, particularly those from developing countries, face many impediments in the discharge of their activities, while it is recognized that they are required to prepare reports analysing complex

[1] The statute of the Commission only envisages the appointment of a special rapporteur in the case of progressive development of international law.

[2] See generally, United Nations, *The Work of the International Law Commission*, vol. I (2017) (ninth edition), (United Nations publication, Sales. No. E.17.V.2).

questions of international law in advance for the sessions of the Commission. Some Special Rapporteurs are located in places where accessibility to primary research materials and resources is difficult and expensive. As the Commission assumes increasingly responsibility for topics that are multidisciplinary, coupled, in some instances, with the paucity of readily available practice. The research work on particular topics has involved travel and contacts with individuals and institutions with particular expertise on the specific topics in question or with access to particular information. Support for Special Rapporteurs is needed in particular to ensure that they are in a position to collect materials from a wide range of legal systems and in different languages. There have been situations in which individual Special Rapporteurs have used their personal resources for research activities or have foregone travel entitlements to make detours to conduct research elsewhere. In some cases, access to the Internet is difficult and expensive. Where the Commission has in recent years established a Study Group, the Chair(s) and members assigned to particular issues work in a similar manner. In accordance with General Assembly resolution 56/272 of 27 March 2002, Special Rapporteurs no longer receive, exceptionally, 2500 dollars that previously was specially dedicated to assisting them in the preparation of their reports, payable upon submission. Since its fifty-fourth session in 2002, the International Law Commission has repeatedly drawn the attention of the General Assembly to the impact of its resolution 56/272,[3] by the terms of which it decided, with effect from 6 April 2002, to set at a level of one United States dollar per year all honoraria payable on an exceptional basis, *inter alia* to the members of the International Law Commission, including for assistance to Special Rapporteurs, emphasizing in particular that the resolution affects the Special Rapporteurs, especially those from developing countries, as it compromises support for their research work. It has urged the General Assembly to reconsider this matter, with a view to restoring the honoraria for Special Rapporteurs.

7. In some circumstances, the Commission has established Study Groups whose Chairs or co-Chairs work in a similar manner as outlined above in relation to Special Rapporteurs. Accordingly, references to Special Rapporteurs also refer to Chairs of Study Groups carrying out similar activities.

8. In paragraph … of resolution … of … December 2022, the General Assembly took note of paragraphs …to … of the Commission's report and, "without prejudice to the importance of ensuring the necessary allocations in the regular budget, request[ed] the Secretary-General to establish a trust to accept voluntary contributions so as to provide assistance to Special Rapporteurs and to provide any support to the Secretariat as may exceptionally be required".

9. Additionally, in recent years the work of the Commission has proceeded under conditions of financial and budgetary stress affecting the United Nations with impact on its Secretariat. The regular budget will continue to be used for travel and subsistence of Commission members and members of the substantive Secretariat at the annual sessions of the Commission. Resources from the Trust Fund may also be used to ensure attendance of a member of its Secretariat at activities other than the annual session of the Commission, undertaken by a Special Rapporteur to accomplish her or his tasks.

[3] See *Yearbook … 2002*, vol. II (Part Two), pp. 102–103, paras. 525–531; *Yearbook … 2003*, vol. II (Part Two), p. 101, para. 447; *Yearbook … 2004*, vol. II (Part Two), pp. 120–121, para. 369; *Yearbook … 2005*, vol. II (Part Two), p. 92, para. 501; *Yearbook … 2006*, vol. II (Part Two), p. 187, para. 269; *Yearbook … 2007*, vol. II (Part Two), p. 100, para. 379; *Yearbook … 2008*, vol. II (Part Two), p. 148, para. 358; *Yearbook … 2009*, vol. II (Part Two), p. 151, para. 240; *Yearbook … 2010*, vol. II (Part Two), p. 203, para. 396; *Yearbook … 2011*, vol. II (Part Two), p. 178, para. 399; *Yearbook … 2012*, vol. II (Part Two), p. 87, para. 280; *Yearbook … 2013*, vol. II (Part Two), p. 79, para. 181; *Yearbook … 2014*, vol. II (Part Two) and Corr.1, p. 165, para. 281; *Yearbook … 2015*, vol. II (Part Two), p. 87, para. 299; *Yearbook … 2016*, vol. II (Part Two), p. 229, para. 333; *Yearbook … 2017*, vol. II (Part Two), p. 150, para. 282; *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 382; *ibid.*, *Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 302; and *ibid.*, *Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 317.

III. Purpose

10. The purpose of the Trust Fund is to provide a mechanism for donors to contribute resources for the research activities of the Special Rapporteurs of the International Law Commission, and Chairs of its Study Groups, and where circumstances so require, expenses for members of the Secretariat in relation to activities undertaken by the Special Rapporteur and Chairs of Study Groups to accomplish their tasks, under subprogramme 3 for which the Codification Division, Office of Legal Affairs, is responsible.

IV. Contributions

11. Contributions to the Trust Fund may be made by States, intergovernmental and non-governmental organizations, national institutions, bar associations, private institutions and individuals, and other appropriate entities. Contributions may only be accepted by the Assistant Secretary-General, Controller.

12. Contributions in cash to the Fund may be accepted in United States dollars or other fully convertible currencies.

13. Financial contributions shall not be earmarked for any specific activity of the International Law Commission, its Special Rapporteurs or Chairs of its Study Groups.

14. Any interest income derived from contributions to the Fund shall be credited to the Fund in accordance with the applicable United Nations Regulations and Rules, and policies and procedures.

15. The Controller has designated the following bank account in which the resources of the Fund shall be kept:

[Account details]

Earmarked for the Trust Fund for Assistance to Special Rapporteurs of the International Law Commission

V. Authority

16. The Trust Fund shall be administered in conformity with the United Nations Financial Regulations and Rules and with the relevant policies and procedures. Exceptions to such rules, policies and procedures are not permissible, unless specifically authorized by the Secretary-General or on his behalf by the Assistant Secretary-General, Controller or by the Assistant Secretary-General, Office of Human Resources, as appropriate.

VI. Administration and implementation arrangements

17. The Trust Fund will be administered by the Secretary-General. The Codification Division, Office of Legal Affairs, shall be the implementing office of the Fund. It shall coordinate its efforts with the Executive Office of the Office of Legal Affairs

18. For the purpose of ensuring proper financial controls, the Under-Secretary-General, The Legal Counsel shall be the Programme Manager of the Trust Fund and the Executive Officer of the Office of Legal Affairs shall be its Certifying Officer.

19. The Legal Counsel shall be responsible for ensuring that the Trust Fund is utilized for the purpose described in Part III, as read with objectives set out in Parts I and II.

20. In particular, up to [X] dollars shall be payable to a member when acting as Special Rapporteur, however designated, conditional upon the preparation of specific reports or studies between sessions of the Commission.

21. Where it is determined that there is a shortfall in meeting the expenses in relation to activities that might be undertaken by the Special Rapporteur to accomplish their tasks, an

attestation to that effect and its impact on the servicing of the Commission will be made by the Legal Counsel.

22. The Certifying Officer shall ensure that expenditures are incurred in accordance with the applicable United Nations Financial Regulations and Rules, and policies and procedures, for the purpose intended, and shall draw to the attention of the Controller any proposed commitment or expenditure which, in his or her view, is inconsistent therewith.

VII. Reporting

23. The Controller will provide an annual financial statement showing income and expenditures as at 31 December of each year with respect to the total funds pledged and received for the Trust Fund for Assistance to Special Rapporteurs of the International Law Commission.

24. All accounts and financial statements shall be expressed in United States dollars.

VIII. Programme support costs

25. In accordance with United Nations Financial Regulations and Rules, programme support costs will be charged to the Trust Fund at the rate of thirteen (13) per cent of the total annual expenditures, unless otherwise agreed with the Controller. In addition, the Trust Fund operating reserve will be applied within the cash resources to meet final expenditures of the activities covered from the Fund.

IX. Audit

26. The Trust Fund will be subject solely to the external and internal audit procedures of the United Nations.

X. Revision

27. The Secretary-General may revise the above provisions, should circumstances so require.

XI. Termination

28. The Secretary-General shall decide the termination of the Trust Fund and the disposal of its assets.